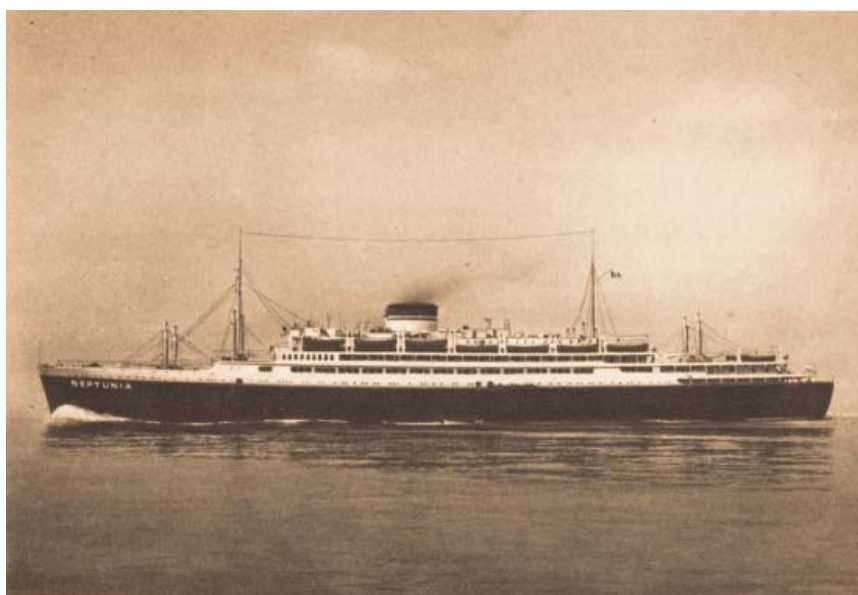


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THE SEARCH AND RESCUE TASKS COORDINATED BY THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX) REGARDING THE SURVEILLANCE OF EXTERNAL MARITIME BORDERS

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I. INTRODUCTION – II. SURVEILLANCE AND MANAGEMENT OF MARITIME BORDERS AS SHARED COMPETENCE BETWEEN THE UE AND ITS STATES – III. THE INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO THE RESCUE OF PERSONS IN THE MEDITERRANEAN SEA – IV. THE EXTERNAL SEA BORDERS REGULATION OF OPERATIONS COORDINATED BY FRONTEX. – V. CONCLUSIONS.

SUMMARY: Regulation 656/2014 represents an important step towards the clarification of EU surveillance obligations, including search and rescue missions and disembarkation in operations coordinated by the European Border and Coast Guard Agency (Frontex). This Regulation is complemented by Regulation 2016/1624 as part of the integrated border management system, reinforcing Frontex and increasing its level of autonomy. However Frontex has not got a more proactive mission in saving lives. Therefore the main function of search, rescue and disembarkation remains in the hands of the Member States.

According to this legal framework each operational plan coordinated by Frontex should guarantee the protection of fundamental rights in the conception and implementation of a joint operation. This also codifies, integrates and develops the rules of international maritime law related to search and rescue and also the European jurisprudence relating to the principle of “non-refoulement”. Although the scope of Regulation 656/2014 is limited to the operations coordinated by Frontex, it should also be extended to other European and national surveillance operations at sea.

Beyond the improvements identified in such regulations, a more stable and automatic design of resources and instruments is still required for the effective development of this kind of joint operations, as well as a more equitable sharing of burdens and responsibilities among all Member States.

KEY WORDS: surveillance, search and rescue, disembarkation, Frontex, non refoulement.

LAS FUNCIONES DE BÚSQUEDA Y RESCATE COORDINADAS POR LA AGENCIA EUROPEA DE LA GUARDIA DE FRONTERAS Y COSTAS (FRONTEX) EN RELACIÓN A LA VIGILANCIA DE LAS FRONTERAS MARÍTIMAS EXTERNAS

RESUMEN: El Reglamento 656/2014 representa un avance y mejora en la clarificación de las obligaciones de vigilancia en las fronteras marítimas, incluyendo las misiones de búsqueda, res-

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cate y desembarco de personas halladas en el mar en las operaciones conjuntas coordinadas por la Agencia Europea de Guardia de Fronteras y Costas (Frontex). Dicho régimen se complementa con el Reglamento 2016/1624 formando parte de la gestión integrada de las fronteras externas a nivel europeo. A través de ellos, Frontex se ha reforzado y ha asumido un mayor margen de autonomía. Sin embargo, no tiene actualmente atribuida una función proactiva de salvar vidas, quedando la principal función de búsqueda, rescate y desembarco en manos de los Estados miembros.

Ambos reglamentos prevén que cada plan operativo coordinado por Frontex debe garantizar la protección de los derechos fundamentales en la concepción e implementación de toda operación conjunta. También contienen y codifican tanto normas de derecho marítimo internacional sobre búsqueda y rescate como la jurisprudencia europea relativa al principio de no devolución (*non refoulement*). Aunque el ámbito de aplicación del Reglamento 656/2014 sea el de las operaciones coordinadas por Frontex, algunas disposiciones deberían aplicarse a otro tipo de operaciones europeas y nacionales de vigilancia marítima.

Más allá de las mejoras identificadas en ambos reglamentos, se requiere un diseño más estable y automático de los medios materiales y humanos previstos en el desarrollo de las operaciones conjuntas, así como un reparto más equitativo de las cargas y responsabilidades entre todos los Estados Miembros.

PALABRAS CLAVE: vigilancia y rescate, desembarco, Frontex, no devolución (*non-refoulement*).

LES MISSIONS DE RECHERCHE ET DE SAUVETAGE COORDONNÉES PAR L'AGENCE EUROPÉENNE DE GARDE-FRONTIÈRES ET DE GARDE-CÔTES (FRONTEX) CONCERNANT LA SURVEILLANCE DES FRONTIÈRES MARITIMES EXTÉRIEURES

RÉSUMÉ: Le règlement 656/2014 représente une avancée et une amélioration dans la clarification des obligations de surveillance aux frontières maritimes, y compris les missions de recherche, de sauvetage et de débarquement des personnes trouvées en mer dans des opérations conjointes coordonnées par Agence européenne de garde-frontières et de garde-côtes (Frontex). Ce régime est complété par le règlement 2016/1624 faisant partie de la gestion intégrée des frontières extérieures au niveau européen. Grâce à eux, Frontex a été renforcée et elle a assumé une grande marge d'autonomie. Cependant, actuellement, elle n'a pas pour fonction proactive de sauver des vies, laissant la principale fonction de recherche, de sauvetage et de débarquement entre les mains des États membres.

Les deux règlements prévoient que chaque plan opérationnel coordonné par Frontex doit garantir la protection des droits fondamentaux dans la conception et la mise en œuvre de toute opération conjointe. Ils contiennent également et codifient d'une part, les règles du droit maritime international en matière de recherche et de sauvetage et d'autre part, la jurisprudence européenne sur le principe de non-refoulement. Bien que le champ d'application du règlement 656/2014 soit celui des opérations coordonnées par Frontex, certaines dispositions devraient s'appliquer à d'autres types d'opérations de surveillance maritime européennes et nationales.

Au-delà des améliorations identifiées dans les deux règlements, un plan plus stable et automatique des ressources matérielles et humaines prévues dans le développement des opérations conjointes est nécessaire, ainsi qu'une répartition plus équitable des charges et des responsabilités entre tous les États membres.

MOTS CLÉS: surveillance et sauvetage, débarquement, FRONTEX, non-refoulement.

I. INTRODUCTION

Surveillance of external maritime borders is covered by the area of shared competences between the Union and its States, but its operative development has been traditionally in the hands of the States who, in their turn, must respect both International and European laws, as well as those which are related to the protection of fundamental rights. This article examines the contributions of Regulation 2016/1624² and Regulation 656/2014/UE³ in relation to the extension of the central notion of surveillance along the external maritime borders of the EU. The notion of surveillance included in both regulations allows clarification of the obligations attached to the search-and-rescue operations and the disembarkation of persons found at risk. There is also an important evolution towards the improvement in the protection of fundamental rights in both Regulations, especially in the protection of the *non refoulement* principle. Based on the analysis of these Regulations, the article presents some reflections and puts forward proposals for improvements.

The European Union (EU) has long sea borders of more than 42,000 km, as well as hundreds of sea ports. The role of carrying out the surveillance and control of these borders is a high cost strategic one, this being both as a result of the extent of the operational areas which are under surveillance and because of the resources that are necessary for it to be effective. Because of their geographical situation, some Member States are often subject to enormous migratory pressure and demand a fairer distribution of responsibilities, especially when they have to face complex emergency situations which affect lives and human dignity⁴. In 2016, a record high number of refugees and migrants sought to reach the European shores across the Central

² Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, DO L 251 16.09.2016, pp. 1-61

³ Regulation 656/2014/EU of the European Parliament and of the Council of 15 May, 2014 which lays down the rules for the surveillance of the external maritime borders within the context of the operational cooperation coordinated by Frontex. DO L 189 27.06.2014 p. 93 y s.

⁴ The Mediterranean Sea is the biggest mass grave of the post-war period. In 2016 more than 5000 persons have died drowned, on their way fleeing from war, poverty and persecution, looking for a decent life, STYLIANIDES, Cr., AVRAMPOULOS D., O'REILLY, E.,;"Joint Declaration regarding to "Search and Rescue in the Mediterranean Sea" Against criminalization of the Humanitarian Aid, MEP, 5 April 2017. See also OBEROI, P and TAYLOR-NICHOLSON, E. , "The

Mediterranean, the vast majority of whom reached Italy and almost 90% of them departed from Libya⁵. The EU knows that it needs an effective cooperation with third countries to face this big challenge, but besides the different strategies and efforts launched for the implementation of the Partnership Framework, the results of the cooperation with the countries of origin and transit of migrants are still limited⁶.

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was created in 2004 to become a mechanism of solidarity between Member States to help those States subject to great migratory pressure that required assistance in the management of their external borders, their protection being a prerequisite for the normal functioning of the Schengen area. Their evolution through the present European Border and Coast Guard Agency, which will most often continue to be referred to as Frontex⁷, has reinforced its tasks and competence, instruments, autonomy and capacity to carry joint operations and rapid border interventions, but has also reinforced its responsibility and the obligation to act with full respect for fundamental rights.

II. SURVEILLANCE AND MANAGEMENT OF MARITIME BORDERS AS SHARED COMPETENCE BETWEEN THE UE AND ITS STATES

The Lisbon Treaty establishes that the surveillance and management of external borders is a competence to be shared between the Union and its Member States, and it considers that the Union “shall develop a policy with the aim of carrying out checks on persons and efficient monitoring of ex-

Enemy at the Gates: international Borders, Migration and Human Rights”, *Laws*, vol 2, n°3, 2013, p. 173, <http://www.mdpi.com/2075-471X/2/3/169> (accessed 15 October 2015).

⁵ JOIN (2017) 4 final, 25.1.2017 of the European Commission and the HR of the Union, Migration on the Central Mediterranean route Managing flows, saving lives.

⁶ The EU launched in 2016 the Partnership Framework as a comprehensive approach to address the challenges of irregular migration and its root causes as part of the broader cooperation with third countries partners. See COM (2017)350 final, 13.6.2017. Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

⁷ Recital 11 of Regulation (EU) 2016/1624 where there is explained that the new Agency should remain the same legal person, with full continuity in all its activities and procedures.

ternal border crossings” (art. 77 TFEU). At the same time it establishes, that such a policy and its execution shall be governed by the principle of solidarity and the fair distribution of responsibility between the Member States, and likewise in financial terms (art. 80 TFEU). The progressive implementation of an integrated system of management of the external borders has brought about the adoption of a large number of regulatory measures and operational instruments (data bases, agencies, networks, coordination mechanisms, joint operations, etc.) to centralise and share the information, harmonise a series of concepts, procedures and obligations, and to coordinate and make the most of existing capabilities and resources at national level.

The main legal framework within which the joint management of the borders is carried out at European level is the Schengen Borders Code (SBC)⁸, which lays down that the means adopted in a surveillance operation must be proportionate to the objectives pursued, non discriminatory and must fully respect fundamental rights, such as human dignity and the rights of refugees and those seeking asylum, including the principle of non-refoulement. The management of external borders has traditionally focused on controlling people crossing to prevent illegal immigration, the interchange and access to information about those people who cross the borders and on the development of other means of surveillance on external borders. Recently, the Union has explicitly embraced the idea that it should contribute to protecting and saving lives at risk at sea, there having been a great deal of debate on the subject of whether or not the concept of “surveillance of the border” includes search operations and the saving of the lives of those rescued. (*Search and Rescue*, SAR).

Despite the progressive harmonisation of legislation which governs the management of external borders, the main competences of control, surveillance and sanctioning continue to be in the hands of the Member States, as well as the judicial and police activity in the pursuit of offenders and the punishment of offences. Further to the fact that the borders are *common*, each State maintains control and administrative management of its own national border – and the power of coercion-, it being considered that such management is a responsibility linked to national sovereignty which affects the

⁸ Regulation (CE) 562/2006 of the European Parliament and Council, 15 March, 2006, establishing a Community code on the rules governing the movement of persons across borders, *DO L* 105, 13.04.2006, p. 1 and its subsequent amendments.

security, defence and protection of the territory. This means that the search, interception, rescue and disembarkation operations are carried out regularly by the Member States, who must comply with the obligations which arise, not only out of European law, but also International maritime law and the agreements in matters of the protection of fundamental rights. The European Court of Human Rights (ECHR) indicates which of the border guards should be invested with the power to use coercive powers and who must decide whether or not to take into account the individual situation of people who attempt, or are suspected of attempting to cross the border illegally, to determine the nature of the means which must be adopted against these persons once they are detained, eventually, the conditions for expulsion and, in any event, that all the measures against illegal immigration properly respect human rights⁹.

The States have their own resources, materials and technologies (police forces, customs agencies, coast guards, armies personnel, ships, aeroplanes, satellites, helicopters, drones, data bases etc.) in order to perform such functions, and the Union (through Frontex) only takes on a limited management of the operational cooperation and some coordination of roles of the competent national authorities. Frontex was created as a European operational agency for the coordination and support to bring together the national forces linked to the control of external borders¹⁰. Nowadays besides its new Regulation of 2016, a key aim remains the promotion of an integrated pan European model of border security, carrying out risk analysis and giving support to the States that organise joint surveillance, control and return operations¹¹.

The Agency has improved its autonomy, but it acts normally on the request of the State which seeks its help or aid. Only in cases where there is a specific and disproportionate challenge at the external borders, should the Agency on its own initiative, organise and coordinate rapid border interven-

⁹ See, for example, the important Judgement of Great Chamber of the ECHR, 23 February 2012, n.° 27765/09, *Hirsi Jamaa and others cl Italy* and also the CEFR judgement 21 October, 2014, n° 16643/09, *Sarifi and others cl Italy and Greece*.

¹⁰ Council Regulation 2007/2004 26 October, 2004 which establishes an European Agency for the Management of Operational Cooperation on the External Borders of the Member States of the Union (Frontex), DO L 349, 25/11/2004, p.1.

¹¹ MUNGIANU, R., "Frontex: Towards a Common Policy on External Border Control", *European Journal of Migration and Law*, n° 15, 2013, p. 366

tions and deploy both European Border and Coast Guard teams for a rapid reaction pool and technical equipment following the procedures established in the Regulation¹².

Frontex's commitment to guaranteeing respect for fundamental rights was already strengthened, particularly in relation to the EU Charter of Fundamental Rights, through the amendment of Regulation 1168/2011¹³ and it has continued to reinforce its commitment after the adoption of Regulation 656/2014 and Regulation 2016/1624. Gradually Frontex has widened its scope and its ability to assist and control the sea borders through various joint operations, which are always within the framework of its operational, budgetary role and material constraints. The amendment of 2011 provided Frontex with the possibility of acquiring its own material resources and even previously the possibility of creating Rapid Border Intervention Teams (RABIT)¹⁴, these being made up of national experts capable of providing technical and operative assistance to those States that request it. After Regulation 2016/1624, when a situation requires urgent action, the Agency will be able to deploy European Border and Coast Guard teams for a rapid reaction pool which should be a standing corps composed of a minimum of 1500 border guards and other relevant staff.

In 2013, with the same aim of improving the surveillance and control of the external borders, the Eurosur system (European Border Surveillance System)¹⁵ was created. This facilitates the exchange of information and cooperation between States. It was in fact the tragedy in October 2013, near to the coast of Lampedusa, which gave the final impulse to the creation of Eurosur, at the last moment incorporating the humanitarian role of rescue

¹² Article 15 and 17 of Regulation 2016/1624 sets the procedure for launching a rapid border intervention and Article 19 the procedure to follow if a situation at the external borders require urgent action.

¹³ SANTOS VARA, J., "The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls", *European Foreign Affairs Review*, n° 20, 2015, p. 122.

¹⁴ European Parliament and Council Regulation 863/2007, 1 June, 2007, DO L 199, 31 July, 2007 establishes a mechanism for the creation of Rapid Border Intervention Teams (RABIT), intended as emergency assistance in a situation of exceptional pressure.

¹⁵ European Parliament and Council Regulation 1052/2013, 22 October, 2013, establishing a European System of Border Surveillance (Eurosur), DO L, 295 06.11.2013, p. 11.

operations in its constitutional regulation¹⁶. It is anticipated that Eurosur will have the comprehensive capacity to coordinate, in each one of the States, all of the authorities which have surveillance responsibility on external borders, Frontex being the central focal point of such a system. There is also the commitment to create joint regional networks with members of the Union and neighbouring countries for the exchange of information and cooperation in matters of irregular immigration and cross-border criminal activity. Eurosur, as a surveillance network, allows the exchange of information in near-real time, sharing police intelligence and greater cooperation between European agencies at national or European level. It uses modern surveillance technology and allows for the fusion of data obtained thanks to its vessel monitoring systems and satellite images. This enables it to have a permanently updated situational map. Frontex leads the development of Eurosur and is, at the same time a node which contributes information to the whole situational map. This technical and operative platform enables decision-making on border surveillance, both on the part of the European institutions, and the part of Frontex and the national authorities. For this purpose, it is up to the Member States to take the decision to make satellites, vehicles, vessels, sensors, cameras, radars, patrols and other instruments available, and the National Centre of Coordination (NCC) should provide factual, analytic and operative information so that Frontex can draw up a joint map of pre-border information. However, there are frequently contradictory positions between Member States that limit the development of cooperative action. For example, we can point to the position of several Mediterranean states which, suffering under great migratory pressure on the one hand, call for the application of the solidarity principle, and yet on the other, defend the position that the search and maritime safeguard measures are the exclusive area of competence of the states¹⁷. This was a debate settled, as we shall see, by the European Court of Justice (ECJ)¹⁸ using a wide interpretation of the notion of border survei-

¹⁶ European Parliament and Council Regulation 1052/2013, 22 October, 2015 (Eurosur), DOUE L 295, 06/11/2015 (article 2.1).

¹⁷ See CARRERA, S. and DEN HERTOG, L., "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean", CEPS paper, n° 79, January 2015, p. 12; <https://www.ceps.eu/publications/whose-mare-rule-law-challenges-field-european-border-surveillance-mediterranean>. (accessed on January 2015).

¹⁸ Judgment of the ECJ, 5 September, 2012, C-355/10, PE *c/* Council

llance by allowing those search and rescue roles which might arise during a maritime surveillance operation coordinated by Frontex to be included.

III. THE INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO THE RESCUE OF PERSONS IN THE MEDITERRANEAN SEA

The International law as laid down mainly in the United Nations Convention on the Law of the Sea (UNCLOS)¹⁹ in the International Convention for the Safety of Life at Sea (SOLAS)²⁰ and the International Convention on Maritime Search and Rescue (SAR)²¹ is especially important regarding surveillance operations in the Mediterranean. UNCLOS establishes that every coastal state should have an adequate and effective search-and-rescue service available and, through bilateral or regional agreements, should be able to cooperate with its neighbouring states so as to achieve these aims (art. 98). Moreover, it includes the obligation to act quickly in order to attend persons at risk, if information that help is required is received. Also, every State is obliged to require its ship captains to fly their flag, to give assistance to any person found in danger at sea, insofar as it can be done without endangering the ship, the crew or its passengers. As for the Convention (SOLAS), it provides that a ship's captain, in a case where a signal is received that a person is in danger at sea, is obliged, to go to their help, as quickly as possible, and pass the information, if possible, to both the persons in danger and the search-and-rescue services. The Convention likewise obliges governments to adopt the measures necessary to rescue those at risk at sea around their coasts²². Lastly, the SAR Convention reiterates the obligation to make areas for rescue and assistance as well as rapid intervention services available, thus reaffirming the duty to help any person who is at risk at sea, without taking into account their nationality, their status or the circumstances under which they have been

¹⁹ Approved 30 April, 1982, in Montenegro Bay (Jamaica), the United Nations Convention on the Law of the Sea and entered into force on 16 November, 1994.

²⁰ Adopted in London, 1 November, 1974, came into force 25 May, 1980 (currently, 163 contracting parties).

²¹ Adopted in Hamburg, 27 April, 1979, entered into force 22 June, 1985 (currently, 104 contracting parties).

²² Chapter v, Regulation 33.1 and Regulation 7.

found. It also provides the obligation to attend to the basic needs of such persons and take them to a safe place.

Such Conventions impose various obligations both on the States and the ship captains and it is not unusual, within the framework of surveillance operations, for rescue activities to be carried out involving persons who intend to enter a territory illegally or for them to be asylum seekers.

UNCLOS has been ratified by the EU and all its Member States. However, specifically on the matter of the duty to render assistance to persons in distress at sea, the EU has not made any declaration specifying that the duty to render assistance governed by UNCLOS under Article 98 is a matter in respect to which competence has been transferred to the EU by its Member States. Thus, all Member States, but not the EU, are under the obligation to render assistance to persons in distress at sea under UNCLOS. Further, the EU itself has not acceded to the SOLAS Convention or the SAR Convention. However, the majority of the Member States are parties to the SOLAS and SAR Conventions²³.

Therefore, only the Member States are under the obligation to render assistance to persons in distress at sea and the EU is not bound by such a duty under any of the international treaties analysed. However the duty to render assistance to persons in distress at sea is part of customary international law to the extent that a ship in distress has a right of entry to any foreign port²⁴, but it does not cover search and rescue at sea performed on the high seas. Besides what is under the scope of customary international law, the obligation to render assistance to persons in distress is now included in EU secondary law.

Moreover the different international conventions do not resolve all matters that actually arise and there are different interpretations both on the delimitation of the SAR zones and on the extent of the coordination of

²³ All Member States except Austria, the Czech Republic and Hungary have ratified the SOLAS Convention; all Member States except Austria, the Czech Republic and Slovakia have ratified the SAR Convention.

²⁴ MUNGIANU, R., *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge Studies in European Law and Policy, Ed. Cambridge University Press, 2016, p. 192; NOYES, J. E., "Ships in Distress", *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2007, pp 11-12.

their activities²⁵. In each situation solutions are often required and there are still some uncertainties with regard to the demands and consequences of rescue operations. Disembarkation also poses problems since it is the State that must authorise the landing after the first emergency operation and, in the case where entry is a port to a third country, permission will also be required with relation to the port itself. In accordance with International law, no State holds a clearly defined responsibility regarding offering a safe haven to those persons rescued and in fact various countries may be involved in a rescue operation. Disputes tend to arise between the State under whose ship's flag the rescue was carried out, the State whose port is nearest, the State where the ship's next port of call is planned, the State from which the ship set sail in the first place, the competent State in relation to the SAR zone or the countries related to the nationalities of those who have been rescued. An adequate solution to these disputes between Member States of the EU has yet to be found, and the Mediterranean States are bearing a much higher burden than other States as a result of the large number of landings of persons rescued.

When the ships which go to the assistance of persons who request help at sea are commercial vessels, these often face difficulties which include costs and delays associated with the rescue operation and the disembarkation process of those rescued. And, although there is a certain consensus on what a situation of risk and the duty to rescue are defined as, there is not enough consensus, on the other hand, on the level of assistance that such situations require. Ship captains that find themselves involved in rescue operations do not always have enough knowledge about the security of the regions or the type of protection that the rescued persons require. In the face of these difficult issues, the International Maritime Organisation (IMO) adopted a series of amendments to the SOLAS and SAR Conventions in 2004 with the aim of improving the search-and-rescue system and of minimising the inconvenience to those responsible for privately owned vessels. The amendment to article 4.1.1 of SOLAS and article 3.1.9 of SAR lays down that the contracting parties should cooperate and coordinate with one another so that the captains of those ships which take people found at risk in the sea on board may fulfil

²⁵ DI FILIPPO, M., "Irregular migration across the Mediterranean Sea: Problematic issues concerning the International rules on safeguard of life at Sea", *Paix et Sécurité Internationales*, n°1, 2013 p. 63; PAPANASTAVRIDIS, E., "Fortress Europe and Frontex: Within or Without International Law?", *Nordic Journal of International Law*, n°79, 2010, p.86.

their obligations with the minimum amount of deviation from their planned voyage possible, insofar as it does not endanger the lives of those at risk in the sea²⁶. The contracting party responsible for the search-and-rescue operation in the region in which the assistance has been offered is the party that must take on the initial responsibility for guaranteeing the coordination and cooperation function²⁷. These amendments have not resolved all the problems, since they do not impose an automatic requirement to accept those rescued into the territory, but rather into a process and, often, disagreements impede a quick solution to disembarkation at a safe place. States do not always agree to accept the responsibility and the consequences of the disembarkation of rescued persons²⁸, this being one of the principle motives for dispute, and the reason why some States stop participating in joint rescue operations or even the reason why they do not ask for help from Frontex.

IV. THE EXTERNAL SEA BORDERS REGULATION OF OPERATIONS COORDINATED BY FRONTEX

Regulation 656/2014/EU, which was approved after several years of debate, is applied to the operational cooperation coordinated by Frontex and related to maritime surveillance and Regulation 2016/1624 refers to it while defining the tasks of the Agency in providing technical and operational assistance in support of search and rescue operations for persons in distress at sea which may arise during border surveillance operations at sea²⁹.

Both regulations have managed to clarify the obligations arising from border surveillance, especially on the sea border with another State or in high sea. With this aim, it includes a series of precisions in relation to interception with boats at sea, including high sea zones, and the regulations on search, res-

²⁶ IMO. *Guidelines on the Treatment of Persons rescued at Sea*, 20 May, 2004, MSC, 167 (78); IMO. *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 22 January, 2009.

²⁷ IMO. *Maritime Safety Committee Resolutions*, MSC, 153 (78) and MSC, 155 (78), adopted 20 May, 2004. Both amendments entered into force on 1 July, 2006, using the simplified revision mechanism which is included in both texts.

²⁸ High Commissioner's Dialogue on Protection Challenges: *Protection a Sea*, 11 November 2014.

²⁹ Art. 8 f) Regulation 2016/1624

cue and disembarkation. Regulation 656/2014/EU replaces the Decision of the Council 2010/252/UE, which established measures on the surveillance of maritime borders carried out by the border patrols when they operate under the coordination of Frontex. The European Parliament (EP) considered that such a Decision exceeded the limits of competence of the implementing power attributed to the CFS³⁰, as it introduced essential new elements. The ECJ annulled that Decision of 2010³¹, although it remained in effect until the new Regulation came into force. The EP alleged that the Decision should have been adopted through a legislative act, and not through an act of implementation, since it attributed very wide powers to the border patrols, established far-reaching coercive means and, on the other hand, did not guarantee that the persons intercepted at sea could invoke the right to seek asylum and those rights associated with this. It also alleged that the compulsory inclusion in the operational plan of the norms and directives announced in the Annex modified the list of those elements necessary to put the plan itself into action, such as the functions of the border guards, the participating units and the Rescue Coordination Centre (RCC).

The ECJ confirmed the majority of the EP's allegations and considered that provisions which award public authority powers to the border patrols, powers which include arresting apprehended persons, detaining the vessel and sending persons to a determined place, affect the fundamental rights of those people implicated and this requires the intervention of the legislator since it contains essential elements of surveillance of the external maritime borders. The ECJ stated that the rules in the second part of the Annex must be considered essential and intended to produce legal effects and as such, had to be included in the operational plan drawn up for each operation coordinated by Frontex. The ECJ enabled the European legislator to adopt a wide definition of surveillance, when it considered that the Decision of the Council contains "essential elements of the surveillance of external maritime borders", especially related to measures for intercepting, rescue and disembarkation.

³⁰ Its adoption was based on the amendment to the CFS of 2008 which allowed the use of the regulatory procedure with control (comitology) for the exercise of implementing powers conferred (art. 12.5).

³¹ Judgement of the ECJ, 5 September 2012, C-355/10 PE c/ Council, p. 8.

1. THE NEW EUROPEAN CONCEPT OF MARITIME SURVEILLANCE

The discussions on the European concept of border surveillance raised the question of whether only detection should be covered or also other measures, such as the interception of vessels which were illegally trying to enter the EU, the search and rescue of persons at risk and their prompt disembarkation to a place of safety. The connection between search-and-rescue operations and border surveillance is due to the fact that those migrants who are travelling in unseaworthy boats are often found to be in situations of risk at the time of their interception. On the one hand, six States with borders in the Mediterranean (Greece, Spain, France, Italy, Cyprus and Malta), within the framework of the negotiation of Regulation 656/2014/UE, claimed that rescue and disembarkation could not be included in the regulation on surveillance as this is an exclusive competence of Member States governed by international law. They considered surveillance to be an essential component of the European policy on border control, whereas search, rescue and disembarkation was, to their understanding, an exclusively national competence³².

The Council, in its turn, stated in the action for annulment against the Decision 2010/252 that assisting vessels at risk was not a surveillance measure, but when a situation of this type occurred during a surveillance operation coordinated by Frontex, it was essential for the different participating States to establish in advance how to carry out the search, and when appropriate, the rescue. In contrast, the Commission argued that surveillance should cover, not only detection of attempts at illegal entry, but also the interception of vessels which were suspected of trying to enter the Union without undergoing the necessary border checks and indicated that, in numerous cases a surveillance operation involved a search-and-rescue operation. The Advocate General expressed his doubts about whether the concept of surveillance could include measures which authorise the border patrols to “seize a ship and apprehend the persons on board” and “conduct the ship or the persons on board to the authorities in a third country”, as well as whether they would have the material means for the search, rescue and disembarkation included in part II of Decision 2010/252, however, the ECJ opted for a wide interpretation of the concept of surveillance.

³² See CARRERA, S. and DEN HERTOG, L., *loc. cit.*, p. 2.

Regulation 656/2014/UE consolidated this jurisprudential notion when it stated that “surveillance of borders is not limited to the detention of those unauthorised attempts to cross borders, but also covers such positive measures as the interception of landings of people that are suspected of trying to enter the Union without being subject to controls, as well as the provisions aimed at coping with search-and-rescue situations which arise during a maritime border surveillance operation and specific provisions to carry out these operations successfully”. This means that with the objective of achieving “effective surveillance” (art.77 TFEU) and of guaranteeing “effective management of the migratory flows” (art 79 TFEU), it was possible to adopt a wider concept of surveillance than the one included in the CFS itself.

Under the EU Sea External Border Regulation the operational plan is the document which must contain measures to be taken in case of rescue at sea situations and disembarkation. Article 9 reiterates the search and rescue obligations and states that such obligations must be extended to any EU Member State’s participating units during a joint sea operation. Therefore each operational plan must contain provisions determining how Member States deal with the search and rescue situation, in accordance with international law. This Regulation is important because it clarifies the relation between disembarkation and protection against refoulement as we will see in the next point.

Also Regulation 2016/1624 includes, as a component of the European integrated border management in Article 4 b), the search and rescue operations that must be carried out in accordance with Regulation 656/2014 and with international law. However it is important to specify that search and rescue is not a function in itself for the Agency, but a task that may arise during border surveillance operations at sea. Its main task is supporting Member States to achieve an efficient, high and uniform level of border control and contribute to fighting cross border crime and terrorism at the external borders, so Frontex does not have a proactive and humanitarian mission of search and rescue but a reactive function while implementing its other tasks.

2. THE OBLIGATION OF NON-REFOULEMENT

The institutions of the Union and its agencies, as well as the States when they apply the Law of the Union, must fully respect the fundamental rights and, in particular, the Charter of Fundamental Rights of the European

Union (EU Charter)³³. They must also fulfil the international obligations which include fundamental rights and which arise out of, for example, the United Nations Convention on the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the United Nations Convention on the Rights of the Child and other applicable international instruments. This implies that all maritime surveillance operations must be carried out while respecting, for example, the right to life of persons, human dignity, the absolute prohibition of torture and other inhuman or degrading punishment, the prohibition of trafficking in human beings, the right to freedom and security, the protection of personal data, the right to asylum, the obligation of non-refoulement and non-discrimination, the right to proper legal protection and also children's rights.

The prohibition of refoulement included in the 1951 Refugee Convention and its 1967 Protocol³⁴ constitutes the international cornerstone for the protection of refugees and so has been stated in primary EU law (Art. 78 TFUE). Also the importance of the ECHR has been stated in primary EU law (Art 6 TEU) and the case law of the CJEU shows that the standard of protection against refoulement within the EU legal order currently corresponds to Article 3 ECHR³⁵ and Article 19.2 of the EU Charter re-affirms the rights resulting from the ECHR³⁶.

The ECtHR has interpreted Art.3 as a prohibition against returning individuals if there is a risk of torture or inhuman or degrading treatment or pu-

³³ In particular article 18 of EU Charter sets out the right to asylum and article 19, protection in a case of return, expulsion and extradition, both incorporating the prohibition of collective expulsions and return to a State where there is a serious risk of being subjected to the death penalty, torture or other punishments or inhuman or degrading treatment

³⁴ 1951 Convention relating to the Status of Refugees (189 UNTS 137); 1967 Protocol relating to the Status of Refugees (606 UNTS 267).

³⁵ C-465/07 *Elgafaji v. Staatssecretaris van Justitie*, judgment of 17 February 2009 paraf. 28 et ss. ECR I-921; and C-41/10 NS and C-493/10 ME and others, judgment of 21 December 2011.

³⁶ Article 19.2 establishes that: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". It has to be read with the prohibition of collective expulsion (Art 19.1) and the right to asylum (Article 18).

nishment that cannot be subject to any exception, derogation or limitation³⁷. The principle of non-refoulement constitutes a right benefiting all refugees as soon as they come under the jurisdiction of the asylum State.

Also all secondary legislation must comply with the EU primary legislation, with the general principles of EU Law and with the EU Charter. In that sense, Regulation 656/2014/UE complies with the requirements of the case law of the ECtHR³⁸, especially in the important case *Hirsi Jamaa and others against Italy* (2012)³⁹, in which it was declared that the return of illegal immigrants to Libya carried out by the Italian authorities violated article 3 (non-refoulement), article 13 (lack of effective redress) of the ECHR, as well as article 4 of Protocol 4 (prohibition of collective expulsions), calling for an independent and rigorous examination of the complaints submitted by the individuals. To that end, the Regulation lays down that:

No person will be disembarked in a country, forced to enter it, conducted to or handed over in any other way to its authorities, failing to comply with principle of non-refoulement when, among other circumstances, there is a serious risk of being subject to a death sentence, torture, persecution or any other punishment or inhuman or degrading treatment or when his/her life is threatened on the grounds of race, religion, nationality, sexual orientation, belonging to a determined social group or having a particular political opinion, or when there is a serious risk of being expelled, transported or extradited to another country that does not comply with non-refoulement(art 4).

Thus, any either intercepted or rescued individual must not be disembarked nor obliged to enter in a third country, taken to or handed over to the authorities of a third country, when the host Member State and the participating Member States know, or should know, that this third country carries out some of the practices described above. Moreover, the participating units must use all the means possible to identify the persons intercepted or res-

³⁷ See *Soering v. United Kingdom* App N° 14038/88 (ECtHR, 7 July 1989); *Saadi v. Italy* App N° 37201/06 (ECtHR, 28 February 2008); and *M.S.S. v Belgium and Greece* App N° 30696/09 (ECtHR, 21 January 2011). See also MUNGIANU R. , *Frontex and Non-Refoulement...* *op. cit.* pp 98 et ss.

³⁸ An opinion defended by the Meijers Committee, Standing committee of experts on international immigration, refugee and criminal law. Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex. COM (2013) 197 Final, 23 May, 2013, p. 4.

³⁹ ECHR. *Hirsi Jamaa and Others c. Italia*, n.° 27765/09, 23 February, 2012.

cued, assess their personal circumstances, inform them of the decisions made and allow them the opportunity to express the reasons why they consider disembarkation at a specific place would be non-compliance of the principle of non-refoulement.

This shows the importance of the ECtHR case law in the codification of the afore-mentioned article 4 of Regulation 656/2014/UE, whose application must continue to be in full compliance with the EU Charter and with the interpretation of the principle of non-refoulement delivered by the CJEU and the ECtHR. The article also includes the prohibition to interchange personal data related to the persons intercepted or rescued with third countries obtained during a maritime operation, when there is a serious risk of the violation of the principle of non-refoulement. In the Regulation, reference is also made to the general duty to render assistance to persons at risk, indicating that the captain of the vessel and his crew should not be subjecting themselves to eventual criminal convictions simply for having rescued persons at risk at sea and for having transported them to a safe place. It is also envisaged that surveillance operations must form part of an operative plan, which constitutes a binding text, for all those participating, who must take steps to see that the disembarkation of persons is carried out quickly and effectively (arts 9 and 10).

The operative plan may contain details which are adapted to the circumstances of each maritime operation and must include a whole list of items of information stipulated in the Regulation. It must enable the participant units, when they have reasons to assume that they are faced with an uncertain, high alert or dangerous phase, to communicate the available information quickly to the Rescue Coordination Centre (RCC) responsible for the area of search and rescue where the situation has occurred and be available to collaborate. The International Coordination Centre (ICC) must be informed and, while waiting to receive instructions from the RCC, the participant units must adopt all the appropriate means to guarantee the safety of persons, avoiding actions which could worsen their situation or increase the chances of loss of life.

Regarding the extraterritorial application of rules on interception, it is expected that these not only cover the territorial area, but also the offshore zone (arts. 6 and 7), but it does not include the possibility of a Frontex op-

eration detaining vessels in the territorial sea of third states. It may depend on the cooperation agreed between third countries, which they must respect, in terms of fundamental rights, norms and equivalent requirements to those laid down by Union law. It should be noted that ECtHR upholds the extraterritorial application of the ECHR in some situations. Thus, for example, in the case of *Hirsi Jamaa* it indicates that: “*When a State using agents that are operating outside the territory, exercise control and authority, and, consequently, their jurisdiction over an individual, that State has the duty to guarantee all that individual’s rights and freedoms that are relevant in the situation of that individual*”⁴⁰, and this would include the right to non-refoulement⁴¹. The problems do not usually arise in the area of the territorial sea or in the area immediately around the Member States, but in the area of high sea or in the territorial sea zones of third states⁴². Thus, in cases where the RCC of the third State responsible for the search area and rescue does not respond to the information transmitted by the participant unit, the latter will contact the RCC of the host state unless the former unit considers that the other internationally recognised RCC is in a better position to take on the coordination of the search-and-rescue situation.

Article 10 provides the inclusion of alternatives to disembarkation in the operational plan, without imposing obligations on the Member States that are not participants in the maritime operation. In this phase, in general, the maritime and air patrols would be under the coordination of RCC, which determines the port or appropriate disembarkation location. The key is in the designation of “a safe place” which is defined as “*a place where a rescue operation is finalised and where the survivors’ safety and lives are not threatened, and where their basic needs can be met and means of transport can be found for their next or final destination, taking into account their fundamental rights in accordance with the principle of non-refoulement*”.

Regulation 656/2014/UE is only applicable to maritime operations of surveillance coordinated by Frontex, but given the fact that many articles codify and develop international duties of search, rescue and disembarkation, as well as the duties arising out of case law which interprets the principle of

⁴⁰ Considering 74 of the ECHR judgement, *Hirsi Jamaa and others c. Italia*, n.º 27765/09, p. 22

⁴¹ PEERS, S. , “New EU rules on maritime surveillance: will they stop the deaths and push-backs in the Mediterranean?”, *Statematch*, 2014, pp. 4-6.

⁴² See CARRERA , S. and DEN HERTOG, L., *loc. cit.*, p. 29.

non-refoulement, it can be considered that both the precisions related to fundamental rights, and the norms of the organisation responsible for disembarkation, must be taken into consideration in the development of national operations and other types of European operations, as for example the EU-NAVFORMED (Operation SOPHIA)⁴³. In that way, Regulation 656/2014/UE could generate an assimilation effect in a large number of European and national maritime surveillance operations or with similar aims or even could be applied in operations carried out in cooperation with third states.

Currently, the European rule that enables Frontex to implement an operational plan, which includes the protection and saving of lives, clearly represents financial help for the States and it stimulates the cooperation among them. But the Agency is increasingly involved in a leading role and therefore it has to be analysed case by case as to whether the Agency's function could share some responsibility with the main State's responsibility in the exercise of its own role in surveillance, rescue and non-refoulement.

3. PUTTING THE NEW CONCEPT OF SURVEILLANCE INTO PRACTICE: OPERATION TRITON

The tragedy off the Lampedusa coast on October 2013, together with Italy's conviction by the ECtHR in the Hirsi case, led to the Italian Government setting up a strengthened search-and-rescue operation called "Mare Nostrum", using a large capacity military ship whose activities began in October 2013, but which came to an end in October 2014. Mare Nostrum included surveillance, rescue, the arrest of traffickers and disembarkation in Italian ports. It was an Italian unilateral initiative and its objective was both humanitarian and for security. Despite its success in having saved a large number of lives, the operation received various criticisms from certain opponents, both because of the cost which it involved (some 9 million Euros a month) and for the fact that it was considered to have become a factor in attracting

⁴³ Adopted by the General Affairs Council, 22 July, 2015 (CFSP 2015/778) with the aim of dismantling the business model of the networks of illicit trafficking of persons in the central Mediterranean (between Libya and Italy), detecting, capturing and eliminating the vessels and the resources they use. See ARTEAGA, F. and GONZALEZ ENRIQUEZ, C., "La respuesta militar a la crisis migratoria del Mediterráneo", ARI 40/2015, p. 5; http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM-GLOBAL-CONTEXT=/elcano_es/zonas_es/ari40-2015-artega-gonzalez-enriquez-respuesta-militar-crisis-migratoria-mediterraneo.

illegal immigrants and that it gave incentives for the use of dangerous boats and sea routes⁴⁴. After an arduous discussion process, Italy brought the Mare Nostrum operation to an end and it was agreed that Frontex would coordinate the setting up of a new operation together in specific areas along the Italian coast, called Operation Triton, principally conceived of as principally a surveillance operation and considerably less ambitious than Mare Nostrum.

Operation Triton was set in motion on November 2014 with a budget of 2.9 million Euros a month and within a limited operating area (reaching only up to 30 nautical miles). However, within a short time and faced with the enormous migratory pressure along the Italian coasts during the spring and summer of 2015, it was agreed to reinforce its activities, tripling the funds destined for Frontex, widening its operation area⁴⁵, extending the running time of such an operation until 2016⁴⁶ and 2017⁴⁷. The novelty of Operation Triton was to include not only the role of controlling irregular immigration, but also to contribute to the search and rescue of people at risk in the Mediterranean Sea, without the operation limiting the possibility of every State setting up its respective surveillance and rescue systems in the maritime zones under control. It was thus sought to establish a fairer distribution of responsibilities in the allocation of material and human resources. It is to be noted that Frontex has not been assigned the duties of search and rescue, nor is it a centre for the coordination of rescue missions and it can only help the States which require its assistance. On the other hand, the roles of search and rescue continue to be highly sensitive in relation to all operations and initiatives at European level.

⁴⁴ See CARRERA S. and DEN HERTOOG, *loc. cit.*, p. 3 ss.

⁴⁵ Conclusions of the Joint Council of Justice and Home Affairs (JHI) and Foreign Affairs, 20 April, 2015. The operational plan of Operation Triton has been modified to widen the area of operation (up to 138 thousand nautical miles to the south of Sicily) and to include a greater number of experts, ships and aeroplanes.

⁴⁶ On 7 June the amended budget n.º 5/2015 (26 million Euros) was approved allowing Frontex's operations in the Mediterranean to be tripled and for them to strengthen the number of posts and expenses of the corresponding personnel of the three agencies most affected: 16 more people in Frontex; 4 in the European Asylum Support Office (EASO) and 3 in Europol.

⁴⁷ EPN Triton has been maintained in 2017 in a similar way and budget as in 2016. See Frontex's Programme of work for 2017 <<http://frontex.europa.eu>>.

In accordance with Regulation 656/2014/UE, the operational plan of Operation Triton was to be the object of an exhaustive revision process, having to cover a wider range of incidents at sea and a new balance between the need for security and the aim of protecting individuals and their fundamental rights. The operational plan includes information on the different operational areas and on the forecast for disembarkation, having to specify the type of aid which is currently available in the country where disembarkation will take place. It also includes the system of communication and cooperation between the national coordination centres (NCC) and the Italian Sea Rescue Coordination Centre.

In the first report, presented by Frontex to the Commission of Civil Freedoms, Justice and Internal Affairs of the European Parliament (Commission LIBE), in the application of article 13 of Regulation 656/2014/UE⁴⁸, it is stated that Operation Triton does not include the possibility of disembarkation in third-country ports, but only in Italy, and that there have been several attempts to communicate this to the authorities responsible for the surveillance services in the area of Libya, but it has never been possible to achieve a response or any cooperation. It is also stated that, as a result of the existence of clearer and more detailed rules on fundamental rights in joint operations, Frontex has been able to control the implementation of the operational plan better and the channels of communication between the different participant centres have improved. It concludes that such rules have contributed to strengthening life saving capability at sea and to promoting respect towards the migrants' fundamental rights, without undermining the effort of controlling external maritime borders.

In any event, despite the fact that Frontex can coordinate certain operations jointly and that, together with Eurosur, it constitutes an instrument which centralises a large amount of information allowing new strategies to be proposed, it has not been able to bring the various positions of the States closer so as to have an adequate European tool available, which would allow it to act in an autonomous and effective way, on the request of a Member State. Beyond the improvements in the design or the operational plans and a clearer and more effective monitoring of its implementation, Operation

⁴⁸ *Frontex Annual Report on the implementation of EU Regulation 656/2014/UE, May 15, 2014 establishing rules for the surveillance of the external sea borders*, 15 July, 2015 (PRES-A-COURRIER A) (2015) 7897, presented to the LIBE Commission at the meeting of 14 September, 2015.

Triton could have served as a basis for creating a more stable structure at European level⁴⁹. Regulation 2016/1624 has done a new step in this direction but without achieving a fair distribution of responsibilities between Member States since there is any automatic, rapid and effective response at the European level to the needs of search, rescue and disembarkation, when a State requires assistance.

V. CONCLUSIONS

In a time blessed with advanced technology but lacking in political and ethical leadership when great tragedies or emergency situations must be faced, it seems only possible to adopt reactive and unambitious measures. However, there is still the need to find common and stable responses regarding complicated migratory challenges. The current context requires a greater distribution of both monitoring and humanitarian responsibilities between the Union and its States and a more serious and effective commitment in the application of the principle of solidarity.

Regulation 656/2014/UE and Regulation 2016/1624 are new steps in the clarification of some obligations linked to complying with the norms of international maritime law and the respect for fundamental rights. They reflect a new balance between the need to prevent illegal migrations and the need to guarantee the safety and protection of refugees and of those individuals at risk of losing their lives in the sea. It is an answer that strengthens the compromise of the Union and its agencies with the protection of human rights, but it requires a greater effort and more joint-responsibility of Member States.

The operational function of surveillance and management of the external maritime borders, which is within every Member State's competence, has been strengthened when assistance is required. The joint operations coordinated by Frontex now include the roles of search, rescue and disembarkation as stipulated in Regulation 656/2014/UE, whose application must continue to be in full compliance with the EU Charter and with the principle of non refoulement as has been interpreted by the ECJ and the ECtHR.

⁴⁹ LIBE Committee. Working Document on Article 80 TFUE – *Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration)*, 15 July, 2015.

The design of every operational plan should include all the consequences of a possible rescue and reflect how the responsibilities are distributed between the host country, Frontex and the other participating Member States or even third States. Joint operations help, complement and incentivise cooperation between Member States, however they do not substitute search and rescue operations on a national level.

Regulation 2016/1624 constitutes an improvement towards a more stable and binding mechanism. For instance, it would allow possible emergency situations or request for assistance to be better responded to, through the reinforced capability of rapid border interventions and with more technical and operational assistance in the support of search and rescue operations for persons in distress at sea. However this legal framework does not create a stable, common and automatic system based on a fair distribution of responsibilities between all Member States. It does not guarantee an effective answer when a State may require assistance as the other States respond to the calls for human and material resources made by Frontex in the way they think appropriate.

Despite the fact that the scope of application of Regulation 656/2014/UE is limited to the joint operations coordinated by Frontex, it should have a wider application on national operations and on other European maritime surveillance operations, since it contains and codifies rules of international maritime law and integrates European case law related to the principle of *non-refoulement*.

Whether or not the Agency's decisions may lead to some responsibility related to the obligation of search, rescue and the principle of non-refoulement should be analysed on a case by case situation, as Frontex is progressively assuming a leading role during the approval and implementation of different operational plans.

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