

## The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers

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### 1. *The extent of smuggling of migrants and human trafficking from Africa to the EU*

Following the incident of April 2015, when 800 people lost their life in the Mediterranean Sea, the EU has concentrated its efforts on fighting the smuggling of migrants by sea, with the European Council emphasising that all efforts should be made to prevent the loss of life in the sea, including by cooperating with transit and origin countries of migrants.<sup>1</sup> Hence, in May 2015, a EU Council Decision (Council) on the military operation called EU Naval Force for the Mediterranean Sea (EUNAVFOR MED) was adopted in order to detect the smuggling of migrants in the Southern Central Mediterranean Sea.<sup>2</sup> The military operation was renamed Sophia after a baby who was born on a boat which was rescued by the EUNAVFOR MED (Operation Sophia), on 22 August 2015.<sup>3</sup> On 20 June 2016, the Council extended Operation Sophia's

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<sup>1</sup> See European Union Naval Force-Mediterranean Operation Sophia, Update: 1 July 2016 <[www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet\\_eunavfor\\_med\\_en.pdf](http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf)>.

<sup>2</sup> See Council Decision 2015/778/CFSP of 18 May 2015 [2015] OJ L122/31.

<sup>3</sup> See 'EU Names Anti-Human-Smuggling Mission 'Operation Sophia' (28 September 2015) <[www.wsj.com/articles/eu-names-anti-human-smuggling-mission-operation-sophia-1443471234](http://www.wsj.com/articles/eu-names-anti-human-smuggling-mission-operation-sophia-1443471234)>. See also I Mercone, 'Some notes on the relations between UNSC resolution 2240 (2015) fighting smugglers in Mediterranean and EUNAVFOR Med "Sophia" Operation' <<http://free-group.eu/2015/10/19/some-notes>>.

mandate until 27 July 2017, reinforcing it by adding two supporting tasks, namely: training of the Libyan coastguard and navy; and contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya<sup>4</sup>. The aim of the Decision is ‘to identify, capture and destroy vessels before they are used by traffickers’<sup>5</sup> and consists of three phases which are analysed in section 2 of this article.

Ten months after Operation Sophia transitioned from phase 1 to phase 2 and after the adoption of UN Security Council resolution 2240 (2105), it is opportune to evaluate the effectiveness of the Operation.

The issue will be addressed by analysing the crime of smuggling of migrants; the response given by the EU through the establishment of a military operation; the contribution of the UN Security Council resolution; and whether this contribution is adequate and can make the difference in the fight against smuggling of migrants by sea. In order to answer the question, the article will also refer to recent investigations conducted in Palermo (Italy) on smuggling of migrants committed by a criminal network in different countries in Africa, Europe, Australia and Canada.

Smuggling of migrants is a very complex crime which can take place not only by sea but also by air and land. Smuggling by land may take place from Turkey to Bulgaria, from Ethiopia to Libya through Sudan, from Pakistan to Turkey through Iran.<sup>6</sup> Migrants who are waiting in Greece, are smuggled through Macedonia to Serbia and Hungary.<sup>7</sup> Usually migrants wait in small villages for days before being recruited by smugglers. In the central Saharan, journeys are managed by the “Af-rod” system which is controlled by Tuareg transport entrepreneurs. They connect Northern Niger, Algeria and parts of Libya and are able

on-the-relations-between-unsc-resolution-2240-2015-fighting-smugglers-in-mediterranean-and-the-eunavfor-med-sophia-operation/>.

<sup>4</sup> See ‘EUNAVFOR MED Operation Sophia: mandate extended by one year, two new tasks added’, Council Press Release (20 June 2016) <[www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/](http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/)>.

<sup>5</sup> See Council Decision 2015/778 (n 2) para 3.

<sup>6</sup> See European Commission, ‘A Study on Smuggling of Migrants. Characteristics, Responses and Cooperation with Third Countries: Final Report’ (September 2015) 38 ff <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/study\\_on\\_smuggling\\_of\\_migrants\\_final\\_report\\_master\\_091115\\_final\\_pdf.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf)>.

<sup>7</sup> *ibid.*



to carry two or three dozen individuals.<sup>8</sup> There are then other criminal groups controlled by Tebu, Hausa and Arab, criminal groups involving large trucks which are able to transport up to 120 migrants. Smuggling of migrants by land and in the desert can take several weeks because of the unstable situation in countries which are crossed by smugglers and which can cause delays in the journeys.<sup>9</sup> There is evidence showing that migrants are often abandoned in the desert when trucks encounter difficulties in the various transit countries.<sup>10</sup> Several incidents were reported in 2015 and migrants have died in the Sahara desert, particularly in Niger, whilst trying to reach Europe.<sup>11</sup> In the EU, tragedies were also reported in 2015 whilst migrants were trying to cross different countries by hiding in trucks. The most tragic fatality was discovered in Austria where 71 people were found dead in a truck.<sup>12</sup>

Smuggling by sea routes usually consist of transporting migrants from their place of accommodation in Hub cities to places of embarkation.<sup>13</sup> Smugglers are able to adapt their routes on the basis of where the international search and rescue operations take place and the weather conditions.<sup>14</sup> There is evidence that in Libya criminal organisations have been supported by Libyan security officials and migrants have been shipped to Europe at prearranged times in order to avoid controls undertaken by officials in charge of search and rescue operations.<sup>15</sup> Before commencing their trips, it has been reported that migrants are provided with a satellite phone, GPS and a list of contacts which allow them to contact Maltese or Italian authorities in order to be rescued. If they are not rescued by these authorities, they are rescued by private ships and merchant vessels. Incidents have been reported in the Eastern Mediterranean route and particularly between migrants who have crossed the Turkish coast, the Greek

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> See Frontex, 'Risk Analysis for 2016' (March 2016) 47 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf)>.

<sup>13</sup> *ibid.* 39.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

Islands and the Evros River.<sup>16</sup> Fatalities have also been reported in the Western Mediterranean route between Morocco and Spain.<sup>17</sup>

Smuggling can be carried out by air through falsification of documents as reported by Frontex in 2015.<sup>18</sup> This agency has also reported that in the second half of 2015, people entering the EU were mainly from Nigeria, Somalia, Sudan, Eritrea, Morocco and Cameroon and that they crossed the EU borders illegally not only from Mediterranean routes but also from other routes such as Eastern European and Western Balkan routes.<sup>19</sup> In April, Frontex reported that most people crossing the EU borders illegally, were from Syria, Afghanistan, Iraq, Iran, Pakistan, Morocco, Somalia, Nigeria and Palestine.<sup>20</sup> Most recently, Frontex has reported that people from Sub-Saharan Africa are ‘the single largest group being detected/rescued’<sup>21</sup> in the central Mediterranean route. Certainly, according to Frontex, the Mediterranean route remains the most transited route.<sup>22</sup>

Smuggling of migrants is supported by coordinators, organisers, recruiters, transporters, spotters, drivers, messengers, enforcers, service providers and suppliers.<sup>23</sup> In the last years, smuggling of migrants has become more organised and professional.<sup>24</sup> Smuggler networks rely on social media and it is almost impossible for migrants to travel on their own initiative, without the support of these criminal networks.<sup>25</sup> In addition, migrants have to pay prices and fees for their journey and smugglers ‘tailor their prices to the economic means of their clients’.<sup>26</sup> In other words, migrants pay what they can afford and usually Syrian refugees

<sup>16</sup> *ibid* 46.

<sup>17</sup> *ibid*.

<sup>18</sup> See Frontex, ‘Risk Analysis Quarter 2. April-June 2015’ 14 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q2\\_2015\\_final.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2015_final.pdf)>.

<sup>19</sup> See Frontex, ‘Risk Analysis Quarter 3. July-September 2015’ 6 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q3\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2015.pdf)>.

<sup>20</sup> See Frontex, ‘Risk Analysis Quarter 4. October-December 2015’ 10 <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q4\\_2015.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q4_2015.pdf)>.

<sup>21</sup> See Frontex, ‘Risk Analysis Quarter 3’ (n 19) 12.

<sup>22</sup> *ibid*.

<sup>23</sup> See United Nations Office on Drugs and Crime, ‘Issue Paper: A short introduction to migrant smuggling’ (2010) 14 <[www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_A\\_short\\_introduction\\_to\\_migrant\\_smuggling.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf)>.

<sup>24</sup> See European Commission, ‘A Study on Smuggling of Migrants’ (n 6) 48.

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid*.



pay more than migrants coming from Sub-Saharan Africa as the former are healthier than the latter.<sup>27</sup> Often migrants have to pay several times for each journey they undertake and the payment modalities have become more organised compared to some years ago.<sup>28</sup> Migrants who travel on the Southern Mediterranean route, for example, are requested to pay for their journey before they start travelling.<sup>29</sup> If the journey is interrupted or the departure is halted, migrants do not have the right to a reimbursement.<sup>30</sup> Instead, for journeys from Pakistan to Greece, migrants can repay the price of their trip after safely arriving at an agreed destination.<sup>31</sup>

The EU has responded to the level of smuggling of migrants by concentrating on smuggling of migrants by sea because so many people die whilst trying to reach EU by sea. The next section will examine Operation Sophia, including the two phases which have been launched by the Council.

## 2. *Operation Sophia*

Operation Sophia was launched on 22 June 2015 by the Council Decision (CFSP) 2015/972.<sup>32</sup> Denmark decided not to take part in the military operation.<sup>33</sup> Operation Sophia consists of three phases. In the first phase, Operation Sophia gathered information and will patrol the high seas in compliance with international law.<sup>34</sup> In the second phase, the Operation boarded the suspect vessels, searched, seized and diverted them in the high seas and in respect of international law, including the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol) and the United Nations Convention on the Law of the Sea (UNCLOS). The second phase also consisted of conducting boarding, search, seizure and diversion of suspect-

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid* 45.

<sup>29</sup> *ibid* 46.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> See Council Decision 2015/972/CFSP of 22 June 2015 [2015] OJ L157/51.

<sup>33</sup> *ibid* para 3.

<sup>34</sup> See Council Decision 2015/778 (n 2) art 2(2)(a).



ed vessels within the territorial waters of the coastal State concerned. In the third phase, Operation Sophia will take necessary measures, to ensure that the vessels are made inoperable by disposing of them and destroying vessels if this is necessary.<sup>35</sup>

The legal basis of Operation Sophia are Article 42(4) and Article 43(2) of the EU Treaty (TEU).<sup>36</sup> Article 42(4) TEU states that 'Decisions relating to the common security and defence policy', including military operations (which Operation Sophia is), shall be concluded 'by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State'. Article 43(2) TEU states that military operations shall be adopted by Council decisions which shall establish the 'objectives', 'scope' and 'general conditions for their implementation'. Article 43(2) also states that the High Representative of the Union for Foreign Affairs and Security Policy (HR) 'acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks'. Hence, Operation Sophia acts under the political control and strategic direction of the Political and Security Committee (PSC).<sup>37</sup> The PSC directs the Operation under the responsibility of the Council and of the HR.<sup>38</sup> In other words, Sophia will be accountable before the Council and the HR, which will exercise their control through the PSC. These institutions are inter-governmental and thus, Sophia is an inter-governmental operation and therefore not accountable to the European Parliament (EP). The EP has a very marginal role in the EU common foreign and security policy (CFSP) as it can only be consulted by the HR on the main aspects and the basic choices<sup>39</sup> of the CFSP and by the Council when agreements between the EU and third countries or with international organisations, related to the CFSP are concluded.<sup>40</sup> The Court of Justice of the EU (CJEU) has ruled a number of times on

<sup>35</sup> *ibid* art 2(c).

<sup>36</sup> *ibid* Preamble.

<sup>37</sup> *ibid* para 10 and art 6(1).

<sup>38</sup> *ibid* art 6(1).

<sup>39</sup> See art 36 TEU.

<sup>40</sup> See art 218 of the Treaty on the Functioning of the European Union (TFEU).



the issue and confirmed that the EP has only a consultative role on the CFSP.<sup>41</sup>

The Decision states that the Council will seek the participation of third States which ‘may be invited to participate in the operation’.<sup>42</sup> The Decision also states that the third countries’ contribution will not put at risk EU decision-making autonomy and EU institutions independence.<sup>43</sup> Thus, agreements with third countries will be based on Article 218 TFEU which states that agreements have to be authorised by the Council after consulting the EP. By reading the provisions of the Council Decision, it might be assumed that the participation of third countries will concern the detection and disposal of vessels and that the Council may require their participation when vessels are detected in their territorial waters. In this way, encroachment of national sovereignty will be avoided and third countries will participate in the military operation and cooperate to deal with vessels. EUNAVFOR will be authorised to release information to third countries and the UN, on the operation they are undertaking.<sup>44</sup>

Since the adoption of the Decision, Sophia Operation has been criticised for its ambiguous scope and lack of effectiveness.<sup>45</sup> In this regard, the Mejer Committee pointed out that ‘unlike piracy and international crimes, international law does not establish universal criminal jurisdiction over human smuggling’.<sup>46</sup> There is only the Smuggling Protocol

<sup>41</sup> See Case C-658/11 *European Parliament v Council* (ECJ, 24 June 2014). For a comment on the case see S Peers, ‘The CJEU ensures basic democratic and judicial accountability of the EU’s foreign policy’ (24 June 2014) <<http://eulawanalysis.blogspot.co.uk/2014/06/the-cjeu-ensures-basic-democratic-and-judicial-accountability-of-the-eu-s-foreign-policy/>>. See also, for instance, Case C-317/04 *Parliament v Council* [2006] ECR I-04721; Case C-403/05 *Parliament v Commission* [2007] ECR I-09045; Case C-130/10 *Parliament v Council* (ECJ, 19 July 2012). See also Case C-263/14 *Parliament v Council* (pending).

<sup>42</sup> See Council Decision 2015/778 (n 2) art 9(1).

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid* art 12.

<sup>45</sup> See Meijers Committee, ‘Military action against human smugglers: legal questions concerning the EUNAVFOR Med operation’ (23 September 2015) <[www.statewatch.org/news/2015/sep/eu-meijers-cttee-eunavfor.pdf](http://www.statewatch.org/news/2015/sep/eu-meijers-cttee-eunavfor.pdf)>. See also House of Lords European Union Committee, 14th report of Session 2015-16 ‘Operation Sophia, the EU’s naval mission in the Mediterranean: an impossible challenge’ (13 May 2016) <[www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/144/144.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/144/144.pdf)>. See also S Peers, ‘Analysis the EU’s Planned War on Smugglers’ (May 2015) <[www.statewatch.org/analyses/no-268-eu-war-on-smugglers.pdf](http://www.statewatch.org/analyses/no-268-eu-war-on-smugglers.pdf)>.

<sup>46</sup> *ibid.*



which states that a 'State Party shall take appropriate measures in accordance with relevant domestic and international law' when evidence confirms that a vessel is engaged in the smuggling of migrants by sea.<sup>47</sup> The EU Council Decision does not establish any rules on the apprehension, arrest and detention of smugglers of migrants. It is likely that the EUNAVFOR Council Decision does not establish rules on the arrest of smugglers because EUNAVFOR is a military task force and thus, they cannot carry out investigations on the smuggling of migrants. It is the police and prosecutors of EU Member States who have jurisdiction over investigations, not EUNAVFOR. Jurisdiction will be decided on the basis of Article 4 of the Framework Decision 2002/946/JHA.<sup>48</sup> Article 4 states that Member States will establish jurisdiction over assisting illegal migration, either when the crime is wholly or partially committed on their territory or when it is committed by one of their nationals or when it is committed for the benefit of a legal person established on their territory. This provision has been complied with in recent investigations conducted by Italian public prosecutors in Palermo, which successfully detected a criminal network which smuggled migrants from Libya, Eritrea, Ethiopia, Sudan, Israel to Sicily.<sup>49</sup> Subsequently, the same organisation smuggled migrants to Northern Italy and eventually to Sweden, Germany, Norway, the Netherlands, France, Austria, Australia and Canada.<sup>50</sup> Evidence on the crime of smuggling was gathered through wiretapping.<sup>51</sup> The Italian Supreme Court of Cassation has admitted wiretapping as evidence as they have been made either from Italian telephones or to Italian telephones. This activity is not in breach of the national sovereignty of third countries as the wiretapping was wholly undertaken on Italian territory<sup>52</sup> and Article 4 of Framework Decision

<sup>47</sup> See art 8(7) Smuggling Protocol.

<sup>48</sup> See art 4 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1.

<sup>49</sup> See Decreto di fermo ex art 384 c.p.p. disposto dal P.M. della Procura della Repubblica presso il Tribunale di Palermo, Direzione Distrettuale Antimafia, 30 May 2016, 16.

<sup>50</sup> *ibid* 2.

<sup>51</sup> *ibid* 20.

<sup>52</sup> *ibid* 20-21. See also Supreme Court of Cassation, Sez. IV, Judgement n. 32924 of 29 July 2004, Belforte rv. 229103; Supreme Court of Cassation, Sez. V, Judgement 4401 of 21 October 1998, Assisi.





2002/946/2002 states that Member States have jurisdiction over the crime of smuggling if part of the criminal activity is committed on their territory. In addition, national authorities can rely on the European Arrest Warrant (EAW) if the crime has been committed in other EU Member States.<sup>53</sup> Article 1(1) of the EAW Framework Decision 2002/584/JHA defines the EAW as

‘a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.’

Article 1(2) states that the EAW is based on the principle of mutual recognition which permits the transfer of suspected criminals who surrender without applying the complex extradition procedures which cause delays in prosecuting criminals and executing judicial decisions.<sup>54</sup> Mutual recognition is based on mutual trust among Member States’ criminal justice systems, which is essential to give effectiveness to the EAW which ‘is the first measure to be adopted in the field and the only mutual recognition measure which has been implemented fully and in detail ...’<sup>55</sup> Mutual recognition is ‘the “cornerstone” of judicial cooper-

<sup>53</sup> See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1. See also Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L 81/24.

<sup>54</sup> See Council Framework Decision 2002/584/JHA of 13 June 2002 (n 53) art 1(2) and Recital 5. For an in depth analysis of the principle of mutual recognition see Case C-396/11 *Ciprian Vasile Radu* (ECJ, 29 January 2013) para 33; Case C-42/11 *Lopes De Silva Jorge* (ECJ, 5 September 2012) para 28; Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECR I-03633, para 28; Case C-66/08 *Kozłowski*, [2008] ECR I-06041, paras 31 and 43; Case C-123/08 *Dominic Wolzenburg* [2009] ECR I-09621, para 56; Case C-261/09 *Gaetano Mantello* [2010] ECR I-11477, para 35.

<sup>55</sup> See V Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 YB Eur L 323. For an in depth analysis of the correlation between mutual trust and mutual recognition see E Herlin-Karnel, ‘From mutual trust to the full effectiveness of EU law: 10 years of the European arrest warrant’ (2013) 38 Eur L Rev 79-91. On the shift of the EAW legislation from intergovernmentalism to supra-

ation'.<sup>56</sup> The EAW is an effective way to fight the trans-national crime of smuggling of migrants within the EU. However, if the activity should be undertaken entirely on the territory of a third country not belonging to the EU, the principles of mutual recognition and mutual trust established within the EU legal system, cannot be applied.

The UN Security Council adopted resolution 2240 (2015) in October 2015, authorising Member States to intercept vessels from Libya suspected of smuggling of migrants and to 'disrupt the organised criminal enterprises engaged in migrant smuggling and human trafficking'.<sup>57</sup> Nevertheless, as will be noted in the next section, the Security Council resolution does not set up rules on the arrest, detention and investigation of the crime, which are the most important actions that should be taken to detect smuggling of migrants by sea because the crime is trans-national and requires cooperation in investigations and persecution within and outside the EU.

### 3. *Extraterritorial criminal jurisdiction over migrant smuggling and human trafficking under the UN Security Council resolution 2240 (2015)*

The Preamble of Security Council resolution 2240 (2015) states that it is urgent that 'all States ... comply with their obligations under international law, including international human rights law and international refugee law'.<sup>58</sup> Actions in this direction have to be taken by Member States regardless of the immigration status of individuals as their human rights shall be respected without any discrimination between refugees and other migrants. The Security Council resolution focused mainly on cooperation with Libya by emphasising that in Libya, smuggling and trafficking networks could provide support to other criminal organisa-

nationalism see M Ventrella, 'European integration or democracy disintegration in measures concerning police and judicial cooperation?' (2013) 4 *New J Eur Criminal L* 290-309.

<sup>56</sup> See Council Framework Decision 2002/584/JHA of 13 June 2002 (n 53) Recital 6.

<sup>57</sup> See UN Security Council resolution 2240 (2015) UN Doc S/RES/2240 (2015) (9 October 2015) para 12.

<sup>58</sup> *ibid* Preamble.



tions and terrorist networks. For this reason, it is important that the Libyan government takes responsibility over the smuggling of migrants at sea.<sup>59</sup> The Security Council resolution also stressed that the fighting against smuggling and trafficking should be tackled by immediate and long-term initiatives. For this purpose, the Security Council resolution requires Member States to cooperate with Libya and to coordinate actions against smuggling and trafficking.

The Security Council resolution called upon Member States to take tough measures against vessels involved in smuggling and trafficking. First, the Security Council resolution authorizes Member States to inspect vessels on the high sea when there is the suspicion they are perpetrating smuggling and trafficking from Libya, provided that good faith efforts to obtain the consent of flag State have been done.<sup>60</sup> Second, the Security Council resolution also states that in these exceptional circumstances, Member States can adopt further actions, including the seizure and disposal, with regard to vessels suspected of smuggling of migrants at sea.<sup>61</sup> However, a question that is inadequately addressed in resolution 2240 (2015) relates to the kind of actions that Member States may take vis-à-vis the smugglers found on the inspected vessels. In paragraph 10 of the resolution the Security Council authorizes Member States ‘to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers ...’.<sup>62</sup> This wording however does not seem to cover the question of the exercise of criminal jurisdiction over smugglers and traffickers, insofar as another paragraph of the resolution calls upon all States ‘with relevant jurisdiction under international law and national legislation, to investigate and prosecute persons responsible for acts of migrant smuggling and human trafficking at sea ...’.<sup>63</sup>

The Security Council resolution states that smuggling and trafficking are two distinct crimes and requires Member States to tackle both crimes by the same short term measures, including the disposal of suspected vessels.<sup>64</sup> The resolution seems to underestimate the fact that

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid* para 7.

<sup>61</sup> *ibid* para 8.

<sup>62</sup> *ibid* para 10.

<sup>63</sup> *ibid* para 15.

<sup>64</sup> *ibid* Preamble.

smuggling can be a form of trafficking and that this may occur when migrants are tortured, raped and abused during their journeys.<sup>65</sup> Member States should take their responsibility and carry out investigations on smuggling, trafficking and their possible connections. The Security Council resolution generally focuses on shared responsibility but it is important to clarify where criminals should be prosecuted. This is an issue of national sovereignty which the resolution does not focus upon at all, as it simply states that the Security Council reaffirms 'its strong commitment to the sovereignty, independence, territorial integrity and national unity of Libya'.<sup>66</sup> International law as a whole does not address issues concerning national sovereignty in criminal investigations and in extra-territorial jurisdiction. Certainly, Article 3 of the United Nations Convention against Transnational Organised Crime (UNTOC) applies when a crime has a cross-border dimension, but Article 4 establishes the sovereignty clause which imposes on State Parties an obligation not to intervene in the domestic affairs of another State Party. Investigations over the smuggling of migrants, which is a trans-national crime, require investigative cooperation with origin and transit countries which might risk encroaching on national sovereignty. In criminal cases involving EU Member States, the EAW may serve as a useful tool for investigative cooperation. Some personal interview suggests that Italian public prosecutors have issued the EAW on several occasions, and that this favoured the interrogation and prosecution of criminals.<sup>67</sup> However, if criminals were based in countries outside the EU, public prosecutors needed to conclude agreements with third States and many of them were unwilling to contribute in the investigations.<sup>68</sup> Many other criminals may be at large because of the complexity of investigations and issues related to national sovereignty. This latter problem remains unresolved by the Security Council resolution because it only focused on

<sup>65</sup> See European Commission, 'A Study on Smuggling of Migrants' (n 6). See also Amnesty International, 'Libya: Horrific abuse driving migrants to risk lives in Mediterranean crossings' (11 May 2015) <[www.amnesty.org/en/press-releases/2015/05/libya-horrific-abuse-driving-migrants-to-risk-lives-in-mediterranean-crossings/](http://www.amnesty.org/en/press-releases/2015/05/libya-horrific-abuse-driving-migrants-to-risk-lives-in-mediterranean-crossings/)>.

<sup>66</sup> See UN Security Council resolution 2240 (2015) (n 57).

<sup>67</sup> In an e-mail exchange with one of the public prosecutors from Palermo, he highlighted that public prosecutors have issued the EAW on several occasions and in this way, criminals could be interrogated and prosecuted: e-mail interview undertaken with Dr Ferrara on 8 April 2016.

<sup>68</sup> *ibid.*



Operation Sophia by stating that its establishment ‘underlined the need for effective international action to address both immediate and long-term aspects of migrant smuggling and human trafficking towards Europe’.<sup>69</sup> The Commander of Operation Sophia emphasised that moving from the operation in the high seas (Phase 2A) to the operation in Libyan territorial waters (Phase 2B), may have political and legal implications, as not only the fight against smuggling requires the contribution of the Libyan authorities, but it might also imply the power to arrest, detain and prosecute smugglers.<sup>70</sup> It has been reported that Libya denies the possibility of undertaking investigations on their territory even though there are still migrants waiting to embark to Europe with more people arriving from Sub-Saharan Africa.<sup>71</sup> The Commander pointed out that if Operation Sophia remains outside the Libyan territory, smugglers will not be apprehended.<sup>72</sup>

Insofar as Operation Sophia, as shown in section 2 of this article, is carried out in the framework of CFSP and therefore remains an inter-governmental operation, no progress has been made in EU police and judicial cooperation with transit and origin countries. The EU has established the EAW and Justice and Home Affairs (JHAs) agencies such as Europol and Eurojust. However, these agencies are not adequate to lead effective actions against smugglers of migrants committed outside the EU. Europol does not have the powers of domestic police because the agency cannot initiate investigations.<sup>73</sup> The same problem also affects the ‘external’ side of Europol activity, as Europol can only exchange data with external agencies and third countries and it is not conceived as a European Police with investigative tasks.<sup>74</sup> In addition, the agency lacks transparency because the reports they publish annually, despite being very informative, are written by Europol and only re-

<sup>69</sup> *ibid.*

<sup>70</sup> See ‘EUNAVFOR MED-Operation Sophia. Six Monthly Report: June, 22<sup>nd</sup> to December 31<sup>st</sup> 2015’ (17 February 2016) <<https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>>.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> See Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L121/37. Art 5 simply states that Europol has coordinating tasks as it can ask Member States to initiate investigations, although Europol cannot itself take this initiative.

<sup>74</sup> *ibid* art 23.



flect their position.<sup>75</sup> Furthermore, Europol does not have democratic accountability,<sup>76</sup> despite the fact that the EU is trying to make Europol more transparent and democratic.<sup>77</sup>

Eurojust is not really in a better position. The agency was established to improve judicial cooperation between Member States to better fight against trans-national criminal organisations.<sup>78</sup> Nevertheless, its external scope is very limited. Article 27(3) of the Council Decision states that Eurojust can conclude cooperation agreements with third countries, if the Council agrees. The cooperation established by the Council Decision only concerns the exchange of personal data. Investigative cooperation is not within the scope of the Decision. The same principles apply to international cooperation between Eurojust and third countries. Their cooperation will be mainly based on the exchange of information, including personal data.<sup>79</sup>

It is the present author's view that the conclusion of cooperation agreements to fight against smuggling and trafficking would be enhanced by the establishment of the European Public Prosecutor's Office (EPPO), with the task of coordinating investigations between EU investigative authorities, such as Europol, and investigative authorities of countries of origin and transit of migrants. The European Council highlighted that smuggling of persons and trafficking in human beings are two crimes which require cooperation 'which goes beyond the area of freedom, security and justice and (...) includes external relations'.<sup>80</sup>

<sup>75</sup> See S Peers, *EU Justice and Home Affairs Law* (OUP 2011) 932.

<sup>76</sup> See S Peers, 'The reform of Europol: modern EU agency, or intergovernmental dinosaur?' (18 June 2014) <<http://eulawanalysis.blogspot.co.uk/2014/06/the-reform-of-europol-modern-eu-agency.html>>.

<sup>77</sup> See 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA', COM (2013) 173 final, 27 March 2013 <[www.consilium.europa.eu/en/press/press-releases/2015/12/04-updated-rules-for-europol/](http://www.consilium.europa.eu/en/press/press-releases/2015/12/04-updated-rules-for-europol/)>.

<sup>78</sup> See Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime OJ L 63/1, paras 1 and 3.

<sup>79</sup> See Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime OJ L 138/14 art 26a(2).

<sup>80</sup> See 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' (2 December 2009) C/115/1, para 4.4.2 <<https://ec.europa.eu/anti>>.



The Lisbon Treaty has introduced the possibility of establishing the EPPO '[i]n order to combat crimes affecting the financial interests of the Union'.<sup>81</sup> The Treaty also states that the EPPO's scope can be extended 'to include serious crime having cross-border dimension'<sup>82</sup> and thus, the fight against smuggling and trafficking can be included. However, at the moment proposals on the establishment of the EPPO are only concentrated on fraud against the EU budget and corruption within the EU.<sup>83</sup> Furthermore, an attempt to establish the EPPO in the past, has been strongly criticized as it was considered to be an attempt to encroach national sovereignties.<sup>84</sup> Hence, it can be concluded that neither the Security Council resolution nor the EU are appropriately addressing this problem, which concerns States' responsibility and police and judicial cooperation between the EU and countries where the crime of smuggling is committed. As the Meijer Committee emphasised, Operation Sophia could not meet the standards established in Articles 39 and 42 of the UN Charter for the Security Council authorization of military operations, as the activities of human smugglers do not qualify per se as a threat to international peace and security.<sup>85</sup> The aim of Operation So-

trafficking/sites/antitrafficking/files/the\_stockholm\_programme\_-\_an\_open\_and\_secure\_europe\_en\_1.pdf>.

<sup>81</sup> See art 86(1) TFEU.

<sup>82</sup> See art 86(4) TFEU.

<sup>83</sup> See 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM (2013) 534 final, 17 July 2013, 4 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:en:PDF>>.

<sup>84</sup> The UK criticised the EPPO project as an attempt to encroach upon national sovereignties in criminal law. See United Kingdom Response to the Commission Green Paper. The United Kingdom Parliament, Select Committee on European Communities, 9th Report, 'Prosecuting Fraud on the Communities' Finances-The Corpus Juris' (18 May 1999). For an in-depth study of the EPPO, see 'Green paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM (2001) 715 final, 11 December 2001 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001DC0715>>. See 'Follow-up report on the Green paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM (2003) 128 final, 19 March 2003 <[http://ec.europa.eu/anti\\_fraud/documents/fwk-green-paper-corpus/corpus\\_juris\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf)>. See C Fijnaut, MS Groenhuijsen, 'A European Public Prosecutor: Comments on the Green Paper' (2002) 10 Eur J Crime, Criminal Law and Criminal Justice 321-336. See M Zwiers, *The European Public Prosecutor's Office* (Intersentia 2011). See LH Erkelens, AWH Meij, M Pawlik, *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* (Springer 2015).

<sup>85</sup> See Meijers Committee, 'Military action against human smugglers' (n 45) para 3.



phia seems to be more the achievement of peace and security by preventing the illegal entry of migrants within EU Member States rather than saving the lives of migrants and preventing them from seeking the support of smugglers to leave their countries of origin. Migrants seek their support simply because legal routes have been banned and this fact has been confirmed by the investigations carried out on smuggling by Italian prosecutors in Palermo.<sup>86</sup> The EU is addressing the problem using an inadequate military operation and the UN Security Council resolution is supporting this inadequate approach.

#### 4. *Conclusions*

The Security Council resolution 2240 (2015) appears inadequate to fight the smuggling of migrants by sea. This conclusion has been reached after having considered Operation Sophia which is a military operation and which only addresses smuggling committed between Libya to Italy. The article has shown that smuggling of migrants is committed in different countries and in different regions including Africa, Europe and Canada. Hence, a military operation cannot address the problem appropriately as military forces do not have jurisdiction over investigations on smuggling.

Adequate investigations on smuggling and trafficking can be carried out only if there is international investigative cooperation between police and judicial authorities of different regions. This is because investigations on cross-border crimes are generally complex and the burden should not be left to single investigative offices. Unfortunately, the situation will not improve, as EU policy is concentrated on agreements to reduce the number of migrants and refugees in the EU<sup>87</sup> and this will be detrimental to effective investigations on smuggling and trafficking committed in different regions of the world.

<sup>86</sup> See Decreto di fermo ex art 384 c.p.p. (n 49) 11.

<sup>87</sup> See 'EU-Turkey Statement' (18 March 2016) <[www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/)> and European Council Conclusions (17-18 March 2016) <[www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/)>.

