

Improving Europe's fight against migrant smuggling

*A study of good practises of the Italian investigations on migrant smuggling
and an analysis of Italy's cooperation with Operation Triton and Operation Sophia*

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Introduction

While Europe is facing a refugee crisis with millions of refugees and migrants crossing the Mediterranean Sea in the last few years, the industry behind the migrant smuggling has become an extremely lucrative business. Escaping from war-torn countries that deal with widespread violence and highly repressive governments or out of poverty and in pursuit of better economic prospects, migrants from Africa and the Middle-East have increasingly found their way towards Europe. And according to Europol, because of the lack of legal ways of migration, almost 90% of them relied on services provided by migrant smugglers. They demand exorbitant amounts of money for each passage. It has made the smuggling industry a highly profitable business with profits exceeding those made by drug trafficking. But for the migrants it has resulted in extremely dangerous enterprises, with risks varying from being beaten to death in the safe houses in Libya, imprisonment for ransom in the Sahel desert, the sell of their organs, sexual assault and death by drowning in the Mediterranean Sea.¹

Clearly, steps have to be taken to bring the migrant smuggling industry to a halt. But although irregular migration flows heading towards the European mainland exist for a much longer period of time, it wasn't until the refugee crisis reached unprecedented heights that the EU stepped up its efforts to respond to the crisis. A European Agenda on Migration was set up in May 2015.² In the Agenda, the fight against migrant smugglers and traffickers was also mentioned as one of the main priorities and on 27 May 2015 the EU adopted the EU Action Plan against Migrant Smuggling (2015-2020).³ The action plan distinguished several ways to combat migrant smuggling, including ways to improve the prosecution of smugglers: by enhancing the capacities of EU member states to investigate and prosecute migrant smuggling networks, by strengthening the cooperation and coordination between law enforcement and judicial structures in the EU and with third countries of origin and transit and by improving the existing EU legal framework and the penal framework.⁴ Since then, the EU has already taken some steps to better identify and target the smuggling networks, as is shown by the launch of the military operation EUNAVFOR Med, also known as Operation Sophia, the

¹ These and other hardships encountered by migrants are extensively documented. See for example: Lucia Heisterkamp, "Tortured for ransom: extortion on migrant routes", *Open Democracy* (12 October 2016); Nourhan Abdel Aziz, Paola Monzini, Ferruccio Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, New-Med research network (October 2015); Sahar Foundation and IGAD Security Sector Program (ISSP), *Human Trafficking and Smuggling on the Horn of Africa-Central Mediterranean Route* (February 2016); Tuesday Reitano, Laura Adal and Mark Shaw, "Smuggled Futures: The dangerous path of the migrant from Africa to Europe", *Global Initiative against Transnational Organised Crime series on Human Trafficking* (May 2014).

² European Commission, *A European agenda on migration* (13 May 2015).

³ European Commission, *EU Action Plan against migrant smuggling (2015 - 2020)* (27 May 2015).

⁴ *Ibidem*.

creation of the European Migrant Smuggling Centre at Europol and the establishment of the Thematic Group on Illegal Immigrant Smuggling at Eurojust.

However, when it comes to the criminal investigations and the effective prosecution of migrant smugglers, the EU lags behind one EU member state in particular: Italy. The country operates at the frontline of the European migration crisis: it is one of the main ports of entry for migrants trying to reach Europe and at the moment it is also the only EU member state that prosecutes migrant smugglers active along the migration routes from North-Africa towards Italy.⁵ Over the last years, Italian prosecution offices have launched impressive large scale investigations and brought to trial hundreds of suspects who were placed on different levels within the criminal organisations: figures have been convicted that performed their smuggling activities on the high seas, in Italy or in North-European countries and international arrest warrants have been issued against some high mobsters who are mainly based in the African mainland.

In their investigations, the prosecution offices of the country also receive assistance from a multitude of EU institutions. Europol has assisted the Italian investigations by analysing data collected by the Italian authorities, and Eurojust supported the cross-border cooperation between Italy and other EU member states by organising coordination meetings and facilitating the exchange of information and the execution of Letters of Request.⁶ Next to these well-known institutions, two other EU structures also support the Italian authorities: the two EU naval missions active in the Mediterranean Sea, Frontex-led Operation Triton and the military mission EUNAVFOR Med. They also conduct law enforcement activities and cooperate with the Italian authorities, but their contributions to the investigations have received much less attention.

These developments of the last years show on the one hand that the EU tries to increase its efforts in combating the migrant smuggling business and that it also wants to give better support to the criminal investigations of EU member states. On the other hand, one EU member state is already conducting many criminal investigations on the smugglers for a number of years and with large successes. That raises the questions to what extent the EU can

⁵ Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFOR MED - Operation SOPHIA Six Monthly Report, 22 June to 31 December 2015* (January 2016).

⁶ Eurojust Press Release, "Eurojust and Europol support major operation against illegal immigrant smuggling" (6 September 2016); Eurojust Press Release, "Organised crime group behind illegal immigration dismantled" (23 November 2016).

learn from the Italian experience, and to what extent the EU can further improve the Italian investigations on migrant smuggling. Could the EU find ways to promote or legally allow the use of investigation methods in other EU member states that have proved to be efficient in Italy? And does the EU have the means to alleviate the difficulties that the Italian prosecutors encounter during their investigations? These aspects will be the focus of the thesis. It wants to give more clarity about how the EU can better support the migrant smuggling investigations of EU member states. In that way, the thesis wants to provide recommendations for an improved fight against migrant smuggling by the EU alongside the planned activities mentioned in the European Agenda on Migrant Smuggling. This study is aimed at answering the following central question:

In which ways can the EU learn from the Italian practise and improve the investigation and prosecution of migrant smugglers by national law enforcement and judicial authorities?

Two sub questions serve to answer the core question:

- (1) how can the EU improve the investigations on migrant smuggling of EU member states, based on Italy's good practises?
- (2) how can the EU further support the Italian investigations on migrant smuggling, by improving the support of EU agencies?

There are multiple way in which the EU can support the migrant smuggling investigations conducted by member states. The thesis will provide recommendations for two of these ways: (1) reinforcing the investigative capacities of the EU member states within their national jurisdictions, (2) strengthening the support of EU agencies for migrant smuggling investigations done by EU member states. In the first case, the EU can be of importance by improving the legislation and the investigation tools that national agencies have at their disposal. This can for example be done by disseminating best practises among the national authorities, by providing guidelines or adopting legislation about the use of investigation methods and by modifying the European penal framework. In the second case, the EU can be of assistance by directly improving the efficacy of EU agencies, such as Europol, Eurojust, Frontex and the European External Action Service (EEAS) – Operation Triton and Operation Sophia are launched respectively by Frontex and the EEAS. Examples of these are already mentioned above.

For finding out how to improve the EU's legislation and the functioning of the EU agencies, the Italian investigations on migrant smuggling shall be looked upon as a case study. By analysing these investigations, it will become clear which methods used in Italy can best be taken over by the EU and other EU member states. And by looking at the cooperation between the Italian authorities and the EU agencies, it can be identified how the EU agencies can be more supportive. In that way, recommendations can be provided to the EU as to how to better support the anti-smuggling investigations of the EU member states. For that purpose, attention will be given to the instruments and methods used by Italian prosecutors and, due to the limited scope of the thesis, the thesis will be focussed on the cooperation between the Italian authorities and Operation Triton and Operation Sophia.

Research on the investigation and prosecution of migrant smugglers is particularly important because of the limited academic research on the topic. Save for some exceptions⁷, academic research has often assessed the EU's fight against migrant smuggling by looking at all different policy tools and thereby regularly criticising their rather security-based approach instead of being more protection and justice based.⁸ Other studies are based on individual aspects of the EU's policy framework to address migrant smuggling, such as the legal framework regarding the criminalisation of migrant smuggling and protection of victims⁹, or the cooperation with third countries.¹⁰ Case study research on the investigation and prosecution methods is also almost absent. That accounts in particular for the investigation

⁷ Some relevant research on this topic is conducted, see for example: Matilde Ventrella, "The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers", *QIL Zoom-in* 30 (2016) 3-18 and Optimity Advisors, the International Centre for Migration Policy Development (ICMPD) and the European Council of Refugees and Exiles (ECRE), *A study on smuggling of migrants: Characteristics, responses and cooperation with third countries*, Study commissioned by the European Commission's DG Migration and Home Affairs (September 2015).

⁸ Ilse van Liempt, "A Critical Insight into Europe's Criminalisation of Human Smuggling", *Sieps - Swedish Institute for European Policy Studies* (January 2016); Sergio Carrera and Elspeth Guild (eds.), "Irregular migration, trafficking and smuggling of human beings: Policy dilemmas in the EU", *Centre for European Policy Studies* (2016); Ruben Andersson, "Europe's failed 'fight' against irregular migration: ethnographic notes on a counterproductive industry", *Journal of Ethnic and Migration Studies* (4 January 2016); Anne T. Gallagher, "Exploitation in Migration: Unacceptable but Inevitable", *Journal of International Affairs* 68 2 (2015); ARCI, "Steps in the process of externalisation of border controls to Africa, from the Valletta Summit to today", *ARCI analysis document* (June 2016).

⁹ Sergio Carrera, Elspeth Guild, Ana Aliverti et. al., *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Study commissioned by the European Commission DG for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee (2016); Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Characteristics, responses and cooperation with third countries*; Joanne van der Leun and Anet van Schijndel, "Emerging from the shadows or pushed into the dark? The relation between the combat against trafficking in human beings and migration control", *International Journal of Law, Crime and Justice* 44 (2016); European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Working document on tackling criminal smuggling, trafficking and labour exploitation of irregular migrants* (19 October 2015); Louise Shelley, "Human Smuggling and Trafficking into Europe: A Comparative Perspective", *Migration Policy Institute* (February 2014); A. Brunovskis and M. L. Skilbrei, "Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers", *Anti-Trafficking Review* 6 (2016).

¹⁰ Alexander Bühler, Susanne Koelbl, Sandro Mattioli and Walter Mayr, "Following the Money, On the Trail of African Migrant Smugglers", *Spiegel Online – International* (26 September 2016); Heisterkamp, "Tortured for ransom: extortion on migrant routes"; Judith Sunderland, "Why Cooperating with Libya On Migration Could Damage the EU's Standing", *Human Right Watch* (7 November 2016); Peter Seeberg, "The EU-Turkey March 2016 Agreement As a Model: New Refugee Regimes and Practices in the Arab Mediterranean and the Case of Libya", *Centre for Contemporary Middle East Studies, Odense* (December 2016); Optimity Advisors, the International Centre for Migration Policy Development (ICMPD) and the European Council of Refugees and Exiles (ECRE), *A study on smuggling of migrants. Characteristics, responses and cooperation with third countries, Case Study 2, Ethiopia-Libya-Malta-Italy*, Study commissioned by the European Commission's DG Migration and Home Affairs (September 2015).

methods of the Italian judiciary. When academic articles refer to the subject, the authors only shortly describe the Italian practises in combating migrant smuggling without going much into detail, or they only refer to the results obtained by the Italian investigations, such as the number of arrests carried out.¹¹ However, despite the scarcity of academic research on the topic, EU institutions and national prosecution offices are to some extent familiar with the Italian investigation methods. Italian prosecutors have shared their methods with European and national authorities at different occasions.¹² But more can be done to bring the prosecutors' successes and difficulties under the attention and further investigation is needed. As to the cooperation between Italian authorities and Operation Triton and Operation Sophia, and about the contributions of the missions to the Italian anti-smuggling investigations, academic research on these topics is also very limited. Extensive research has been conducted especially on Operation Sophia, but the research is focussed on a few topics such as the effectiveness of the Operation in disrupting migrant smuggling networks and the judicial framework of the Operation.¹³

Despite the limited attention in academic research, documentation about the Italian investigations on migrant smuggling is very extensive. Italian courts do not have a duty to disclose material or evidence to the public, but information about court cases and about the methods used is acquired through media articles that covered the cases, through court documents that were leaked to the press, through parliamentary documents and through a

¹¹ Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Characteristics, responses and cooperation with third countries*; Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Case Study 2, Ethiopia–Libya–Malta–Italy*; Sahar Foundation and IGAD Security Sector Program (ISSP), *Human Trafficking and Smuggling on the Horn of Africa–Central Mediterranean Route*; European Migration Network (EMN), *Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence* (17 November 2014); Aziz, Monzini, Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*; European Migration Network, *Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU*.

¹² To give an example, they have given presentations on the topic at meetings of the Consultative Forum of Prosecutors General and Directors of Public Prosecutors of EU Member States: Giovanni Salvi, "From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions" (12 December 2014) & Giovanni Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office" (3 June 2016). A presentation held at the Council of Europe in Strasbourg was delivered by Calogero Ferrara: Calogero Ferrara, "Tackling the smugglers of migrants. A new approach: the 'Glaucò' cases" (3 December 2015). Presentations held at the UN level are delivered by Simona Ragazzi, Calogero Ferrara, Captain Pierini and Gabriele Fragalà at the *Trans-regional Training Workshop on Preventing and Combating the Smuggling of Migrants by Sea affecting the Mediterranean Region, held by UNODC and ISISC* (Syracuse, Italy, 14-16 October 2015). See also: 13th UN Congress on Crime Prevention and Criminal Justice, *Background paper for Committee II, workshop II: Trafficking in persons and smuggling of migrants: successes and challenges in criminalization, in mutual legal assistance and in effective protection of witnesses and trafficking victims* (Doha, 12-19 April 2015); Simona Ragazzi, "The Italian experience. Challenges and interpretative solutions", Presentation held at the UN Working Group on the Smuggling of Migrants, third session (Vienna, 18-20 November 2015) and Simona Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach", *Europe's crisis: What future for immigration and asylum law and policy?*, Seminar of the Migration and Law Network, Queen Mary University of London (27-28 June 2016).

¹³ Ventrella, "The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers"; Steven Blockmans, "New thrust for the CSDP in the refugee and migrant crisis", *CEPS Special Report* No. 142 (July 2016); Graham Butler and Martin Rátovíh, "Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea", *Nordic Journal of International Law* 85 (2016) 235-259; Marco Gestri, "EUNAVFOR MED: Fighting migrant smuggling under UN Security Council Resolution 2240 (2015)", *The Italian Yearbook of International Law Online* 25 1 (2016) 19-54; Meijers Committee, *Military action against human smugglers: legal questions concerning the EUNAVFOR Med operation* (23 September 2015).

limited number of academic articles.¹⁴ Commissions of the Italian Parliament regularly call upon prosecutors and other stakeholders involved in the smuggling investigations to inform them in so-called *audizioni* about the latest developments, which are made available to the public and provide a lot of relevant information. The prosecutors themselves have also written articles and given presentations about their investigations, which are openly accessible.¹⁵ These sources are all very useful to collect information about the investigation methods used and also to gather information about the cooperation with Operation Triton and Operation Sophia. As to this topic, journalistic articles and conducted interviews were other important sources. Interviews were conducted with a spokesperson of Frontex, and with the commanding officers of two vessels under Operation Sophia and of one vessel under Operation Triton. The decision to interview specifically these persons had to do with their willingness to provide an interview and was not a deliberate choice. Since only a few commanding officers provided information about activities done on board, these experiences are not to be considered representative for each vessel operating under Operation Triton or Sophia. However, they give important information, are used as examples in the thesis and the examples are often backed up by other sources.

The subject shall be approached from two different angles: from the perspective of a qualitative analysis and from a case study perspective. The first chapter provides a general overview of the Italian investigations on migrant smuggling. In this part, the different investigation methods and instruments used will be mentioned. Such an overview makes it possible to identify good practises that the EU can try to implement in other EU member states. The second and third chapter focus on the cooperation between the Italian authorities and the EU Operations Triton and Sophia. In the second chapter, it will be clarified how the cooperation currently takes place and which factors complicate an effective cooperation with the Italian authorities. Upon that basis, in the third chapter an analysis can be made of how to improve Operation Triton and Operation Sophia's support to the Italian investigations. The concluding fourth chapter provides a number of recommendations for the EU. In this final chapter, some recommendations are also provided for a third way for the EU to improve the

¹⁴ Academic articles on the subject: Aziz, Monzini, Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*; European Migration Network, *Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU: national institutional frameworks, policies and other knowledge-based evidence* (17 November 2014); Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Characteristics, responses and cooperation with third countries*.

¹⁵ See footnote 12. See also: David Mancini, "Successful prosecution of human trafficking – challenges and good practices", *National Criminal Justice Responses to Combating Human Trafficking - Challenges and Best Practices*, Conference of OSCE, Helsinki (10-11 September 2008); Roberta Barberini, "La rilevanza penale del fenomeno migratorio", *Questione Giustizia* (30 October 2015); Franco Roberti, "Il ruolo della Direzione Nazionale Antimafia", *L'immigrazione che verrà*, National Seminar in Catania (20-21 February 2015); Simona Ragazzi, "Introduzione alla Sessione: Il viaggio in mare", *L'immigrazione che verrà*, National Seminar in Catania (20-21 February 2015).

prosecution of migrant smugglers: by taking over part of the investigations instead of only supporting EU member states. That would provide a long-term solution to the combat of the smuggling networks and is therefore important to include in this study.

Before focussing on Italy's investigation methods, some ultimate remarks have to be made. Firstly, this study does not intend to assess the efficacy of enforced prosecution methods as a means to combat irregular migration. That can hardly be assumed. Stepping up efforts to bring migrant smugglers to trial is part of Europe's comprehensive approach to the refugee crisis, but the effects of this instrument will be minor. Even if the number of arrests will rise, this will not stop the migration flows. These flows are mainly the result of endless wars, security vacuums, poverty and a lack of employment. As long as these root causes are not dealt with, migrants will continue trying to reach Europe. Next to that, the smuggling business has grown in such proportions, providing an income to tens of thousands of people, that the prosecution of a few top smugglers can impossibly eradicate the business. Nevertheless, the prosecution of migrant smugglers remains an important task, if only for the sake of justice: by punishing those who are most responsible for the wrongdoings.

A second aspect to mention regards the perspective of this thesis. In this study is chosen for a law enforcement perspective: current practises will be examined on how they combat the migrant smuggling networks and options will be looked at that might improve the fight against these smuggling networks. However, the refugee crisis is often approached from a human rights perspective. From that perspective, it is more important how migrants are treated and in which ways their human rights can be best safeguarded. These two perspectives are not always compatible and practises that might be very advantageous for the prosecution of migrant smugglers can pose difficulties for the safeguard of human rights. Since this study is primarily focussed on the prosecution of migrant smugglers, less attention can be given to the human rights point of view.

Finally, it must be mentioned that the choice of Italy as a case study and as an example from which important lessons can be learned, does of course not signify that Italy's fight against migrant smuggling is the perfect example to follow in any possible way. Italy is also criticised for inhuman treatment towards migrants, for example by collectively expelling a group of Sudanese refugees – after a Memorandum of Understanding signed between Italy and Sudan

– without looking at their asylum requests¹⁶, and by using considerable coercive methods against migrants, such as beatings, electric shocks and sexual humiliation, to obtain their fingerprints during the registration process.¹⁷ Next to that, when it specifically concerns the investigation and prosecution of migrant smugglers, not every method used by the Italians is praiseworthy. Accusations have been made against the treatment of migrant witnesses, in which case migrants attending to testify against a smuggler were left carelessly in reception centres instead of being placed under protection in safe places.¹⁸ These are methods that are clearly not to be recommended. But as a country that is very active in the prosecution of migrant smugglers, it is by far the best country to study for finding out how to improve the EU's fight against migrant smuggling.

¹⁶ Pietro Barabino, “Migranti, prima espulsione di gruppo: 48 presi a Ventimiglia e rispediti in Sudan. ‘Ma Khartoum viola diritti umani’”, *Il Fatto Quotidiano* (24 August 2016); ASGI, *Memorandum d’Intesa tra il Dipartimento della Pubblica Sicurezza Italiano e la Polizia Nazionale Sudanese. Guida alla lettura* (3 October 2016); Memorandum d’intesa tra il dipartimento della pubblica sicurezza del ministero dell’interno italiano e la polizia nazionale del ministero dell’interno sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio.

¹⁷ “Hotspot Italy: How EU’s flagship approach leads to violations of refugee and migrant rights”, *Amnesty International* (3 november 2016).

¹⁸ Simona Arena, “Messina, visita in centro accoglienza Bisconte «Testimoni contro scafisti lasciati senza tutele»”, *Meridionews* (8 March 2016); “I non-luoghi della prima accoglienza a Messina. Settimo report multimediale della campagna Overthefortress”, *Melting Pot Europa* (21 November 2016).

1. Italy's investigation methods in the fight against migrant smuggling

Since the autumn of 2013, the fight against the criminal organisations that are behind the migrant smuggling business is a battle fought primarily by Italy. Italian prosecution offices introduced new approaches, innovative legal provisions and the use of special methods, which will be the focus of this chapter. An introductory paragraph looks closer at the historical background and achieved results of the Italian investigations, in terms of investigations conducted and information gained about the smugglers' modus operandi. The subsequent paragraphs consider the different aspects of the Italian anti-smuggling investigations, starting with the targets of the investigations, followed by the requisites to begin a criminal investigation and the methods used during the process of evidence gathering and finishing with the difficulties encountered during the investigations.

Historical background of anti-smuggling investigations and smuggling practises

When migration flows from Libya towards Italy increased enormously after the collapse of the Ghaddafi regime in 2011 and especially when a tragic shipwreck off the coast of Lampedusa led to the death of 366 people in October 2013, Italian authorities decided to put much more effort in the identification and dismantlement of the smuggling organisations operating on the route from Libya. Previously, prosecution offices in Apulia conducted anti-smuggling investigations already since the early 1990s, but these were focussed on the migration route between the Balkan countries and the eastern coast of Italy. At the end of 2013, the attention shifted southwards: Italy started operation Mare Nostrum with the specific objective of saving lives at the Mediterranean Sea and investigations on migrant smuggling were increasingly performed by the prosecution offices of Palermo and Catania, who focussed their attention on the routes between the Horn of Africa and Europe. Since then, impressive investigations were launched, among which the Glauco I, II and III investigations (Palermo's prosecution office) and operation Tohkla (Catania's prosecution office) are the most important ones to mention.

Based on these and other investigations, the Italian prosecutors uncovered the main smuggling routes and the organisations arranging the migrants' journeys. They affirm knowing almost everything about it. According to them, highly organised criminal groups

control at least part of the smuggling business.¹⁹ These groups take care of the entire journey of a migrant starting from their countries of origin, often in the Horn of Africa, until their final destination in North-Europe or North-America. The networks are hierarchically structured and include a large range of cross-border contacts. At the African mainland, mediators put migrants in touch with the criminal network and make them pay, whereas drivers transport the migrants from one country to another. Once arrived in Libya, other intermediaries organise the boat journeys and guards keep the migrants imprisoned in flats, houses and farms until they are permitted to leave. In South-Italy, low-level middlemen are found both outside and inside of reception centres, where they pretend to be relatives in order to recruit migrants for their onward journey, and in Milan and Rome major cells are uncovered that take charge of the continuation of the migrant's journeys to North-Europe. At the top of these comprehensive criminal networks are the high-level bosses, who gain most financial benefits.²⁰

Approaching migrant smuggling with anti-mafia methods and pursuing the top leaders

Two crucial approaches lie at the heart of the Italian investigations on migrant smuggling, which enabled them to conduct a large number of arrests and to gain so much information about the smuggling networks. Firstly, the Italian authorities consider migrant smuggling a highly organised crime, view the smuggling networks as criminal organisations equal to the mafia and apply anti-mafia methods to migrant smuggling cases, which is a very innovative approach. In Italy, district prosecution offices are in charge of investigations and prosecutions and these offices are subdivided in two distinct offices, which are the anti-mafia prosecution office (*DDA - Direzione Distrettuale Antimafia*) and an ordinary prosecution office (*Procura Ordinaria*). When serious organised crimes are committed, the anti-mafia district offices take charge of the investigations. The Italian authorities decided to place migrant smuggling investigations also under the responsibility of these anti-mafia offices. Within the anti-mafia

¹⁹ According to current research, both loosely connected small groups of persons, who focus only on the crossing of one border or on a part of the journey (the so-called "cross-border cottage industries"), and very large and transnationally operating criminal networks, who take control of the organisation of entire migration routes, are active along the main migration routes. Therefore, it cannot be said that the highly organised criminal groups, as uncovered in the Italian investigations, are representative of all smuggling coming from Libya and the Horn of Africa. See: European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Working document on tackling criminal smuggling, trafficking and labour exploitation of irregular migrants* (19 October 2015); Michael Collyer, "Cross-border cottage industries and fragmented migration", in: Sergio Carrera and Elspeth Guild (eds.), *Irregular migration, trafficking and smuggling of human beings: Policy dilemmas in the EU* (Centre for European Policy Studies, Brussels 2016).

²⁰ Information about the smuggling business and the criminal organisations behind it is found in many sources, among which court documents of prosecution offices and presentations given by prosecutors. The information given above is based on: Carlo Amenta, Rino Coluccello, Paolo Di Betta, Gery Ferrara, "Il traffico di essere umani e i network del contrabbando tra Libia e Italia", in: Francesco Semprini (ed.), *Emergenza Libia* (Soveria Mannelli 2016); Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach"; Eric Reidy, *Ghost Boat, A boat went missing with 243 people on board. What happened to them? We decided to find out in a 10-part, open, crowdsourced investigation*; Procura distrettuale della Repubblica presso il Tribunale di Catania, *Richiesta di applicazione di misura cautelare personale*, request for the preliminary hearing judge (Giudice per le indagini preliminari) (5 December 2014).

district offices of Palermo and Catania, specialised teams were set up to focus solely on this crime and the methods allowed in anti-mafia investigations were equally applied to anti-smuggling cases: extensive wiretapping, witness-protection programs for informants, interviews with them for the collection of information and interviews with prison inmates, among which Italian Mafiosi.²¹ Nuredin Atta Wehabrebi was the first smuggling kingpin who turned into an informant after his arrest and decided to cooperate with the Italian authorities. Now he is part of the same witness protection programmes that mafia informants benefit from.²²

An anti-mafia approach of this kind has resulted in a second important asset of Italy's smuggling investigations: the search for the leading members of the criminal groups. Whether it concerns migrant smuggling, mafia or drugs, law enforcement and judicial authorities always have to decide whether to build cases on easy-to-catch and low-level crew members or to let them go – or perhaps use their information – and to focus their efforts on the higher pawns in the organisational chain, who are more difficult to bring to trial but whose arrests certainly have a higher impact. With regard to the smuggling activities along the Central Mediterranean Route, Italy decided to prioritise the prosecution of the higher levelled smugglers and the top kingpins, just as it is common in anti-mafia and drugs investigations.²³ “We are not interested in the *scafisti*, but first and foremost in the mobsters at the very top of the chain”, as a former prosecutor in the office of Palermo stated.²⁴ At the lowest level of the chain are the drivers of the boats coming from Libya to Italy, the so-called *scafisti*. Although officially facilitating irregular migration and therefore being liable to a penalty, these *scafisti* are often migrants themselves, who do not belong to the criminal networks and receive a discount on their travel by providing the service, and who are easily replaceable.²⁵ On a

²¹ Ferrara, “Tackling the smugglers of migrants. A new approach: the “Glauco” cases”; Salvi, “From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions”; Amenta, Coluccello, Di Betta and Ferrara, “Il traffico di essere umani e i network del contrabbando tra Libia e Italia”; Hester van Bruggen, Marjolein Cupido and Joop Voetelink, “Militair-justitiële samenwerking bij de aanpak van migratiestromen”, *Nederlands Juristenblad* 36 (21 October 2016).

²² Hannah Roberts, “People smuggling kingpin wracked by guilt over drownings turns supergrass: Trafficker reveals the brutality, boasts and booming business behind the sick trade in humans”, *Mail online* (1 September 2015); Bühler, Koelbl, Maoli and Mayr, “Following the Money, On the Trail of African Migrant Smugglers”.

²³ Salvi, “New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office” (3 June 2016); Salvi, “From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions”; Luisa Santangelo, “Migranti, svolta nella lotta al traffico di uomini. Richiesta l'estradizione del superboss egiziano”, *Meridionews* (7 March 2016); van Bruggen, Cupido and Voetelink, “Militair-justitiële samenwerking bij de aanpak van migratiestromen”.

²⁴ Annalisa Camilli, “Non basta condannare gli scafisti per fermare la strage di migranti nel Mediterraneo”, *Internazionale* (16 December 2016); Italian Parliament, Commissione parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali, anche straniere (Bicamerale Antimafia Commission), *Audizione del procuratore della Repubblica presso il tribunale di Catania, Giovanni Salvi* (7 July 2015).

²⁵ Fabrizio Gatti, “Io, scafista della morte”, *L'Espresso* (16 October 2013); Giovanni Tizian, “Buba e i ragazzini «scafisti per necessità»”, *L'Espresso* (19 April 2016).

yearly basis, hundreds of boat drivers are still arrested and prosecuted in Italy, but they are not the main priority of the prosecution offices.²⁶

Starting a case: criminalising migrant smuggling and asserting national jurisdiction

The prosecutors of Palermo and Catania approached their migrant smuggling investigations in these two ways. But they could not even start an investigation without two requisites: the penalisation of the offence in criminal law and the assertion of national jurisdiction. As to the first aspect, the Italian criminal code penalises the facilitation of irregular migration. That is not an innovative legal provision of the Italian authorities, since many other EU member states have penalised the crime as well and the current legal framework on migrant smuggling of the EU, codified in the Facilitation Framework Decision and Directive of 2002, also includes it.²⁷ However, in the Italian criminal code, the smugglers are exposed to harder punishments when aggravating circumstances are present – such as endangering the migrants’ lives, exposing them to inhuman treatments and engaging in smuggling activities for financial gain or other benefits –, and an exception is made to those facilitators that provide humanitarian assistance to migrants.²⁸ In these aspects, it goes further than the European legal framework.²⁹

A second requirement for starting a case regards the assertion of jurisdiction. Jurisdiction relates to the power or the right of a political agency to prescribe and enforce its law. If jurisdiction is asserted, a state has the authority to bring a person to trial. Traditionally, jurisdiction was limited to a state’s territory, meaning that a state asserts national jurisdiction only within its territorial boundaries. It implies that a state is authorised to try a person who is a national of the state and to try a foreigner of a crime that has been conducted within the territory of the state.³⁰ This principle proved to be a problem for apprehending and prosecuting smugglers whose activities took place on the high seas. The assertion of jurisdiction on the high seas is governed by the UN Convention of the Law of the Sea

²⁶ van Bruggen, Cupido and Voetelink, “Militair-justitiële samenwerking bij de aanpak van migratiestromen”

²⁷ Council of the European Union, *Council Directive of 28 November 2002 (2002/90/EC) defining the facilitation of unauthorised entry, transit and residence*; Council of the European Union, *Council Framework Decision of 28 November 2002 (2002/946/JHA) on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*.

²⁸ The facilitation of irregular migration is criminalised in article 12 of Legislative Decree No. 286 of 1998 (*Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*, also referred to as Immigration Law or the National Law on Migration). It defines the crime of abetting illegal immigration, in other words promoting, directing, organising, financing or operating the transport of foreigners into the State, or performing other acts intended to procure illegal entry into the territory of the State.

²⁹ In the European provisions, the facilitation of irregular migration is still a criminal offence but the aspect of financial gain is absent, the obligation to provide an exception for humanitarian assistance to migrants is left out as well, and EU member states have to decide for themselves which sanctions are “effective, proportionate and dissuasive”. Council of the European Union, *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence*.

³⁰ James C. Hathaway and Thomas Gammeltoft-Hansen, “Non-Refoulement in a World of Cooperative Deterrence”, *Law & Economics Working Papers* 106 (2014).

(UNCLOS), providing that no state can assert national jurisdiction on the high seas, save for exceptional cases.³¹ For the prosecution of smugglers committing crimes on the high seas, a link to the Italian territory had to be established. For their apprehension on the high seas, Italian flagged ships needed to be authorised with the enforcement powers to board, inspect and seize the vessels used to smuggle migrants and to arrest suspected smugglers on board.³²

The Italian authorities established this link on the basis of international law and the *modus operandi* of the smugglers. Although the smuggler's techniques for organising the boat trips change over time, over the last years it was common to rely on the intervention of Italian rescue forces. Migrants were put into small boats, that were unsafe and placed the migrants at extreme risks, and the Maritime Rescue Coordination Centre (MRCC) – who coordinates the search and rescue missions in the Mediterranean Sea – was called to save them. It was a strategy chosen by the smugglers to reduce costs and to escape prosecution. However, as codified by UNCLOS, naval units have the moral and legal obligation of saving human lives in distress at sea and they are bound to the principle of non-refoulement, a principle of customary international law which forbids a country receiving migrants to return them to a country where they are in danger of prosecution.³³ For these reasons, Italian naval units were practically forced to complete the illegal journey towards Italy and partake in the criminal offence. They themselves were not punishable on the basis of the principle of duress/necessity – the navy was compelled to save the migrants' lives –, but this technique provided the Italian authorities with the missing link for asserting national jurisdiction on the high seas.³⁴

As to the necessary enforcement powers to apprehend smugglers at sea, Italy's prosecution offices authorised themselves with these powers by combining the legal basis of two international conventions: UNCLOS and the UN Protocol against the Smuggling of Migrants,

³¹ United Nations Convention on the Law of the Sea (UNCLOS). Since this provision of UNCLOS will come back several times in the thesis, it is useful to name these exceptional cases. They are mentioned in article 110: "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorised broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

³² Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED"; Ragazzi, "The Italian experience. Challenges and interpretative solutions"; Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach"; Salvi, "From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions"; Gestri, "EUNAVFOR MED: Fighting migrant smuggling under UN Security Council Resolution 2240 (2015)".

³³ United Nations Convention on the Law of the Sea (UNCLOS), article 98, duty to render assistance.

³⁴ Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED"; Ragazzi, "The Italian experience. Challenges and interpretative solutions"; Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach"; Salvi, "From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions".

which is an important part of international law setting up provisions for migrant smuggling.³⁵ UNCLOS grants the right to visit stateless vessels on the high seas – the boats overloaded with migrants are often stateless – and the UN Protocol permits states to “take appropriate measures” in case a vessel is engaged in the smuggling of migrants and confirming evidence is found.³⁶ According to the Italian authorities, appropriate measures can consist in the seizure of the smugglers’ boat and the arrest of the smugglers. This affirmation received confirmation at Italy’s highest court of appeal in 2014. A year later, a European Council Decision and a Resolution adopted by the UN Security Council further strengthened the legal basis: by allowing to inspect, board and search vessels suspected of smuggling migrants and to use “appropriate measures against the vessels, persons and cargo” (EU Council Decision) or “all measures commensurate to the specific circumstances” (UN Resolution).³⁷

Methods and instruments used to gather evidence for trial

These legal provisions open up possibilities to start an investigation, but after that the entire process of gathering evidence and bringing a suspect to trial have yet to take place, not to mention the importance of resources to carry out the investigations. As regards evidence, the migrant smuggling investigations are conducted with anti-mafia techniques, and among these techniques prosecutors have acquired most information through wiretapping and migrant testimonies. Both sources have proved to be very important in identifying the leaders of the smuggling organisations. In order for the migrant testimonies to be used as evidence before court, some legal obstacles had yet to be overcome. Firstly, in order for migrant testimonies to be considered evidence, migrants had to be treated as witnesses instead of defendants. But since illegal entry is a minor offence in Italian law and therefore punishable, officially migrants had to be prosecuted as defendants. Prosecutors based in Catania found the means to treat migrants as witnesses nonetheless: since no *attempt* to commit a minor offence can be

³⁵ United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime (2000)³⁵. The Protocol was adopted in 2000 as a supplement of the UN Convention against Transnational Organised Crime and contains provisions to prevent and combat the smuggling of migrants, to protect the rights of smuggled migrants and to promote cooperation between states, provisions to which the signed states have to adhere.

³⁶ United Nations Convention on the Law of the Sea, article 110: “A warship which encounters on the high seas a foreign ship is not justified in boarding it unless there is reasonable ground for suspecting that: (d) the ship is without nationality”; UN Protocol against Smuggling of Migrants (article 8, paragraph 7): “A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”

³⁷ UN Security Council Resolution adopted by the UN Security Council of 9 October 2015: Member states are authorised “to inspect unflagged vessels suspected of being used for migrant smuggling or human trafficking on the High Seas off the coast of Libya, to seize them after confirmation of smuggling and to use all measures commensurate to the specific circumstances”; Council of the European Union, *Council Decision on a European Union military operation in the Southern Central Mediterranean* (EUNAVFOR MED) (2015/778) (18 May 2015): “On the high seas, in accordance with relevant domestic and international law, States may interdict vessels suspected of smuggling migrants, where there is flag State authorisation to board and search the vessel or where the vessel is without nationality, and may take appropriate measures against the vessels, persons and cargo.”

punished, migrants rescued at sea are not liable and consequently they can be heard at court as witnesses.³⁸ The interpretation was confirmed by Italy's highest court of appeal. Secondly, problems arose regarding the way evidence of testimonies should be collected and presented at court. Migrants had to be interviewed and these interviews had to be cross-examined before the judge at trial. However, migrants very often escaped from reception centres or disappeared shortly after their arrival. In order to solve that problem, migrants were interviewed immediately after their arrival at the port and their cross-examination took place during the preliminary investigations before the trial. Such an anticipation of legal evidence (*incidente probatorio*) was - under very exceptional circumstances - allowed in the Italian code of criminal procedure. In case migrants had already disappeared before the cross-examination, the testimonies could still be used as so-called "sole or decisive evidence" on the basis of the European Convention of Human Rights.³⁹

Difficulties and problems encountered

The new methods and the large quantity of resources put into the investigations have resulted in many successes. However, the prosecution offices dealing with migrant smuggling have encountered difficulties and obstacles as well. A major problem facing the prosecutors regards the lack of cooperation with third countries.⁴⁰ Italian prosecutors have unravelled the entire hierarchy of several criminal organisations, claim to possess the names, telephone numbers and residence of the highest pawns in the organisations and have gathered the evidence to put them to trial, but the big mobsters stay safely abroad in Africa. Extraditions and other legal requests for collecting evidence are refused, as the Egyptian authorities did in the case of three smuggling top leaders: in the Tohkla investigations, the smuggling leaders were accused of being responsible for several shipwrecks but unfortunately the Egyptian criminal code does not criminalise migrant smuggling – it is merely a contraventional offence

³⁸ Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED"; Camilli, "Non basta condannare gli scafisti per fermare la strage di migranti nel Mediterraneo"; Direzione Nazionale Antimafia e Antiterrorismo (DNA), *Relazione annuale sulle attività svolte dal Procuratore nazionale e dalla Direzione nazionale antimafia e antiterrorismo nel periodo 1 luglio 2014 – 30 giugno 2015* (February 2016).

³⁹ Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED"; Ragazzi, "The Italian experience. Challenges and interpretative solutions"; Italian Parliament, Comitato parlamentare di controllo sull'attuazione dell'accordo di schengen, di vigilanza sull'attività di europol, di controllo e vigilanza in materia di immigrazione, *Indagine conoscitiva sui flussi migratori in Europa attraverso l'Italia, nella prospettiva della riforma del sistema europeo comune d'asilo e della revisione dei modelli di accoglienza* (16 December 2015).

⁴⁰ The lack of cooperation with third countries is very often mentioned by Italian prosecutors. See for example: DNA, *Relazione annuale 1 luglio 2014 – 30 giugno 2015* (February 2016); European Migration Network, *Ad-Hoc Query on Facilitation of irregular immigration (migrants smuggling) to the EU*; Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Case Study 2, Ethiopia-Libya-Malta-Italy*; Eurojust, *Tactical meeting on judicial challenges in illegal immigrant smuggling - Outcome Report* (Brussels 9456/16) (25 May 2016); Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED".

– and the arrests are still pending.⁴¹ Besides these obstacles regarding extradition procedures in particular, general problems in the cooperation with countries of origin and transit in Africa are a recurrent phenomenon. Cooperation is often obstructed by corrupt civil servants who take part in the smuggling business themselves or are easily bribed. In other cases, the major criminal kingpins enjoy considerable protection from their governments.⁴² In the case of Libya, a national authority to cooperate with is completely absent and the different militias and rivalling governments within the Libyan state make judicial and police cooperation simply impossible.⁴³

Conclusion

In the fight against migrant smuggling, a continuous interplay takes place between the migrant smugglers, who meticulously follow the Italian and European policies in the Mediterranean Sea and modify their modus operandi accordingly, and the prosecution offices, who puzzle out the smugglers' operating ways, who change their working methods in line with the new Italian and European policies and who adapt themselves to the smugglers' new approaches in terms of the instruments used as well as in matters of legislation and jurisdiction. As this overview of Italy's investigations shows, the Italian prosecution offices have made a lot of efforts to identify the smuggling networks and used innovative methods for that purpose. With the creation of specialised teams, with a focus on the kingpins of the smuggling business as a starting point, with innovative anti-mafia methods that include wiretapping, migrant testimonies and interviews with informants, with the necessary legal provisions to facilitate the gathering of evidence to apprehend smugglers on the high seas, and with effective international cooperation, they demonstrate that anti-smuggling cases can be brought to a success: they can put a blow to the criminal organisations and compel them to change their modus operandi.

⁴¹ Extradition requests by Italy have often been denied for two reasons: the double criminalisation clause and the prohibition of extradition on nationals. See Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, Giovanni Salvi (7 July 2015)*; Eurojust, *Tactical meeting on judicial challenges in illegal immigrant smuggling - Outcome Report*.

⁴² “Tranello agli italiani: per arrestare il falso trafficante eritreo pagato del denaro”, *Africa ExPress* (12 January 2017); Colin Freeman, “Europe hunts for people-trafficking gangs behind tide of migrant misery”, *The Telegraph* (18 April 2015); Kingsley, “Libya's people smugglers: military action won't stop this multifaceted trade”; Salvi, “New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED”; Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Case Study 2, Ethiopia-Libya-Malta-Italy*.

⁴³ Lorenzo Galeazzi and Mario Portanova, “Traffico di migranti, così Egitto e Libia salvano i boss delle stragi. L'Isis ringrazia”, *Il Fatto Quotidiano* (4 dicembre 2015); Camilli, “Non basta condannare gli scafisti per fermare la strage di migranti nel Mediterraneo”.

2. The cooperation between EU naval missions and Italian judicial authorities

This chapter will focus on two European naval missions, Operation Triton and EUNAVFOR Med, and on their contributions to the Italian investigations on migrant smuggling. In order to ascertain to what extent these contributions can be improved, it has to be identified what an ideal cooperation between the Italian authorities and naval missions looks like and which problems currently obstruct an ideal cooperation. These two aspects return in the structure of the chapter. As an introductory paragraph, a small overview and historical background is provided of naval missions in the Mediterranean Sea. Subsequently, it will be examined what an ideal cooperation between naval assets and the Italian judiciary consists of. In this part, the point of view of the Italian prosecutors will be taken, as they perform the anti-smuggling investigations and know how naval missions can best support these investigations. After that, attention will be given to the current cooperation between the Italian authorities and the EU naval missions. By examining the regulations and institutional set-up of the missions, by looking at experiences from vessels having participated in the operations and by including experiences from the cooperation between the Italian authorities and Italian naval assets, current shortcomings and the reasons of these shortcomings will become clear. Upon that basis, recommendations can be made for a better functioning of the EU naval missions, which will be the subject of the third chapter.

Naval missions in South-Europe: Operation Mare Nostrum, Triton, Sophia and Mare Sicuro

Naval missions in the Mediterranean Sea have been conducted since the second half of 2013. As a response to increased migratory flows towards Italy and in the absence of a joint effort under the EU, the Italian government started up Operation Mare Nostrum in October 2013. The mission was primarily focussed on search and rescue operations and lasted a year, in the course of which more than 150 000 people were rescued at sea and 366 presumed migrant smugglers were turned over to the Italian judicial authorities. In April 2015, half a year after the ending of Operation Mare Nostrum, Italy launched another naval mission, Operation Mare Sicuro. It was a military mission, not specifically focussed on search and rescue but centred on national security and the protection of ships and oil platforms.

It was after the ending of Operation Mare Nostrum, after continuous pressure from Italy for a joint European rescue mission and after a series of shipwrecks, that European leaders decided

to start two maritime missions in the Mediterranean Sea. Operation Triton started in November 2014 as a replacement of Mare Nostrum and was reinforced in April 2015. It is a civilian joint operation coordinated by EU border security agency Frontex and mandated to ensure the surveillance of Italy's external borders. The assets are deployed by different EU member states.⁴⁴ The European Council decided to launch a Common Security and Defence Policy (CSDP) mission, called EUNAVFOR Med or Operation Sophia, in April 2015 as well. As stated in the Council Decision, the mission should prevent more people from dying at sea by contributing to “the disruption of the business model of human smuggling and trafficking networks”.⁴⁵ Similarly to Operation Triton, Operation Sophia relies on the assets that are provided by the EU member states. The mission is currently operational in Italy's territorial waters and on the high seas, but it could expand its activities into the territorial waters and into the territory of Libya, for which Libya's consent is required. Currently, Operation Triton, Sophia and Mare Sicuro are operational in the South Mediterranean and their vessels are present in the area alongside commercial vessels and vessels belonging to NGO's.

2.1. The ideal cooperation with naval missions from the viewpoint of Italian prosecutors

The naval missions in the Mediterranean Sea show important similarities that are important for the purpose of law enforcement. Whether they are patrolling in the territorial waters of Italy or on the high seas and deploying only Italian flagged vessels or assets of different EU member states, the naval missions are mandated to intercept migrant vessels and/or obliged to conduct search and rescue missions under international law. According to Italian prosecutors, the interception and rescue of migrant vessels provides a number of opportunities to start criminal investigations on board. As they state, from the very first moment when a migrant boat is intercepted or rescued, the process of gathering information and collecting evidence to support Italy's judicial investigations on migrant smuggling can already start. They place great emphasis on the first investigative steps that are taken on board and have mentioned a number of steps: interviews with migrants, the detection of smugglers or other persons of interest (who will be handed over to the Italian authorities immediately after disembarkation), the taking of photographs and videos, the confiscation and search of satellite cell phones (especially satellite cell phones purposely given to the migrants to call for help can contain

⁴⁴ Frontex press release, “Vessels deployed by Frontex help rescue 2 800 people in Central Mediterranean” (7 May 2015).

⁴⁵ Council of the European Union, *Council Decision on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)* (2015/778) (18 May 2015).

valuable information), the seizure of other objects that are related to the crime and the interception of phone calls.⁴⁶ Some of these steps can even be taken only on board of the ship, or otherwise important information will be lost. The cell phones used to make the emergency call might have been thrown away in the sea, migrants may have disappeared or not willing anymore to provide information, suspect behaviour or criminal activities among the rescued migrants may not have been detected, and the interception of phone calls can only take place from Italian mainland within limited reach.⁴⁷

Currently, law enforcement activities on board are considered even more crucial with a view to the impasse in which the Italian prosecutors find themselves. Investigative activities aboard naval assets in the Mediterranean Sea are often focussed on the detection of smugglers found among the migrants rescued – I will come back to this. However, due to Italy's interventions on the high seas and the start of operation Sophia, the risk of arrest on the high seas became too high and even the lowest ranked smugglers stay within Libyan territorial waters, making the efforts to detect smugglers on board useless. Now, only the so-called occasional *scafisti* can be apprehended but they are just migrants forced to drive the boats. The smugglers' absence in the international waters causes Italian prosecutors to describe their current judicial proceedings as a stalemate.⁴⁸ In order to break the impasse, Italian prosecutors consider law enforcement activities aboard vessels more important than ever, especially those aimed at gaining information about the higher levelled smugglers and the criminal organisations.⁴⁹ If these activities are neglected or if their correct legal proceedings are not respected and any

⁴⁶ Italian Parliament, Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, *Audizione del Capo del III Reparto Operazioni del Comando generale della Guardia di finanza, generale di divisione Stefano Screpanti* (April 2017); Italian Parliament, Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, *Audizione di Fabrice Leggeri, direttore esecutivo di FRONTEX* (April 2017); Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, Giovanni Salvi* (7 July 2015); "Polizia ferma 5 scafisti, 3 sono minorenni_ 6 gommoni soccorsi", *Vittoriadaily.net* (30 March 2016); Italian Parliament, Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impegnate, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017); Italian Parliament, Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, *Audizione del Comandante generale del Corpo di capitanerie di porto, ammiraglio ispettore (CP) Vincenzo Melone* (May 2017).

⁴⁷ Italian Parliament, *Audizione del generale di divisione Stefano Screpanti* (April 2017).

⁴⁸ Italian Parliament, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017); Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office"; Italian Parliament, Comitato parlamentare di controllo sull'attuazione dell'accordo di schengen, di vigilanza sull'attività di europol, di controllo e vigilanza in materia di immigrazione, *Audizione del procuratore della Repubblica presso il tribunale di Catania, dottor Carmelo Zuccaro* (22 March 2017); Italian Parliament, Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017).

⁴⁹ Italian Parliament, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017); Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office"; Italian Parliament, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017); Ragazzi, "The Italian experience. Challenges and interpretative solutions".

evidence found is useless in court, the judicial investigations remain in their current position of “checkmate”.⁵⁰

The effective execution of law enforcement activities aboard is also a requisite for the only way left to arrest smugglers on the high seas, as Italian prosecutors argue: smugglers have to be forced out of Libya’s territorial waters. In order to achieve that, special police forces need to be placed aboard vessels located closely to Libya’s territorial waters. These vessels should be equipped with sophisticated instruments to perform satellite interceptions of phone calls, and the police forces on board need to be authorised with the executive power to intercept the calls. That enables them to detect the smugglers’ activities from the beginning and not only after a boat is in danger. Only in that way, and only if not a single vessel performs rescue missions within Libya’s internal waters, smugglers that escort the boats filled with migrants can be detected in time and the police forces present could immediately apprehend them. Apart from the requirements just mentioned, this would however imply a forward movement of European or Italian naval missions, whose vessels are currently located much more backwards towards the Italian shore, or require the permission of NGO’s active in the area to embark police officers – I shall come back to the activities of these NGO’s.⁵¹

2.2. Law enforcement activities conducted by Operation Triton and Operation Sophia

The interception and rescue of migrant vessels provides a number of opportunities to start criminal investigations on board, whether these are focussed on the detection of smugglers present among the migrants or on the gathering of information about the organisations behind the smuggling industry. However, it remains to be asked to what extent these activities are practically done aboard the vessels of Operation Triton and Operation Sophia.

Mandates and law enforcement activities of Operation Triton and Operation Sophia

A closer look at the official documents of Operation Triton and Operation Sophia shows that both missions are mandated to conduct some of the activities mentioned above. As a border control and surveillance agency, Operation Triton has the core objective to detect and prevent unauthorised border crossing and to tackle cross border crime. The operational plan of the

⁵⁰ Italian Parliament, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017).

⁵¹ Italian Parliament, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017); Italian Parliament, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017).

mission mentions a number of activities, such as intercepting suspicious vessels, taking measures against persons who have crossed the border illegally and reporting other illegal activities detected to the competent authorities.”⁵² In order to enhance border security, the mission supports the registration and identification of migrants by conducting screening activities. Operation Triton is an intelligence driven agency as well. As such, the operational activities of the mission are also aimed to gather information on the people-smuggling networks and, as the operational plan states, it does so by carrying out debriefing activities.⁵³

Operation Sophia is specifically aimed at the detection and apprehension of migrant smugglers and the disposal of the smugglers’ vessels. In order to detect persons suspected of smuggling, a spokesperson of the EU military staff stated that “all questioning, forensics and evidence gathering is conducted by qualified and authorised personnel through to the arrest and start of the judicial prosecution process.”⁵⁴ Alongside these primary objectives, Operation Sophia is also aimed to gather intelligence in order to identify the smuggling networks, their operating ways, financing, etc. Enrico Credendino, the Operation Commander of EUNAVFOR Med, has referred to debriefing activities conducted on board for this purpose. According to him, search and rescue operations were taken advantage of in order to interview migrants and gain information about their journeys.⁵⁵

In practice, both naval missions have indeed contributed to the Italian investigations on migrant smuggling. In the first place, it concerns the apprehension of suspected smugglers. Until April 2017, Operation Sophia has disposed of 414 migrant vessels and detected 109 suspected migrant smugglers.⁵⁶ According to a press release of Frontex, the vessels deployed in operation Triton contributed to the arrest of 588 suspected smugglers in 2016.⁵⁷ These results were achieved on the basis of interviews with migrants and observations during the interception or rescue operation and on board of the ship.⁵⁸ As to the gathering of information

⁵² Frontex, *Operational Plan - Joint Operation EPN Triton 2015* (2015/OPS/05).

⁵³ *Ibidem*.

⁵⁴ British Parliament, House of Lords, European Union Committee, *Operation Sophia, the EU’s naval mission in the Mediterranean, an impossible challenge* (13 May 2016); British Parliament, House of Lords, European Union Committee, *Operation Sophia, the EU’s naval mission in the Mediterranean, an impossible challenge: examination of witness Lieutenant General Wolfgang Wosolsobe, Director-General, European Union Military Staff* (3 March 2016).

⁵⁵ Italian Parliament, Commissioni congiunte 4a (Difesa) del Senato della Repubblica e IV (Difesa) della Camera dei deputati, *Audizione dell’ammiraglio di divisione Enrico Credendino, Operation Commander della missione EUNAVFOR MED – Operazione SOPHIA* (February 2016).

⁵⁶ Italian Parliament, Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattamento dei migranti e sulle risorse pubbliche impegnate, *Audizione dell’Ammiraglio di Divisione Enrico Credendino, Comandante della missione EUNAVFOR MED* (April 2017).

⁵⁷ Frontex Press Release, “Vessels deployed by Frontex help rescue 2 800 people in Central Mediterranean” (7 May 2017).

⁵⁸ Italian Parliament, *Audizione dell’Ammiraglio di Divisione Enrico Credendino, Comandante della missione EUNAVFOR MED* (April 2017).

about the smuggling organisations, it seems that many activities are done on board for this purpose and that at least part of the collected information arrives at the Italian prosecution's offices. A recent progress report of Operation Sophia states that the picture of the smuggler's business model has been completed for 70% - the gaps are due to a lack of assets and mainly concern the smugglers' activities along the Libyan coastline.⁵⁹ Operation Sophia also contributed to the identification of a network that traffics women and children with a view to their sexual exploitation.⁶⁰ Italian prosecutors receive information from the naval missions immediately after the embarkation of a ship. All activities conducted on board, related to law enforcement, are filed in a report and handed over to an Italian prosecutor, who is present whenever a ship with rescued migrants embarks in one of the designated Italian ports.⁶¹

Experiences from participating vessels

Experiences from participating vessels also show that police tasks are performed on board of Triton and Sophia vessels, but the number of police tasks performed is limited and differs from vessel to vessel. As the commanding officers of several vessels participating in the missions brought forward and as the activities carried out will show, it also seems that the focus of the activities lies primarily on the detection of the smugglers who might be present, and not on the gathering of information about the criminal organisations and the higher levelled smugglers. After each rescue mission, the crew of a Dutch frigate under Operation Triton registered the migrants and interviewed them and tried to detect smugglers by observation and by taking photographs.⁶² When too many rescue missions were performed and too many migrants were on board, the customs police on board (*Koninklijke Marechaussee*) could not proceed with the interviews and left that to the Italian authorities after embarkation. The crew of a Belgian frigate, deployed in Operation Sophia, performed the same activities: mere observation, the registration of migrants and the conducting of interviews on a voluntary basis.⁶³ On board of the Slovenian vessel Triglav, that joined Operation Sophia for several months, the military police did the registration of migrants, took photograph and videos of the registration process and handed over confiscated cell phones

⁵⁹ Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFOR MED - Operation SOPHIA Six Monthly Report, 1 January – 31 October 2016* (November 2016).

⁶⁰ British Parliament, *Operation Sophia, the EU's naval mission in the Mediterranean, an impossible challenge: examination of witness Lieutenant General Wolfgang Wosolsobe*; Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, dottor Carmelo Zuccaro* (22 March 2017).

⁶¹ Interview with Commanding Officer of Dutch frigate Zr. Ms. Van Amstel; Interview with Commanding Officer of Belgium Frigate Leopold I.

⁶² Interview with Commanding Officer of Dutch frigate Zr. Ms. Van Amstel.

⁶³ Interview with Commanding Officer of Belgium Frigate Leopold I; Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (February 2016).

and other personal belongings to the Italian authorities, but lacked the capacity to conduct interviews.⁶⁴

The Norwegian vessel Siem Pilot, operating under Operation Triton, went to much greater lengths to assist in criminal investigations. The crew of the vessel was augmented by Norwegian policeman – amongst whom some intelligence officers –, soldiers, coast guards officials and Italian liaison officers from the *Guardia di Finanza* (Italian customs police) and the Italian coast guard, and the commanding officer was also a policeman.⁶⁵ They consider the detection of smugglers among the thousands of refugees to be an important part of their mission and conduct a large number of police tasks: they take photographs and video recordings during a rescue mission, evaluate mobile phones, investigate corpses in a separate forensic department, take pictures, DNA samples and fingerprints of every migrant, and they even undress each one and register injuries.⁶⁶ All the information is forwarded to the Italian authorities and to the Norwegian police.⁶⁷ On the basis of these activities performed on board, Siem Pilot collected information about 160 so-called persons of interest (POI's): persons who were suspected of migrant smuggling or who were witnesses and whom the Italian police should interview. This information was also passed on to the Italian authorities, and sometimes they were even reported about the activities on board prior upon arrival in a port.⁶⁸ Next to these police tasks, it should be mentioned – just to give credit– that Siem Pilot is also praised for its efforts to rescue migrants: in total, since the start of its deployment in June 2015 until the end of 2016, Siem Pilot brought more than 30 000 people to safety.⁶⁹

⁶⁴ Interview with Commanding Officer of Slovenian patrol ship SNS Triglav.

⁶⁵ Christian Jakob and Eric Bonse, "Beyond the fence: The EU is transforming Frontex into a full-service agency. It is working with shady governments", *Taz.de* (15 December 2016); "Siem Pilot caught in rescue chaos", *News in English* (24 October 2016).

⁶⁶ Jakob and Bonse, "Beyond the fence: The EU is transforming Frontex into a full-service agency. It is working with shady governments"; "Siem Pilot was on mission and three men sentenced to prison for killing 49 people", *Norway Today* (27 October 2016); Ingeborg Eliassen, "Operation Sophia: Mission impossible in the Mediterranean", *Investigate Europe* (2 January 2017); Ingeborg Eliassen, "The uncounted: Invisible deaths on Europe's borders", *News Deeply, Refugees Deeply* (16 February 2016).

⁶⁷ Eliassen, "The uncounted: Invisible deaths on Europe's borders".

⁶⁸ "Siem Pilot was on mission and three men sentenced to prison for killing 49 people", *Norway Today*; Eliassen, "Operation Sophia: Mission impossible in the Mediterranean".

⁶⁹ Ella Ide, "Modern-day Vikings who roam Mediterranean to rescue migrants" (27 October 2016).

2.3 Current difficulties in the law enforcement activities conducted on board

As their mandates clarify, the two EU naval missions are aimed to combat migrant smuggling and they conduct similar activities. However, experiences from participating vessels show that the possibilities are not exploited to their full extent, and that is due to a number of reasons.

Difficulties related to deploying vessels of many EU member states: jurisdictional issues

Some problems are related to the deployment of vessels sailing under the flag of different EU member states. That brings matters of jurisdiction to the surface that both Operation Sophia and Operation Triton are confronted with. A first jurisdictional issue is related to the limited number of investigative steps that may be performed on board. That is partially due to the different jurisdictions and the different criminal laws that the vessels are subject to. The jurisdiction of a state also applies to the vessels that are sailing under its flag. It is referred to as the principle of exclusive flag state jurisdiction, which provides that vessels sail under one state's flag and that any activity performed by or aboard these ships falls under the exclusive jurisdiction of that state.⁷⁰ It is a form of asserting jurisdiction outside national territory that has often been established for the protection of human rights. In court cases, such as *Hirsi Jamaa and Others v. Italy*, states have been convicted for violating the human rights of migrants who were aboard vessels registered in those states.⁷¹ The principle also applies to law enforcement activities done on board, and on the basis of different criminal laws not every investigative step is legally allowed on board. Italian prosecutors cannot order foreign police officers to perform all police tasks they want to be performed on board of the vessels. They can only ask for mutual legal assistance from the states deploying their vessels in the EU naval missions. This problem of different jurisdictions complicating criminal

⁷⁰ Salam Khadim Baghdad Al-Khafaji, "The regime of boarding ships in international maritime law", *World Maritime University Dissertations* 184 (2006); Brian Wilson, "Human Rights and Maritime Law Enforcement", *Stanford Journal of International Law* 52 2 (2016); Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries"; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford 2012).

⁷¹ European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* (No 27765/09): the European Court of Human Rights has acknowledged that "a state may be held accountable for violation of rights and freedoms of persons who are under the former state's authority and control through its agents operating", which include vessels registered in the country or flying its flag.⁷¹ Sources referring to the court case: Hathaway and Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence"; Wilson, "Human Rights and Maritime Law Enforcement"; Natalie Klein, "A case for harmonising laws on maritime interceptions of irregular migrants", *International and Comparative Law Quarterly* 63 4 (2014); Efthymios Papastavridis, "Fortress Europe' and FRONTEX: Within or Without International Law?", *Nordic Journal of International Law* 79 (2010); Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries".

investigations is referred to by the crew of vessels participating in the EU operations, by staff members of EUNAVFOR Med and Frontex and by Italian prosecutors.⁷²

Another jurisdictional issue has to do with the assertion of national jurisdiction on the high seas. The interception of vessels suspected of migrant smuggling on the high seas requires two legal bases, as outlined in the previous chapter. Firstly, the exercise of law enforcement powers on the high seas (also called maritime law enforcement, MLE) needs to be asserted, otherwise the visit of a vessel cannot be done. International law, as codified by UNCLOS, stipulates on which conditions the visit of a foreign-flagged or stateless vessel is permitted.⁷³

Secondly, migrant smuggling activities on the high seas must be considered a criminal offence in the flag state of the vessel wishing to conduct the interception. The Italian Navy gives a clear explanation of this distinction: “navies exercise MLE functions under international law, although interventions are carried out according to domestic law.”⁷⁴

Especially the second legal requisite has obstructed a proper functioning of Operation Triton and Operation Sophia. In the case of Italy, migrant smuggling on the high seas is punishable because the Italian judicial authorities established the link between smuggling activities on the high seas and the Italian territory, as explained in the first chapter. However, migrant smuggling activities performed on the high seas are not considered a criminal offence in Belgium, as the commander of a Belgian vessel deployed in Operation Sophia pointed out, and neither in Germany and the United Kingdom, as mentioned by Operation Commander Credendino.⁷⁵ The vessels registered in these countries can intercept and search a suspicious vessel on the high seas on the basis of UN Resolution 2240, but no legal consequences can be attached to it: without a criminal offence, no one can be arrested and no case can be built. That also hampers the investigative process that could be conducted on board.⁷⁶

Difficulties related to deploying vessels of many EU member states: institutional differences

The deployment of vessels subject to different jurisdictions put a limit on the kind and number of law enforcement activities that can be done on board. Other aspects also cause the law enforcement activities to differ greatly from country to country and from vessel to vessel,

⁷² Interview with Commanding Officer of Belgium Frigate Leopold I; Interview with coordinating officer of Frontex; Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (April 2017); Ragazzi, “New experiences in investigating and prosecuting the migrants’ smuggling: from the national dimension to a European approach”.

⁷³ United Nations Convention on the Law of the Sea (UNCLOS), article 95, 96 and 110. See also footnote 31.

⁷⁴ Italian Navy, *Policing the High Seas*, An Italian Navy Non-Paper on the Identification of the Current Legal Gaps Preventing the Most Effective Use of Maritime Forces in Maritime Law Enforcement (MLE), in the Framework of Maritime Security Operations (MSO) (2010)

⁷⁵ Interview with Commanding Officer of Belgium Frigate Leopold I; Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (April 2017).

⁷⁶ Ibidem; den Heijer, *Europe and Extraterritorial Asylum*; Papastavridis, “Fortress Europe’ and FRONTEX: Within or Without International Law?”.

resulting in different contributions to the Italian investigations on migrant smuggling. Some examples can illustrate that:

- differences in the communication lines with national prosecutors: under the Italian navigation code, the commanding officer of a Navy ship is in direct contact with a prosecutor and can follow up on his instructions directly, whereas foreign vessels are sometimes more limited in their communication with prosecutors.⁷⁷ The commander of the Italian Navy refers to Germany as an example. According to him, this is a crucial difference for which reasons the activities done by Italian flagged vessels are more effective and useful.⁷⁸

- differences between marine and coast guard vessels: to give Italy as an example, on Italian marine ships the commanding officer is the only one authorised to exercise law enforcement but on Italian coast guard ships, all coast guard officers are allowed to perform law enforcement activities. As a consequence, Italian prosecution offices state that the reports they received from coast guard vessels were more valuable compared to those of marine ships.⁷⁹

The deployment of marine vessels in support of criminal investigations has also proven not to be optimal. Experts on the issue have brought forward that Operation Sophia does not always share the information acquired with the relevant Italian judicial authorities, and if it does, the shared information can be inadmissible to use in court.⁸⁰ That is because, as Operation Sophia is a military mission and deploying military assets, many documents are immediately considered classified.⁸¹ Some experts also refer to obstacles when deploying military forces for the purpose of judicial investigations. Criminal investigations require skills and methods of evidence gathering that military personnel are not familiar with.⁸²

⁷⁷ Italian Parliament, Comitato parlamentare di controllo sull'attuazione dell'accordo di schengen, di vigilanza sull'attività di europol, di controllo e vigilanza in materia di immigrazione, *Audizione del Capo di Stato Maggiore della Marina Militare Ammiraglio di squadra Valter Girardelli* (29 September 2016).

⁷⁸ Ibidem.

⁷⁹ Italian Parliament, Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, *Audizione del Procuratore della Repubblica di Siracusa, Francesco Paolo Giordano* (19 April 2017).

⁸⁰ Enrico Letta, Sergio Carrera, Steven Blockmans Jean-Pierre Cassarino Daniel Gros Elspeth Guild, "The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?", *CEPS Task Force Report*, (Brussels 2017); van Bruggen, Cupido and Voetelink, "Militair-justitiële samenwerking bij de aanpak van migratiestromen"; Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, dottor Carmelo Zuccaro* (22 March 2017).

⁸¹ Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office"; van Bruggen, Cupido and Voetelink, "Militair-justitiële samenwerking bij de aanpak van migratiestromen".

⁸² Marius Pricopi, "EU Military Operation Sophia – Analysing the Shortfalls", *Scientific Bulletin of the Nicolae Balcescu Land Forces Academy, Romania* 21 2 (December 2016); British Parliament, *Operation Sophia, the EU's naval mission in the Mediterranean, an impossible challenge*.

Cooperation in the past: the Italian judiciary working together with Italian naval assets

Contrary to the current situation, the cooperation between the Italian judiciary and Italian naval assets is not obstructed by jurisdictional differences and Italian authorities only speak positively about it. They refer to a number of advantages that have now disappeared.⁸³ Italian flagged vessels, operating under Operation Mare Nostrum, had the legal basis to inspect and seize vessels suspected of migrant smuggling on the high seas and to prosecute migrant smugglers for committing crimes on the high seas. On this basis, the first investigative steps could be taken on board and Italian officers authorised to perform law enforcement activities were aboard the vessels to start the investigations. These officers conducted any law enforcement activity that was legally allowed under the Italian criminal code, and they did so in the appropriate form to use the evidence in court and in close communication with the Italian prosecutors.⁸⁴ Currently, vessels belonging to the *Guardia di Finanza*, the Italian Navy and the Italian coast guard are also joining Operation Triton, EUNAVFOR Med and Mare Sicuro, but that doesn't cause problems. According to the commanding officers of the Italian coast guard and of the Italian marine, the cooperation between the judicial authorities and these Italian flagged vessels proceeds in the same way as occurred previously with Operation Mare Nostrum.⁸⁵

Difficulties related to the embarkation of Italian police officers on board

Several Italian parties recommend the embarkation of Italian police officers on board of the foreign vessels deployed in Operation Triton and Operation Sophia. These police officers can ascertain that the necessary investigative steps are taken, ensure that these steps are correctly taken and keep communication lines with the Italian prosecutors. As some Italian prosecutors argue, it would even be better if these police forces are authorised with executive powers, allowing the Italian police units to perform law enforcement activities by themselves under

⁸³ Italian Parliament, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017); Italian Parliament, *Audizione del Procuratore della Repubblica di Siracusa, Francesco Paolo Giordano* (19 April 2017); Salvi, "New challenges for prosecution of migrants trafficking: from *Mare Nostrum* to EUNAVFOR MED. The experiences of an Italian prosecution office"; Italian Parliament, *Audizione del Capo di Stato Maggiore della Marina Militare Ammiraglio di squadra Valter Girardelli*; Italian Parliament, *Audizione del Comandante generale del Corpo di capitanerie di porto, Vincenzo Melone* (May 2017); Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione del Comandante in Capo della Squadra navale, ammiraglio di squadra Donato Marzano* (April 2017).

⁸⁴ *Ibidem*.

⁸⁵ Italian Parliament, Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione, *Audizione del Contrammiraglio Nicola Carlone, Capo del III reparto Piani e Operazioni del Comando generale del Corpo delle Capitanerie di Porto-Guardia costiera* (3 May 2017); Italian Parliament, *Audizione del Comandante in Capo della Squadra navale, ammiraglio di squadra Donato Marzano*; Italian Parliament, *Audizione del Capo di Stato Maggiore della Marina Militare Ammiraglio di squadra Valter Girardelli*; Italian Parliament, *Audizione del Comandante in Capo della Squadra navale, ammiraglio di squadra Donato Marzano*.

Italian jurisdiction.⁸⁶ Despite the advantages brought forward to bring Italian police officers on board, the regulations on the subject and the practical implementation show some shortcomings.

As to Operation Triton, Frontex' handbook to the operational plan of its missions allows for the presence of host liaison officers on board of the participating vessels.⁸⁷ The operational plan of Operation Triton also mentions the possibility to deploy Italian debriefing teams on board of a foreign vessel, on the condition that the participating member state agrees.⁸⁸ On the basis of these provisions, many vessels of Operation Triton have indeed embarked or still embark Italian officials from the *Guardia di Finanza* or the Italian coast guard.⁸⁹ At the moment, the presence on board of an official of the *Guardia di Finanza* is even made obligatory, whereas the deployment of an official from the Italian coast guard is voluntary.⁹⁰

However, the officials from the *Guardia di Finanza* and from the Italian coast guard are not primarily focussed on the exercise of criminal investigations on board. The officials from the *Guardia di Finanza* are the representatives of the host state on board. As such, they keep communication lines between the commanding officer of the vessel and the International Coordination Centre (ICC, the structure that coordinates all assets deployed under Operation Triton) and they forward messages from the ICC (as to the patrolling area, targets of interest, etc.).⁹¹ The officials of the Italian coast guard are focussed on search and rescue missions: they council on correct procedures, communicate with the Maritime Rescue Coordination Centre (MRCC) and provide the link with Italian local authorities. Among the tasks assigned to the coast guard liaison officers, there is no mention that they are also involved in police actions on board.⁹² As sources from Italian prosecutor officers and experiences from participating vessels show, the embarked Italian liaison officers can be involved in the

⁸⁶ Italian Parliament, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017); Italian Parliament, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017); Italian Parliament, *Audizione del Procuratore della Repubblica di Siracusa, Francesco Paolo Giordano*.

⁸⁷ Frontex, Handbook to the operational plan (OPLAN) of Joint Maritime Operations (February 2014): "If requested by a home or host MS [member state], the host MS shall appoint a Liaison Officer skilled in know-how of the relevant operational matters for aerial and maritime assets. The LO-TE deployed on board the foreign assets will act as the continuous connection between the CO [Commanding Officer] and the national authorities of the host MS."

⁸⁸ Frontex, Operational Plan of Joint Operation EPN Triton 2015 (May 2015): "Frontex and Italy, in agreement with the participating member state, will deploy, if deemed necessary and useful to collect immediately information, debriefing teams on board selected surface units that will increase the situational awareness and support the identification of facilitators".

⁸⁹ Interview with coordinating officer of Frontex; Italian Parliament, *Audizione del generale di divisione Stefano Screpanti* (April 2017); British Parliament, House of Lords, European Union Committee, *Operation Sophia, the EU's naval mission in the Mediterranean, an impossible challenge* (13 May 2016); Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, Giovanni Salvi* (7 July 2015); Italian Parliament, *Audizione di Fabrice Leggeri, direttore esecutivo di FRONTEX* (April 2017).

⁹⁰ Interview with coordinating officer of Frontex.

⁹¹ Interview with coordinating officer of Frontex.

⁹² *Ibidem*; Italian Coast Guard Headquarters, MRCC Rome, *ITCG Liaison Officer EPN Meeting* (18 March 2016).

detection of smugglers and the collection of evidence. But it is not their primary task and they are also not given executive powers to enforce the Italian law on board. It gives possibilities to better deploy Italian liaison officers for the purpose of law enforcement.

As to Operation Sophia, in 2015 an agreement was signed between Frontex and EUNAVFOR Med providing for the presence of Italian liaison officers aboard.⁹³ A spokesperson of Frontex has confirmed that Italian police officers are deployed on some vessels under Operation Sophia. They come from a pool of Italian police forces (including officers from the *Guardia di Finanza*, the Italian coast guard and the *Polizia di Stato*, another Italian police unit) and are embarked on the vessels primarily to advise on the collection and preservation of evidence.⁹⁴ That the Italian officers embarked on board of Operation Sophia are assigned to overlook police tasks, has to do with the differences between military and coast guard vessels. The coast guard vessels, deployed in Operation Triton, often have police officials from the flag state among the crew, whereas military vessels may not have police officials on board.⁹⁵ The deployment of Italian liaison officers on Sophia vessels is not mandatory and has started only recently. Also these police officials have only an advisory and observatory role and they are not authorised with executive powers.⁹⁶ With regard to the tasks assigned to these Italian liaison officers, these tasks seem to show that the liaison officers, if they are involved in law enforcement activities on board, have a primary focus on the detection of smugglers present on board and the collection of evidence aimed to bring these smugglers to trial. It leaves out police tasks to be conducted for the collection of information about the entire criminal organisations.

The arrival of NGO's

Recent changes have further complicated the preliminary investigations aboard vessels: the arrival of non-governmental organisations (NGO's). In 2016, as a response to the large number of migrants dying at sea, NGO's deployed ships off the coast of Libya with the sole purpose of rescuing migrants at sea. They patrol on the borderline between the Libyan territorial waters and the international waters, whereas the vessels participating in Operation Sophia and Operation Triton lie much further backwards. That had consequences for the search and rescue operations carried out in the Mediterranean Sea: while previously NGO

⁹³ Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFOR MED - Operation SOPHIA Six Monthly Report, 1 January – 31 October 2016* (November 2016).

⁹⁴ Interview with coordinating officer of Frontex.

⁹⁵ Ibidem.

⁹⁶ Ibidem.

vessels were involved in less than 5% of the incidents, now almost 50% of the rescue operations in the Mediterranean Sea are carried out by NGO's, thereby reducing the efforts from EUNAVFOR Med and Operation Triton to respectively 10% and 12%.⁹⁷

These changes also affect Italy's criminal investigations on migrant smuggling. The NGO's can be requested to perform law enforcement activities on board, but each NGO decides for herself if and in which ways and to what extent the cooperation with the Italian authorities takes place. Some NGO's were asked by the Italian authorities to assist in police investigations on migrant smuggling⁹⁸, but most NGO's are reluctant to provide assistance, limit themselves to rescue missions and leave any investigative step to the Italian authorities.⁹⁹ The NGO Médecins Sans Frontières (MSF) has deliberately avoided taking any visual materials that could be used as evidence in court¹⁰⁰, and Seawatch has declared to be willing to cooperate solely in case an Italian military vessel joins their ship.¹⁰¹ Now, the only NGO actively assisting the Italian police is the Migrant Offshore Aid Station (MOAS). According to the NGO's spokesperson, MOAS is aware of the importance of both rescuing migrants and pursuing justice and for that reason it performs a number of law enforcement activities on board. At the end of each rescue mission, the crew of MAOS compiles a rapport including all activities done during the rescue and any photographs taken (even drone footage), which is subsequently delivered to the Italian authorities.¹⁰²

Regarding the issue of Italian liaison officers, Italian prosecutors support the presence of Italian police officers on board of the NGO's vessels.¹⁰³ However, they also raise awareness of the obstacles that such a proposal would face; these obstacles are similar to difficulties encountered in the cooperation with Operation Triton and Operation Sophia and relate to the

⁹⁷ Frontex, *Annual Risk Analysis 2017*; Italian Parliament, *Audizione di Fabrice Leggeri, direttore esecutivo di FRONTEX* (April 2017); Italian Parliament, *Audizione del procuratore della Repubblica presso il tribunale di Catania, dottor Carmelo Zuccaro* (22 March 2017).

⁹⁸ Letta, Carrera, Blockmans et al., "The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?"

⁹⁹ Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione di esponenti di Jugend Rettet* (4 May 2017); Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione di esponenti di Medici senza Frontiere* (May 2017); Eugenio Cusumano, "The sea as humanitarian space. Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route", *Mediterranean Politics* (2017).

¹⁰⁰ Cusumano, "The sea as humanitarian space. Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route".

¹⁰¹ Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione di esponenti di Sea-Watch e Sea-Eye* (May 2017).

¹⁰² Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione di rappresentanti dell'Organizzazione «Migrant Offshore Aid Station» (MOAS)* (4 May 2017).

¹⁰³ Italian Parliament, *Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Audizione di magistrati della Procura della Repubblica di Trapani* (9 May 2017); Italian Parliament, *Audizione del Procuratore della Repubblica di Catania, Carmelo Zuccaro* (3 May 2017), *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro* (9 May 2017).

different national jurisdictions that the NGO's vessels are subject to.¹⁰⁴ Some NGO's were asked if they would accept an Italian police officer on board for conducting the first investigative steps. Almost all NGO's to whom the question was asked responded negatively, fundamentally because the presence of police on board would undermine the humanitarian principles the NGO's stand by.¹⁰⁵ The only exception was – again – MAOS, which declared to be willing to allow anyone on board and who had already received officers from Frontex aboard.¹⁰⁶

Conclusion

Since the end of 2014, European countries have stepped up their efforts to help Italy combating migrant smuggling and vessels flying the flag of different European countries participate in Operation Triton or Operation Sophia. The increased activities of the EU and European countries have positive effects, as acknowledged also by Italian prosecutors, since more means are being deployed and the burden on Italy has been lowered.¹⁰⁷ However, these new developments also provide challenges for cooperation with the judicial authorities, due to the deployment of ships falling under different national jurisdictions and having different institutional set-ups and to the regular absence or limited competences of Italian police officers aboard the foreign vessels. The arrival to the scene of NGO's has further complicated the joint efforts to combat migrant smuggling. On the other hand, the cooperation with only Italian flagged vessels had shown many advantages compared to the current situation. These are evidence of good practises that have partially gone lost after the start of the European naval missions. In order to bring the current cooperation mechanisms to a better level, more needs to be done: there is a need of more clarity, more unity and more equality.

¹⁰⁴ Italian Parliament, *Audizione di magistrati della Procura della Repubblica di Trapani*.

¹⁰⁵ Italian Parliament, *Audizione di esponenti di Jugend Retter*; Italian Parliament, *Audizione di esponenti di Sea-Watch e Sea-Eye*.

¹⁰⁶ Italian Parliament, *Audizione di rappresentanti dell'Organizzazione «Migrant Offshore Aid Station» (MOAS)* (4 May 2017).

¹⁰⁷ Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach".

3. Improving the cooperation between EU naval missions and Italian judicial authorities

This chapter wants to focus on one possibility that can improve the cooperation between the European naval missions and the Italian judicial authorities: the establishment of so-called shiprider agreements. Shipriders are police officials of one state that are embarked on a naval ship of another state, and who, on the basis of an agreement between the two states, are authorised to enforce the law of their home state while present on the naval ship of the other state. Agreements like these may be of interest to Operation Triton and Operation Sophia. As explained in the previous chapter, the missions deploy ships falling under different national jurisdictions and that has complicated the cooperation with the Italian authorities. However, although the use of shipriders in Operation Triton and Operation Sophia was discussed on some occasions, some parties involved considered it as a possibility to solve current difficulties and Operation Sophia's Operation Commander Credendino mentioned the possible use of Libyan shipriders when the operation enters into Libyan territorial waters, none of them and neither academic researchers have looked into detail at the subject.¹⁰⁸ Academic research has given attention to shiprider agreements arranged in the past, but there is a complete lack of references to the use of shipriders in the context of Operation Triton and Operation Sophia.

Therefore, this chapter wants to explore how shiprider agreements can be best applied in the Mediterranean Sea. Since this study is focussed on the cooperation between the EU missions and the Italian authorities, and since it is not likely that Operation Sophia will operate within Libyan territorial waters in the near future, this chapter focuses on the possibilities of Italian shipriders on board of Triton and Sophia vessels. The chapter starts with a definition of shipriders, the legal implications of their deployment and their usefulness for the purpose of combating crime. After that, the second part clarifies how shiprider agreements in the past looked like, how they transferred jurisdiction from one state to another and for which purpose the agreements were concluded. These examples show what is possible from a legal point of view, and on that basis, in the third part, it can be explored how the use of shipriders can be applied to Operation Triton and Operation Sophia.

¹⁰⁸ SHADE (Shared Awareness and Deconfliction) Med Meeting 1-2016 (12-13 May 2016); UNODC and ISISC, *Trans-regional Training Workshop on Preventing and Combating the Smuggling of Migrants by Sea affecting the Mediterranean Region* (Syracuse, 14-16 October 2015); Salvi, "New challenges for prosecution of migrants trafficking: from Mare Nostrum to EUNAVFOR MED"; Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFOR MED - Operation SOPHIA Six Monthly Report, 1 January – 31 October 2016* (November 2016).

Explaining shiprider agreements, their legal implications and their usefulness

As just mentioned, shiprider agreements authorise police officials of one state to enforce their national law on the naval ship of another state. These police officials, that are embarked on the foreign ship, are called shipriders or law enforcement detachment teams (LEDET's). Such agreements result in interesting jurisdictional changes on board of a vessel. Basically, the assertion of jurisdiction changes: whereas normally vessels fall under the jurisdiction of their flag state, now the vessels are temporarily and under specific circumstances subject to the national jurisdiction of another state.¹⁰⁹ The existence and legal possibility of arrangements such as these is an example of the broadened concept of jurisdiction. Although the notion of jurisdiction was exclusively territorial in the past, as referred to in the first chapter, exceptions are increasingly carved out in customary law that allow for the assertion of extraterritorial jurisdiction as well.¹¹⁰ In the case of shiprider agreements, exceptional situations are created on board of a vessel in which practically law enforcement entities from two different countries are present and able to enforce the laws of the two countries, resulting in areas of overlapping and concurrent jurisdictions. In most ship rider agreements, the flag state waives its jurisdiction and permits another state to exercise full jurisdiction over its ship, which is then called a jurisdictional transfer or jurisdiction swapping.¹¹¹

These jurisdictional transfers, made possible by shiprider agreements, give the notion of jurisdiction a very porous nature but allow for a range of possibilities. As will be shown below in further detail, they can especially be useful in the fight against organised crime. It can solve some problems related to jurisdictional boundaries that law enforcement agencies have come across. These jurisdictional boundaries are related to the concept of national jurisdiction. The concept of national jurisdiction authorises a state to enforce the law within its territorial boundaries, as explained in the first chapter, but also implies that a state cannot project its power into the jurisdiction of another state. A state can only conduct police tasks within the jurisdiction of another state after the express consent of that state. In the fight against organised crime, law enforcement agencies have encountered three jurisdictional boundaries that caused problems: they are not allowed to enter the territorial waters of another state, they are not allowed to take coercive measures against a foreign-flagged vessel (save for

¹⁰⁹ Douglas Guilfoyle, "Piracy off Somalia- a sketch of the legal framework", *Blog of the European Journal of International Law* (20 April 2009); Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFOR MED - Operation SOPHIA Six Monthly Report, 1 January – 31 October 2016* (November 2016).

¹¹⁰ Hathaway and Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence"; Wilson, "Human Rights and Maritime Law Enforcement"; Nora Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries", *The European Journal of International Law* 27 3 (2016).

¹¹¹ Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries".

exceptional circumstances as drawn up in international law), and they cannot conduct police actions on board of a foreign-flagged vessel.

3.1. Shiprider agreements concluded in the past for three purposes

Crossing territorial waters

That the entry of another state's territorial sea cannot be conducted without the express consent of that state, is a problem in the fight against the smuggling of drugs, that often takes place on sea. The territorial waters are an area over which the coastal state has sovereignty. Vessels of the coastal state can enter its territorial waters, but vessels of another state may enter the territorial waters or exercise police tasks within them only after the consent of that coastal state.¹¹² Therefore, smugglers can easily pass the maritime border line separating the territorial waters of two states but the border line obliges law enforcement agencies to stop while pursuing a suspected vessel and wait for consent before continuing the chase. Shiprider agreements can be established in order to deny smugglers getting away with their illegal activities.¹¹³ Under a shiprider agreement, designated police officers of coastal state B are embarked aboard vessels sailing under flag state A and assert jurisdiction over the foreign-flagged vessel, and then the vessel can freely pass into the territorial sea of coastal state B. The state pursuing a suspected vessel into the other state's territorial waters can be entrusted with the whole operation, including the seizure of the suspect vessel, the arrest of the smugglers and further criminal investigations on board. The chasing party can also stop the suspected vessel and wait until the coastal state's law enforcement authorities arrive and take over the investigation. In order to better combat the smuggling of illegal goods between adjacent territorial waters, shiprider agreements were concluded between the United States and Canada, in which case American and Canadian vessels had law enforcement officers from both countries aboard who were authorised to enforce the law on both sides of the shared American – Canadian marine border.¹¹⁴ The United States have also concluded shiprider agreements with Jamaica and Panama to allow for the pursuit of suspected vessels into their territorial waters.¹¹⁵

¹¹² Klein, "A case for harmonising laws on maritime interceptions of irregular migrants".

¹¹³ UNODC press release, "Ship riders: tackling Somali pirates at sea" (20 January 2009).

¹¹⁴ Dean Lenuik and Jena Baker McNeill, "Shiprider Program Demonstrates U.S.-Canadian Cooperation", *The Heritage Foundation* (4 August 2009).

¹¹⁵ Al-Khafaji, "The regime of boarding ships in international maritime law".

Interception of foreign vessels in international waters

The fight against the smuggling of drugs also takes place on the high seas, and in this maritime zone patrolling states may wish to visit and search a foreign-flagged vessel suspected of carrying drugs. In order to curb irregular migration flows, states also may want to intercept boats filled with migrants on the high seas.¹¹⁶ However, the legal order on the high seas, as drawn up in UNCLOS, stipulates that no state has sovereignty over the high seas and that a state only asserts jurisdiction over the vessels flying its flag.¹¹⁷ As a consequence, save exceptional cases expressly provided for in international treaties¹¹⁸, any coercive measure against a vessel flying another state's flag is only allowed upon prior authorisation of that flag state. A shiprider agreement between state A, that patrols a part of the high seas, and state B, under whose flag many drugs smuggling boats or migrant boats are sailing, could solve this situation. The shiprider of state B is on board of a vessel sailing under flag state A and can conduct or authorise the boarding of a vessel sailing under state B.¹¹⁹ Under such agreements, it has been common for state B to give the boarding state consent to continue with the investigations of criminal offences discovered aboard.¹²⁰ Agreements such as these have been completed between the United States and the United Kingdom that were aimed to "obviate the necessity of requesting individual authorisations from the United Kingdom for U.S enforcement authorities to board ships under the British flag."¹²¹ Agreements aimed to intercept migrant boats were agreed between Italy and several North-African countries. Under so-called "push-back" operations, migrant boats were intercepted on the high seas by Italy and returned to the country where they came from.¹²² These operations have however received a lot of criticism, because they violated the principle of non-refoulement.¹²³

On board of flagged vessels within territorial waters and on the high seas

In the previous paragraphs, shiprider agreements were primarily concluded for two reasons: to allow state A to cross the territorial waters of state B or to allow state A to intercept vessels sailing under state B, made possible by the embarkation of a shiprider of state B. However, after the crossing of the territorial waters and the subsequent interception of the pursued

¹¹⁶ Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries"; den Heijer, *Europe and Extraterritorial Asylum*.

¹¹⁷ United Nations Convention on the Law of the Sea (UNCLOS); den Heijer, *Europe and Extraterritorial Asylum*; Wilson, "Human Rights and Maritime Law Enforcement".

¹¹⁸ See for the exceptions footnote 31.

¹¹⁹ Wilson, "Human Rights and Maritime Law Enforcement".

¹²⁰ Markard, "The Right to Leave by Sea- Legal Limits on EU Migration Control by Third Countries".

¹²¹ Al-Khafaji, "The regime of boarding ships in international maritime law".

¹²² Jan Arno Hessbruegge, "European Court of Human Rights Protects Migrants Against "Push Back" Operations on the High Seas", *ASIL (American Society of International Law) Insights* (17 April 2012); Human Rights Watch Report, *Pushed back, pushed around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (21 September 2009).

¹²³ *Ibidem*.

vessel and after the interception of a foreign vessel on the high seas, it remains to be asked which of the two states proceeds with the criminal investigations. If suspects were found on board of the intercepted vessel, which state conducts the arrest and which state continues with the further gathering of evidence on board: the flag state or the shiprider's state? This question brings to the fore a third way of deploying shipriders: by authorising them to conduct criminal investigations on board of a foreign vessel.

A state is not allowed to assert jurisdiction and to exercise law enforcement on board of foreign vessels. That is determined by the principle of exclusive flag state jurisdiction, implying, as explained in the previous chapter, that a vessel falls under the jurisdiction of its flag state and that everything that happens on board remains subject to the national laws of the flag state.¹²⁴ However, shiprider agreements can allow the flag state to transfer jurisdiction over the events occurring on board to another state, including the jurisdiction over law enforcement activities conducted on board. It means that shipriders from state B, although embarked on a foreign vessel sailing under state A, have the power to exercise police tasks on board and to do that in accordance with their national law. Fundamentally, the flag state waives jurisdiction over its own vessel and hands it over to another state. Referring back to the examples from the previous paragraph, this kind of jurisdiction swapping takes place when the shiprider's state (B) proceeds with the criminal investigations on board of the flag state (A). Many concluded shiprider agreements arrange for these types of jurisdiction transfers on board of a vessel. Next to the examples mentioned in the previous paragraphs, shiprider agreements like these were brought forward in the past for two important reasons: in West-Africa to assist coastal states with border control, and off the coast of Somalia to combat piracy.

In West Africa, some coastal states lacked the naval assets to effectively control and secure their borders. Other countries showed their willingness to provide assistance but they did not want the burden of arresting and prosecuting criminal offenders as well. Shiprider agreements allowed the coastal state to enforce only its own law and still receive support in border control from other states, while the supporting states could provide assistance but were saved from the obligation and costs of judicial investigations and prosecutions. Such agreements were signed between Spain and Cape Verde, whereby Cape Verdean police officers were placed on

¹²⁴ den Heijer, *Europe and Extraterritorial Asylum*; Wilson, "Human Rights and Maritime Law Enforcement"; Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries"; Al-Khafaji, "The regime of boarding ships in international maritime law".

board of Spanish vessels patrolling in Cape Verdean waters and coercive measures were either carried out by Cape Verde or by Spain but under the direction of Cape Verde.¹²⁵ Spain also completed similar agreements with Mauritania and Senegal.¹²⁶ Subsequently, Frontex' Operation Hera, that implemented these bilateral agreements, made the embarkation of Senegalese and Mauritanian police officials obligatory for all vessels deployed by the participating EU Member States. Similarly to the agreement with Cape Verde, these police officials fell under the sovereignty and jurisdiction of Senegal/Mauritania and decided exclusively upon interceptions, visits, arrests, etc.¹²⁷ Italy has completed similar agreements with Libya in order to combat irregular migration.¹²⁸

In the Horn of Africa, shiprider agreements were suggested to solve a jurisdictional stalemate in which case both the coastal state and the flag state – or on the high seas the seized state and the seizing state – did not have the capacity or the willingness to prosecute pirates and another third state was prepared to take over the task and fill the void.¹²⁹ Extradition procedures already allow for the transfer of a suspect from one jurisdiction to another, but then the gathering of evidence may not have been conducted by the prosecuting state from the beginning, whereas shiprider agreements allow third state's police officers to gather evidence from the start. In the fight against piracy off the coast of Somalia, multilateral naval missions (including the EU's Operation Atalanta) were undertaken and multiple governments were able to assert jurisdiction: the country where the pirates came from (Somalia), the countries that had the seized ships registered (Liberia, Panama and the Marshall Islands) and the country that seized the suspect ships (the United States, India, EU member states). But since no government was capable or interested to prosecute pirates, they were recurrently released.¹³⁰ As a solution, resolution 1851 of the UN Security Council encouraged participating states to conclude special agreements with countries that were willing to prosecute pirates and to embark shipriders from the latter countries.¹³¹ The European

¹²⁵ den Heijer, *Europe and Extraterritorial Asylum*; Papastavridis, "Fortress Europe' and FRONTEX: Within or Without International Law?"

¹²⁶ Ibidem; Hathaway and Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence".

¹²⁷ den Heijer, *Europe and Extraterritorial Asylum*; Papastavridis, "Fortress Europe' and FRONTEX: Within or Without International Law?"; Markard, "The Right to Leave by Sea".

¹²⁸ den Heijer, *Europe and Extraterritorial Asylum*.

¹²⁹ UNODC press release, "'Ship riders': tackling Somali pirates at sea"; Lauren Ploch, Christopher M. Blanchard, Ronald O'Rourke, et al., "Piracy off the Horn of Africa", *CRS (Congressional Research Service) Report for Congress (April 2009)*; Tullio Treves, "Piracy and the International Law of the Sea", in: Douglas Guilfoyle, *Modern Piracy: Legal challenges and responses* (Cheltenham 2013).

¹³⁰ UNODC press release, "'Ship riders': tackling Somali pirates at sea"; Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *The European Journal of International Law* 20 2 (2009); Ploch, Blanchard, O'Rourke, et al., "Piracy off the Horn of Africa".

¹³¹ UN Security Council Resolution 1851, article 3: "The Security Council invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the

Council's joint action of the mission does not mention the practise of shipriders but does however allow for the transfer of arrested persons to another EU member state or to another third state willing to exercise jurisdiction.¹³² On this legal basis, the United States, the United Kingdom, the EU, Canada and some other countries have concluded bilateral agreements with Kenya, which allowed for the transfer of captured pirate suspects.¹³³ However, there is no evidence of the embarkation of Kenyan shipriders on board of the foreign vessels.¹³⁴ The exchange of letters between the EU and Kenya, that is made public, stipulates the procedures for the transfer of apprehended pirates but does not mention shipriders.¹³⁵ Therefore, despite the legal possibilities and the support from the UN and the EU, the use of shipriders seems to have happened rarely.

Different formats of shiprider agreements

As these examples show, a number of shiprider agreements were arranged in the past and they can take different forms. Shiprider agreements show different formats in the powers assigned to the shipriders. A first difference lies in the activities the shipriders are authorised to perform: shipriders may merely be limited to authorise the entry into another state's territorial waters but they can also be permitted to perform any law enforcement activity on board, as long as these are in accordance with their state's national law. Secondly, they may only conduct the law enforcement activities themselves (in which case they conduct the boarding of a foreign vessel or perform the criminal investigations on board), or they can also have the authority to command the flag state's personnel and vessels, who then conduct law enforcement activities under the other state's direction and under the other state's national law. A third variable regards the extent of jurisdiction swapping: two states can share enforcement powers or one of the two state authorities is granted full permission to enforce its own law. In the first case, law enforcement detachments of two countries are aboard and the state authorities decide, on a case-by-case basis, which of the two states asserts jurisdiction and conducts the boarding and further criminal investigations on board. In the second case,

coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention."

¹³² Council of the European Union, *Council Joint Action on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast* (2008/851/CFSP of 10 November 2008).

¹³³ Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia"; Antonio Maria Costa, "Piracy must be defeated in courts, ports and banks, not just at sea", *Lloyd's List* (5 February 2009); UNODC, *Fighting piracy on land and at sea*, Testimony to the United States House of Representatives, Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight (14 May 2009).

¹³⁴ Yurika Ishii, "International Cooperation on the Repression of Piracy and Armed Robbery at Sea under the UNCLOS", *Journal of East Asia and International Law* 7 2 (2014); Deborah Osiro, "Somali pirates have rights too: Judicial consequences and human rights concerns", *ISS (Institute for Security Studies) Paper* 224 (July 2011); Arabella Thorp, "Preventing and prosecuting piracy at sea: legal issues", *House of Commons Briefing Paper* (28 February 2012).

¹³⁵ Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia".

the flag state has totally waived jurisdiction and the police officers of the second state are empowered to enforce their national law. It depends on the terms of the agreement what kind of activities and competences are assigned to the shipriders. Depending on the content of the agreement, there may even not be a shiprider aboard. In that case, the consent to cross territorial waters, to board a foreign vessel or to enforce the other state's national law on board is given in advance to another state and no further authorisation is needed.¹³⁶ One aspect is however fundamental in the stipulation of any shiprider agreement: the state that waves its jurisdiction sets the terms.

3.2 Applying shiprider agreements to Operation Triton and Operation Sophia

Just as shiprider agreements were arranged in the past to better combat organised crime, they can improve the functioning of Operation Triton and Operation Sophia as well. As clarified in the previous chapter, Italian prosecutors have emphasised how important it is to conduct the first investigative steps on board: not solely for the apprehension of smugglers, but more importantly for the gathering of information and evidence about higher levelled smugglers. Now, the police tasks executed on board are often solely focussed on the detection of smugglers among the migrants, not every police task is performed that could ideally be conducted and as a consequence important evidence might get lost. The number of law enforcement activities conducted on board also differs substantially between the vessels. The limited number of police tasks conducted on board and the differences between the participating vessels are mainly due to the deployment of vessels falling under different national jurisdictions with different criminal laws, and that has complicated the cooperation with the Italian prosecution offices. The current deployment of Italian liaison officers on board does neither solve these jurisdictional difficulties, because they have only an advisory and observatory role and do not have executive powers.

The deployment of shipriders would provide a solution. In the context of the EU naval missions, shiprider agreements would best be implemented that transfer the jurisdiction over a vessel from the flag state to another state, namely Italy (the third form of the examples mentioned above). Under such an agreement, Italian police officers are embarked on board of the Triton and Sophia vessels and authorised to conduct police tasks under Italian law. With

¹³⁶ Markard, "The Right to Leave by Sea- Legal Limits on EU Migration Control by Third Countries".

these competences, they can not only conduct any police task as long as these are in compliance with Italian law, but they can also ensure that the same police tasks are performed on each vessel, making the criminal investigations on board of Triton and Sophia vessels of an equal level. It would bring the cooperation of the Italian prosecution offices with EU naval missions back to their previous level of cooperation with the Italian naval missions. Just as the gathering of evidence aboard the Italian vessels was performed by Italian authorities in Italian jurisdiction and under Italian criminal law, the same provisions apply to the deployment of shipriders on board of Triton and Sophia vessels. And in analogy with Frontex Operation Hera, Italy can still enforce its own law in Italian territorial waters and even on the high seas, but at the same time be provided with naval assets from other EU member states to help with border control and rescue missions. In relation to concluded shiprider agreements in the past, it does not even seem anomalous to apply the same concept to Operation Triton and Operation Sophia. Fundamentally, shiprider agreements make it possible that the country willing to prosecute a criminal offender is present from the moment suspects are apprehended and the gathering of evidence can start. In the context of Operation Triton and Operation Sophia, arrangements have been made with Italy providing for the transfer of any suspect to Italy¹³⁷, but without allowing Italian police officials to collect evidence under Italian law on board of the vessels. The embarkation of Italian shipriders would solve this current shortcoming as well.

Feasibility of shiprider agreements in the context of Operation Triton and Operation Sophia

The embarkation of Italian police officials as shipriders has many benefits. But there is one crucial question: is it feasible? Can Operation Triton and Operation Sophia have the legal basis to deploy Italian shipriders on board of the participating vessels? Next to that, are the EU member states participating in the missions willing to allow shipriders on board and to waive their jurisdiction?

As concluded shiprider agreements in the past show, the lawfulness of a shiprider agreement is based on the agreement of two states: one state has to be willing to take over criminal investigations in an extraterritorial jurisdiction, and the other state must grant its permission to waive its jurisdiction. There is one additional requirement: the agreement has to be put on paper. For that purpose, even relatively informal agreements, such as memoranda of

¹³⁷ Operation Commander Op SOPHIA (EEAS) Rear Admiral Enrico Credendino, *EUNAVFR MED - Operation SOPHIA Six Monthly Report, 22 June to 31 December 2015* (January 2016); Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (April 2017).

understanding and an exchange of letters, are enough to demonstrate the required consent.¹³⁸ As the example of Frontex operation Hera showed, shiprider agreements can also be arranged with a political entity, such as the EU. Therefore, as long as Italy and the participating member state agree on the deployment of shipriders, the Italian police officials can be embarked and they can perform police tasks under Italian law. On the basis of the necessary requirements, shipriders can be embarked both on vessels operating under Operation Triton and on vessels operating under Operation Sophia. Actually, both the EEAS (that launches EU military missions) and Frontex are already familiar with the legal possibilities of shipriders. In the joint action of Operation Atalanta, the EU recommended the transfer of arrested persons to another EU member state or to another third state. And in Operation Hera, Frontex made the embarkation of Senegalese and Mauritanian police officials obligatory for all participating EU Member States.

From the viewpoint of participating EU member states, there seems to be no need to raise objections because the presence of Italian shipriders does not significantly change the current situation. EU member states that deploy their vessels do not arrest and prosecute detected smugglers now and they will not do that under a shiprider agreement. If, under the agreement, the shiprider is not granted authorisation to command the crew of the flag state, the crew of the flag state does neither need to assist the Italian shipriders. Interestingly, some commanders of vessels participating in Operation Triton and Operation Sophia also support the presence of Italian police officers aboard and the allocation of more executive power to them. They agree it would facilitate the investigative process aboard and solve current jurisdictional issues.¹³⁹ And even if some EU member states object to the embarkation of shipriders, as some EU member states did neither request for the deployment of an Italian coast guard officer¹⁴⁰, that should not restrain Italian authorities and the EU naval missions from arranging and offering it. The deployment of shipriders can be provided on a voluntary basis.

Although shiprider agreements can theoretically be arranged with Operation Triton and Operation Sophia, it seems most feasible to start the deployment of shipriders under Operation Triton. That is due to a number of reasons. That is firstly because of the command

¹³⁸ Hathaway and Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence".

¹³⁹ Interview with Commanding Officer of Belgium Frigate Leopold I, Interview with Commanding Officer of Dutch frigate Zr. Ms. Van Amstel.

¹⁴⁰ Interview with coordinating officer of Frontex.

structure of the operation. The command and control of a Frontex joint operation remains with the host member state, which implies that the host state has a large say in operational matters. As the EU Regulation on the European border and Coast Guard (which replaces Frontex) states, “any amendments to or adaptations of the operational plan shall require the agreement of the executive director and the host member state, after consultation of the participating member states.”¹⁴¹ Italy is allowed to make a request, such as for the embarkation of Italian shipriders on board of Triton vessels, which is then forwarded to the legal department of Frontex. If the request is legally feasible and if the executive director agrees, amendments can be made to the operational plan.¹⁴²

By providing for the deployment of Italian shipriders on board, Operation Triton would also continue a line of experiments with embarking liaison officers. Operation Triton started with the deployment of Italian officials from the *Guardia di Finanza*, who represented the host member state of the operation, and made the embarkation obligatory for participating vessels. After that, the operation started experiencing with the embarkation of officials from the Italian coast guard, which is on a voluntary basis. Since recently, as referred to in the previous chapter, Frontex also deploys Italian police officers to vessels participating in Operation Sophia, who have an advisory and observatory role in the detection of smugglers. In this line of developments, it seems a logical next step to deploy Italian police officers with executive powers on board of Triton vessels: than can be done firstly on a voluntary basis, then on a mandatory basis and after that Frontex can second Italian shipriders to Operation Sophia.

Conclusion

As shiprider agreements from the past show, they have especially been useful in the fight against organised crime. By taking over a different jurisdiction – thus by concluding shiprider agreements –, state authorities are able to enter another state’s territorial waters, to board foreign-flagged vessels and to enforce the national law in foreign territory whether it is on board of a foreign vessel or within foreign territorial waters. In doing so, shipriders are efficient and timesaving when pursuing a suspect vessel in shared waterways and they are essential when combating a crime in a state that is incapable or unwilling to do so by herself. Shiprider-agreements can be used to collect evidence in accordance with the prosecuting

¹⁴¹ Council of the European Union and European Parliament, *Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.*

¹⁴² Interview with coordinating officer of Frontex.

state's evidentiary rules, thereby saving on complicated procedures of international cooperation in which two laws are enforced, including procedures such as mutual legal assistance requests. They also enable states to prosecute an offender if they are willing to, even if the criminal offence is not conducted within national territory. As such, they allow decisions related to the investigation and prosecution of offenders to be based on where and by whom they can most effectively be conducted, instead of where they are legally obliged to be conducted. Such a history of shiprider agreements for the purpose of law enforcement shows that it is legally possible to introduce the concept in the context of Operation Triton and Operation Sophia, and the previous chapter has made clear that the EU naval missions would benefit from such a shiprider agreement.

Recommendations and conclusion

According to experts, massive migration flows heading towards Europe will remain a common phenomenon for decades to come. The refugee crisis of the last years is just the beginning, as they argue, and we have to grow accustomed to these flows of migrants.¹⁴³ It is assumed that one million migrants are currently waiting in Libya to cross the Mediterranean Sea. Continuous underdevelopment in Africa, a rise in population and climatic changes reducing the size of fertile ground are the main reasons why millions of other Africans are expected to start their journey towards Europe in the future.¹⁴⁴ And since legal pathways to enter Europe are very scarce at the moment, probably won't increase that much in the near future and certainly can never be used by all Africans wishing to emigrate, the smuggling networks will have enough business in the coming decades as well. Accordingly, the fight against migrant smuggling and against all those crimes that are strongly interwoven with the smuggling business – ranging from rape, imprisonment, torture and death by drowning – has also just started and will continue to be a pressing issue for the law enforcement and judicial authorities, both in Italy, probably increasingly so in other European countries and for the EU. Against this background of ever continuing illegal migration flows and enduringly strong criminal networks, it is of great importance to look back on the first years of large-scale judicial investigation on migrant smuggling and to identify difficulties and good practises. In that way, current and future judicial investigations can be performed better.

These first years of anti-smuggling investigation are characterised by two aspects: they show that the EU has become increasingly interested to combat the smuggling business and that Italy is the EU member state starting the first large judicial investigations and putting most efforts in the prosecution of suspected smugglers. Therefore, in order for the EU to better combat migrant smugglers in the future, it is useful to look upon the Italian investigations of the last years. This study has looked upon two ways for the EU to bring the judicial investigation to a higher level: (1) how can the EU improve the investigations on migrant smuggling of other EU member states, based on Italy's good practises, and (2) how can the EU further support the Italian investigations on migrant smuggling, by ensuring a better support of Operation Triton and Operation Sophia?

¹⁴³ EPSON, *Territorial and urban aspects of migration and refugee inflow*, EPSON Policy Brief (November 2015); Gideon Rachman, "Mass migration into Europe is unstoppable", *Financial Times* (11 January 2016), Tim Cocks and Edward McAllister, "Africa's population boom fuels 'unstoppable' migration to Europe", *Reuters* (13 October 2016).

¹⁴⁴ *Ibidem*.

Improving judicial investigations of EU member states, based on Italy's good practises

A closer look at Italy's investigations on migrant smuggling, including their starting points, methods used and legal provisions introduced, has not only shown their effectiveness but also gives us lessons to learn from these Italian practises. What can the EU do with these lessons? The EU can legally allow and facilitate the use of methods proved to be effective in the Italian investigations, in anti-smuggling investigations of other EU member states. These are then practically modelled on the investigations performed by the Italian judiciary. As the first chapter showed, two practises proved to be especially important that other EU member states can take over: the focus on high-level figures in the criminal organisations and the use of migrant testimonies. In order for other member states to change their focus, it can already be helpful if the EU changes the legal definition of the facilitation of irregular entry and includes the aspect of financial gain. The EU can also better support the collection of migrant testimonies, for example by abolishing illegal entry into a EU member state as a criminal offence and by allocating funds for witness protection programmes. For this purpose, the EU can also establish firm rules about the rights of victims of migrant smuggling, about their benefits if they cooperate with the judicial authorities and about the use of their testimonies in court, as Italy has already done in cases of migrant smuggling and as the EU directive on the trafficking in human beings does with reference to victims of this offence.¹⁴⁵ Next to these proposals, the EU can legitimise the use of advanced methods as a means to gather evidence and perhaps urge for the setting up of specialised teams of prosecutors in each EU member state to address migrant smuggling, so that the EU member states will put more efforts into anti-smuggling investigations. Provisions such as these and others can be arranged by establishing a EU Directive on Smuggling, as proposed by Italian experts as well.¹⁴⁶ By choosing this line and by implementing such a directive, the EU would also follow on the EU Action Plan against Migrant Smuggling, and especially on two provisions that are aimed to improve the prosecution of smugglers – and to which I referred in the introduction: enhancing the capacities of EU member states to investigate and prosecute migrant smuggling networks and improving the existing EU legal framework and the penal framework.

¹⁴⁵ Council of the European Union and European Parliament, *Directive of 5 April 2011 (2011/36/EU) on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*.

¹⁴⁶ Andrea di Nicola and Giampaolo Musumeci, *Confessioni di un trafficante di uomini* (Milan 2014); Michele Luppi, "L'Europa colpisce il favoreggiamento dell'immigrazione", *Servizio Informazione Religioso* (29 May 2015).

Further supporting the Italian investigations

The Italian practises show which steps the EU can take to improve anti-smuggling investigations of other EU member states. They also clarify how the EU can better support the Italian investigations on migrant smuggling. Firstly, the EU can give further support by providing more operative and financial means. European agencies such as Europol, Eurojust and Frontex already give operational support in Italy's hotspots, which can be further expanded.¹⁴⁷ Italian prosecutors also point to a lack of professional translators and interpreters needed for the interception of cell phones and the interviews with migrants.¹⁴⁸ In order to solve that, a list should be made including the names of qualified persons who can be called upon any moment, and such a list could be established at the European level.

More importantly, as the second and third chapter clarified into detail, the EU can provide for a better cooperation between Operation Triton and EUNAVFOR Med and the Italian authorities: by deploying Italian shipriders on board of Triton and EUNAVFOR Med vessels. Italian prosecutors emphasise the importance of a number of police tasks to be performed on board, but these cannot be conducted: either because the criminal code of the flag state does not allow certain investigative steps to be conducted and/or because the criminal code of the flag state does not penalise migrant smuggling on the high seas. The embarkation of Italian shipriders would solve the jurisdictional issues impeding other member states' crew to conduct law enforcement activities, as mentioned above, and eliminate the need to ask for mutual legal assistance requests. That is crucial to make sure no evidence gets lost and to get as many information as possible, both about the smugglers present on board and about the high-level smugglers based in the African mainland.

Facilitating EU member states and EU institutions to take over criminal investigations

The analysis of the investigations of the Italian prosecution offices and of their cooperation with Operation Triton and Operation Sophia reveals a third possibility for the EU to improve the prosecution of migrant smugglers: enabling EU member states or European institutions to take over the prosecution of smugglers active along the Central Mediterranean Route. Currently, Italy is the only country prosecuting smugglers who offer their business along this

¹⁴⁷ Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach"; Gestri, "EUNAVFOR MED: Fighting migrant smuggling under UN Security Council Resolution 2240 (2015)".

¹⁴⁸ Direzione Nazionale Antimafia e Antiterrorismo (DNA), *Relazione annuale 1 luglio 2014 – 30 giugno 2015* (February 2016); Optimity Advisors, ICMPD and ECRE, *A study on smuggling of migrants. Case Study 2, Ethiopia–Libya–Malta–Italy*; Eurojust, *Tactical meeting on judicial challenges in illegal immigrant smuggling - Outcome Report* (Brussels 9456/16) (25 May 2016); Eliassen, "Operation Sophia: Mission impossible in the Mediterranean".

route. But that is an impossible situation to last forever. Just as the country needs help to deal with the migratory pressure, with over 85 000 migrants having arrived at its shores this year¹⁴⁹, the prosecution of the criminal offenders behind these flows can neither be left to Italy alone.

As mentioned before, the EU can improve the anti-smuggling investigations of EU member states by allowing methods used in Italian investigations. However, current obstacles complicate their efforts to start investigations on smugglers active along the route from Libya to Italy. And as much as shiprider agreements are beneficial for the Italian investigations on migrant smuggling, they don't relieve the burden of Italy either. Another aspect would help to solve these obstacles and to increase the involvement of other EU member states: invoking universal jurisdiction over the smuggling and trafficking of human beings. Italian authorities have already brought forward this idea and mentioned its usefulness to release the burden of Italy.¹⁵⁰ This part wants to elaborate on their idea and bring forward additional suggestions how the universal jurisdiction of migrant smuggling can be applied.

The assertion of universal jurisdiction allows any state to prosecute an individual, wherever he is caught and whether or not there is any link with the prosecuting state. There is no need to assert national jurisdiction, meaning that the suspect does not need to be a national of the state, does not have to commit a crime in the state's territory or against its nationals, and does neither have to affect negatively the state's national interests. Universal jurisdiction is asserted to serious crimes against international law, such as crimes against humanity, war crimes, genocide and torture. They are so heinous and universally condemned that the sole nature of the crime suffices to bring the suspects to trial. Piracy also falls under universal jurisdiction.¹⁵¹

In the case of migrant smuggling, there are solid grounds to consider it a crime against humanity, but currently the smuggling and trafficking of human beings are transnational crimes. If they are afforded universal jurisdiction as crimes against humanity, any state can

¹⁴⁹ Jennifer Rankinin and Angela Giuffrida, "Austrian troops to stop migrants crossing border with Italy", *The Guardian* (4 July 2017).

¹⁵⁰ Parliament, *Audizione del Procuratore della Repubblica di Siracusa, Francesco Paolo Giordano* (8 July 2016); Italian Parliament, *Audizione dell'Ammiraglio di Divisione Enrico Credendino* (April 2017); Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (February 2016); Italian Parliament, *Audizione del Contrammiraglio Nicola Carlone, Capo del III reparto Piani e Operazioni del Comando generale del Corpo delle Capitanerie di Porto-Guardia costiera* (3 May 2017).

¹⁵¹ M. Langer, "The Diplomacy of Universal Jurisdiction: the Political Branches and the Transnational Prosecution of International Crimes", *The American Journal of International Law* 105 1 (2011); Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia".

arrest and try a person suspected of migrant smuggling, wherever the smuggling acts took place. It paves the way for other EU member states, the EU and the international community to take over criminal investigations on migrant smuggling along the Central Mediterranean Route. Firstly, under a universal jurisdictional basis, flag states would be provided with the legal basis to intercept migrant vessels on the high seas, to pursue any activity on board aimed to gather evidence and to prosecute the offenders.¹⁵² The universal jurisdiction does not change the principle of exclusive flag state jurisdiction and, as a consequence, does not alter anything about which law enforcement activities are allowed to be conducted on a vessel under the flag state's law and which are not. But it would solve the jurisdictional issue that some EU member states came across: that they could not start criminal investigations against apprehended smugglers on the high seas, because migrant smuggling on the high seas is not a criminal offence under national law. The universal jurisdiction does not only provide flag states with the legal basis to prosecute apprehended suspects, but also allows shiprider agreements to be put to greater use: shipriders do not necessarily have to come from Italy any more, but can also come from any other EU member state that is willing to assert jurisdiction and prosecute the apprehended smugglers. Such arrangements were also mentioned with respect to piracy, where a shiprider of a third state (for example Kenya) could be embarked on one of the vessels participating in the multilateral anti-piracy missions.

If recognised as a crime against humanity with universal jurisdiction, the International Criminal Court (ICC) can be invoked as well to take over the criminal investigations and prosecutions.¹⁵³ On the basis of agreements made between the ICC and EUNAVFOR Med, any evidence gathered by the missions can then be handed over to the international court. It would not be the first time for a military mission to assist in the collection of evidence. As the ICC is not supported by a police force of its own but dependent on nation states and international organisations to collect the evidence, military missions have also been deployed for this purpose. As such, the UN mission MONUC/MONUSCO collected evidence of war crimes committed in Congo for the International Criminal court. A Memorandum of Understanding, signed between the ICC and MONUC/MONUSCO, stipulated the forms of

¹⁵² den Heijer, *Europe and Extraterritorial Asylum*; Papastavridis, "Fortress Europe' and FRONTEX: Within or Without International Law?"; Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (April 2017).

¹⁵³ Italian Parliament, *Audizione del Procuratore della Repubblica di Siracusa, Francesco Paolo Giordano* (8 July 2016); Italian Parliament, *Audizione dell'Ammiraglio di Divisione Enrico Credendino* (April 2017); Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (February 2016); Italian Parliament, *Audizione del Contrammiraglio Nicola Carlone, Capo del III reparto Piani e Operazioni del Comando generale del Corpo delle Capitanerie di Porto-Guardia costiera* (3 May 2017).

cooperation, which included the arrest and transfer of suspects, the search of crime scenes and the seizure of objects.¹⁵⁴

In order for universal jurisdiction to be asserted, a member of the UN Security Council has to come up with a proposal and upon that basis the UN Security Council adopts a resolution addressing the issue or orders the International Criminal Court to see to it.¹⁵⁵ Even if the UN Security Council does not reach consensus on the universal jurisdiction basis, the EU can make arrangements to enable a larger involvement of other EU member states nonetheless: by establishing the nexus between the crimes of migrant smuggling and the territory of the EU. It can be stated that migrant smuggling has final effects on the whole territory of the EU, and on that basis the EU can assert jurisdiction in international waters.¹⁵⁶ That brings the subject back to how the EU can improve the prosecution of migrant smugglers.

European combat against migrant smuggling

These are the recommendations provided by this study for an improved fight against the migrant smuggling business by the EU. Which of these steps the EU decides to follow on, lies in the hand of the authorities of the EU and the leaders of the EU member states. But whatever path will be chosen for, first and foremost the EU has to do more. The smuggling business has grown to such proportions, has become so extremely lucrative and has also become so vile and violent that an appropriate European response is highly necessary. In the last years, Italy's prosecution offices took the lead and now they can show the EU the way how to respond better. There are several ways to respond: by following Italy's example and trying to apply her good practises in the rest of the EU, by better supporting the efforts of the Italian prosecution offices and by transferring the Italian investigations to the EU level. With a better response, the Italian combat against migrant smuggling can ultimately – and hopefully – be changed into a European one.

¹⁵⁴ Marjolein Cupido, "Militaire Criminaliteitsbestrijding: Naar Structureel Onderzoek en Beleid", *Militair Rechtelijk Tijdschrift* 3 (August 2016).

¹⁵⁵ Italian Parliament, *Audizione dell'ammiraglio di divisione Enrico Credendino* (April 2017).

¹⁵⁶ Ragazzi, "New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach".

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Dick van der Neut	Commanding Officer of Dutch frigate Zr. Ms. Van Amstel, participating in Operation Triton in June 2016
Boris Gutar	Defence Attaché of the Republic of Slovenia in Italy, forwarded information from: Commanding Officer of Slovenian patrol ship SNS Triglav, participating in Operation Sophia in October 2015 – February 2016
Florea Ganea	Coordinating Officer, Sea Border Sector Joint Operations Unit, Operations Division, FRONTEX

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