MEIJERS COMMITTEE
STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL
IMMIGRATION, REFUGEE AND CRIMINAL LAW

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Military action against human smugglers: legal questions concerning the EUNAVFOR Med operation

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1. The EUNAVFOR Med operation

On 22 June 2015, the Council of Ministers of the European Union adopted a Common Foreign Security Policy (CFSP) Decision establishing a military crisis management operation with the aim of combatting fighting people smuggling: EUNAVFOR Med.[1] This mission is currently in its first phase, focusing on intelligence gathering, i.e. surveillance and the assessment of existing smuggling networks.

A second phase would involve searching and possibly diverting vessels on the high seas and territorial waters, either under a mandate of the UN Security Council or with the consent of the appropriate coastal state. The Foreign Affairs Council has recently established that the conditions for the second phase have been met insofar as operations in international waters are concerned.[2] During the third phase, vessels and related assets of human smugglers would be destroyed and smugglers apprehended.

The mission will operate in a complex legal environment of overlapping rules of refugee law, international human rights law, the law of the sea, and international rules on the use of force. This note discusses some of the most pressing legal questions raised by this operation.

2. General remarks

At the outset, the Meijers Committee would like to raise a general point regarding the focus on people smuggling as a response to the loss of life at sea. In the absence of safe and legal access to the right to seek asylum in Europe, together with routes for legal migration, people will turn to human smugglers as a last resort. Increased border controls have resulted in higher casualties as people are forced to take more dangerous routes.

The Meijers Committee questions the appropriateness of the approach taken under EUNAVFOR Med to stop the loss of life at sea. The Committee would like to point to the shift from saving lives at sea under the Italian-led Mare Nostrum Operation, to border management (Triton), to military action

[1] Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED), OJ 2015, L157/51.
[2] Council of the European Union, "EUNAVFOR Med: Council adopts a positive assessment on the conditions to move to the first step of phase 2 on the high seas", *Press Release*, 14 September 2015, no. 643/15.

(EUNAVFOR Med). The Meijers Committee emphasizes that the legal obligation to save lives at sea should have primacy in all Union action at sea and that a long-term solution must also involve improving legal access to asylum and legal employment.

3. Human smuggling as a threat to international peace and security

The Meijers Committee notes that the decision establishing the EUNAVFOR Med operation refers explicitly to the need for a UN Security Council Resolution or consent of the coastal states concerned before the second phase of the operation can enter into force.

In this respect the Meijers Committee notes a fundamental difference from the EUNAVFOR operation Atalanta against piracy off the Somalian coast, which was taken as a model for EUNAVFOR Med. The Atalanta operation was explicitly supported by a UN Security Council Resolution, and had the consent of the coastal state involved.[3]

Articles 39 and 42 UN Charter stipulate that the Security Council shall only authorize the use of force if 'necessary to maintain or restore international peace and security'. The Meijers Committee is not convinced that the EUNAVFOR MED mission meets this standard. Although the humanitarian crisis may meet this standard, the activities of human smugglers – unlike piracy – do not qualify. Although the Security Council has previously adopted resolutions in response to refugee crises in Iraq and Haiti, these were intended to stabilize the countries of origin and not to prevent persons from seeking refuge elsewhere.

4. Phase 2: search and diversion of ships

The Second Phase of the operation would involve the search and diversion of ships in third-country territorial waters, which requires the consent of the flag state or a UN Security Council Resolution.

The Meijers Committee recalls that on the high seas, Article 87 UN Convention on the Law of the Sea (UNCLOS) ensures the right to freedom of navigation. Article 110 permits a warship to board and inspect a vessel if, *inter alia,* it has no nationality. As regards the vessel, a finding of statelessness should allow states to exercise jurisdiction in order to ensure compliance with the 'minimum public order on the high seas', namely, the duties that normally fall on the flag state (Art. 94 UNCLOS).[4] This could include a state's power to escort the vessel into harbor for inspection. As regards the people on board, UNCLOS does not seem to provide a basis for the exercise of jurisdiction.

Although Article 110(1) UNCLOS expressly allows that grounds of interference may be established by Treaty, the UN Smuggling Protocol seems to impose a duty of cooperation only on the contracting parties, while maintaining the requirement of flag state authorization. Article 8(7) of the Smuggling Protocol provides a firmer legal basis for interference with stateless vessels than Article 110 UNCLOS. The wording 'suppressing the use of the vessel' or 'take appropriate measures' implies the possible use of force. Nevertheless, such force should be used as a means of last resort and will be subject to the requirement of necessity and proportionality. It is noted, however, that the Migrant Smuggling Protocol lacks the precision of, for instance, the UN drug trafficking regime, which explicitly sets out

[3] http://www.un.org/Depts/los/piracy/piracy_documents.htm
[4] E. Papastavridis, 'Enforcement Jurisdictions in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas', International Journal of Marine and Coastal Law, Vol. 25, 2010, p. 585.

the measures that an intercepting power may take against a drug transport.[5] Accordingly, no clear legal basis for action is provided in international law.

Diversions on the high seas may not result in the refoulement of people on board. It is important to stress that States cannot relieve themselves of this obligation by labelling an operation as 'search and rescue'. The IMO Guidelines on the treatment of persons rescued at sea state that '[d]isembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided.' This approach has been confirmed by the European Court of Human Rights in the *Hirsi* case.[6] Member States remain bound by their obligations under international human rights law, independently of the nature and location of their intervention. In this regard it is particularly problematic that Libya – one of the most important coastal states whose cooperation is sought – is currently a notoriously dangerous and unstable country.

It is unclear how the EU intends to give practical effect to these obligations in the course of the EUNAVFOR Med mission. The Meijers Committee would recommend that clear guidelines be put in place, comparable to the rules applicable in the framework of Frontex coordinated operations at sea.[7]

5. Phase 3: destruction of vessels and apprehension of smugglers

The Third Phase of the Operation would entail the destruction of vessels and related assets, and the apprehension of smugglers. The Meijers Committee argues that clear, binding, publicly available rules should be adopted prior to the commencement of Phase 3.

As regards the smugglers it must be noted that unlike piracy and international crimes, international law does not establish universal criminal jurisdiction over human smuggling. As with diversions, the interference with vessels believed to be engaged in human smuggling requires the consent of the flag state (or a UN SC Resolution). In case the ship is sailing without a flag, Article 8 of the Protocol allows a party to take 'appropriate measures in accordance with relevant domestic and international law'. The extent to which this includes the exercise of criminal jurisdiction over human smugglers is not clear, however.

The Council decision establishing EUNAVFOR Med is silent about the possible detention and prosecution of smugglers. The Meijers Committee points out that even though EUNAVFOR Med is executed by military forces, the EU is not acting as party to an armed conflict and thus normal peace-time law applies. This means that after arrest, those suspected of migrant smuggling should be brought promptly before a judge[8]. In the case of subsequent criminal prosecution, jurisdiction should be established in one of the Member States. In this respect it is noted that not all Member States have established universal jurisdiction over human smuggling. If smugglers are to be extradited or released to third countries, their fundamental rights should be guaranteed.

[5] See Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
[6] ECHR, Hirsi Jamaa and others v. Italy, Grand Chamber, Judgment, 23 February 2012, Application no. 27765/09.
[7] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, L 189, 27 June 2014.
[8] ECHR, Medvedyev v France, 9 March 2010, appl. no. 3394/03.

The Meijers Committee notes that EUNAVFOR Med is aimed at the destruction of vessels used or *suspected* of being used for migrant smuggling, possibly even inside third-country territory, yet it remains unclear what legal standard is applied to identify such vessels. The Meijers Committee cautions that the destruction of vessels cannot be arbitrary. Unlike UNCLOS, which provides for clear rules on the seizure and liability for seizure of pirate ships, there is no explicit legal basis in international law for the seizure of migrant smuggling boats. The right to property as enshrined in Article 1 of Protocol 1 ECHR, which will apply to the Member States acting extra-territorially, prescribes that any destruction of property must be provided for by law and must be necessary and proportionate.

6. Unclear division of responsibility between the EU and its Member States

The Meijers Committee recalls that Article 21 TEU requires CFSP actions to be based on human rights. This includes respect for human dignity, including the prohibition of torture and inhuman treatment; personal security and liberty; and protection from arbitrary detention and arrest.[9] It also notes, however, that the Court of Justice of the EU has no authority to ensure this respect for fundamental rights as it lack jurisdiction over the CFSP.[10] This means that legal remedies would have to be provided under the national law of the participating Member States.

The experience with joint operations under the coordination of Frontex shows that in case of violations of fundamental rights, it is unclear to whom wrongful conduct must be attributed. Although the operation is coordinated by the EU, it is the Member States that provide the assets and personnel, over which they maintain operational command.

Case law issuing from the European Court of Human Rights on the obligations of the Member States as contracting parties to the European Convention on Human Rights clearly indicates with regard to the Member States that they cannot escape their responsibilities under the Convention by acting outside the Convention's territorial scope. The situation is more complicated, however, when Member States act as agents for the European Union (Bosphorus) or within the context of UN Peace Keeping Operations (Al Jeddah, Behrami, and Saramati). The Meijers Committee therefore stresses that it is fundamentally important that questions of international responsibility and responsibility under the European Convention for Human Rights are addressed prior to commencement of Phases 2 and 3.

7. Conclusions and recommendations

I. There are no indications that combating migrant smuggling contributes to the restoration of international peace and security or to ending the ongoing humanitarian crises;
II. Without express consent from third states or authorization from the UN Security Council, the EU lacks jurisdiction over vessels or assets in third-country territorial waters;
III. Without express consent from third-country coastal states or authorization from the UN Security Council, there is no clear legal basis for coercive measures against vessels or assets on the high seas;

[9] The promotion and protection of human rights during common security and defence policy operations. In-between a spreading state of mind and an unsolved concern. M L Sánchez Barrueco, in The EU as a "Global Player" in human rights?, J E Wetzel (edit.), 2011, pp. 158-160.
[10] See also Case T-271/10, under appeal C-455/14 P.

IV. Despite the unclear legal framework covering interdiction on the high seas, international human rights law does apply;

V. Should a legal basis for action on the high seas and in territorial waters be provided, clear rules of engagement and proper safeguards should be in place to prevent indiscriminate destruction of civilian property; any undue loss should be compensated;

VI. An unambiguous legal basis for the arrest and detention of suspected smugglers is needed, and also for the seizure and destruction of any personal property. Suspects should either be prosecuted, extradited or released, the last action having due regard to the right to asylum and the prohibition of refoulement;

VII. Clear attribution rules and accountability mechanisms for human rights violations committed by EUNAVFOR assets should be in place;

VIII. The right to apply for asylum, access to asylum procedures *on land* with proper language and legal assistance, and the prohibition of refoulement should be respected and subject to judicial oversight;

IX. Outsourcing migration control to third countries, even though outside Member State jurisdiction, should take place with assurances and safeguards against human rights violations.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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Contact info:
Louis Middelkoop
Executive secretary
post@commissie-meijers.nl
+31(0)20 362 0505

Please visit www.commissie-meijers.nl for more information.