
*The role of the European Union in the (non-)rescue of
migrants in the Mediterranean Sea*

Synthesis

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Abbreviation List

AFSJ - area of freedom, security, and justice

CAS - Emergency Accommodation Centres

CAT - UN Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment

CEAS – Common European Asylum System

CFSP - Common Foreign and Security Policy

CSDP - Common Defence and Security Policy

EASO - European Asylum Support Office

EASO - European Asylum Support Office

ECHR - European Convention on Human Rights

ECJ - European Court of Justice

ECtHR - European Court of Human Rights

EPAM - European NGO Platform on Asylum and Migration

EU – the European Union

EURODAC - European Dactyloscopy

EUROSUR - European Border Surveillance System

EUTF - Emergency Trust Fund for Africa

FRA - European Union Agency for Fundamental Rights

ICC - International Coordination Centre

ICCPR - International Covenant on Civil and Political Rights

IOM – International Organization for Migration

LOSC - 1982 UN Convention on the Law of the Sea

MERSAR - Merchant Ship Search and Rescue Manual

MOAS - Migrant Offshore Aid Station

MRCC - National Maritime Rescue Coordination Centres

MSF - Médecins Sans Frontières

NGO - Non-governmental organisation

OLP – Ordinary Legislative Procedure

PICMME - Provisional Intergovernmental Committee for the Movement of Migrants from Europe

QMV - qualified majority voting

SAR – search and rescue

SBC - Schengen Borders Code

SIPROIMI - System of protection of refugees and unaccompanied minors

SOLAS – Safety of Life Convention

SPRAR - System of protection for asylum seekers and refugees

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

UN – The United Nations

UNCLOS - United Nations Convention on the Law of the Sea

UNHCR – the United Nations High Commissioner for Refugees

UNICEF - United Nations Children's Fund

VMC - Vienna Migration Conference

Abstract

The problem of irregular arrivals in Europe has been familiar to the European countries for many decades. Currently, one of the most sensitive issues is an authorisation to disembark arriving migrants in national ports by the EU Member States. Since the migration crisis of 2015, this subject brings controversy as some countries refuse to accept vessels with migrants on boards and introduce strict measures against search and rescue operations at sea. This leads to cases of non-rescue in the Mediterranean and increasing rate of drownings. Moreover, avoidance of responsibility for migrants at sea became a serious problem concerning the violation of human rights. This paper analyses the legality of Member States' actions with regards to search and rescue actions as well as the refusal of migrants in national ports. It focuses on the responsibility of Member States over foreign ships not only in territorial water but as well as in high seas.

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1. Introduction

Avoidance of responsibility for migrants is an ongoing issue in the Mediterranean. Every day migrants cross miles of seas to arrive in Europe to escape conflict in their countries of origin. According to UNHCR data, the number of arrivals has decreased since the migration crisis from 1,032,408 in 2015 to 123,663. Nevertheless, every year there are cases of dead and missing migrants at sea. They are challenged not only with troubled seas but as well as obstacles that Member States put on them. New migration law and policies introduced by the EU Member States lead to more cases of non-rescue at sea and migrants left drifting outside of national ports for days or even weeks. Since the escalation of irregular immigration in 2015, some deficiencies in the EU migration policy have been revealed. One of the most sensitive issues is an authorisation to disembark arriving migrants in national ports by the EU Member States. This subject brings controversy as some countries refuse to accept vessels with migrants on boards and introduce strict measures against search and rescue operations at sea. Moreover, Member States try to avoid responsibilities towards migrants by using gaps and loopholes in the EU and international law. Hence, this work addresses the problem of responsibility avoidance and analyses the obligations of Member States towards migrants at sea from the legal perspective.

The current scientific literature regarding the migration crisis mostly covers issues related to asylum and gives much less attention to rescue operations at sea. Hence, there are a couple of shortcomings regarding the matter of rescuing migrants at sea and the refusal of migrants in harbours. Firstly, most of the scholars do not focus on the role of agencies like Frontex concerning a lack of assistance for migrants from the Member States. Secondly, a subject of the lawfulness of refusal of migrants is analysed from the perspective of international law, not on the EU level. Furthermore, this paper focus on the question of the legal obligation of Member States with regards to SAR missions both in territorial waters and high seas. Therefore, this paper is based on the main research question: *What is the Member States' jurisdiction toward migrants that are beyond the boundaries of their territorial sea?* To answer the question the research is structured in three parts. The first part analyses the overall functioning of the EU in the area of migration policy and the development of law and policies over the years. Then, the next part focuses on the actors participating in SAR operations. It includes all actors within and outside of the EU. Finally, the last chapter evaluates the compatibility of Member States actions in light of the EU and international law. The objective of this part is to answer to the main question, which is possible after the in-depth analysis included in this work.

This study is primarily a type of synthesis, with a qualitative method as its methodological approach. This technique allows us to gather in-depth insights on the topic of this research, focusing inter alia on case studies and partly an interview. The research focuses as well on the analysis of different texts. This method is substantial, for it allows for a comprehensive analysis of the topic and relations between different actors engaged in rescue operations at sea. Thanks to gathering documents from different sources it is possible to formulate answers for the main research question.

2. Development in the area of migration policy in the EU

In order to better understand the role of the EU in the rescue of migrants in the Mediterranean the first part of this work focuses on an analysis of the EU migration policy. Divided into two subchapters the first chapter examines the primary law of the EU. In this section, the subsequent EU Treaties are analysed with regards to migration law and policy. Beginning with the Maastricht Treaty the subchapter follows changes in Amsterdam, Nice, and Lisbon Treaties. Then, in the succeeding subsection the focus shifts to secondary law. This part mainly emphasizes new policies introduced as a response to the migration crisis of 2015. The subchapter analyses the origin of the problem, the steps taken by the EU and Member States, as well as criticism towards these actions.

2.1. Primary law

2.1.1. Migration policy in the EU treaties

The problem of irregular arrivals in Europe has been familiar to the European countries for many decades. Immigration and refugee measures were taken by Western European countries back in the 1970s, and even earlier in the international arena as in the 1951 Refugee Convention was drafted and signed. Since then measures about the entry and stay of immigrants were tightened up, a problem of irregular arrivals in the European countries only increased and forced migrants to use more dangerous routes to enter Europe.¹ Over the years, the EU has been adopting new instruments to include in its immigration policy. Alongside the EU Treaties, the European institutions introduce their proposals in the field of migration and asylum, as well as subjects closely related to it. The European Union's migration policy deals with both legal and irregular migration. But what does irregular migration exactly mean? Irregular migration cannot be mistaken with illegal migration, the latter refers to criminal actions like human trafficking or smuggling. In contrast, irregular migration concerns crossing borders without valid documents that are required in compliance with multiple resolutions established in the immigration policy and regulations. The matter of migration appears to be quite a controversial area of law not only in the EU but internationally as well. Therefore, for the many years where the EU and its Member States have been working on developing the treaties, competencies, and

¹ Boswell, C. (2003). The 'external dimension' of EU immigration and asylum policy. *International Affairs*, 79(3), 619-638, p. 619.

regulations, we can observe that the member states have been and are very reluctant to harmonise on this area of law and policy. Moreover, unlike the internal market's common area, the Member States coastal waters are not regulated by the EU but independently by the countries. Hence, there is more move for manoeuvre in the area of irregular migration and acceptance of migrants in the harbours of the coastal states.

2.1.1.1. Maastricht Treaty

At the EU level, the matter of immigration was mentioned in the Treaty of Maastricht for the first time and was signed in 1992. One of the European Communities' objectives in the third pillar (cooperation in the fields of justice and home affairs) was a certain control of illegal immigration.² However, the instruments adopted back then suffered from two main weaknesses: soft law and no adequate monitoring arrangements.³ The soft law contains resolutions and recommendations that do not have legally binding effects for the members, therefore they were not obliged to subordinate to them. Moreover, there was no solidarity in case of an emergency like the inflow of migrants to the Community's territory.

The Treaty of Maastricht was just an introduction to migration law and policy, which was further developed in the succeeding EU Treaties.

2.1.1.2. Amsterdam Treaty: minimum standards

Later on, in the Treaty of Amsterdam, the Council, which was aware of the previous weaknesses, took the decision to not undertake a deeper harmonization but to just set minimum standards.⁴ It is a set of principles that define international protection procedures, reception conditions, and the refugee definition with regards to an asylum context.⁵ In the 1990s there was a need for special procedures to deal with mass influxes of displaced persons, which appeared due to a conflict in Yugoslavia. Then, solidarity was not a common political response. Some countries bore disproportionately heavier consequences of the inflow. The first article to

² Sokolska, I. (2019). Maastricht and Amsterdam Treaties. *Fact Sheets on the European Union*. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/3/the-maastricht-and-amsterdam-treaties>

³ Scipioni, M. (2017). Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *Journal of European Public Policy*, 25(9), 1357-1375, p. 1361.

⁴ Ibid., p. 1361.

⁵ European Union: Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, Article 63.

promote a balance of effort between Member States and to set minimum standards was Article 63 of the Treaty of Amsterdam. As Article 63(1) stated

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

- (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties [...]

This article was a building block for the development of asylum and migration policy.⁶ It included criteria and mechanisms to respond to an influx of nationals of third countries.

Before the Treaty of Amsterdam, there was little place for intervention by the European Commission, European Parliament, or European Court of Justice in the area of migration policy. Eventually, some of the areas concerning legal migration which were part of the third pillar in the previous treaty had been transferred to the first pillar in the Treaty of Amsterdam. With other important changes concerning migration came an initiation of the decision-making by the community method that applied also to asylum, immigration, and crossing external borders. According to article 294 of the Treaty on the Functioning of the EU, this method involves the European Commission, Council, and Parliament, as well as the judicial oversight of the European Court of Justice (ECJ) in the decision-making process, which indicates that the Member States transferred some competences to the Community and shared their power with the supranational institutions like the Commission and Parliament.⁷ At the same time, however, the role of the European Court of Justice has been significantly limited with regards to asylum and migration policy. The arrangements under the Amsterdam Treaty confined references for a preliminary ruling to the highest domestic courts limiting the possibility for harmonisation from below⁸.

⁶ UNHCR. (2000, 22 November). *Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation to a Common Asylum and Migration Policy*, p. 99.

⁷ Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*, Macmillan, Basingstoke, p. 23.

⁸ The containment of the references for a preliminary ruling by national courts to the ECJ precluded the approximation of national laws in the area of migration in the Member States. The ECJ unable to rule on cases concerning migration could not set up common legal definitions on the EU level. (Scipioni, 2017: 1361).

2.1.1.3. Nice Treaty

In 2003, the Treaty of Nice was signed. It did not introduce any major changes in the area of migration. However, asylum policy attracted more scrutiny and consequently, different proposals were negotiated in this area, including the Common European Asylum System (CEAS) established in 1999. The matter of migration has been included in two European Council summits, firstly Tampere Programme (1999-2004), and afterwards in 2008 in the European Pact on Immigration and Asylum, following the five years Hague Programme (2004-2009).⁹ One of the main goals of the Pact was ‘to control illegal migration by ensuring that illegal immigrants return to their countries of origin or to a country of transit’.¹⁰ It was the EU basis in the area of migration and asylum, with its main goals and aim of a stricter control of migratory flows with respect to human rights. These bases have not changed, nevertheless, the Pact is no longer in force.

2.1.1.4. Lisbon Treaty: common migration policy and the principle of solidarity

At last, the Treaty of Lisbon increased the significance of immigration policy in the EU. The main change is the migration policy-making process that was brought under the ordinary legislative procedure, therefore, engaging the European Parliament and the Council into co-decision.¹¹ The legal bases for migration policy were incorporated into Articles 79 and 80 of the Treaty on the Functioning of the European Union (TFEU), where for the first time a common immigration policy was introduced in Article 79(1) of the TFEU which provides that:

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.¹²

⁹ European Parliament (2018, 18 June). Migration and Asylum: a challenge for Europe. *Fact Sheets on the European Union*.

¹⁰ Council of the EU (2008, 24 September). *European Pact on Immigration and Asylum*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0038>

¹¹ Hampshire, J. (2016). European migration governance since the Lisbon treaty: introduction to the special issue. *Journal of Ethnic and Migration Studies*, 42(4), 537–553, p. 538.

¹² European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

However, this cannot be mistaken with the harmonisation of law in this area, which has never taken place. At this moment existing EU directives in the area of irregular migration and asylum do not comprise fully harmonised requirements. Instead, there are common minimum standards that equal minimum harmonisation. In this situation, the Member States are allowed to set higher standards within their countries. Once rules are fully harmonised at the EU level, the Member States cannot introduce any higher standards.¹³ Some level of harmonisation in migration policy concerns only legal migration and integration of third-country nationals in Article 79(1) of the TFEU. Regarding irregular migration, paragraph 5 of the same Article mentions that the Member States shall decide themselves on the number of accepted migrants from third countries in their territories.

On the other side, according to Article 80, EU policies on border checks, asylum and immigration should be implemented using principles of solidarity and fair sharing of responsibilities. These principles were introduced in the Treaty of Lisbon. The principle of solidarity cannot be enforced by the Commission, but it is a matter reserved for member states. However, it is not so clear-cut and the application of article 80 of the TFEU involves some mechanisms, which could be considered as limitations of this article in burden-sharing. All of them mostly concern asylum seekers rather than migrants. According to these mechanisms, the countries affected can receive help in a situation of “sudden influx” by reallocation of asylum seekers, limited emergency assistance, or partial funds from the EU budget but that help remains small. There are no internal borders as such in the Schengen area. The EU citizens have free and unrestricted possibilities to move between the Member States. However, this arrangement also brings some concerns regarding irregular migrants. Any immigrant or a refugee once crossing the external border of the EU can freely move crossing ‘internal borders’. Therefore, he or she becomes a responsibility of all European community that is meant to work as a solidarity. Nonetheless, in practice when there are countries more affected by the problem of high migrants inflows and despite the principle of fair sharing responsibility, as an example of common asylum policy, some countries refuse to accept asylum seekers.¹⁴

¹³ EUR-lex (2008, 11 July). European Union directives. *Access to European Union law*. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv%3A114527>

¹⁴ Kucuk, E. (2016). The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?. *European Law Journal*, 22(4), 448-469, pp. 449-451.

The idea of common immigration policy and solidarity also appears in Article 67(2) of the TFEU as an important part of changes that this Treaty brought in both asylum and immigration policies. As the paragraph 2 of Article 67 states:

[The Union] (...) shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. (...).

Principles of solidarity and fair sharing of responsibilities can be presented in both negative and positive ways. As for the more positive one, we can look at the cooperation of the members to achieve a common goal, which *“here is the common immigration policy, characterized by efficient management of flows and fair treatment of third country nationals”*.¹⁵ However, it can also include the negative aspects, where Member States are obliged to refrain from taking any measures that could distort migration flows to and within the EU. This would prohibit taking national measures that make migration to one Member State far more attractive and would cause negative effects on other Member States in attracting these immigrants.¹⁶

Since the Lisbon Treaty, the references to the ECJ significantly increased,¹⁷ and the competences of the EU broadened in the area of common asylum policy. It is said that *‘due to the high level of abstraction and the absence of jurisprudence to date, interstate solidarity does not entail concrete legal obligations’*.¹⁸ However, the important role of the European Court of Justice (CJEU) cannot be overlooked in all matters with regards to migration, including the principle of solidarity. In the judgment of the CJEU from 6 September 2017, the principle of solidarity in the EU migration policy has been strengthened. The case concerned the Slovak Republic and Hungary, where they sought annulment of Council Decision 2015/1604 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (“the Relocation decision”). The Court in its judgment decided that the actions of Slovakia and Hungary must be dismissed. Moreover, the case established that obligations within the immigration policy arising from the principle of solidarity can be subject

¹⁵ Vanheule, D., van Selm, J., & Boswell C. (2011, 14 March). The implementation of Article 80 TFEU, *Directorate-General for Internal Policies*, p. 47.

¹⁶ Ibid., p. 47.

¹⁷ Arcarazo, A. D. & Geddes, A. (2013). The development, application and implications of an EU rule of law in the area of migration policy. *JCMS: Journal of Common Market Studies*, 51(2), 179-193, p. 179.

¹⁸ Rosenfeldt H. (2017). The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU, in: Mitsilegas V, Moreno-Lax V and Vavoula N (eds): *Securitising Asylum: Extraterritoriality and Human Rights Challenges* (Brill 2017, Forthcoming), p. 9.

to judicial enforcement. According to Article 78(3) of the TFEU, the EU institutions are allowed to adopt temporary measures that:

In the event of one or more Member States being confronted by an emergency characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

In case of sudden inflows, the EU must act effectively, where:

“(...) the concept of ‘provisional measures’ within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries”.¹⁹

Furthermore, judgments of the CJEU have an impact on the situation of asylum seekers, which also plays a part in accepting migrants in the Mediterranean countries. Since the Treaty of Lisbon references to the Court significantly increased. The CJEU gave many judgments considering refugees. According to the CJEU, an asylum seeker may not be transferred to a Member State where he risks being subject to inhuman treatment, an example of that is Greece. In 2011 the European Court of Human Rights in case of *M.S.S. v. Belgium and Greece* ruled against the transfer of asylum seekers to Greece and two years later the CJEU agreed that asylum seekers returned under the Dublin Regulation II to Greece are at “*real risk of being subjected to inhuman or degrading treatment*”.²⁰

Prevention and reduction of irregular migrants lies in the competences of the EU. The cooperation within migration and asylum policy has comprised a combination of two types of approach: the externalization of control tools, and prevention. There are two elements that the externalisation of migration control consists of. The first one is simply border control instruments which consist of “*measures to combat illegal migration, smuggling and trafficking, and capacity building of asylum systems and migration management in transit countries*”.²¹

¹⁹ Judgement of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, paragraph 77.

²⁰ Court of Justice of the European Union (2013, 14 November). *Judgment in Case C-4/11 Bundesrepublik Deutschland v Kaveh Puid*, PRESS RELEASE No 147/13, Luxembourg.

²¹ Boswell, ‘The external dimension’, pp. 620-621.

The second element consists of measures that facilitate the return of asylum seekers and other irregular migrants to third countries. It includes agreements between the EU and third countries. In contrast, the second approach is prevention and focuses on the roots of the migratory pressures. Its main objective is to prevent inflows through different instruments, for example, development and foreign policy assistance in third countries and the country of origin of refugees so they do not have to seek escape in Europe.²² This way the migrants would less likely seek asylum in Europe.

Nevertheless, as it is clearly apparent in the works and literature of many researchers on the EU, including **Virginie Guiraudon**, migration control is rather not associated with ‘multi-governance’, but ‘*remains an emblem of national sovereignty*’. The decisions about the access and stay of migrants on one country’s territory have commonly been a result of national legal systems. However, along with the internationalization of migration control, the policy in this field started developing and its implementation has shifted upwards into the EU.²³ The internal market project was a driving force of the deepening of the cooperation on migration and asylum. However, the Member States that pushed towards the internal market did not want to engage in the matter of migration.²⁴ Afterwards, the development of European integration resulted inter alia in an ‘area of freedom, security, and justice’ (AFSJ), where according to article 3(2) of Treaty on European Union (TEU):

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.²⁵

However, the Member States’ implementation of asylum and immigration policies differ within the Member States, and as it can be noticed on the example of the case with Hungary and Slovakia, the countries keep trying to find a way around implementing different decisions. Therefore, appears the question what is the real power of the EU in this matter? Weak monitoring and sanctioning measures remain due to the lack of support of some of the Member States. It is directly related to the migration history of the countries, while those less experienced ones like Italy, Spain, and Greece agree with EU arrangements, the other part of

²² Ibid., pp. 622-624

²³ Guiraudon, V. (2002). European Integration and Migration Policy: Vertical Policy-making as Venue Shopping. *JCMS: Journal of Common Market Studies*, (38)2, 251-271, p. 252.

²⁴ Ibid., p. 255.

²⁵ European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01.

countries oppose the strengthening of monitoring and sanctioning procedures.²⁶ It is also associated with the Member States' freedom of choice to respond to sensitive issues like asylum and migration. Therefore, in these areas the EU institutions did not receive any exclusive powers, so the members could maintain discretion on the national level.²⁷

2.2. Secondary law: EU's responses to migratory pressure

2.2.1. Migration crisis of 2015

The problem of sudden inflow of migrants built up in 2015, when the European migration crisis began. It was portrayed by the EU as '*the most severe refugee crisis since the Second World War*'.²⁸ There was a mass arrival of refugees and migrants, caused by violent conflicts in the countries of departure like Syria, Afghanistan, and Libya. According to Frontex, only in 2015, the number of irregular border crossings in the EU increased to 1.83 million, while in 2014 it was 283.500²⁹. The situation started getting serious back at the end of 2014. The responses to migratory pressures revealed the European migration system and border control weaknesses. The crisis tested "*the limits of the EU's commitment to human rights norms and its capacity to act as a political union of 28 countries capable of offering credible and common solutions*".³⁰ Many European states had different policies and responses to the issue. The problem intensified along with a highly increased number of migrants in countries like Italy and Greece. The political fight over who will take responsibility for arrivals began. Due to increasing migration issues, some of the Member States had reinstated border controls under the Schengen Borders Code. Referring to Article 25 of this Regulation, the temporary reintroduction of borders "*shall not exceed six months*", however, there are particular cases where the time can be extended to 2 years as referred in Article 29. Five Member States (Austria, Germany, Denmark, Sweden, and Norway) followed the Council's recommendations

²⁶ Scipioni, 'Failing forward', p. 1362.

²⁷ Monar, J. (2015). Setting the context: why EU institutions matter in justice and home affairs. In: TRAUNER, F. & RIPOLL SERVENT, A. (eds.) *Policy Change in the Area of Freedom, Security and Justice. How EU institutions matter*, London/New York: Routledge, p. 7.

²⁸ European Commission (2016, 10 February). *Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, Brussels.

²⁹ European Parliament (2016, March). *Hot spots and emergency relocation*, Briefing, p.1. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282016%29579070

³⁰ Barbulescu, R (2017). Still a Beacon of Human Rights? Considerations on the EU Response to the Refugee Crisis in the Mediterranean. *Mediterranean Politics*, 22(2), 301-308, p. 10.

based on the Commission's proposal and reinstated temporary internal border controls from September 2015 to May 2020.

The EU migratory issue can be characterised by two main migratory routes, the Central Mediterranean and the Eastern Mediterranean. The first one refers to the most-used route leading to the EU mostly from North Africa. The second route is situated between Turkey and Greece, where migrants from Syria cross Turkey to enter into Europe. In both cases, the leaders of the EU acted to solve the problem with different measures. On the example of the Central Mediterranean route, the EU acted through Malta Declaration from 2017 on search and rescue (SAR) and relocation, and the Joint press release of the United Nations, the African Union, and the European Union from the same year that also covers the subject of the assisted voluntary returns.

A situation like the migration crisis of 2015 has been called “a window of opportunity”, for it very often enables the Commission to use its power of initiative successfully.³¹ A perfect example of that is the introduction of European Border Guards. In 2005 the Commission's proposal for integrated management of borders had failed due to the lack of agreement between the Member States. The result was a less integrated agency Frontex, without European officials to protect the external borders. 10 years later, when the migration crisis hit Europe in 2015, the idea of the European Border and Coast Guards Agency has been reintroduced as a response to the crisis.³² This time it was a success as it was the right solution to tackle the problem of irregular immigration and a tool of counter-terrorism.³³ Due to the absence of unilateral solutions in the Member States to respond to the emergency, the Members agreed upon these common actions.

Besides agencies, the actions taken by the EU involve different NGOs that help saving many lives at the sea every day. Unfortunately, the conflicts in the countries that migrants come from are still escalating. Since 2015, the number of migrants significantly decreased from over one million to 125 500 in 2019 (UNHCR).³⁴ Nevertheless, the situation is not stable and the same year the European Commission announced in September that illegal arrivals from Turkey

³¹ Zaun, N. (2017). *The European Commission in Justice and Home Affairs. Pushing hard to be a motor of integration*. In: Trauner, F. & Ripoll Servent, A. (eds.) *The Routledge Handbook of Justice and Home Affairs Research*, London/New York: Routledge, p. 4.

³² Ibid., p. 5

³³ Ibid., p. 5

³⁴ UNCHR (2020, 31 January). *Mediterranean Situation*. Available from : <https://data2.unhcr.org/en/situations/mediterranean>

to Greece and Bulgaria increased. The issue is directly connected with an agreement between the EU and Turkey, which is scrutinised further in this chapter.³⁵

The EU implemented a series of measures in order to tackle migratory pressure and to prevent further loss of lives at the sea. However, the strengthening of borders' control only resulted in decreasing irregular arrivals from these specific routes and increased the use of alternative, more dangerous routes. The problem remains and some of the EU Member States, particularly Greece and Italy struggle to manage the numbers of migrants arriving in their harbours. Until today, they are unable to process and accommodate any more asylum seekers. The EU introduced common standards and enhanced cooperation within an area of asylum policy and one of the tools to protect refugees is the Dublin Regulation III (replacing the two previous versions), which is a part of the harmonised policies. However, there is a problem of an apparent divergence in response to these policies within the EU countries.³⁶ Member States refuse to accept migrants and dismiss refugees applications for asylum. The European Union is trying to find solutions to these problems by transforming its policies. There are new policies aimed at countries that do not accept refugees. Moreover, EU Member States cannot agree on the operation Sophia analysed in one of the next subchapters. It has been created to respond to migration issues in the Mediterranean Sea, however, the coastal states in particular Italy do not agree with the rules on disembarkation. More rescue missions lead to a rising number of arrivals of migrants in the Italian ports. Therefore, the Italian government demanded to limit actions of the operation Sophia to air patrols, where naval assets remain suspended. As a result, the future of immigration aid is becoming even more complex within the EU.

Since the tragic events of 2015 in the Mediterranean, the European Union has limited arrivals by 90% to Europe with newly implemented measures that strengthen the control of external borders. At the beginning of the crisis, the heads of states and governments during a special meeting agreed that the main objectives are to prevent people from dying in the sea and focus on the origins of this problem. At the special meeting of the European Council on 23 April 2015, the parties issued a statement with four main areas of focus: strengthening presence

³⁵ Gotev, G. (2019, 24 September). *Commission 'aware' of increase of migrants to Greece, Bulgaria*. Euractiv. Available at: <https://www.euractiv.com/section/justice-home-affairs/news/commission-aware-of-increase-of-migrants-to-greece-bulgaria/>

³⁶ Brekke, JP. & Brochmann G. (2014). Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation, *Journal of Refugee Studies*, 28(2), 145–162, p. 146.

at sea; fighting traffickers following international law; preventing illegal migration flows; and reinforcing internal solidarity and responsibility.³⁷

EU High Representative for Foreign Affairs and Security Policy Federica Mogherini stated on 22 June 2015 that "EU has never taken the issue of migration as seriously as we are doing now".³⁸ The EU has taken prominent steps after a boat with 800 people on board sank near the Libyan coast in April 2015. A couple of weeks later the European Commission was ready with its proposal of the European Agenda on Migration (COM(2015) 240). It took six summits and several meetings for the EU institutions and the Member States to agree upon new measures.³⁹ The Agenda covered: improvement of SAR in the Mediterranean and the Aegean; military intervention against illegal migration; resettlement and relocation scheme; creation of a list of safe countries to ameliorate the process to return failed asylum application and undocumented migrants; as well strengthen cooperation with third countries. Furthermore, these measures covered inter alia: reinforcement of the civilian mission EUCAP Sahel Niger that is part of the European External Action Service to address irregular migration; EUNAVFOR Med (operation Sophia); Valletta Joint Plan; a regulation to improve the functioning of the European network of immigration liaison officers; as well extra financial help to address migration issues. One of the EU's main objective was and still is to tackle the origin of the problem, hence, instruments like the Regulation of the European Parliament and the Council on the creation of a European network of immigration liaison officers. The European Migration Liaison Officers are sent to meet with heads and governments of third countries to enhance the cooperation on migration-related issues and support development in these countries. However, some of these responses have revealed numerous shortcomings and sparked off criticism, which is analysed in a subsequent subsection of this work.

As **Marco Scipioni** explained in his work, after the migration crisis of 2015, the EU is 'failing forward' in migration policy. This expression refers to the failure in the context of adapting new migration policies. It is a process of studying and improving new policies and taken measures. During this process, the EU and its Member States learn from their mistakes to turn a failure into benefit and adopt better measures in the future. However, the opinion regarding the failure of migration policies within the EU diverge among scholars. Scipioni's

³⁷ European Council (2015, 23 April), *Special meeting of the European Council*, Press release. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/>.

³⁸ Council of the EU (2015, 22 June). *Council launches EU naval operation to disrupt human smugglers and traffickers in the Mediterranean*. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2015/06/22/fac-naval-operation/>

³⁹ Barbulescu, 'Still a Beacon', p. 3.

view differs when assessing the failure of the EU migration policy. According to **Peter Slominski** and **Florian Trauner**, there is no learning factor in the process of applying new rules and policies within the area of irregular migration. During the migration crisis, “*Member States have used the opportunities and avoided the constraints of the EU’s multilevel governance architecture to return unwanted migrants*’, calling it “*the Strategic (non)use of ‘Europe’*”.⁴⁰ At first, it seems that migrants were welcomed in Europe, however as soon as the problem of migration grew to the point to consider it as a crisis, the states changed their attitudes and decreased the number of migrants, returning them to their home states. Furthermore, as many argue the Dublin Regulation, presented as the backbone of the Common European Asylum System (CEAS) was ‘*a failure of solidarity and burden-sharing among EU Member States*’⁴¹, in light of the migration crisis. According to **Kelly Greenhill**, there was not only a lack of solidarity but the absence of humanitarian and political collective response as well, which revealed the problem of limitations of border controls and migration systems.⁴²

According to professors of migration law, **Den Heijer**, **Rijpma**, and **Spijkerboer**, the failure of asylum policy contributes to the migration issue. Firstly, as it was mentioned above in this work, the EU rules on asylum do not comprise a set of fully harmonized standards.⁴³ Prohibitive measures applied by the EU to prevent the arrival of asylum seekers equalled leading to more uncontrolled migration. The situation has become only more complicated for countries like Italy and Greece already overwhelmed with the number of arriving migrants. As a result, some countries refuse to accept ships with migrants on the board in their ports, as they deny accepting more asylum applications.

2.2.2. EU return policy

In order to tackle the problem of irregular migration, the EU institutions adopted different measures in the form of secondary law. Effective and humanitarian return policy is an important part of the EU migration policy. According to the data of the European Commission, every year

⁴⁰ Slominski, P. & Trauner, F. (2017). How do Member States Return Unwanted Migrants? The Strategic (non-)use of ‘Europe’ during the Migration Crisis, *JCMS: Journal of Common Market Studies*, 56(1), 101-118 p. 101.

⁴¹ Fratzke, S. (2015, March). *Not adding up: the fading promise of Europe’s Dublin system*, Migration Policy Institute Report, p. 1. Available at: <https://www.kgreenhill.com/users/kgreenhill/Downloads/MPIe-Asylum-DublinReg.pdf>.

⁴² Greenhill, K. M. (2016). Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis, *European Law Journal*, (22)3, 317-332, p. 318.

⁴³ Den Heijer, M., Rijpma, J.J., & Spijkerboer, T. (2016). Coercion, prohibition and great expectations: The Continuing Failure of the Common European Asylum System, *Common Market Law Review*, 53(2016), 607-642, p. 2.

between 400,000 and 500,000 foreign citizens are ordered to leave the territory of the EU as a result of irregular residing. Only 40% of them return to their home countries and states that they travelled from. To ensure credibility in a field of international protection and legal migration the instruments regarding return policy must be applied.⁴⁴ The EU set up common rules for managing the return of irregular migrants of third-countries in the “Return Directive”. *“The measure presupposes that the 28 EU Member States agree on a common list of countries considered ‘safe’, to which failed asylum seekers can be returned”*.⁴⁵ Migrants arriving from Syria, Eritrea, Afghanistan, and Iraq are more likely to succeed in their asylum application. The nationals of other countries are very often qualified as failed asylum seekers and undocumented migrants.

On 12 September 2018, the European Commission published a proposal to modify the Return Directive to make it more efficient and increase the overall rate of returns. However, after an assessment of the European Parliament, it was concluded that there was no clear evidence that the updated directive would lead to more returns. Moreover, some of the provisions of the Commission’s proposal *“would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights, as safeguarded under international and EU law, in particular the EU Charter of Fundamental Rights.”*⁴⁶ The rights and principles likely to be affected by the proposal are inter alia the right to asylum and the principle of non-refoulement. Article 7(1)(d) of the proposal requests from asylum seekers *“to lodge to the competent authorities of third countries a request for obtaining a valid travel document”*. This request stands against an asylum applicant’s right to confidentiality. Additionally, it would also result in economic implications by producing significant costs for the Member States. The problem migratory pressures that the EU countries struggle with do not make this situation any easier. The EU wants to assure that all the Member States transpose the Return Directive into their national legislation to accelerate the return procedure.⁴⁷ However, Member States’ implementation practices vary within the EU and the scale of successful returns

⁴⁴ European Commission, *Return & Readmission*, Migration and Home Affairs. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en

⁴⁵ Barbulescu, ‘Still a Beacon’, p. 4.

⁴⁶ European Parliament (2019, February). *The proposed Return Directive*, European Parliamentary Research Service, p. 12. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2019\)631727](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2019)631727)

⁴⁷ Barbulescu, ‘Still a Beacon’, p. 4.

is below expectations.⁴⁸ Thus, in 2015 the Commission proposed a list of safe countries of origin to speed up returns, which was suspended by the Council 2 years later.

*“The combination of low harmonization, weak monitoring, low solidarity and lack of strong institutions in EU migration policy became increasingly unsustainable during the 2015 crisis”.*⁴⁹ Lack of strong institutions rather refers to asylum policy, where due to the absence of an internal border once crossing a border of any Member State, migrants can move forward to the rest of the Schengen area. Therefore, as it will be analysed afterwards, well secured external borders became an important part of EU policies to tackle the problem of irregular arrivals to Europe.

2.2.2. Valletta Joint Action Plan

The EU emphasizes cooperation not only within the region but with third countries as well. Most often this kind of cooperation concentrates on development, however, in the case of the migration crisis, it also addresses common challenges related to migratory pressure. Following the unexpected high inflow of migrants from Syria and the consequent high number of asylum seekers, the EU decided to convene a special summit on migration and mobility in Malta with African countries of transit and origin in November 2015. The Valletta Action Plan is a result of this summit and a part of the Africa-EU Partnership, where the states unite in the name of the core principles of solidarity, partnership, and shared responsibility. The dialogue takes place between the EU, the African Union, and African countries involved in the migration crisis. All countries agreed upon the Action Plan that was built around five priority areas that were *“implemented in full coherence with countries’ sovereignty, national legislations and taking into account national specificities”*.⁵⁰ The tools used to monitor the implementation of these priorities are mechanisms of the Rabat Process, the Khartoum Process, and of the Joint EU-Africa Strategy. All three mechanisms focus on strengthening Africa-EU cooperation and the first two essentially concentrate on migration and mobility and the Joint EU-Africa Strategy is an instrument for strengthened political dialogue and cooperation in different areas.⁵¹

⁴⁸ European Parliament, ‘The proposed’

⁴⁹ Scipioni, ‘Failing forward’, p. 1365.

⁵⁰ Council of the EU (2015, 11-12 November). *Valletta summit on migration – action plan*, Press release. Available at: <https://www.consilium.europa.eu/pl/press/press-releases/2015/11/12/valletta-final-docs/>

⁵¹ European Commission (2019, 15 July). *A Joint Africa-EU Strategy*, Knowledge for policy. Available at: https://ec.europa.eu/knowledge4policy/publication/joint-africa-eu-strategy_en

Moreover, there are five priority domains which include: addressing the root causes of irregular migration, the prevention of migrant smuggling, and the protection of refugees and other displaced people, that focus on 16 priority initiatives.⁵²

The objective of this summit was to strengthen the cooperation between Sub-Saharan countries, Southern Mediterranean countries, and European ones. It concerns not only migrant-related topics but also economic relations that involve a matter of development in the countries of transit⁵³ that in return would support the EU during the crisis. Thanks to intensified cooperation better joint efforts were possible to apply. African leaders agreed for readmission of migrants and committed to “*address the root causes of undocumented migration and displacement, protect the rights of migrants and asylum seekers, prevent and combat smugglers and improve return*”.⁵⁴ To make it possible, the EU committed EUR 1.8 billion from the Emergency Trust Fund for Africa.

A good example of cooperation with African countries is the AU-EU-UN Task Force that engage in saving and protecting lives along the migratory routes and in Libya. Its main focus is to assist voluntary returns to countries of origin. Despite all the efforts, the situation of migrants and refugees in Libya is challenging. The Task Force does everything in its power to save people in danger and calls for respect for human rights. Supported by the International Organisation for Migration (IOM) and UNCHR since 2017, when the task force was established 48,000 migrants were returned and 4,000 refugees evacuated, however, there are still many that are at risk and need help.⁵⁵

2.2.3. EU-Turkey temporary agreement

The EU was not able to manage all challenges associated with irregular migrant inflows, hence, it turned for support to Turkey. Firstly, the EU decided to re-open accession negotiations with Turkey in return for an agreement that would allow returning asylum seekers from Greece to Turkey. Moreover, the EU Members agreed to accelerate visa liberalisation for Turkish citizens.⁵⁶ Thus, this step to overcome the problem of irregular migration is considered rather

⁵² Council of the EU, ‘Valletta’.

⁵³ Ibid.

⁵⁴ Barbulescu, ‘Still a Beacon’, p. 9.

⁵⁵ IOM (2019, 25 September). *Joint Press Release: Meeting of the Joint AU-EU-UN Taskforce to Address the Migrant and Refugee Situation in Libya*. Available at: <https://au.int/en/pressreleases/20190704/statement-au-eu-un-taskforce-libya-shelling-tajoura-detention-centre>

⁵⁶ Barbulescu, ‘Still a Beacon’, p. 3.

controversial. Since November 2015, the EU started a series of meetings with Turkey concerning the migration crisis and deepening EU-Turkey relations.⁵⁷ Both parties engaged in a Joint Action Plan in order to stop the inflow of irregular migration via Turkey. According to EU-Turkey statement:

the joint action plan aimed to respond to the crisis situation in Syria in three ways, namely by (i) addressing the root causes leading to a mass exodus of Syrians, (ii) providing support to Syrians enjoying temporary international protection and to their host communities in Turkey, and (iii) strengthening cooperation in terms of preventing illegal migration flows towards the European Union.⁵⁸

During the meeting between EU heads of state or government and Turkey on 29 November 2015, the Leaders of the EU committed to: a) a structured and more frequent high-level dialogue, as well as an opening of new negotiation chapters; b) accelerate the fulfilment of the Visa Roadmap benchmarks for visa liberalisation by October 2016; and finally c) provide €3 billion to improve the situation of Syrians in Turkey.⁵⁹ The Roadmap introduced targets for Turkey to be complied with in order to lift the visa requirements for Turkish citizens.⁶⁰

The dialogue between EU leaders and Turkey continued in March 2016, where both parties met to discuss the implementation of the Joint Action Plan. Despite making a concerted effort, the scale of illegal crossing of the EU borders remained high. Lastly, after intense dialogue Member States of the EU and Turkey reached an agreement on 18 March 2016.⁶¹ *'Turkey agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters'*.⁶² According to the accord, for every Syrian sent back from Greek islands to Turkey, another Syrian will be resettled to the EU. Moreover, once irregular crossings between Turkey

⁵⁷ Corrao, I. (2019, July). *Legislative Train Towards a new policy on migration*, European Parliament. Available at: <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>

⁵⁸ Judgement of 12 September 2018, *NF*, Joined Cases C 208/17 P to C 210/17 P, ECLI:EU:C:2018:705, Paragraph 2.

⁵⁹ Council of the EU (2015, 29 November), *Meeting of heads of state or government with Turkey – EU-Turkey statement*, Press Release. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/>

⁶⁰ European Commission (2016, 4 May), *Turkey's progress on the visa liberalisation roadmap*. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/turkey_progress_visa_liberalisation_roadmap_en.pdf

⁶¹ Corrao, 'Legislative Train'.

⁶² Council of the EU (2016, 18 March). *EU-Turkey statement*, Press release 144/16. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated.⁶³ *The objective of the VHAS is to create a system of solidarity and burden-sharing with Turkey for the protection of persons forcefully displaced to Turkey as a result of the conflict in Syria.*⁶⁴

The EU-Turkey agreement aimed to prevent illegal and life-threatening migration to the EU, by replacing it with safer and legal pathways.⁶⁵ Nevertheless, the nature of this agreement is questionable. The so-called ‘EU-Turkey statement’ is just an accord between both parties that does not result in legally binding obligations. Moreover, it is worth noting that, as mentioned above, the agreement is between the EU Leaders and Turkey, not the European Union itself. In April 2016 three asylum seekers challenged the legality of the EU-Turkey statement. On 28 February 2017 in a form of three separate cases, the General Court dismissed the action brought by the asylum seekers “*on the ground of the Court’s lack of jurisdiction to hear and determine it*”.⁶⁶ Furthermore, the orders by the General Court have been appealed before the European Court of Justice in September 2018, where plaintiffs seek the annulment of the orders of the General Court of the European Union of 28 February 2017. The ruling on this agreement was vital as there was a need for clarification of the nature of this statement. The ECJ stated that the agreement is not covered by EU law, nor it is an intergovernmental agreement, therefore the European Parliament does not have any control over this arrangement.⁶⁷ It is just a press release so Turkey cannot be obliged to keep the agreement. Furthermore, although it concerns migrants, it does not make mention of any human rights dimension, hence, we could argue this statement is not an agreement that aims at sustaining the best interest of the people it is concerning. The deal that the EU Leaders came up with brings many concerns regarding the humanitarian treatment of people being returned to Turkey.

Many cases have been brought to the ECJ after three asylum seekers (NF, NG and NM v European Council) located in Greece sought the annulment of the EU-Turkey statement based on infringement of the principle of non-refoulement and the prohibition of collective expulsion,

⁶³ CORRAO, ‘Legislative train’.

⁶⁴ Council of the European Union (2017, 5 December), Voluntary Humanitarian Admission Scheme with Turkey – Endorsement. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6330

⁶⁵ European Commission (2016, 8 December). *Implementing the EU-Turkey Statement – Questions and Answers*, Fact Sheet. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_4321

⁶⁶ General Court of the European Union (2017, 28 February). *The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis*, PRESS RELEASE No 19/17. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>

⁶⁷ Order of the General Court of 28 February 2017, T-193/16, ECLI:EU:T:2017:129, paragraph 30.

as well as a failure to comply with EU procedure to negotiate and adopt an agreement.⁶⁸ The principle of non-refoulement is one of the cornerstone rules of international law concerning asylum and refugees. It refers to the situation, where a person's rights including the rights to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and liberty and security are threatened by returning this individual to a country that does not respect these rights.⁶⁹ According to Article 14 paragraph 1 of the Universal Declaration of Human Rights: *Everyone has the right to seek and to enjoy in other countries asylum from persecution.* Although the Declaration is not legally binding the principles and freedoms that it covers can be found in many international conventions and national legal systems. By the definition of a collective expulsion implicit in several court judgments, it is “any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”.⁷⁰ The actions brought by the asylum seekers were denied as the General Court declared a lack of jurisdiction over this matter as this measure was not adopted by one of the EU institutions.⁷¹

The EU-Turkey statement is not the only accord agreed in this way, there are many more of this kind of agreement between the EU and third countries. They are not treaties or common declarations, an example of this is an agreement with Mali on Peace and Reconciliation, which is not legally binding and takes more a form of a soft declaration.⁷² Nevertheless, the EU-Turkey Statement has become an important element of the EU's comprehensive approach to migration. Since the EU-Turkey statement, the number of migrants arriving in the Greek islands significantly dropped. The amount of 6,360 migrants daily in October 2015 decreased to 83 on 21 March 2016.⁷³ However, the situation is changing now as we experience an increase in arrivals. According to the Commission's progress report, returns of illegal migrants continue,

⁶⁸ Carrera, S., Den Hertog, L., & Stefan, M. (2017). It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal. *CEPS*, No 2017-15, p. 4.

⁶⁹ UN High Commissioner for Refugees (1997, November). *UNHCR Note on the Principle of Non-Refoulement*. Available at: <https://www.refworld.org/docid/438c6d972.html>

⁷⁰ European Court of Human Rights (2019, August). *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, p. 5.

⁷¹ General Court of the European Union, 'The General Court declares'.

⁷² EEAS (2016, 15 April). *Mali-EU Joint Communiqué on the High-Level Dialogue on Migration, as part of the follow-up to the Valletta Summit*, Press Team. Available at: https://eeas.europa.eu/generic-warning-system-taxonomy/404_en/2878/Mali-EU%20Joint%20Communiqué%20on%20the%20High-Level%20Dialogue%20on%20Migration,%20as%20part%20of%20the%20follow-up%20to%20the%20Valletta%20Summit

⁷³ European Commission (2019, March). *EU-Turkey Statement Three years on*. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190318_eu-turkey-three-years-on_en.pdf

and in fact, since October 2019 arrivals to Greek islands radically increased. At the end of February 2020 Turkish President decided to re-open its borders for refugees.⁷⁴ Due to the EU sanctioning Turkey's gas drilling operations in Cypriot waters, the Turkish government decided to suspend the deal with the EU on migrant readmission.⁷⁵ As the nature of the EU-Turkey agreement does not legally bind its parties the action of the Turkish President did not have any legal consequences. For the moment there is no possibility for a new agreement with Turkey and all plans for a new deal presented by the EU were dismissed by Ankara.

3. Actors of the (non-)rescue of migrants in the Mediterranean

This chapter concentrates on the role of different actors in the (non-)rescue of migrants in the Mediterranean. In order to understand the role of the EU and the reason why there are cases of non-rescue at sea one has to understand the attribution of responsibilities of certain actors. Besides, there are also other factors to be pointed out that reduce the effectiveness of rescue missions at sea.

The first subsection analyses the allocation of competences between the EU and the Member States. It emphasises the importance of an application of human rights while performing rescue operations. Moreover, this part includes a few answers to important questions provided by a Frontex Press Office regarding the functioning of Frontex. Then, the second subsection focuses on international agencies and NGOs that participate in search and rescue operations in the Mediterranean. In this part, there are presented several obstacles that some of these actors come across.

3.1. Allocation of competences: the EU and the Member States

Human rights enshrined in the EU Charter of Fundamental Rights (2009) take a significant position in the EU legal order. All of the EU members are part of the Council of Europe, which means they signed the European Convention on Human Rights. Moreover, the EU itself for several years has been trying to accede to the Convention. There are also numerous

⁷⁴ Euractiv.com with AFP (2020, 11 March). *Erdogan vows to keep border open, compares Greece's response to the Nazis*. Available at: <https://www.euractiv.com/section/justice-home-affairs/news/erdogan-vows-to-keep-border-open-compares-greeces-response-to-the-nazi/>

⁷⁵ Eck, D. (2019, 24 July). *Turkey suspends deal with the EU on migrant readmission*, Euractiv. Available at: <https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/>

international treaties that EU members are part of, including the UN Convention on the Status of Refugees from 1951 and the UN Conventions on the Rights of the Child (1989). Therefore, in its actions regarding migrants and asylum seekers, the EU proposes solutions that ensure human rights.⁷⁶ Even though human rights were already recognised as general principles of EU law in 1969⁷⁷ there is a visible change in the EU's action in the area of irregular and illegal migration. Initially, along with Schengen and Frontex, the EU focused on pure securitization of borders with respect to unauthorised and illegal immigration. Over the years, the EU started perceiving migrants as victims and smugglers as a cause of death and abuse at sea. The role of the EU has changed and new measures not only applied to combating illegal migration at sea but included saving the lives of migrants.⁷⁸ However, as in the case of the other measures within the asylum and migration area, the amendments regarding saving lives were not transferred equally within all the Member States. Despite all efforts, the border control remains an ultimate goal, where irregular migration by some Member States is recognized as a danger to national security.

3.1.1. EU institutions

Saving of lives at sea engages actions in accordance with fundamental rights. Moreover, there is the law of the sea that must be complied with as well. The EU's instruments regarding asylum and SAR activities have a limited role and do not apply to the Mediterranean. EU instruments like the European Asylum System (CEAS) apply only to sovereign territories and not international waters. The CEAS comprises several legislative measures within the asylum policy that aim to harmonise common minimum standards.⁷⁹ *“Non-rescue episodes and refoulement incidents are mostly due to disagreement on the extent of legal responsibilities accruing in the maritime context”*.⁸⁰

Following the shipwreck in April 2015 in front of the Libyan coast, the EU improved its presence at sea and led search and rescue (SAR) in the Mediterranean and the Aegean Sea. The migration crisis of 2015 had a significant impact on the development of practices of rescue

⁷⁶ Barbulescu, 'Still a Beacon', p. 2.

⁷⁷ Kosińska, A. M. (2019). *Cultural Rights of Third-Country Nationals in EU Law*. Palgrave, Macmillan, p. 38.

⁷⁸ Moreno-Lax, V. (2017). The EU humanitarian border and the securitization of human rights: the 'rescue-though-interdiction/rescue-without-protection' paradigm. *JCMS: Journal of Common Market Studies*, 56(1), 119-140, p. 119.

⁷⁹ European Commission, *Common European Asylum System*, Migration and Home Affairs. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en

⁸⁰ Moreno-Lax, 'The EU humanitarian', p. 121.

and assistance. Both state and non-state actors had to face new challenges and respond to them. The SAR looms large in the current practices at sea concerning humanitarianism.⁸¹ Mainly the EU sea interventions began along with the establishment of Frontex, the agency that is analysed in depth later in this work. However, the role of the EU is limited within the area of border policing. The part of the EU's competences in this field is conducted through an external border surveillance system (EUROSUR) and (biometric) identification and cataloguing by the European Dactyloscopy (EURODAC) database.⁸²

Regarding the EU's engagement in SAR activities, there are different instruments that are applied. The main ones are further elaborated in the following subsections.

3.1.1.1. Frontex: joint-operations at sea

Since the crisis of 2015, the EU circumscribed the role of member states, giving more power to agencies like the European Asylum Support Office (EASO) and European Border and Coast Guard Agency (Frontex). Frontex is considered to be a winner of the Europeanisation of migration policy, with regards to the new strengthened mandate. However, it does not mean that the agencies are independent of the countries, as their nature is purely intergovernmental. Therefore, their monitoring role is in a way limited, as decision-making remains in the states' hands. The countries may deny some actions, which could be crucial for policy responses in times of emergency.⁸³ This shows that some structural weaknesses in this field remain, even after introducing these new agencies.⁸⁴ Moreover, there are two main issues regarding agencies like Frontex and EAOS. Firstly, they lack accountability, which means they cannot be responsible for eventual abuses. Frontex and its personnel have a coordinating role and lack executive powers. Therefore, fundamental rights responsibilities lie with the Member States.⁸⁵ Secondly, there is no way to bring a complaint mechanism against them. The legal responsibility of the agency rests within the Member States, where Frontex is considered, to a

⁸¹ Pallister-Wilkins, P. (2017). Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders. *Global Policy*, 8(S1), 19-24, p. 19.

⁸² Pallister-Wilkins, 'Humanitarian rescue', p. 20.

⁸³ Scipioni, 'Failing', p. 1367.

⁸⁴ Carrera, S. and den Hertog, L., *A European border and coast guard: what's in a name?*, CEPS Paper in Liberty and Security in Europe, No. 88 (Brussels), p. 12.

⁸⁵ Fink, M. (2020, 30 April). Frontex: Human Rights Responsibility and Access to Justice, *EU Immigration and Asylum Law and Policy*. Available at: <http://eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/>

certain extent, as a facilitator/coordinator of the Member States' cooperation. However, it does not have any executive powers of its own.

The new mandate of Frontex changed the functioning of this agency. Previously concentrated entirely on protecting the external borders, Frontex was given the competence to participate in SAR. At the same time, the European Council decided to “*direct more resources to FRONTEX to expand EU-led search and rescue missions at sea*” in order to tackle the problem of irregular migration.⁸⁶ Frontex is engaged in actions at external borders, according to Article 13 of the Schengen Borders Code, national coastguards are responsible for border surveillance.

Formerly this European agency was established as the Management of Operational Cooperation at the External Borders of the Member States of the European Union by Council Regulation 2007/2004. Then it has been amended two times and finally repealed twice in response to the crisis of 2015. For the first time, the regulation was repealed by the new proposed regulation, where it was agreed between the Council and Parliament that the European border and coast guard would consist of a European agency, and the tasks of Frontex were expanded. Moreover, from now on, national authorities of the Schengen countries were responsible for border management.⁸⁷ The proposal was finally approved on 14 September 2015 and the European Border and Coast Guard Agency was launched on 6 October the same year. The main objective was that the agency would patrol the external borders and cooperate with the member states by providing necessary information that could prevent potential threats and challenges on the EU's external borders.

Since the crisis of 2015 Frontex became an integral part of the EU's policy not only concerning securitization of borders but as well support for the coastal countries most affected by the irregular migration, and prevention of life loss at sea. Frontex is active across the region of the Mediterranean to assist those who survived the sea route to get to Europe. They provide migrants with clothes, food, and information.⁸⁸ Frontex additional competences in this area make this agency liable to save lives and mark Frontex out as one of the main actors of search and rescue at sea.⁸⁹ Moreover, Frontex also participates in return of migrants operations, where

⁸⁶ Barbulescu, 'Still a Beacon', p. 3.

⁸⁷ European Council, Council of the EU, 'Timeline'.

⁸⁸ Perkowski N. (2016). Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean 'Migration Crisis'. *Mediterranean Politics*, 21(2), 1-5, p. 2.

⁸⁹ Aas, F. K., & Gundhus, H. O. I. (2014). Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life. *The British Journal of Criminology*, 55(1), 1-18, p. 3.

it can organize both voluntary and forced returns, coordinated by Member State's, as well as from its own initiative. This competence was given to Frontex with a revised Regulation 2019/1896 that strengthen its mandate, increased equipment, and a number of staff to 10 000 by 2020. It is worth knowing that “*Frontex does not have its own equipment but it relies on and finances the vessels and aircraft as well as border guards provided by the various EU Member States* ”.⁹⁰

Frontex has the capacity to launch the joint-operation and pilot projects after a prior request of the Member States or on its own initiative through the agency's Executive Director. Frontex missions are part of the Justice and Home Affairs policy and established by qualified majority (QMV), which means there is no need for unanimity to agree to launch any mission. Every Member State facing challenges at its external border can request the launching of joint operation. In this case, Frontex's officers act under the instructions of the host Member States. In general, it is the Council and the European Council that is responsible for adopting common strategies in response to challenges that impact all the EU.⁹¹ Currently, the EU has four operations active in the Mediterranean to save migrants in distress. Since the beginning of the crisis, the EU contributed to saving over 528 653 people through the operations at sea.⁹² Moreover, in 2016 the EU established the European migrants smuggling centre to support the Member States in the fight against illegal migration. The four active operations are: operation Themis (formerly Triton) in the Central Mediterranean; operation Poseidon in the Eastern Mediterranean; Operation Indalo in the Western Mediterranean; and a mission in Niger to support local authorities.

As a response to the refugee crisis two JOs were launched: Poseidon and Triton. The latter one was a result of a merger of two previous missions Hermes and Aeneas in November 2014.⁹³ The Triton mission replaced Italian Mare Nostrum in the central Mediterranean. *This operation brings together border guard authorities and assets from 25 Member States and it is hosted by Italy.*⁹⁴ Initially, Triton's scope was limited, however, due to the high number of lives loss in the sea the joint operation was amended, and its operational area expanded until the south of Sicily. The number of additional experts, vessels, and aircraft increased together with an added

⁹⁰ European Commission, *How does Frontex Joint Operation Triton support search and rescue operations?* Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/frontex_triton_factsheet_en.pdf

⁹¹ Monar, p. 6.

⁹² Council of the European Union (2020, 27 April), *Saving lives at sea and targeting criminal networks*. Available at: <https://www.consilium.europa.eu/en/policies/migratory-pressures/sea-criminal-networks/>

⁹³ Carrera and Den Hertog, 'A European', p. 5.

⁹⁴ European Commission, 'How does Frontex'.

budget for Frontex.⁹⁵ In 2018 Triton was replaced with operation Themis which is more law-directed, however, it still includes a major search and rescue component. Its operational area covers the waters of Algeria, Tunisia, Libya, Egypt, Turkey, and Albania.⁹⁶ *All assets deployed within the framework of Operation Themis operate under the command of the Italian Ministry of Interior.*

The second mission of Frontex, the Poseidon Joint Operation covered the Eastern Mediterranean route, the Greek sea borders with Turkey, and Greek islands. Its actions are the same as in the case of other joint operations concerning migration issues include inter alia search and rescue, identification of people smugglers, registration, and identification.⁹⁷ The agency launched Poseidon Rapid Intervention on 28 December, which replaced Poseidon JO as a response to a request from Greece that was overwhelmed with an extraordinary number of migrants arriving to its islands.⁹⁸ Rapid border intervention or joint operation can be also recommended to a Member State by the agency's Executive Director after a review of a situation.

The most astonishing development was receiving a competence to join search and rescue at sea (SAR) since Frontex had no such competence for SAR. This growth in scope at some point enabled Frontex for SAR further south until Libyan territorial waters. Frontex provides support for EU Members and non-EU countries in Search and Rescue operations in accordance with EU and international law. *"It is important to stress that all SAR operations are coordinated by the National Maritime Rescue Coordination Centres (MRCC)".* These vessels that are closest to the place of an incident or are the most specialised to provide help are ordered by the MRCC to take action. This includes operations conducted by Frontex. As the interviewed employee of Frontex Press Office in response to a questionnaire sent to Frontex stated that:

International law obliges all captains of vessels to provide assistance to any persons found in distress at sea. Search and Rescue (SAR) is always a priority for all those operating at sea. It is also a specific objective of the operational plan of every Frontex

⁹⁵ Frontex (2015, 26 May). *Frontex expands its joint operation Triton*, Press Release. Available at: <https://frontex.europa.eu/media-centre/news-release/frontex-expands-its-joint-operation-triton-udpbHP>

⁹⁶ Frontex, Operation Themis (Italy). Available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy-/>

⁹⁷ Frontex, Operation Poseidon (Greece). Available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece-/>

⁹⁸ Frontex (2015, 17 December). Frontex and Greece agree on operational plan for Poseidon Rapid Intervention, News Release. Available at: <https://frontex.europa.eu/media-centre/news-release/frontex-and-greece-agree-on-operational-plan-for-poseidon-rapid-intervention-yiSxga>

joint maritime operation. For this reason, vessels deployed by Frontex to a specific operational area (at present Italy and Greece) are always ready to provide support to the national authorities in SAR operations, if requested by the National Maritime Rescue Coordination Centres (MRCC) – which are responsible for the coordination of all SAR operations in their country.

Even during regular border policing Frontex is obliged to carry SAR requested by the responsible authority.

While during standard border control operations Frontex – deployed vessels operate under the command of the International Coordination Centre (ICC), when contacted by MRCC and redirected for a SAR operation, vessels deployed by Frontex follow instructions of the MRCC.

When Frontex conducts SAR, it is requested to follow further procedures.

Once Frontex assets reach people in distress, they first provide immediate medical assistance, give them food and water, and bring them to the port of safety. Once the rescue operation is completed, the migrants are disembarked and handed over to the national authorities for identification and registration. In Italy and Greece, Frontex officers also assist in registration and identification of the large numbers of arrivals.

In 2018 vessels and aircraft deployed by Frontex helped to save lives of 37 000 people in the Mediterranean Sea.⁹⁹ Overall Frontex missions saved over 150,000 migrants. However, these missions have either ended or been significantly cut back in scope (like it happened in case of the operation Sophia). Therefore, the UN agencies, who are concerned with the ongoing issue with migrants from Libya and Syria that are still seeking help, are trying to appeal to European countries to renew their actions.¹⁰⁰

“Frontex’ coordination role has been fiercely contested”¹⁰¹, as its practices are perceived to be against respecting of human rights. At the same time, Frontex is seen as a contributor to better conditions in detention centres and enhanced policing standards at the external borders.¹⁰²
“Human rights principles per se provide no firm base for police practice and can be subject to

⁹⁹ Frontex, Frontex Operations. Available at : <https://frontex.europa.eu/faq/frontex-operations/>

¹⁰⁰ DW (2019, 12 July). *Restart Mediterranean migrant rescue missions, UN bodies tell Europe*, News. Available at : <https://www.dw.com/en/restart-mediterranean-migrant-rescue-missions-un-bodies-tell-europe/a-49561837>

¹⁰¹ Aas, F. K., & Gundhus, p. 3.

¹⁰² Ibid., p. 5.

considerable flexibility of interpretation and enacting".¹⁰³ Frontex is subject to many concerns and disputes concerning its functioning and competences. Many scholars argue that the securitization of borders cannot go hand in hand with humanitarian actions. Despite collisions between border policing and humanitarianism, there is evidence that policing increasingly often contains humanitarian practices.¹⁰⁴ There is a noticeable change towards life rescue and respect for human rights. The role of Frontex is often misunderstood in the situation of the mistreatment of migrants. However, it is not Frontex' responsibility once migrants have arrived at shores. There are other agencies like EAOS that take responsibility for migrants in ports.

The EU is aware that SAR missions are vital as they allow to prevent human life losses as well as to combat illegal migration. However, neither SAR nor disembarkation conducted by the EU Member States are covered by any common EU framework and the EU's competences are limited. The exception is a Regulation 656/2014, which covers SAR and disembarkation conducted by Frontex's joint operations.¹⁰⁵ Furthermore, the Member States can limit the functioning of joint-operations. This situation could be observed in the case of Malta in 2018. The Maltese government refused to participate in the operation Themis launched in 2018 (replacing Triton) by Frontex. As a result, the operational area of Themis was reduced and does not cover the Maltese maritime zone anymore. This shows how big of an impact the Member States have overall on SAR operations, also conducted by the EU through Frontex.

3.1.1.2. EUNAVFOR Med: Operation Sophia

The high scale of deaths during the crisis brought to existence the operation EUNAVFOR Med renamed Sophia after a baby born on a ship that was a part of the operation. It was established by the Council on 18 May 2015 as a part of a broader EU comprehensive response to the migration crisis in the Southern Central Mediterranean. Although it is not solely rescuing migrants oriented, its mandate includes actions to prevent the loss of lives at sea.¹⁰⁶ Operation Sophia together with the European Border and Coast Guard Agency (Frontex) secure the external borders from illegal migration and provide rescue to persons in distress. Moreover,

¹⁰³ Ibid., p. 14.

¹⁰⁴ Pallister-Wilkins, 'Humanitarian', p. 22.

¹⁰⁵ Carrera, S. & Cortinovis R. (2019). Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing away from responsibility. *CEPS*, No. 2019-10, p. 19.

¹⁰⁶ Tardy, T. (2015). Operation Sophia: Tackling the refugee crisis with military means. *BRIEF*, European Union Institute for Security Studies, p. 1.

Operation Sophia is an element of the EU External Action including immediate and long-term international actions. The mandate of the mission states that it must:

undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, in order to contribute to wider EU efforts to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea.¹⁰⁷

Initially, the mandate of the Operation Sophia was 12 months with 2 months start-up phase. After a successful first phase that included surveillance and assessment of human smuggling and trafficking networks, the Council agreed to begin the second phase involving active actions on high seas.¹⁰⁸ In January 2016 all conditions have been met for the operation Sophia to implement on the High Seas. It was UN Security Council Resolution 2240 that allowed its authority to take measures from the territory of Libya and off its coast as a part of the second phase.¹⁰⁹

On 23 May 2016 during the Foreign Affairs Council, it was agreed that the mandate of the operation Sophia would be extended by 1 year, and new tasks would be added to its actions: “*training of the Libyan coastguards and navy and contributing to the implementation of the United Nations arms embargo on the high seas off the coast of Libya*”.¹¹⁰ A few months after the Council extended and amended the mandate of the operation once again by: arranging monitoring mechanism of trainees to ensure the long-term efficiency of training of the Libyan coastguards; conducting new surveillance activities and gather information on illegal trafficking of oil exports from Libya; and enhancing the possibilities for sharing information on human trafficking with member states' law enforcement agencies, Frontex and EUROPOL.¹¹¹

¹⁰⁷ EU External Action, EUNAVFOR MED: operation Sophia. Available at: <https://www.operationsophia.eu/about-us/>

¹⁰⁸ European Council, Council of the EU. *Timeline - response to migratory pressures*, EU migration policy. Available at: <https://www.consilium.europa.eu/en/policies/migratory-pressure/history-migratory-pressure/>

¹⁰⁹ UN Security Council, *Resolution 2240 (2015) Adopted by the Security Council at its 7531st meeting, on 9 October 2015*, 9 October 2015, S/RES/2240 (2015).

¹¹⁰ European Council, Council of the EU (2016, 23 May). *Council conclusions on EUNAVFOR MED operation Sophia*, Press release. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/05/23/fac-eunavfor-sophia/>

¹¹¹ European Council, Council of the EU (2017, 25 July). *EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018*, Press release. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/07/25/eunavformed-sophia-mandate-extended/>

In 2018 it was decided that the operation Sophia will again extend its mandate, however, “the Operation Commander has been instructed to suspend temporarily the deployment of the Operation's naval assets for the duration of this extension for operational reasons”.¹¹² From now on the operation involved strengthening surveillance by air assets. Today, the operation Sophia still operates, however, the naval assets remain suspended until the undefined period following the 2018 European Council's conclusions.

Moreover, several issues have caused a rise of scepticism towards this kind of operation. Since the beginning of the crisis, the EU has been trying to fulfil legal requirements both inside the EU and on the international level to establish a naval mission like Sophia. There are rules and norms concerning non-intervention, international law of the sea, international refugee law, and international human rights law that must be satisfied.¹¹³ At the EU level with respect to a naval mission, it is necessary to take into account the EU's common defence and security policy (CSDP). According to Article 42(1) the Treaty on European Union:

The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

The EU is a regional organisation, therefore, to initiate a mission there are multiple conditions that are required. Firstly, the EU receives all its competences from the member states, and in most cases, adopts missions through the so-called Ordinary Legislative Procedure (OLP), where three institutions the European Commission, the European Parliament and the Council of the EU co-legislate. The situation is different in case of foreign, defence, and security policies that do never fall under the OLP. Some matters like the establishment of a mission are part of a framework of the Common Foreign and Security Policy (CFSP) that also incorporates the Common Security and Defence Policy (CSDP). Operation Sophia was established by a non-legislative act and came into existence through foreign policy initiatives. As pointed out above,

¹¹² Ibid.

¹¹³ Butler, G. & Ratcovich, M. (2016). 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(3), 235-259, pp. 237-238.

foreign policy matters are not decided via Ordinary Procedure therefore, only the Council has full competencies in the matter. “*The legal instrument that sets in train an EU operation is a Decision of the Council, adopted upon the provisions contained within Article 43 TEU*”.¹¹⁴ The Article refers to the Union as a whole, not as a collective action of the member states. A Decision of this kind seeks to set out the main tasks of a mission, includes its mandate, as well as more detailed information like the budget.

Since 2015 when it was established, the operation Sophia saved over 49,000 lives at sea. Nevertheless, as was stated before its main task is not the rescue of lives but the prevention of human trafficking and smuggling. Therefore, it is criticised that the operation Sophia is not an adequate instrument to deal with an issue like migration and it is not efficient in achieving its primary mission.¹¹⁵

Since the withdrawal of the naval forces in the operation, human rights advocates started strongly disapproving of this mission.¹¹⁶ According to Amnesty International’s statement, by diminishing the operation the EU States are abandoning refugees and migrants that fight for their lives at sea. Massimo Moratti, Amnesty International’s Researcher Director said that “*this shameful decision has nothing to do with the needs of people who risk their lives at sea, but everything to do with the inability of European governments to agree on a way to share responsibility for them*”.¹¹⁷ The human rights commissioner for the Council of Europe and the Doctors without borders support this statement and call the EU’s decision regarding Sophia “irresponsible and reckless”.¹¹⁸ These views demonstrate that the EU is perceived as failing to establish a solid migration policy and the political tensions within the EU do not strengthen these views.

¹¹⁴ Ibid., pp. 238-239.

¹¹⁵ Pietz, T. (2019, 12 September). *A European ‘Mare Nostrum’ instead of Operation Sophia 2.0*, Euractiv. Available at: <https://www.euractiv.com/section/justice-home-affairs/opinion/a-european-mare-nostrum-instead-of-operation-sophia-2-0/>

¹¹⁶ EURACTIV.com with Reuters (2019, 28 March). *Rights groups lambast Operation Sophia – the EU naval mission without ships*, Euractiv. Available at: <https://www.euractiv.com/section/justice-home-affairs/news/rights-groups-lambast-operation-sophia-the-eu-naval-mission-without-ships/>

¹¹⁷ Amnesty International (2019, 27 March). *EU: Diminished “Operation Sophia” abandons refugees and migrants to reckless Libyan Coast Guard*. Available at: <https://www.amnesty.org/en/latest/news/2019/03/eu-diminished-operation-sophia-abandons-refugees-and-migrants-to-reckless-libyan-coast-guard/>

¹¹⁸ EURACTIV.com with Reuters, ‘Rights groups’

3.1.2. Member States

The role of EU Member States is substantial when it comes to SAR and irregular migration. An even more significant part is played by coastal countries in particular Italy, which is located in the centre of the Mediterranean issue. Several tragedies at sea obliged the Member States to provide SAR to assist people in distress in order to comply with international law. This difficult situation brings out the limits of the state's capacity and power to manage it alone. Migration governance exposes the gaps in national policies, which are being filled by the involvement of other actors such as the EU and NGOs".

Search and rescue operations are fully dependent on the Member States, which have sovereign power to circumscribe interventions at sea to save lives.¹¹⁹ The actions at sea can legally operate thanks to the Maritime Rescue Coordination Centres (MRCC), which are dedicated to organise search and rescue at sea. They are the first point of contact in case of incidents at sea.¹²⁰ Due to the highest number of migrants coming through the Central Mediterranean route, most SAR operations depend on the Italian MRCC in Rome. The authorities of coastal states are competent to direct state and non-state actors to conduct rescue missions. According to the Safety of Life Convention (SOLAS), which is "*the most important of all international treaties concerning the safety of merchant ships*",¹²¹ MRCCs are also responsible to direct rescue vessels to safe ports for disembarkation.¹²² However, the North African coastal countries are not considered as a safe place, therefore, in most cases, migrants are expected to be transferred to Italy. This situation causes opposition from the coastal countries. They are already overwhelmed by the number of migrants and asylum seekers and are carrying the burden alone. Due to lack of solidarity in burden-sharing countries like Italy refuse to accept more migrants in their harbours and deny access to rescue boats in their ports. Moreover, there is further disagreement between Italy and Malta whose SAR zones are overlapping and they share responsibility for the Southern Sicily. In 2013 due to conflict of responsibility between these two countries a rescue mission of a boat with migrants was delayed by 5 hours. This led to tragedy, which was the death of 200 migrants as the vessel had sunk an

¹¹⁹ Pallister-Wilkins, 'Humanitarian', p. 21.

¹²⁰ Ibid., p. 20.

¹²¹ International Maritime Organisation, International Convention for the Safety of Life at Sea (SOLAS), 1974. Available at: [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)

¹²² Vosiylütë, L., Allsopp, J., Mitsilegas, V., & Carrera, S. (2019). Policing Humanitarianism EU Policies Against Human Smuggling and their Impact on Civil Society. CEPS, p. 107.

hour before the arrival of rescue. Hence, as it was already mentioned in the section above, a small group of countries agreed on temporary disembarkation arrangements.

Moreover, the coastal states have an obligation to establish effective SAR services themselves. In accordance with Article 98(2) of the United Nations Convention on the Law of the Sea (UNCLOS)

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.¹²³

Sea rescues engage many actors to save people at sea from drowning. Like any other actor at sea, they are responsible to assist any person in distress at sea. SAR operations include Italian, Maltese and Greek coastguards, the Italian Guardia di Finanza and Italian navy.¹²⁴ National waters are divided into 13 SAR zones by IMO's Maritime Safety Committee after the adoption of the 1979 SAR Convention.¹²⁵ The coastguards are obliged to perform search and rescue services in these areas. As the main destination of migrants, Italy and Malta are responsible for large parts of the central Mediterranean, whereas Greek coastguard operates in the Aegean.

In 2013 after the tragedy in Lampedusa on 3 October 2013, when more than 360 migrants lost their lives at sea the Italian government launched the “Mare Nostrum” SAR mission.¹²⁶ It was a significant moment for the SAR activities, which were expanded far into the sea until the Libyan shores. Until then migrants were awaited to reach the national waters and then escorted the remaining nautical miles (17 now).

The operation was carried out by the Italian coast guard until 2015 and saved over 140,000 lives at sea. According to the decision of the Italian government and the EU, due to the lack of contribution from the other Member States, Mare Nostrum was brought to a halt and replaced by the Frontex-led operation Triton. However, this change brought many concerns as Triton's operation range was 30 miles off the Italian coast, whereas the Mare Nostrum was

¹²³ UN General Assembly, Convention on the Law of the Sea, 10 December 1982.

¹²⁴ Pallister-Wilkins, ‘Humanitarian’, p. 20.

¹²⁵ IOM, International Convention on Maritime Search and Rescue (SAR). Available at: [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx)

¹²⁶ Hampshire, ‘European migration’, p. 546.

active within the national waters.¹²⁷ Moreover, the resources dedicated to Triton were much smaller and its primary task was deterrence rather than SAR focused operation.¹²⁸ Until today the problem remains, as many argue that Operation Sophia should be replaced by Mare Nostrum.

Disembarkation remains a subject of disagreement between the Member States. Moreover, search and rescue obligations are understood to operate separately from human rights and refugee law, which brings even more uncertainty regarding migration at sea. Less involvement in SAR at sea is justified by means of preventing loss of life. It is believed that the higher the scale of rescue ops encourages migrants to take the dangerous sea journey. Consequently, the rate of death increases as migrants assume that they will be provided and met with help during the life-threatening journey.

To avoid responsibility for migrants, the states that are not engaging in SAR's operations provide migrants with food, water, and fuel. In 2019, Operation Sophia was limited by the Italian government's pressure that was opposing disembarkation in Italian ports. Removing naval assets of Sophia limited its capabilities to conduct SAR operations as well as disembarkment in Italian ports. Moreover, some Member States including Italy are against non-state actors participating in SAR activities, particularly NGOs. As noted above, it is considered that SAR operations cause an increase in the number of migrants trying to cross the sea, including smuggling and human trafficking. The then Italian Deputy Prime Minister Matteo Salvini stated on numerous occasions that *"private rescue ships are making the smugglers' work easier"*.¹²⁹

Moreover, coastal countries limit the SAR zones, as for the case of the operation Themis whose zone was reduced by Maltese waters. Further actions of some Member States aim at disengaging from SAR operations, including "pullback" operations of the Libyan coast guards that the Italian government is not only aware of but in its actions supports it. Furthermore, the so-called temporary disembarkation schemes fall completely outside the framework of the EU and put in jeopardy European integration concerning asylum policies. *"Flexible integration' or 'solidarity à la carte' in the area of asylum may not further but actually reverse integration and*

¹²⁷ European Council on Refugees and Exiles (2014, 10 October). *MareNostrum to end – New Frontex operation will not ensure rescue of migrants in international waters*, News. Available at: <https://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/>

¹²⁸ Carrera, 'Search and rescue', p. 16.

¹²⁹ Wallis, E. (2019, 9 July). *Can the Law of the Sea regulate the stormy standoffs between private rescue ships and EU governments?*, InfoMigrants. Available at: <https://www.infomigrants.net/en/post/18037/can-the-law-of-the-sea-regulate-the-stormy-standoffs-between-private-rescue-ships-and-eu-governments>

undermine the objectives set out in the EU Treaties.”¹³⁰ Carrera and Cortinovis argue that these actions create great risks not only to “the consistency of the EU asylum and borders acquis” but also impact the right to seek asylum in the EU.¹³¹

3.2. The role of international agencies and NGOs

The subchapter focuses on the other actors that are engaged in SAR at sea or support the development of policies that could improve SAR and help inland. There are many actors in the Mediterranean whose role is as vital as that of the EU and its Members. The first part examines the role of migration and refugee agencies that supported the EU during the migration crisis through action plans. Then, the next part focuses on less vocal actors that participate in SAR missions. Their actions are repeatedly contested by the Member States, which is analysed in this subchapter.

3.2.1. Migration and refugee agencies

Agencies are seen as “*operational support to countries that face big problem of migration and asylum crisis*”.¹³² There are agencies that are not as much in the spotlight, but their role is of as much importance in providing help to migrants as other actors. Although they are functioning on a completely different scale their role is worth mentioning. These are migration and refugee agencies that provide help through policy proposals. These actors do not participate per se in the SAR operations. Nevertheless, they are worth mentioning as they influence the EU’s operations.

One of these agencies is the UN specialised agency International Organization for Migration (IOM) or the International Centre for Migration Policy Development (ICMPD). They play a part in developing policies to secure EU borders and assist in finding solutions for the migration issue.¹³³ These agencies’ actions are part of the coordinated cooperation of different entities.

¹³⁰ Carrera, ‘Search and rescue’, p. 3.

¹³¹ Carrera, ‘Search and rescue’, p. 3.

¹³² Trauner, F. (2016). Asylum policy: the EU’s ‘crises’ and the looming policy regime failure. *Journal of European Integration*, 38(1), 311-325, p. 317.

¹³³ Bialasiewicz, L. (2012). Off-shoring and Out-sourcing the Borders of EUrope: Libya and EU Border Work in the Mediterranean. *Journal Geopolitics*, 17(4), 843-866, p. 845.

IOM was established in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME). Back then the main responsibility of this organisation was the resettlement of people after the Second World War. Over the years the name of the agency underwent changes along with its responsibilities. In 1989 previously logistic agency IOM transformed into a migration agency.¹³⁴ Now it is an inter-governmental organisation that is closely cooperating with governments in the area of migration. Moreover, IOM collaborates with EU institutions, UN agencies, other international organizations, NGOs, academia, and the private sector. It is a worldwide agency functioning in 150 countries. IOM does not only help governments to understand the migration issue but also encourages them to social and economic development in the area of migration.¹³⁵ There are four areas of migration that the IOM works on: (i) migration and development, (ii) facilitating migration; (iii) regulating migration; and (iv) forced migration. Activities within these areas involve above all “*the promotion of international migration law, policy debate and guidance, protection of migrants' rights, migration health and the gender dimension of migration*”.¹³⁶

In October 2015, IOM introduced a response plan for the Mediterranean for countries of origin, transit, and destination. The plan focused on migration governance within four core pillars and perspectives: protecting migrants' rights; addressing drivers of irregular and forced migration; promoting safe, orderly, and dignified human mobility; strengthening partnership for inclusive growth and sustainable development.¹³⁷ Moreover, actions within these pillars are divided into short to medium-term and medium to long-term interventions. The former ones cover immediate response up to 6 months, whereas the second type covers time over 6 months and includes responses that begun as immediate ones.

The plan presents IOM's proposed interventions and reaffirms the collective responsibility of states, institutions, and organizations to respond to the situation that the international community is facing in Europe and beyond, in a manner that is centred on the protection of migrants' rights, as well as enhanced partnership between all concerned stakeholders.¹³⁸

¹³⁴ IOM, UN Migration, IOM History. Available at: <https://www.iom.int/iom-history>

¹³⁵ IOM, UN Migration, About IOM. Available at: <https://www.iom.int/about-iom>

¹³⁶ Ibid.

¹³⁷ IOM (2015, October). *Addressing complex migration flows in the countries of origin, transit and destination*. IOM Response Plan for the Mediterranean and Beyond. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/IOM-Response-Plan-for-the-Mediterranean-and-Beyond-Oct2015.pdf>

¹³⁸ IOM, UN Migration (2015, 30 October). *OM Launches Updated Response Plan for Mediterranean and Beyond*, Press Realises. Available at: <https://www.iom.int/news/iom-launches-updated-response-plan-mediterranean-and-beyond>

Following the plan on 15 December 2016, the EU launched a joint initiative with IOM for Migrant Protection and Reintegration. Thanks to the Emergency Trust Fund for Africa (EUTF) and contributions from a couple of the Member States (Germany and Italy), the EU was able to support African countries.¹³⁹ The EU-IOM Joint Initiative works with countries of transit and origins as well with both state and non-state actors. The main goal of the initiative is to provide safety and assurance of human rights to migrants *en route*. It supports migrants with life-saving assistance and support services, such as food or water, medical and psycho-social support, as well as access to information, counselling or family tracing.¹⁴⁰ As a flexible mechanism, it adjusts to a particular situation and needs of people. Moreover, the initiative offers voluntary return assistance to those who decide to return and supports returnees and their communities in the reintegration process.¹⁴¹ Since the start of the Joint Initiative, 33,162 people from different regions in Africa have been assisted via search & rescue operations. Later on, the initiative is active and continues to assist thousands of migrants in distress. Moreover, in December 2019 it was announced that the Trust Fund will be renewed (€44 million).

The other agency ICMPD as well as IOM are responsible for initiatives devoted to migration. Established in 1993 the agency has its origins in Austria. Functioning in over 90 countries worldwide ICMPD creates partnerships with different actors with regards to migration routes.¹⁴² Its three-pillar approach involves: migration management; structurally linking research; migration dialogues and capacity building. As its main objective “*ICMPD provides policy makers and politicians with the necessary groundwork needed to make decisions*”.¹⁴³ During annual meetings at Vienna Migration Conference (VMC) together with European and global partners, ICMPD discusses the most pressing issues in the area of migration and gives an account of the progress and remaining issues.¹⁴⁴ Concerning the migration problem in the Mediterranean, ICMPD opened Regional Coordination Office for the Mediterranean in Malta in 2016. It works closely with the EU institutions and agencies, Southern

¹³⁹ European Commission (2017, 15 December). EU-IOM Joint Initiative for Migrant Protection and Reintegration: one year on, Press corner. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5306

¹⁴⁰ European Commission (2018, December). *EU Actions Along the Western Mediterranean Route*. Available at: https://ec.europa.eu/commission/sites/beta-political/files/factsheet_-_western_mediterranean_route.pdf

¹⁴¹ European Commission (2019, 20 December). *Towards sustainable reintegration: EU-IOM Joint Initiative for Migrant Protection and Reintegration three years on*, All news and stories. Available at: https://ec.europa.eu/trustfundforafrica/all-news-and-stories/towards-sustainable-reintegration-eu-iom-joint-initiative-migrant-protection_en

¹⁴² International Centre for Migration Policy Development, About us. Available at: <https://www.icmpd.org/about-us/>

¹⁴³ Ibid.

¹⁴⁴ International Centre for Migration Policy Development, Vienna Migration Conference. Available at: <https://www.icmpd.org/about-us/vienna-migration-conference/>

countries, Directorate-General for Neighbourhood and Enlargement Negotiations, and other stakeholders. The main objective of the current project in the Mediterranean is support for migration governance in close collaboration with Libya.¹⁴⁵ In contrast to IOM, ICMPD does not participate in SAR and exclusively focuses on research and planning strategies. Together with the Member States ICMPD develop and implement long-term strategies in order to combat root causes of migration and harmonise or improve migration and asylum policy.¹⁴⁶

There are more agencies functioning within areas of migration and asylum. The most recognizable are the UN's agencies the United Nations Refugee Agency (UNHCR) and the United Nations Children's Fund (UNICEF). The former one was created in 1949 to help millions of Europeans who fled or lost their homes following the Second World War.¹⁴⁷ In the beginning, its mandate covered only refugees. However, it was expanded and the UNHCR can provide international protection and humanitarian assistance for refugees and displaced persons. Regarding internationally displaced people, the UNHCR does not have a general mandate, however, in particular, circumstances it is allowed to take an action.¹⁴⁸ According to the mandate, the UNHCR is primarily responsible to supervise application of different international instruments concerning the refugee protection, asylum-seekers, and stateless persons.¹⁴⁹ Its supervisory responsibility is presented in its Statute as well as Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol, they oblige its signatories to cooperate with the UNHCR concerning the exercise of their responsibilities.¹⁵⁰ Moreover, alike the IOM, the UNHCR created a refugee and migrant response plan for the Eastern Mediterranean and Western Balkans route in December 2016.

The second UN agency is UNICEF responsible for providing help to children in distress all around the world, including migrant and refugee children. Established in 1946 as the International Children's Emergency Fund (ICEF), transformed into the present version the UNICEF assures children's rights through supporting and promoting the Convention on the Rights of the Child. According to UNICEF's statistics, one-third of migrants arriving in Europe are children. In 2019 over 100,000 migrants took the Central Mediterranean route to arrive in

¹⁴⁵ International Centre for Migration Policy Development, Regional Coordinator for the Mediterranean. Available at: <https://www.icmpd.org/our-work/capacity-building/regions/mediterranean/>

¹⁴⁶ International Centre for Migration Policy Development, 'About'.

¹⁴⁷ UNHCR, The UN Refugee Agency, History of UNHCR. Available at: <https://www.unhcr.org/history-of-unhcr.html>

¹⁴⁸ UN High Commissioner for Refugees (UNHCR), Note on the Mandate of the High Commissioner for Refugees and his Office, October 2013.

¹⁴⁹ Sy, M. (2015). UNHCR and Preventing Indirect Refoulement in Europe. *International Journal of Refugee Law*, 27(3), 457–480, p. 458.

¹⁵⁰ UN High Commissioner for Refugees (UNHCR), 'Note'.

Italy. It was estimated that 15% of these migrants are children, mostly young boys on their own without families.¹⁵¹ UNICEF in order to protect and support refugee and migrant children created a Roadmap, which provides guidelines for different actors taking part in SAR and asylum procedures. The Roadmap aims to improve the care and protection of children as well as the creation of child-friendly procedures.¹⁵²

Since the beginning of the migration crisis, agencies like the UNHCR constantly urge the EU to establish stronger actions on refugees. In June 2018, the UNHCR together with the IOM appealed to the EU Member States for common actions to reduce needless loss of life in the Mediterranean. Due to political disputes among the States concerning the migration and asylum, many vessels cruise outside the ports unable disembark migrants onboard. These agencies urge the countries for collaborative actions not only regarding the disembarkation but also resettlement.¹⁵³

Unlike Frontex that is responsible for the securitization of borders, migration agencies exclusively focus on migrants and refugees as well as policies applying in this field. Thanks to these agencies and their research better and more developed measures can be applied in order to tackle the problem of irregular and illegal migration. Although they do not directly engage in search and rescue at sea, their engagement is vital. First and foremost, they assure the applicability of fundamental rights and humanitarian principles. Furthermore, they assist numerous actors engaged at all levels of providing help to migrants and refugees, from SAR through disembarkation and resettlement. With their guidelines and policy support, the EU Member States can establish more feasible measures to respond to the migration issue.

3.2.2. NGOs: the limitation of the effectiveness of SAR by the Code of Conduct

Non-governmental organisations (NGOs) as one of the non-state actors play a crucial role in mitigating migration emergencies in the Mediterranean, making them the biggest provider of SAR in this region. Only in 2017 NGOs' vessels saved one-third of persons that

¹⁵¹ UNICEF, Refugee and migrant children in Europe. Available at: <https://www.unicef.org/eca/emergencies/refugee-and-migrant-children-europe>

¹⁵² Ibid.

¹⁵³ IOM (2018, 27 June). *IOM, UNHCR Appeal for Region-Wide Action by EU Countries Over Mediterranean Tragedies*, Press Realises. Available at: <https://www.iom.int/news/iom-unhcr-appeal-region-wide-action-eu-countries-over-mediterranean-tragedies>

were rescued in total and even higher number in 2018.¹⁵⁴ While agencies like Frontex serve as coast guards, NGOs' main role is to provide humanitarian aid, which consists of spotting boats in distress, providing life vests, water, as well as in some cases NGOs deliver medical help. Over the years NGOs became more significant actors in the international arena and gained more expertise and developed their networks. While relations of NGOs and the United Nations have become more coordinated through formal procedures, the EU-NGOs relations remain more complicated.¹⁵⁵

In 1994, the European NGO Platform on Asylum and Migration (EPAM) was established. It functions voluntary as a meeting place for European non-governmental organisations and networks. EPAM is a place for an exchange of information and views considering asylum seekers and migration policy. Its role is significant as EPAM contributes to policy development. Moreover, '*NGOs have provided a crucial contribution to mitigating the loss of life at sea*'¹⁵⁶, where they participated in search and rescue operations (SAR) at sea.

Since the migration crisis began numerous NGOs have come to help to provide humanitarian aid and acting as private providers of SAR operations. There are two types of NGO's humanitarian operations. First are "fully-fledged SAR missions" conducted by NGOs like MOAS, MSF, SOS-Méditerranée, and Save. These are operations that are fully engaged in saving the lives of people in danger at sea and bringing them to ports indicated by the Maritime Rescue Coordination Centre (MRCC) in Rome. On the other side, there are NGOs equipped in much smaller boats such as Sea-Watch, Sea-Eye, Jugend Rettet, Pro-Activa, and the Boat Refugee Foundation. As distinct to the first type of operations, these missions are responsible for patrolling international waters offshore Western Libya. Moreover, they provide migrants in distress with lifejackets and host them on board until they are transferred by bigger vessels to ports.¹⁵⁷

As the arrivals of migrants to Europe persist, NGOs conduct research, advocacy, and support services also on land.¹⁵⁸ NGOs continue to carry out the SAR through independent

¹⁵⁴ FRA (2018, 1 October). *Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations – 2018*. Available at: <https://fra.europa.eu/en/publication/2019/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue>

¹⁵⁵ Uçar, E. M. (2017). NGOs go to Brussels Challenges and opportunities for research and practice in the Area of Freedom, Security and Justice. In: Trauner, F. & Ripoll Servent, A. (eds.) *The Routledge Handbook of Justice and Home Affairs Research*, London/New York: Routledge, p. 458.

¹⁵⁶ Cusumano, E. (2017). Emptying the sea with a spoon? Non-governmental providers of migrants search and rescue in the Mediterranean. *Marine Policy*, 75:91-98, p. 91.

¹⁵⁷ Cusumano, E. (2018). The sea as humanitarian space. Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route. *Mediterranean Politics*, 23(3), 387–394, p. 389.

¹⁵⁸ Cusumano, 'Emptying', p. 92.

rescue operations at sea. Before the events of 2015, there was only one rescue operation established in 1979, the German Cap Anamur well-known for saving a Vietnamese boat in the 70s. After that, new humanitarian vessels were launched by NGOs in 2014. There are many NGOs that began operational activities in the Mediterranean at that time and some of the most recognized are: MOAS, MSF, Sea-Watch, See-Eye, Pro-Activa, SOS Méditerranée. The first SAR operation to be established after Cap Anamur was the Migrant Offshore Aid Station (MOAS). Thanks to an American-Italian couple MOAS was launched and converted its first purchased ship into a SAR vessel called the Phoenix.¹⁵⁹ Due to financial difficulties after two months the operation was suspended. In 2015 NGO Médecins Sans Frontières (MSF) came with help and provided MOAS with funding and medical help.¹⁶⁰ Then the MOAS thanks to the second boat called Responder expanded its operation into the Aegean Sea. Nevertheless, the Phoenix was stopped in October 2015 and since then it has not been operational in the Mediterranean.¹⁶¹

The sea operations carried out by NGOs have always served to help with transfers of people and help those that are most in need. However, the success of these operations is not possible without the cooperation of coastal countries, where the rescued people are brought by NGOs.¹⁶² Civil Societies and non-governmental organisations, while rescuing migrants at sea, face repeatedly numerous obstacles. Member States constantly try to fight illegal migrations like human trafficking and smuggling, therefore, some of their actions hinder the work of NGOs. NGOs' aim is to provide humanitarian assistance, however, operations of NGOs bring some concerns, as they could facilitate smuggling. Moreover, areas of irregular and illegal migration are perceived by some states as their exclusive competency that shall not be disrupted by actors like NGOs. These areas have traditionally and realistically been strongly related to sovereignty and it is clear that the Member States do not want to lose control over them. According to the European Union Agency for Fundamental Rights (FRA), EU Member States have launched criminal and administrative proceedings against NGOs or other private entities involved in SAR operations in the Mediterranean. There are pending criminal and administrative proceedings against at least half of the NGOs operating in the Mediterranean, while some of them have already gone through legal proceedings against their crew or vessel.

¹⁵⁹ Ibid., p. 92.

¹⁶⁰ Cuttitta, P. (2017). Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean. *Journal Geopolitics*, 23(3), 632-660, p. 633.

¹⁶¹ FRA (2018, 1 October). *Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*. Available at: <https://fra.europa.eu/en/publication/2019/fundamental-rights-considerations-ngo-ships-involved-search-and-rescue>

¹⁶² Cuttitta, 'Repoliticization', p. 639.

Moreover, numerous NGOs' ships involved in SAR have been seized and confiscated by countries. The most notorious adversaries of the NGOs' SAR operations are Italy and Malta. Back in 1979, Italy refused entry to one of its ports for the Cap Anamur, first granting the access to revoke it afterward.¹⁶³ Malta as well did not allow for disembarkation of Cap Anamur. Two weeks later the vessel had no other choice but enter to one of the ports in Italy without any authorisation. This resulted in criminal proceedings against the crew for illegal migration.¹⁶⁴ Moreover, in 2018 Italy seized German NGO Sea-Watch 3 vessel in the Mediterranean halting its operation until 2019. These are just two of many examples, where the Member States caused suspension of rescue operations. There are numerous ongoing proceedings against vessels and crews. Moreover, before 2019 at least five ships were stopped by Italy and Malta, also awaiting legal proceedings till these days.

Due to accusation of illegal activities associated with smuggling and human trafficking “non-governmental organizations face increasing persecution from governments such as Italy”.¹⁶⁵ Thus, the officials of the Italian Ministry of Interior with the help of the European Commission, consulting the relevant NGOs, formulated a Code of Conduct for NGOs involved in search and rescue activities.¹⁶⁶ The Code is not legally binding, nevertheless, lack of signature by any NGO risks in refusal to accept disembarkation in Italian harbours. In the European Parliamentary questions of the 12th Sept 2017, it was pointed out that since the Code was applied the mortality rate of people trying to reach European shores increased. In this case, it increased from 1.2% to 2.1% between 2016 and 2017.¹⁶⁷

Some of the NGOs such as Médecins Sans Frontières or Jugend Rettet did not sign the code¹⁶⁸ as in their opinion it limits the effectiveness of rescue operations. Italian Ministry of Interior has warned that rescue vessels of NGOs that do not respect the Code would not be accepted in Italian ports for disembarkation.¹⁶⁹ The Code consists of 11 requirements that the signatory NGOs ought to respect. These requirements include:

¹⁶³ Ibid., p. 637.

¹⁶⁴ Cusumano E., ‘Emptying’, p. 95.

¹⁶⁵ DW, Restart Mediterranean migrant rescue missions, UN bodies tell Europe, 12 July 2019. Available at: <https://www.dw.com/en/restart-mediterranean-migrant-rescue-missions-un-bodies-tell-europe/a-49561837>

¹⁶⁶ FRA, ‘Fundamental’.

¹⁶⁷ European Parliament (2017, 12 September). Code of conduct for NGOs in the Mediterranean, Question for written answer E-005646-17 to the Commission. Available at: https://www.europarl.europa.eu/doceo/document/E-8-2017-005646_EN.html

¹⁶⁸ Ibid.

¹⁶⁹ Cusumano E., Straightjacketing migrant rescuers? The code of conduct on maritime NGOs, Mediterranean Politics, 27 September 2017, pp. 107.

- absolute ban on the entry by NGOs into Libyan waters;
- obligation not to turn off on-board transponders;
- obligation not to make telephone communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants;
- obligation not to make trans-shipments on other vessels, either Italian or belonging to international naval assets, except in the event of an emergency situation;
- obligation not to obstruct the search and rescue operations by the Libyan Coast Guards;
- obligation to receive on board judicial police officers for investigation to trafficking in human beings;
- obligation to declare, in accordance with the principles of transparency, sources of financing for rescuing activity at sea;
- obligation to notify to the MRCC of their own flag State the sighting and subsequent intervention;
- obligation to hold a certificate attesting technical suitability for rescuing activities;
- obligation to cooperate loyally with the Public Security Authority of migrants' landing location;
- obligation to transmit all information of info-investigative interest to the Italian Police Authorities.¹⁷⁰

However, there are many aspects of this code with which NGOs do not approve of, for they limit the actions of the rescue operations. **Eugenio Cusumano** maintains in his studies that “*the newly drafted Code further encroaches upon these principles, compromising NGOs’ ability to conduct humanitarian relief at sea free of political interference.*”¹⁷¹ First and foremost, the Code does not allow NGOs’ vessels to enter Libyan territorial waters, unless authorised. Italy expects that NGOs will respect the orders of Libyan Coast Guards and will not interfere with the saving of people before the coastguard. The issue at stake is the safety of those migrants who are sent back to Libya, possibly subject to inhuman treatment. In May 2018 an NGO Proactiva Open Arms was seized by Italy, due to refusal to hand over rescued migrants to the Libyan Coast Guards.¹⁷² The Code also includes a few requirements that seem unnecessary as they are already mandatory under international maritime law, such as obligations: to not to turn off onboard transponders, or to transmit information to Italian MRCC

¹⁷⁰ Code of Conduct for NGOs involved in migrants' rescue operations at sea. Available at: <https://www.humanrightsatsea.org/wp-content/uploads/2017/07/2017070516-EU-Code-of-Conduct.pdf>

¹⁷¹ Cusumano, ‘Straightjacketing’, p. 107.

¹⁷² de Bellis, M. (2018). *How Italy’s seizure of an NGO ship exposes Europe’s dangerous policy*, Amnesty International. Available at: <https://www.amnesty.org/en/latest/news/2018/03/how-italys-seizure-of-an-ngo-ship-exposes-europes-dangerous-policy/>

and to follow its instructions. Furthermore, the Code diminishes NGOs' legitimacy by requiring a declaration of financial resources, that were already public before the Code entered into life. As a result, it jeopardizes NGOs' transparency giving an impression as their motives would be “guided by obscure financial and political motives”.¹⁷³

The signatory NGOs respect the Code and all its obligation, however, the Code itself diminish the effectiveness of rescue operations and violates humanitarian principles of independence, neutrality, and impartiality¹⁷⁴ grounded in the Geneva Convention of 1949. Firstly, “humanitarian action must be autonomous from the political [...] objectives”¹⁷⁵, whereas as mentioned before the code jeopardizes NGOs' reliability as a non-political actor. In theory, the humanitarian principles are meant to be apolitical. However, as **Polly Pallister-Wilkins** argues, humanitarian practice is of political nature on its own as a result of the failure of politics.¹⁷⁶ Secondly, NGOs' vessels are expected to accept the Italian judicial officers on their boards in order to search for any activity related to smuggling or human trafficking. Therefore, the presence of police officers on a board infringes neutrality of the humanitarian space, where NGO as neutral actor shall not take any side of a conflict. Finally, the humanitarian action should not be driven by a distinction between migrants on grounds of nationality, race, gender, religious belief, class or political opinions, which infringes the principle of impartiality.¹⁷⁷ NGOs are expected to treat people equally, however, under two obligations of the code to cooperate with the Public Security Authority of migrants' landing location and to transmit all information of info-investigative interest to the Italian Police Authorities¹⁷⁸, NGOs are requested to share confidential information about any possible smugglers, what endangers people's chance for asylum.¹⁷⁹ It is proof that these principles are constantly undermined, transformed, and even ignored as in the case of Italy.

There is an ongoing debate in the matter of NGOs SAR at sea, whether or not they facilitate illegal migration and cause more death as migrants knowing about NGOs' rescue operations more often try to cross the sea towards Europe. Additionally, some Member States as well as Frontex also concur and criticize NGOs rescue operations. There is visible

¹⁷³ Cusumano, ‘Straightjacketing’, p. 110.

¹⁷⁴ Ibid., p. 110.

¹⁷⁵ OCHA (2012, June). *OCHA on Message: Humanitarian Principles*. Available at: https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf

¹⁷⁶ Pallister-Wilkins, ‘Humanitarian’, p. 23.

¹⁷⁷ OCHA, ‘OCHA on Message’.

¹⁷⁸ Code of Conduct

¹⁷⁹ Cusumano, ‘Straightjacketing’, p. 111.

politicisation of SAR within the EU like in the case of the NGOs. Actions that meant to be free of political motives now tend to be led by them. Moreover, there are disembarkation issues arising from the fact that the EU coastal states are overwhelmed with the number of migrants. It comes once again to the subject of divergence between policies in the EU states. The lack of solidarity in the burden-sharing creates many controversies and pushes the Southern countries towards stricter policies against migrants. Basaran (2014) has argued that in recent years

“an increasing number of laws, regulations and practices on national, regional and international levels have effectively discouraged rescue at sea and encouraged seafarers to look away, leading to the incremental institutionalization of a norm of indifference to the lives of migrants”.¹⁸⁰

Unquestionably, the role of non-governmental rescue operations is crucial. However, they are significantly limited by many different factors such as the Code of Conduct or the actions of the Member States themselves. The position of the Member States about NGO SAR is divided. Besides the ships that were seized or confiscated, and are under ongoing legal proceedings, some NGOs decided to suspend their operations to protest the code of conduct as well as due to security threats from the Libyan Coast Guards. Moreover, uncertain of whether they will be accepted or not to disembark migrants in ports of the EU Member States, NGOs such as MOAS permanently suspended its operations.¹⁸¹ It is statistically proved that despite the general decrease in the number of deaths at sea, this rate increases when more and more NGO's ships are being stopped and confiscated by the Member States. Moreover, strengthening of law and policies by the Member States make it impossible for the NGOs to actively participate in SAR.

3.3. Commercial vessels in the Mediterranean

According to article 98(1) of The United Nations Convention on the Law of the Sea (UNCLOS), flag states must oblige masters of vessels to rescue people at risk¹⁸², which applies to all maritime zones. As well as NGOs private actors such as national commercial or military

¹⁸⁰ Carrera and Cortinovis, p. 20.

¹⁸¹ Carrera, S., Vosyliute, L., et. al. (2018, December). *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*. Policy Department for Citizens' Rights and Constitutional Affairs.

¹⁸² United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered in to force 16 November 1994). UNCLOS is currently ratified by 167 States and the European Union.

vessels, private boats, and others may be ordered by the MRCC to provide SAR.¹⁸³ It is possible as it took place in the past that a State's MRCC can order SAR out of the search-and-rescue region (SRR) in international waters.

Private vessels as well as any other actors at sea are obliged to act in accordance with maritime law and different guidelines. By example, once a ship performance SAR according to the Guidelines on the Treatment of Persons Rescued at Sea Article 6.3

A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable.¹⁸⁴

Moreover, there is Merchant Ship Search and Rescue Manual (MERSAR), published in 1971 and last time updated in 1992. It provides guidelines for any vessel that could be requested to provide SAR.

However, similarly to NGOs' ships, commercial vessels are subject to actions of states to stop illegal migration. The role of private actors is being largely disregarded. It is little said about the part they play concerning humanitarian aid, but it is worthy of note that commercial vessels save many thousands of lives of migrants at sea. For example:

The Straits of Sicily is frequently crossed by ferries, oil tankers, containers and cruise ships alike. Based on the legal duty to assist people in distress, all these vessels are obliged to conduct SAR. The Italian Maritime Rescue Coordination Centre (MRCC) in Rome, which keeps track of the position of all vessels transiting in the area, can require any of the closest ship to conduct a rescue if a migrant boat is nearby.¹⁸⁵

Nevertheless, as in the case of NGOs' ships, it is difficult for commercial vessels to operate without risking prosecution. This is due to an increasing level of criminalisation in the Mediterranean that the Member States become more and more reluctant towards SAR led by private actors. As the NGOs, private vessels are considered to aid the smuggling of migrants and irregular migration. The example of the fishermen that were repeatedly accused of "assisting clandestine migration" after rescuing migrants demonstrates this. This kind of

¹⁸³Frontex, Frontex Operations. Available at: <https://frontex.europa.eu/faq/frontex-operations/>

¹⁸⁴ International Maritime Organization (IMO) (2004, 20 May). Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea. Available at: <https://www.refworld.org/docid/432acb464.html>

¹⁸⁵ Cusumano, 'Emptying', p. 97.

situation only leads to more cases where migrants are left without assistance. According to the maritime law, all actors in State's SRR are obliged to provide SAR when they are ordered by MRCC, however, it does not necessarily mean that they want to or are prepared for that. In the past, some merchant vessels in order to avoid possible participation in SAR used to turn off their geolocalisation systems. In this way, they were invisible to MRCCs, which would have otherwise ordered any vessel to take action.¹⁸⁶ Moreover, it cannot be omitted that most of the commercial vessels do not have the means to act as SAR.

As commercial ships mainly cross the Central Mediterranean in waters close to Sicily, Malta, and North-eastern Tunisia, the majority of rescue operations carried out by commercial vessels also take place in that area.¹⁸⁷ Therefore, in most cases, the MRCC in Rome is responsible for conducting vessels in case of an emergency at sea. The situation of SAR mostly in the case of merchant vessels and NGOs became even more complicated since Libya has its own SAR zone. After a failed application in 2017 one year later at the end of June 2018, Libyan SAR supported by the Italian Coastguard was approved by the International Maritime Organisation (IMO) as a new SAR zone.¹⁸⁸ Since then the Italian coast guard is legally allowed to *"to refer any contact from ships not in its own search and rescue zone to the Libyan authorities"*.¹⁸⁹ The situation brings many concerns regarding private actors. Firstly, merchant vessels are being used to transfer rescued migrants back to Libya. Due to the fact that now the Libyan authorities are competent to conduct SAR, ships must follow their instruction even if it means returning migrants to Libya. In many cases, Libyan authorities request commercial vessels to conduct the rescue instead of not-for-profit ships, which are around ready to come to help. Therefore, it brings the second concern, which is the lawfulness of this kind of action. According to the Guidelines on the Treatment of Persons Rescued at Sea Article 5.6 *"shipmasters should seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized"*. Therefore, this case remains the subject of many disputes concerning the mistreatment of migrants and their safety in Libyan ports. However, according to the IMO safe place can be defined different way depending on a situation.¹⁹⁰

¹⁸⁶ Cusumano, 'Straightjacketing', pp. 108-109.

¹⁸⁷ European Commission (2017, 2 February). Irregular Migration via the Central Mediterranean From Emergency Responses to Systemic Solutions. European Political Strategy Centre, Issue 22. Available at: file:///C:/Users/Kamila/Documents/UCL/II%20year/2nd%20semester/AFSJ/irregular-migration-mediterranean-strategic_note_issue_22_0_en.pdf

¹⁸⁸ European Parliament (2018, 3 July). Search and Rescue Area off Libya, Question for written answer P-003665-18. Available at: https://www.europarl.europa.eu/doceo/document/P-8-2018-003665_EN.html

¹⁸⁹ Wallis, 'Can the Law'.

¹⁹⁰ Ibid.

Since the beginning, the EU overlooked the role of commercial vessels during the migration crisis and did not incorporate the shipping industry as a consultative body, which could have facilitated EU actions in the Mediterranean. Instead, later on, there are countries like Italy and Malta that strongly disapprove of the involvement of the private actors and the NGOs. According to them, as it was noted above, the participation of these actors creates incentives for more migrants to cross the sea, and the number of migrants rises. More actors engaged in SAR generate more opportunities for people in distress to be saved. Therefore, the Italian authorities work in close cooperation with Libya to prevent more migrants from coming to their ports. Whereas humanitarian rescue ships do everything in their power to transfer migrants to Europe and assure they are placed in safe ports, other private actors like commercial vessels are used by the national authorities to stop migrants from leaving Libya.

4. Search and rescue operations in the Mediterranean and legal landscape

In order to come to an answer to the research question, one has to have an understanding of the legal landscape in the context of rescue missions at sea. This chapter entirely focuses on the Member States legal obligations with regards to EU and international law. The objective of this chapter is to analyse the two critical issues of SAR and disembarkation. The chapter opens with the matter of SAR in territorial waters and high seas. This section of the work focuses on the answer to the research question, which concerns the obligation to conduct SAR in high seas. The second subchapter analyses, whether the Member States are obliged to let disembark migrants in their harbours. Finally, the chapter ends with a short case study that examines the legality of legislation applied by the Italian government with regards to both SAR and disembarkation. As the work overall focuses on the role of the EU in the search and rescue in the Mediterranean, the chapter reveals the limitations of the EU and international law with regard to this subject.

4.1. The Member States' obligation to conduct SAR missions

This chapter is centred around the legal obligation of the Member States to conduct SAR both in the territorial waters and high seas. Both subsections focus on the application of the sea law, EU law, and human rights. The objective of this subchapter is to analyse under what legal

obligations the Member States are compelled to conduct SAR and to what extent their jurisdiction applies to foreign ships at sea.

4.1.1. SAR in the territorial sea and the search for a safe place

Both international and EU laws impose on the Member States obligations to conduct SAR operations and in general assistance to persons in distress. This section of the work examines the obligation to conduct SAR. Firstly, it focuses on the humanitarian regime at sea and obligations implied by different sea law conventions. Then the analysis brings to attention the limitations of international, EU, and human rights law with regards to taking responsibility over foreign vessels within the territorial waters.

The humanitarian regime at sea consists of “maritime law, norms, and practices” concerning safety, SAR, and protection of distressed persons at sea enshrined in a variety of international conventions.¹⁹¹ There is a general obligation for captains of vessels to assist those in distress, which is enshrined in tradition and international law. Even before the International Convention on Maritime Search and Rescue (SAR Convention) of 1979, this obligation was part of the Convention for the Safety of Life at Sea (SOLAS Convention) of 1974.

The United Nations Convention on the Law of the Sea (UNCLOS), SOLAS Convention, and SAR Convention provide general obligations that their signatories are obliged to follow. While rescuing migrants in the Mediterranean Sea, EU states are covered by international maritime law. According to article 98 of the UNCLOS:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where

¹⁹¹ Pugh, M. (2004). Drowning not Waving: Boat People and Humanitarianism at Sea. *Journal of Refugee Studies*, 17(1), 50-69, p. 58.

circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

However, it was not until the SAR Convention that SAR operations were covered by an international system. The Convention in its preamble besides the general obligation to assist those in distress calls for “*the establishment by every coastal State of adequate and effective arrangements for coast watching and for search and rescue services*”.¹⁹² The provision of adequate SAR services includes various arrangements listed in the Convention that all the parties shall respond to. These provisions were brought along with the 2004 amendments. They include inter alia organization and coordination (legal frameworks, the establishment of the responsible authority, etc.), cooperation between States, operating procedures (which involves previously mentioned Rescue Coordination Centre as well as subcentres), and a ship reporting system. These requirements apply to all 13 SAR areas that were mentioned in the second chapter. However, some of the countries including Malta decided not to sign the amended version.¹⁹³

The EU Southern states “*have exposed uncertainties, gaps and room for discretion that relate to distress and safety at sea, disembarkation, interception, and search and rescue by merchant ships*.”¹⁹⁴ The applicability of human rights at sea within the context of the EU is uncertain. Moreover, the implementation within the EU level as well as on the international level is limited due to “*the manner in which they are being construed*”.¹⁹⁵ SAR obligations are interpreted unevenly among the EU Member States. Many loopholes in the law have an impact on states’ complying with them, leading to avoidance of responsibility. Like in the example of migration law and policies presented above, the Member States use these gaps in international law to refuse migrants in ports.

In a Regulation establishing the European Border Surveillance System (Eurosir), the Council stated ‘*that search and rescue at sea is a competence of the Member States which they exercise in the framework of international conventions*’.¹⁹⁶ The Eurosir itself is a system that facilitates cooperation between the Member States and Frontex at external borders and

¹⁹² International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS.

¹⁹³ Martin, M. (2014, June). Prioritising Border Control over Human lives: Violations of the Rights of Migrants and Refugees at Sea, Policy Brief. Available at: <https://www.refworld.org/pdfid/56fccbcbd.pdf>

¹⁹⁴ Pugh, M, ‘Drowning’, p. 58.

¹⁹⁵ Moreno-Lax, V. (2011). Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2), 174-220, p. 174.

¹⁹⁶ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir) (2013), *Official Journal* L295.

contributes to saving lives at sea. As it was described above in the second chapter Frontex 2016 European Border and Coast Guard ('Frontex') Regulation includes SAR operations. According to Article 4(b) of the Regulation border management consist of SAR operation at sea that is launched and carried in compliance with 'Sea Borders' Regulation (EU) No 656/2014 of the European Parliament and the Council as well as international law. However, the SAR operations only take place during '*border surveillance operations at sea*'.¹⁹⁷ Moreover, '*the EU Coastguard is not directly responsible for guaranteeing compliance with SAR obligations, but only to support EU norms by reinforcing, assessing, and coordinating the actions of Member States*'.¹⁹⁸

In 2006 the Commission in a communication to the Council has concluded that there is "*general disunity among the actors concerned 'over which obligations arise from EU fundamental rights and international human rights and refugee law, and how these obligations relate to the law of the sea*".¹⁹⁹

In a situation when a boat manages to reach the shore of a coastal state or shipwrecks in territorial waters by law the state is responsible to carry aid. However, states found ambiguity also for the concept of "presence in the country".²⁰⁰ The States found a solution to evade the law and distinct the situation of a physical presence and a legal one in a territory. Concerning the latter one, a refugee can be denied the right to seek protection despite being physically present, when declared a non-entrant in a legal sense. This applies to a situation when migrants are on foreign vessels both physically and lawfully present under a state's jurisdiction, nevertheless, later on not considered to enter the country.²⁰¹

In the Aquarius case, Italy and Malta did not take responsibility for a vessel with migrants on board.²⁰² The incident took place in June 2018, when a German rescue vessel under a flag of Gibraltar carried rescued migrants to the Italian coast. It was Italy's RCC that

¹⁹⁷ Regulation (EU) 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 (2016), *Official Journal* L251.

¹⁹⁸ Ghezelbash, Moreno-Lax, Klein & Opeskin (2018). Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia. *International and Comparative Law Quarterly*, 67(2), 315-351, p. 317.

¹⁹⁹ Barrett-Brown, S. (2012, 26 September). *Submission of the Immigration Law Practitioners' Association to the public consultation by the European Ombuds on Frontex and Fundamental Rights*, ILPA, pp. 2-3.

²⁰⁰ Pugh, 'Drowning', p. 60.

²⁰¹ Ibid.

²⁰² Fink, M. & Gombeer, K. (2018, 14 June). The Aquarius incident: navigating the turbulent waters of international law, *Blog of the European Journal of International Law*. Available at: <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/>

coordinated SAR for the vessel, which by law means that Italy fulfilled its duty to conduct SAR operation. According, to the SAR Convention in the next step Italy was obliged to find a port for disembarkation, however, the Convention does not imply that it is Italy's obligation to allow for the vessel to disembark in its port.²⁰³ Both Italy and Malta were accused to violate human rights by not allowing for the disembarkation of migrants. According to Article 1 of the European Convention on Human Rights and the obligation to respect Human Rights, '*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*'.²⁰⁴

However, in the case of Aquarius, it is questionable, whether or not the vessel was under Italian jurisdiction. Although it was Italy that conducted SAR, as it is further elaborated in the next subchapter, there was a lack of physical presence of a State's official on the scene of the SAR operation to consider that the ship fell under Italian jurisdiction. Therefore, it is uncertain, if an order to conduct SAR is considered jurisdiction as such.²⁰⁵ In another case *Women on Waves and others v. Portugal*, although not related to the SAR, the Court suggested that a request made by a Member State towards a foreign vessel could act as a means of jurisdiction. A note sent by the Portuguese authorities to the NGO vessel to stop it from entering the territorial waters was enough to consider the application of the Convention. Nevertheless, the case-law is not sufficient to rule whether Italy and Malta violated human rights.²⁰⁶ The same applies to the EU law, which is also limited with regards to fundamental rights and search and rescue operations.

The Charter of Fundamental Rights could be triggered only in case that a Member State acts within the scope of the EU law. '*The territorial scope of application of EU legislation may extend to all areas and activities where the member States exercise full sovereignty or enjoy "sovereign rights"*'.²⁰⁷ Although the EU law applies also to territorial waters, in the case like Aquarius, the vessel was not considered to fall under the jurisdiction of any Member State, therefore, the fundamental rights could not apply. Moreover, as the SAR did not take place within the joint operation coordinated by Frontex the Sea Borders Regulation could not apply

²⁰³ Ibid.

²⁰⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

²⁰⁵ Fink, M. 'The Aquarius'.

²⁰⁶ Ibid.

²⁰⁷ Paasivirta, E. (2015). The European Union and the United Nations Convention on the Law of the Sea. *Fordham International Law Journal*, 38(4), 1045-1070, p. 1069.

either. According to the Regulation, Member States would be required to ensure disembarkation while participating in joint operations, which does not concern the case of Aquarius.²⁰⁸

The obligation to conduct SAR operations is quite clear and enshrined in many international conventions that overlap. However, the problem appears with regards to steps after the SAR operation is conducted. There is a visible lack of clarification of responsibility. On several occasions, avoidance of responsibility by the Member States resulted in the deaths of hundreds of migrants in left-to-die boat cases. The EU law, law of the sea as well as the human rights law do not provide a clearly defined framework. Therefore, accidents like this in the case of Aquarius still appear and will continue to do so due to a lack of conclusive answers from the legal point of view.

4.1.2. The EU Member States in the high seas: SAR operations and the principle of non-refoulement

The aim of this subchapter is to answer the main question of this work. This part of the work focuses on the jurisdiction of the Member States in the high seas. Firstly, the subchapter focuses on the obligation of the Member States to conduct SAR in the high seas. Then, the analysis shifts to the principle of non-refoulement and its applicability in the high seas. The latter issue is analysed on the basis of a case-law, which allows for a better understanding of the matter.

According to the UN International Convention of the Law of the Sea, signed in 1982 by all states in the European Union, each state has a zone of 12 nautical miles (22 kilometres) around their coasts under which their own law applies.

While most states have established territorial waters, few have claimed an economic exclusive zone or a fishing zone extending beyond these waters. As a result, the high seas area in the Mediterranean lies much closer to the coasts than in most other seas and oceans on the planet.²⁰⁹

As it was analysed above even in territorial waters foreign ships are not necessarily under the jurisdiction of this state. The State's official must be present on the scene of the SAR

²⁰⁸ Fink, M., 'The Aquarius'.

²⁰⁹ Cacaud, P. (2005). *Fisheries Laws and Regulations in the Mediterranean: A Comparative Study*, Food and Agriculture Organization of the United Nations, Annex 2.

operation in order for a ship to be under the jurisdiction of this state. Therefore, the main question of this subchapter as well as of the work states: *What is the Member States' jurisdiction toward migrants that are beyond the boundaries of their territorial sea?*

States' authority at sea is not absolute and has its legal basis in international treaties. According to the 1982 UN Convention on the Law of the Sea (LOSC), states are free to utilize high seas with respect to the Convention and "other rules of international law". As Articles 90 and 91 of the LOSC state high seas allow for freedom of navigation and ships fall within the jurisdiction of flag states. However, there are cases where other states can exercise their jurisdiction but in a very limited scope. A state may approach and aboard a ship within the 'right of visit' in certain situations listed in Article 110 LOSC: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized 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. However, the Convention does not clarify whether powers of seizure apply to these situations.

Regarding SAR operations outside states' jurisdiction, several treaties such as the LOSC, the 1974 Safety of Life at Sea (SOLAS) Convention and the 1979 Search and Rescue (SAR) Convention bear significant relevance in this context. As it was mentioned on numerous occasions, including Article 98 of UNCLOS

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

According to general provisions of the LOSC, search and rescue obligations apply also to high seas.

Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea

and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.²¹⁰

It stems from the law of the sea that the Member States are obliged to conduct SAR even in the high seas. However, the jurisdiction of the Member States does not end here. As well as in the territorial waters the rescue missions are not considered complete unless they end with the successful disembarkation of rescued persons. The previously elaborated principle of non-refoulement also applies to the high seas.

International law instruments define the scope of the principle of non-refoulement twofold referring to ‘jurisdiction’ as well as to ‘territory’. Article 2 (1) of the Convention against Torture obliges states to “prevent acts of torture in any territory under its jurisdiction”, whereas Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR) stands that states shall respect and ensure the rights of the convention to all persons “present in its territory and subject to its jurisdiction”. Therefore, the UNHRC has clarified that both notions identified in Article 2 (1) are “not cumulative requirements”.²¹¹ Likewise, the European Convention on Human Rights (ECHR) refers to the scope of the principle as to jurisdiction, whereas the EU Treaties indicate to which territories it applies (Article 52 TEU) and even more precisely in Article 355 provides additional provisions relating to the territorial scope. However, the situation differs in the case of the EU Charter of Fundamental Rights, which does not indicate territorial scope. Nevertheless, as an integral part of the EU Treaties with the same status, the Charter should apply to “*EU’s external relations and hence extraterritorially.*”²¹² Article 21 (1) of the TEU states that the “[t]he Union’s action [...] seeks to advance in the wider world [...] the universality and indivisibility of human rights and fundamental freedoms”. Therefore, under international human rights law ‘jurisdiction’ “*is not a threshold requirement for the applicability of EU human rights law*”.²¹³ In practice, it means that all legal decisions made extraterritorially remain subject to states’ human rights obligations.²¹⁴

Moreover, the extraterritoriality of the principle of non-refoulement and the Member States’ responsibility were confirmed in the landmark *Hirsi* case (*Hirsi Jamaa and Others v.*

²¹⁰ UN General Assembly, Convention on the Law of the Sea, 10 December 1982, Article 98(2).

²¹¹ Moreno-Lax, V. & Costello, C. (2016). Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, European Union Agency for Fundamental Rights, p. 16.

²¹² Ibid.

²¹³ Peers, Hervey, Kenner, & Ward (eds.) 2014. *The EU Charter of Fundamental Rights: A Commentary, First Edition*, Hart Publishing, p. 1662.

²¹⁴ Guild, Castello, Garlick, Moreno-Lax, Mouzourakis, & Carerra (2014). *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, European Parliament, p. 63.

Italy). On 23 February 2012, the European Court of Human Rights ruled that Italy violated human rights principles by rejecting African migrants and asylum-seekers on the high seas.²¹⁵ The problem began in 2009 when Italy and Libya signed a bilateral anti-immigration cooperation agreement. Under the agreement, both parties engaged in push-back operations in high seas. The migrants were intercepted at sea and then turned back to Tripoli on Italian military ships regardless of the conditions awaiting in Libya. The applicants in the Hirsi case were 11 Somali and 13 Eritrean citizens that were part of one of the intercepted and turned back boat. None of the migrants was identified by the Italian authorities before handing to the Libyan guards. Moreover, they were told that they are being transferred to an Italian port. Only a few of them were granted a status of refugee by UNHCR in Tripoli. One after second attempt to enter Italy was granted there a refugee status, while two of the migrants died after the arrival to Libya.²¹⁶ Therefore, there is no doubt that the migrants were in need of international protection.

The case is a landmark for multiple reasons. First of all, the Court clarified that Article 3 ECHR also applies to the high seas. It was agreed that under Article 1 ECHR, the principle of non-refoulement can be applied to the high seas as the applicant was under the jurisdiction of Italy.²¹⁷ Once intercepted and transferred by Italian military ship, the migrants were under the jurisdiction of Italy and there is no doubt that human rights applied in this case.. Furthermore, Italian authorities should have been aware of the situation in Libya and that conditions there fall under the scope of Article 3. Secondly, Italy was found guilty of breach of Article 4 of Protocol 4 ECHR, which stands for the prohibition of collective expulsion of aliens.²¹⁸ The provision of this Article normally applies to expulsion from the territory of a contracting country, whereas the situation at stake concerns high seas. Therefore, the Court referred to the criteria in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.²¹⁹ In the judgement “*the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the*

²¹⁵ Amnesty International (2012, 23 February). *Italy: ‘Historic’ European Court judgment upholds migrants’ rights*. Available at: <https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights/>

²¹⁶ Messineo, F. (2012, 24 February). Yet another mala figura: Italy breached non-refoulement obligations by intercepting migrants’ boats at sea, says ECtHR, *Blog of the European Journal of International Law*. Available at: <https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/>

²¹⁷ Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 79-82.

²¹⁸ Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46.

²¹⁹ Messino, F.

exercise of extraterritorial jurisdiction by that State took the form of collective expulsion”.²²⁰

To conclude, the European Court of Human Rights (ECtHR) found the extraterritorial application of ECHR and reaffirmed the importance of Article 3 ECHR which is a backbone of human rights protection and applies to many recent cases in the Mediterranean.

The research question stands: *What is the Member States’ jurisdiction toward migrants that are beyond the boundaries of their territorial sea?* The analysis of SAR and the principle of non-refoulement in high seas allows for better understanding to what extent the Member States’ jurisdiction applies. With regards to the SAR operations, it is clear that the law of the sea obliges the Member States to conduct SAR even extraterritorially. LOSC, SOLAS, as well as SAR Conventions, clearly stand that the parties to these conventions are obliged to assist those in distress. The same applies to the high seas, whereas such none of the state has jurisdiction, however, in particular, circumstances the States are allowed to interfere on board of foreign or flagless ships. Moreover, as soon as the State’s officials are present onboard of a foreign state, the vessels fall under the jurisdiction of this state. This leads to further obligations as it was presented in the Hirsi case. As the ECHR confirmed in its judgement that the principle of non-refoulement applies not only to territorial waters but as well as the high seas. Therefore, the Member States’ jurisdiction applies to the high seas and migrants saved or intercepted should be treated in compliance with European and international law.

4.2. The Member States’ obligation to let migrants disembark

Disembarkation of migrants in national ports is an indispensable part of every successful SAR operation. Therefore, taking into consideration the SAR actions in territorial waters and the search of a safe place, this section focuses on, whether, the Member States are obliged to let migrants disembark in their harbours. The first part of this subchapter focuses on the application of the sea law in the case of refusal for disembarkation by the Member States. It aims to analyse whether the law of the sea can oblige the states to accept migrants in their ports. Then, the objective of the second part is to examine the legality of refusal to disembark in light of human rights. In both cases, EU law is brought into consideration.

The experience showed on multiple occasions that the Member States often do not allow for disembarkation in their ports. Over the years even before the crisis of 2015 states have been

²²⁰ Hirsi Jamaa, para. 178.

denying access to their territorial waters, rejecting disembarkation, or even returning vessels trying to access ports. These practices not only lead to cases of non-rescue at sea but threaten the integrity of the ‘SAR regime’ and refugee law. Therefore, an important question arises *To what extent can the EU and international law (including the ECHR, be interpreted so as to force) the Member States to accept the shipping off of migrants in their harbours?*

As it had been clarified above, Member States are obliged to assist people in distress at sea and request shipmasters of the vessels under their flags to provide SAR. However, the international law of the sea does not directly oblige states to allow access to their ports. The SAR Convention defines ‘rescue’ as “*an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety*”.²²¹ As the Search and Rescue Convention states in Chapter 1.3.2 the parties are obliged “*to provide for their initial medical or other needs, and deliver them to a place of safety*”.²²² However, a duty to carry SAR is not clear about the problem of disembarkation that has been most visible in recent years since the migration crisis. As mentioned earlier in this work the ‘place of safety’ is not clearly defined and following the IMO’s statement a safe place can be defined differently in each case.²²³ UNHCR defined it as the ‘next port of call’, which should not be referred to as to the nearest port but a place that fill certain criteria to allow for successful disembarkation. In history, there was a practice that a flag state of a ship took responsibility disembarkation, which in practice can be too far to assist people in distress. Moreover, many migrants travel through the Mediterranean on unflagged boats, and this leads to further concern of liability towards unflagged ships in the international waters. As a result of these uncertainties Member States, and particularly Italy, tend to avoid any responsibility for migrants. Therefore, the clarification of the term of ‘safe place’ is essential for successful SAR activities.²²⁴ Under the IMO Guidelines²²⁵ on the treatment of persons rescued at sea, it is certain that only a dry land can be considered as a safe place, which completely excludes vessels.

Therefore, the SAR Convention touches upon the obligations of the states with regards to rescue operation but does not mention the question of disembarkation.²²⁶ After numerous non-rescue incidents at sea and continue disagreement regarding the question of disembarkation, the

²²¹ The SAR Convention, para. 1.3.13.

²²² Moreno-Lax, V. & Costello, C., p. 34.

²²³ Wallis, ‘Can the Law’.

²²⁴ Pugh, p. 61.

²²⁵ International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004.

²²⁶ UN High Commissioner for Refugees (UNHCR), Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes), 18 March 2002, p. 2.

SAR and SOLAS Conventions have been amended by Resolutions MSC.155(78) and MSC.153(78). The obligation to provide disembarkation was clarified. As it was mentioned above the SAR activities are not considered complete unless they end with the successful disembarkation of rescued persons.

It stems from the text of the Resolutions that the involved parties working in coordination and cooperation must assist a rescued ship in successful disembarkation. Nevertheless, later on, it is not explicit whether the States that conduct SAR are obliged to let disembark. According to the amendments, the parties to the Conventions are only obliged to organise disembarkation. It is not clear, whether they are compelled to allow for disembarkation in their ports.

Beyond the international law of the sea, the EU Member States have obligations arising from international and European human rights and refugee law. Article 2(1) of the European Convention on Human Rights “*enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.*”²²⁷ There is a visible connection between the obligation to rescue migrants and the right to life.²²⁸ By refusing migrants, states put these people in danger. As in both cases, the way back through the sea and the situation in their home states are a threat to their lives.

A principle of non-refoulement is subject to both European and international law.²²⁹ With regards to the former one, the EU covers the principle in primary law as well as secondary law, which stress out the importance to comply with the principle of non-refoulement. Therefore, the same applies to EU law regulating Frontex’s work that provides guidelines on how to ensure the principle of non-refoulement in its actions.²³⁰ It especially refers to actions at sea including Frontex coordinated joint operations. According to the Regulation establishing the European Border Surveillance System (Eurosur) Article 2(4), ‘*Member States and the Agency shall comply with fundamental rights, in particular the principles of non-refoulement and respect for human dignity and data protection requirements, when applying this Regulation*’. Moreover, we can find references to this obligation in other EU legal frameworks

²²⁷ Council of Europe, The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights, November 2006, Human rights handbooks, No. 8.

²²⁸ Papanicolopulu I. (2016). The duty to rescue at sea, in peacetime and in war: A general overview. *International Review of the Red Cross*, 98(2), p. 509.

²²⁹ Pugh, p. 60.

²³⁰ Moreno-Lax, V. & Costello, C., p. 15

like the Schengen Borders Code, Regulation (EC) No 863/2007 establishing a Mechanism for the Creation of Rapid Border Intervention Teams (hereinafter “Rabit Regulation”).²³¹

On the international level, the principle of non-refoulement is at the core of the Refugee Convention. This obligation is one of the fundamentals of the 1951 Convention, and no reservations to it are acceptable. It is also a part of the 1967 Protocol Relating to the Status of Refugees, as well as the European Convention on Human Rights to which all EU member states are signatories. According to Articles 31-33 of the Convention states must guarantee this principle to asylum seekers that are already in their territories, whether lawfully or not. Most notably, Article 33 prohibits states from returning those who fulfil the article 1 definition to countries where there is a threat to their life or freedom. According to the Convention, the principle applies also to refugees turned back that already reached the EU’s external borders.

Moreover, neither the international law nor EU law has the power to force states to open their ports for any vessels including migrants. This decision is fully dependent on the states which ships to let in in their harbours.²³² However, this constitutes a real obstacle for the humanitarian organisations trying to get permission for disembarkation in national ports. By refusing to open ports to migrants, Member States not only possibly act in breach of Article 2 ECHR, but as well as of Article 3. Migrants suffer inhuman treatment at the entrance of the ports, which should be admitted pursuant to Article 3 ECHR. In left-to-die boat cases, migrants are left drifting at sea for days and days hardly provided with water and food.²³³ Moreover, in some of these cases, migrants are forced to return to countries of origin, where they risk inhuman treatment which falls within the principle of non-refoulement.

Referring back to the law of the sea, Carrera and Cortinovis argue that The Member States retain the right to refuse access to their ports.²³⁴ The law only “*imposes an ‘obligation of conduct’ to guarantee swift disembarkation in a place of safety of people in distress at sea*”. However, following human rights this obligation may transform into an obligation to disembark in a case when the safety of persons is in danger or their rights are jeopardized by unreasonably delayed disembarkation.²³⁵ In the event of a real emergency onboard the states are obliged to

²³¹ UN High Commissioner for Refugees (UNHCR), UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM(2010)61 final, October 2010.

²³² Wallis, ‘Can the Law’.

²³³ Martin, M., ‘Prioritising Border’, p. 4.

²³⁴ Carrera and Cortinovis, p. 3.

²³⁵ Ibid., p. 13.

open their ports. According to Italian authorities, a situation of emergency takes place when there is not enough water, a need for medical help, or a danger aboard.

Later on, Member States use gaps in policy and law to avoid responsibility for irregular migrants. The EU, to ensure the functioning of asylum and migration control policies of the Southern states strengthened the role of EU agencies like EASO and Frontex.²³⁶ However, the EU's role is limited concerning the refusals of migrants in harbours by the Member States. The states find ways to avoid responsibilities towards migrants and both EU and international law cannot oblige them to disembark the same way contributing to more cases of non-rescue at sea.

Opinions concerning the obligation to disembark diverge among scholars. Taking into consideration both EU and international law, including the law of the sea we could argue that the obligation is implicit.²³⁷ Although the EU cannot force the Member States to open their ports and allow for disembarkation, *obligations under the law of the sea must be read in light of their obligations under international and regional human rights and refugee law.*²³⁸ The law is not explicit with regards to disembarkation, neither the ECtHR delivered an answer to the problem of migrants indefinitely waiting at sea.²³⁹ Nevertheless, taking into consideration the obligation of the Member States arising from the human rights law, they should be obliged to carry help. By allowing migrants to await at sea the Member States put them not only at risk of suffering but on multiple occasions death.

4.3. Case study: legality of Italian legislation

The situation in Italy is by far the most controversial and disturbing comparing to the other Southern countries affected by irregular migration. It is especially due to the new Italian Decree-Law, as well as the previously analysed situations concerning the Code of conduct on NGOs. Therefore, this subchapter focuses on the legality of the Italian legislation with regards to SAR and disembarkation. This part of the work analyses of Italian laws and policies in the area of irregular, illegal migration and their relation to the refusal of migrants in national harbours, as well as search and rescue missions.

As it was analysed above in the work States are legally obliged by European and international law to carry help to migrants in distress. Yet, the states find loopholes in the law

²³⁶ Slominski, P. & Trauner, F., p. 14.

²³⁷ Moreno-Lax, 'Seeking Asylum', p. 196.

²³⁸ Carrera, S. & Cortinovia R., p. 4.

²³⁹ Ibid., p. 3.

to avoid responsibility for migrants like in the example of Italy. The national law of the coastal States “*can sometimes counteract, leading to stand-offs*”.²⁴⁰ Therefore, the question arises, whether new Italian laws, regulations, and practices are legal from the European and international point of view.

The geographic position of the EU coastal states puts them in an unfortunate position. Unable to carry the burden in the form of thousands of migrants alone the Southern states took different measures to avoid the responsibility for arriving migrants. Arrivals from the sea are only part of the general number of people entering Europe, nevertheless, they severely affected southern countries especially Italy and Greece, and to a lesser extent Malta and Spain. Due to its situation and regarding its refusal of migrants in its harbours, Italy is the most vocal of the coastal countries. The Italian government introduced many measures, which underline SAR activities in the Mediterranean.

Practices and policies concerning irregular and illegal migration, including SAR and disembarkation have been developing in Italy long before the crisis even began. Anti-migration policies began with Berlusconi taking over office as a Prime Minister. In 2013, a visible shift took place in responses and methods to migration in the MED with the adoption of the above mentioned Mare Nostrum search and rescue operation.²⁴¹ Italy’s engagement into rescuing people in distress through coast guard and navy began in the 90s after the collapse of the Soviet Union and Yugoslavia, however, the real challenge came in 2011 along with the Arab Spring. Italy’s policy of refusal and expulsion of migrants dates back many years before the migration crisis of 2015. Back in 2005 ten non-governmental organisations complained to the European Commission and demanded sanctions, due to violation of European and international law by the Italian Government.²⁴² Moreover, in 2009 Italy was accused of illegal push backs to Libya.²⁴³

Beginning with 2009 Italy started to operate push-back migrants activities. As a result of the Italian-Libyan partnership, an agreement between Italy and Libya has been concluded. In return for funding from Italy Libya agreed to accept returned migrants without screening

²⁴⁰ Wallis, ‘Can the Law’.

²⁴¹ Panebianco, S. (2019). The Mediterranean migration crisis: humanitarian practices and migration governance in Italy. *Contemporary Italian Politics*, 11(4), 386-400, p. 387.

²⁴² Klepp, S. (2010). A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea. *European Journal of Migration and Law*, 12(1), 1–21, p. 5.

²⁴³ Aas, F. K., & Gundhus, p. 3.

them for asylum claims.²⁴⁴ Moreover, Italy sent several patrol boats to Libya to be jointly operated by both parties. They were “*used in joint patrols in Libyan territorial water and international waters in conjunction with Italian naval operations*”.²⁴⁵ Moreover, the Italian Guardia di Finanza was sent to the Libyan coast guard station and Libyan coast guards were stationed on Italian islands. Together by the 30th July 2009, they conducted seven operations resulting in a return of over 602 migrants back to Libya.²⁴⁶ Moreover, Italy openly admitted that they would not formally identify migrants that are intercepted at sea, and there were no persons that would expressly ask for asylum. Italy justified its actions in a CPT Report from 2009 to the Italian Government “there has been no need to identify these persons and establish their nationality”.²⁴⁷

In 2016 Amnesty International focused in its research on abuses of refugees and migrants with regards to identification in Italy. They suggested that in Italy there is less ‘*identify, screen and filter*’ and more a case of ‘*abuse, mislead and expel*’.²⁴⁸ Hence, Italian’s actions were considered to be in breach of fundamental obligations to aid people in distress. In 2012 the European Court of Human Rights (ECtHR) in the Hirsi case analysed in the subchapter above, confirmed that Italy’s actions were illegal. The Court judged that violated Article 3 (Prohibition of torture) as well Protocol No.4 and confirmed the extraterritorial reach of the human rights protection regime when assessing Italian authorities ‘pushbacks’ to Libya of people intercepted at sea.

Since the migration crisis, Italy’s legal framework has not been encouraging for migrants to pass the borders, nor for NGOs to provide SAR activities. As already mentioned in the previous chapter due to suspicions that NGO SAR could facilitate illegal immigration, in 2017 Italian government formulated obligations that are binding for the signatories in the form of the Code of Conduct. Interestingly these requirements are aimed to NGOs and no other actors such as commercial or government vessels.²⁴⁹ The doings of the Italian authorities were justified by the possibility that NGO vessels facilitate illegal migration. In domestic legislation of many

²⁴⁴ Euractiv (2009, 11 June), *Italy’s immigration deal with Libya sparks uproar*. Available at: <https://www.euractiv.com/section/justice-home-affairs/news/italy-s-immigration-deal-with-libya-sparks-uproar/>

²⁴⁵ Moreno-Lax, ‘Seeking Asylum’, p. 183.

²⁴⁶ Ibid., p. 186.

²⁴⁷ Council of Europe: Committee for the Prevention of Torture, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, 28 April 2010, CPT/Inf (2010) 14, paras. 13-14.

²⁴⁸ Zammit Lupi, D. (2016). Hotspot Italy: Abuses of refugees and migrants, Amnesty International. Available at: <https://www.amnesty.org/en/latest/campaigns/2016/11/hotspot-italy/>

²⁴⁹ Carrera, et al.

Member States facilitating entry and stay of irregular migrants may even result in criminal proceedings.

In Italy, the penalisation process concerning SAR intensified in March 2018 when the Italian government adopted Directive 14100/141(8). The Directive “*requires Italian maritime and military authorities to prevent commercial and private boats that have carried out SAR in international waters from having access to Italian ports*”.²⁵⁰ UN special rapporteurs and other experts found the Directive to prioritise security concerns over the rescue of lives at sea.²⁵¹ However Italy, who was little concerned with the accusations, closed its ports to migrants a few months later. Italy’s then Deputy Prime Minister Matteo Salvini introduced the ‘closed ports’ policy. In August 2019 the Italian government took a step even further in penalising SAR and approved a new decree that results in fining vessels and organizations that provide SAR up to €1 million.²⁵²

Moreover, in September 2018 a new Decree-Law on Immigration and Security was adopted by the Italian Council of Ministers. After new legislation regarding SAR, the time came for limiting the protection and stay of migrants. The Decree consists of provisions concerning inter alia humanitarian residence permits, fight against irregular migration, more effective returns, international protection, and conditions for asylum seekers.²⁵³ First of all the new law abolished the humanitarian protection status, which is particularly disturbing. The ‘humanitarian protection’ is a legal tool that provided third-country nationals with the residence permit. Those who could not be qualified as refugees but at the same time could not be returned to their countries of origin received a special permit. Moreover, the new decree prohibits “asylum-seekers to register as resident, excluding them from basic health care and social coverage”.²⁵⁴ Furthermore, the duration of detention time for migrants was prolonged from 90 to 180 days, and the funds intended to serve for relocation of migrants, now facilitate ‘return measures’.²⁵⁵ Last but not least, the law transformed the System of protection for asylum seekers and refugees (SPRAR) to the System of protection of refugees and unaccompanied

²⁵⁰ Carrera, S. & Cortinovis R., p. 5.

²⁵¹ Carrera, et al., p. 17.

²⁵² Gilbertson, A. (2019, 15 August). Children’s lives in Mediterranean Sea must take priority over politics, says UNICEF, UN News. Available at: <https://news.un.org/en/story/2019/08/1044301>

²⁵³ Carta, S. (2018). Beyond closed ports: the new Italian Decree-Law on Immigration and Security. OMNIA. Available at: file:///C:/Users/Kamila/Downloads/new%20italian%20decree.pdf

²⁵⁴ European Council on Refugees and Exiles (2020, 10 January). *Italy: Report on Effects of the “Security Decrees” on Migrants and Refugees in Sicily*, News. Available at: <https://www.ecre.org/italy-report-on-effects-of-the-security-decrees-on-migrants-and-refugees-in-sicily/>

²⁵⁵ Carta, S., ‘Beyond closed’.

minors (SIPROIMI). With the new system, only already recognized refugees and beneficiaries of subsidiary protection can be granted accommodation within the SPRAR. Asylum seekers are sent to the Emergency Accommodation Centres (CAS), which are isolated and do not offer integration opportunities.²⁵⁶

The latest Italian law and policy changes bring concerns. In May 2019, the UN Joint Communication to the Italian government concluded that

the politics of SAR criminalisation and disengagement pursued by that government, including deterring migrants from arriving and facilitating ‘pullbacks’ by Libyan authorities, is leading to grave human rights violations of nonderogable and absolute rights, such as the right to life and non-refoulement, which are in violation of the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment (CAT).

The number of drownings on the number of general arrivals to Europe from Libya highly increased 2.52% in 2016 to 10.8% in 2019.²⁵⁷ Due to closed ports policy and objection to disembarkation, a number of non-rescue cases rise. Moreover, Italy’s new law decreases the protection of migrants that already arrived in Europe. From the legal point of view, Italy possibly violates international law on multiple occasions including the principle of non-refoulement and ‘Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts for aiding and assisting the Libyan Coastguard’.²⁵⁸ In 2018, United Nation human rights experts articulated that the new decree “*fundamentally undermine human rights principles, and will certainly lead to violations of international human rights law*”.²⁵⁹

One of the main concerns is a violation of the principle of non-refoulement, which is the core principle of international law. As it was analysed above in the Hirsi case, Italy is responsible not only for migrants in its territorial waters but as well as those intercepted in the high seas. Italy’s pushback-practices put migrants in grave danger as once returned to their country of origin are at a great risk of inhuman treatment. Moreover, Italy through the agreement with Libya violates more than the principle of non-refoulement. First of all, Libya is not considered a safe place as a result of ongoing political instability and migrants returned

²⁵⁶ European Council on Refugees and Exiles, ‘Italy: Report’

²⁵⁷ Gupta, G. (2020). Italy’s Legal Responsibility in the Mediterranean Migration Crisis. *Cambridge International Law Journal*, p. 1.

²⁵⁸ Ibid., pp. 1-2.

²⁵⁹ HRW (2020, 31 January). Italy: Revoke Abusive Anti-Asylum Decrees: Draconian Migration Measures Put Lives, Rights at Risk. Available at: <https://www.hrw.org/news/2020/01/31/italy-revoke-abusive-anti-asylum-decrees>

there are halted and detained in inhuman conditions. Furthermore, migrants once intercepted by the Libyan coastguards are detained for an extended period of time against the right to liberty and security under Article 9 of the International Covenant on Civil and Political Rights (ICCPR).²⁶⁰

According to Article 16 of ARSIWA (Draft Articles on Responsibility of States for internationally wrongful acts), Italy is responsible “*for aiding and assisting the Libyan Coastguard in interdicting and detaining refugees and asylum seekers*”.²⁶¹ Under Article 16

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

With regards to the EU law, interceptions and ‘pushbacks’ to Libya led by Italian authorities, the Commission concluded that “border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone, the exclusive economic zone or on the high seas, fall within the scope of application of the Schengen Borders Code (SBC)”, and the EU notion of “border surveillance” laid down in Article 13 of the SBC.²⁶²

Finally, Italy’s actions towards NGOs and refusal of disembarkation result in a violation of Italy’s human rights obligations. There is an ongoing process of criminalisation of SAR actions carried out by civil society organisations. As it was examined above Italy’s actions towards NGOs, such as the code of conduct cause more cases of non-rescue and death of migrants at sea. Moreover, refusal to disembark possibly violates Article 3 ECHR, while migrants onboard drift for days or even weeks around ports with limited water and food supplies. In both cases Article 2 of the Human Rights Act has to be taken into concern as ‘*everyone’s right to life shall be protected by law*’.²⁶³

Additionally, Italy refuses to accept many NGO vessels with migrants on board in national ports. Due to harsh penalties, seizing of ships, refusal of disembarkation, and even

²⁶⁰ Gupta, G., ‘Italy’s Legal’, p. 5.

²⁶¹ Ibid., p. 6.

²⁶² Amnesty International, ‘Italy: ‘Historic’.

²⁶³ Korff, D. (2006). The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights. *Human rights handbooks*, No. 8. Available at: <https://rm.coe.int/168007ff4e>

proceedings against shipmasters and crews, the number of humanitarian organisations' boats is constantly falling. Beside newly approved penalty payments the Italian law itself prescribes harsh punishment for illegal migration up to 3 years in jail. The situation in Italy is very strict for non-state actors. The clash with the NGOs not only leads to a halt many humanitarian operations conducted by the NGOs but limits as well as SAR missions at sea adding to more non-rescue incidents.

5. Conclusion

The EU seems to struggle with maintaining solidarity in migration policy, which undoubtedly has an impact on its power within this field. The Member States act according to their national policies, which as presented in this work vary and in some cases can be harmful for migrants. The EU primary law does not cover the solution to the problem of irregular migration. It only sets up minimum standards in the field of migration and asylum policies, where the Member States have room for manoeuvre. This leads to avoidance of responsibilities and add to non-rescue accidents at sea. Eventually, the migration crisis could be characterised as a policy crisis. The EU bodies like the Commission with the support of the Parliament try to harmonise the area of migration policy, however, their actions are limited to secondary law. The EU is failing forward in migration policy, which is based on learning through mistakes while responding to the ongoing migration challenges. The problem of migrants at sea lasts, but the EU does not give up on transforming its policies. However, its new policies only partly respond to the problems that Europe faces regarding irregular migration.

SAR and disembarkation bring further concerns with regards to irregular migration. New laws and policies applied by the EU Member States like in the case of Italy limit SAR missions and add to more cases of boats left-to-die. The role of private actors like NGOs and merchant ships is vital in the Mediterranean. However, the actions of Member States make it harder for these actors to continue their commitment to SAR. There is an ongoing criminalisation of humanitarian help conducted by private actors like NGOs and commercial vessels. Some of the Member States believe that NGOs SAR missions expand illegal migration. Uncertain of whether they will be accepted or not to disembark migrants in ports of the EU Member States, NGOs such permanently suspended its operations. Moreover, coastal countries limit the SAR zones, as for the case of the operation Themis whose zone was reduced by Maltese waters.

However, as it was analysed in this work Member States' jurisdiction does not end within the territorial borders. Member States are also obliged to render help in high seas. Even the human rights law and the principle of non-refoulment applies beyond the borders. The historical Hirsi case confirmed the applicability of this principle to the high seas, found the extraterritorial application of ECHR and reaffirmed the importance of Article 3 ECHR which is a backbone of human rights protection. As this work proves Article 3 can apply to multiple situations. Migrants waiting for disembarkation outside of national ports can be also victims of inhuman conditions. The question of obligation to disembark is one of the main concerns with

regard to irregular migration. The law is not explicit in this matter, however, taking into consideration the obligation of the Member States arising from the human rights law, they should be obliged to carry help. By allowing migrants to await at sea the Member States put them not only at risk of suffering but on multiple occasions death. On the example of Italy, it was proved that the Member States are not above the law. Italy's actions towards NGOs, refusal of disembarkation as well as 'pushbacks' result in a violation of Italy's human rights obligations.

Member States as signatories of multiple regional and international conventions are subject to different obligations. Some of them are not explicit, however, some rights go beyond the borders. Both EU and international law can apply even to high seas are particular situations. Based on the analysis conducted in this paper it could be concluded that some obligations in the law are implicit. This particularly applies to the human rights law, where the right to life should be taken into consideration in many of the situations presented in this work.

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