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Search and rescue, disembarkation and relocation arrangements in the Mediterranean

Sailing Away from Responsibility?

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Abstract

Search and Rescue (SAR) and disembarkation of persons in distress at sea in the Mediterranean continue to fuel divisions among EU member states. The 'closed ports' policy declared by the Italian Ministry of Interior in June 2018, and the ensuing refusal to let NGO ships conducting SAR operations enter Italian ports, has resulted in unresolved diplomatic rows between some European governments and EU institutions, and grave violations of the human rights of people attempting to cross the Mediterranean.

This paper examines how current political controversies surrounding SAR and disembarkation in the Mediterranean unfold in a policy context characterised by a 'contained mobility' paradigm that has materialised in the increasing penalisation of humanitarian SAR NGOs, a strategic and gradual operational disengagement from SAR activities by the EU and its member states, and the delegation of containment tasks to the Libyan coast guard (so-called 'pullbacks'), a development that has been indirectly supported by EU institutions. These policies have contributed to substantially widen the gap in SAR capabilities in the Central Mediterranean.

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The paper challenges the assumption that national governments and EU institutions can bypass their rule of law and human rights responsibilities under international maritime, human rights and refugee law, as well as those laid down in EU Treaties and national constitutional laws. It argues that, despite the many barriers to ensuring effective remedies for the affected individuals, the application of the notion of 'portable justice' in the context of EU law has the potential to capture EU and national agent responsibilities and liabilities for human rights violations in the Mediterranean and crimes against humanity in Libya.

Since the summer of 2018, a number of cases of disembarkations following NGO SAR operations have been addressed through ad hoc disembarkation and relocation arrangements from Italy and Malta, involving a limited number of member states on a voluntary and secretive basis. The paper provides a first critical examination of these 'arrangements' and shows how, since the beginning of 2019, the European Commission and EU agencies (Frontex and EASO) have assisted in the implementation of these 'extra-EU Treaty' arrangements. This paper argues that the use of solidarity 'à la carte' or 'variable geometry' in asylum policies takes Europeanisation backwards, allows for a 'cherry picking' approach by EU governments and challenges the consistency of the EU asylum acquis.

The paper concludes by putting forward some options to addressing SAR and disembarkation challenges and recommends that these should be based on the principle of 'equal solidarity', whereby all EU member states share equally the responsibility for asylum seekers in full compliance with EU constitutive principles and fundamental rights.

Contents

List of Figures and Tables

Executive summary

This paper examines recent political controversies and policy developments in search and rescue (SAR) and disembarkation in the Central Mediterranean. Disputes in this area among Mediterranean coastal states are by no means a novelty. They find their roots in long-standing disagreements over the interpretation and applicability of relevant international law of the sea and human rights obligations and by the inability (or unwillingness) of EU member states to devise cooperative agreements among them to enhance the effectiveness and efficiency of SAR operations. However, over the last few years, those disputes have been emphasised by the increasing politicisation of SAR and disembarkation issues at the EU and national levels and by the emergence of increasingly restrictive policy responses towards migrants and asylum seekers attempting to cross the Mediterranean Sea.

The politics of SAR criminalisation and disengagement

This paper argues that EU and member state policy responses have been driven by a *politics of SAR criminalisation and disengagement.* The latter have materialised in a number of interrelated policy responses. First, the increasing policing and criminalisation of civil society actors and non-governmental organisations involved in SAR activities. Since 2017, actions taken to disrupt the activity of SAR NGOs have included the seizing and confiscation of NGO boats, the application of a 'code of conduct' limiting their independence, the launch of formal prosecutions based on unfounded allegations of facilitating irregular immigration and human smuggling, the refusal by the Italian government to allow access to national ports and, recently, the imposition of administrative fines against those organisations (*Section 2.1 of the paper*).

Second, the strategic disengagement of national and EU actors from SAR activities in the Central Mediterranean. This approach has translated into the incremental 'backing out' and reduction of the operational space of Frontex Joint Maritime Operation Themis (launched in 2018), as well as the withdrawal of the naval means and SAR-related activities of EUNAVFOR-MED operation 'Sophia' (launched in 2015). Member state and EU disengagement from SAR activities has been accompanied by the progressive delegation of containment tasks to Libyan authorities, including in the form of 'pullbacks' to Libya of boats carrying migrants headed to Europe.

Support by the EU and Italian government has materialised in the provision of funding, training, and equipment aimed at increasing the capacity of the Libyan Coast Guard to conduct unlawful interdiction operations at sea, enabling Libyan authorities to establish a Libyan Search and Rescue Region (SRR) and setting up a Libyan Maritime Rescue Coordination Centre (MRCC). The European Commission has provided indirect financial support to these activities through the EU Trust Fund for Africa. The Commission has also controversially considered 'lawful' the sharing, with the Libyan Coast Guard, of information on boat sightings by satellite maritime surveillance technologies, such as EUROSUR Fusion Services under Frontex Themis Joint Operations and aerial assets of the EUNAVFOR-MED Sophia operation, (*Section 2.2*).

While in 2018 the total number of irregular entries to Italy across the Central Mediterranean reached its lowest level since 2012, the perverse practical effects of these policies have been well documented and internationally criticised. The shrinking of SAR humanitarian and operational space has led to a surge in the number of deaths in the Mediterranean, with the International Organisation for Migration (IOM) estimating more than 15,000 deaths on the Central Mediterranean route alone from 2014 to 2018. Moreover, the United Nations High Commissioner for Refugees (UNHCR) estimated that more than 45,000 people have been 'intercepted or rescued' by the Libyan Coast Guard between 2016 and first half of 2019, and thereby exposed to grave human rights violations and crimes against humanity in a country that remains largely unsafe and in conflict (*Section 2.1*).

'Contained mobility' and portable justice

The range of policies aimed at restricting SAR operational capacities and criminalising the humanitarian actors involved in SAR operations may be understood as different components or 'layers' of a strategy of *contained mobility* that aims at limiting and filtering the movements of migrants and asylum seekers at different stages of their journeys. Contained mobility policies have been implemented through a matrix of legal, financial and operational instruments involving EU and member state actors, which have increasingly taken the form of 'extra-EU Treaty' tools, such as emergency funds, memoranda of understanding and informal arrangements (*Section 3*).

Policies adopted and/or implemented by European institutions, EU agencies and national authorities have been designed with the aim of escaping legal accountability and liabilities. However, despite the many barriers still existing to ensuring effective justice and remedies for the victims, this paper argues that those policies do not happen in a legal vacuum: they fall within the scope and have the potential of being taken on by international and EU justice venues, actors and instruments. In the case of EU member states, the *portable justice* approach to the applicability of EU law advocated in this paper implies that member state responsibility is not limited to cases where they exercise jurisdiction over individuals in line with the ECtHR case law, but also extends to all practices falling within the scope of EU law, including the provision of operational assistance by EU agencies and financial support through EU funding instruments (*Section 3*).

The legality and legitimacy of EU and national policies in the field of SAR and disembarkation depend on their compatibility with legal standards stemming from the law of the sea, international and regional human rights law and secondary EU legislation in the field of border surveillance and asylum.

First, the international law of the sea stipulates a clear duty for every shipmaster to render assistance in case of vessels or persons in distress at sea and considers the right to life as customary under international law. Coastal states have the obligation to establish effective SAR services ensuring the provision of assistance to any person in distress at sea. The state responsible for the search and rescue region where assistance has been rendered also has

primary responsibility for coordinating SAR activities in due diligence and 'good faith' with other states, as well as taking the lead in finding a port for disembarkation in a place of safety.

States retain the right to allow or deny access to their national ports. The law of the sea only imposes an 'obligation of conduct' to guarantee swift disembarkation in a place of safety of people in distress at sea. However, such an '*obligation of conduct*' may become an *obligation to disembark* if no other option is available to ensure the *safety* of people on board or when the human rights and dignity of the people rescued would be jeopardised by unreasonably delayed disembarkation. While political controversies have continued regarding the exact scope of the concept of 'place of safety' under the law of the sea, the International Maritime Organization (IMO) and UNHCR have emphasised that states should avoid actions or inactions leading to disembarkation in unsafe territories and putting people at risk of torture, and/or inhuman or degrading treatment (*Section 3.1 of this paper*).

Second, EU member states obligations under the law of the sea must be read in light of their obligations under international and regional human rights and refugee law. A recent Joint Communication by no less than Five United Nations Special Procedures to the Italian Government issued in May 2019 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 non-derogable 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).

EU institutions, agencies and member states also incur responsibility when they directly or indirectly aid, assist, direct and control or coerce another state to engage in a conduct that violates international obligations, and which constitutes an internationally wrongful act in light of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). In cases where these acts constitute 'crimes against humanity', they fall within the framework of the Rome Statute and the jurisdiction of the International Criminal Court (ICC). Recent requests have been made before the ICC and the ICC Prosecutor to open investigations into the complicity and collusion of high-ranking EU agents and Italian authorities in crimes against humanity in Libya, and into criminal liabilities for well-documented crimes against migrants attempting to transit through the country and experiencing arbitrary detention, enslavement, torture, and other inhuman treatments in detention camps (*Section 3.2*).

The European Court of Human Rights (ECtHR) in its landmark 2012 *Hirsi* case confirmed the extraterritorial reach of the human rights protection regime when assessing Italian authorities 'pushbacks' to Libya of people intercepted at sea. The Strasbourg Court found that, by bringing intercepted migrants on board of Italian Navy vessels before escorting them to Libya, Italian authorities exercised exclusive *de jure* and *de facto* control over the persons concerned. The *Hirsi* doctrine represents the starting point for tackling some of the more sophisticated containment policies currently deployed in the Mediterranean, including those involving the

provision of financial, technical and operational support to third country authorities in preventing migrant boats from reaching European shores ('pullbacks'). Regarding the duty of states to allow disembarkation of migrants rescued at sea, however, the ECtHR has until now left unanswered the issue whether people rescued by NGO boats need to go through the suffering of waiting indefinitely at sea and eventually become 'vulnerable' for a government such as Italy to have an *obligation* to disembark.

Third, SAR and disembarkation activities conducted by EU member states conducted in the framework of Frontex joint maritime surveillance operations are covered by EU Regulation 656/2014 establishing rules for the surveillance of the external sea borders in the context of Frontex operational cooperation. The Regulation provides a common EU concept of 'place of safety' which is protection driven. It also requires the member state hosting the operation to accept disembarkation of rescued migrants in case there is no other possibility to identify a place of safety rapidly and effectively. Finally, maritime border surveillance by EU member states falls within the scope of the Schengen Border Code (SBC), which applies "without prejudice of(...) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*" (Art. 3.b SBC).

Disembarkation platforms and controlled centres

Over the last year, EU proposals to address disembarkation issues have centred on the possible establishment of 'regional disembarkation platforms' in third countries and 'controlled centres' on the EU territory. However, almost one year from their formulation at the June 2018 European Council, such proposals have failed to reach consensus due to their lack of political and legal feasibility. Controlled centres would mean that migrants disembarked in an EU member state would be transferred to these centres for an assessment of their international protection needs. Such 'centres' would essentially entail the continuation and further expansion of the hotspot approach deployed in Greece and Italy since 2015, albeit with a more formalised and systematic use of 'administrative detention'. The hotspot model has not succeeded in preventing forced fingerprinting of individuals, quasi-detention practices, and keeping people in degrading and inhuman reception conditions.

Similarly, regional disembarkation platforms have spurred a wide range of criticism and concerns – and have proved to be unfeasible in practice. As the possibility of disembarking individuals in distress at sea in the territory of a third country is *conditional* on their safety, i.e. including the principle of *non-refoulement,* the very idea has been considered unlawful and against EU Treaty values laid down in Article 2 of the Treaty on European Union (TEU). Another Joint Communication issued by UN Special Procedures (UN Rapporteurs and two Working Groups) to the European institutions on 18 September 2018 stated that "Outsourcing the responsibility of disembarkation to third countries, in particular those with weak protection systems, only increases the risk of *refoulement* and other human rights violations". This idea has also been met with disagreement and criticism among African States, which are justifiably reluctant to accept EU policies that would imply setting up new detention facilities for

potentially disembarked people in their territories, as these would endanger their own international and regional commitments to ensure safety and the protection of human rights.

Ad hoc disembarkation and relocation arrangements

Against the background of disagreements described above, since the summer of 2018, some cases of disembarkation following SAR operations conducted mainly by civil society vessels have been covered through new instruments called "temporary disembarkation and relocation arrangements". They have involved a small group of member states willing to accept a share of asylum seekers disembarked in Spain, Italy and Malta and involved only a modest number of asylum seekers. While labelled as expressions of 'pragmatism' by some EU policy makers, their informal or 'extra-EU Treaty' nature raises serious concerns regarding their compliance with EU asylum standards, EU Treaty principles and fundamental rights.

Since early 2019, the European Commission has been somewhat involved in the implementation of informal relocation arrangements following disembarkation in Italy and Malta (*Section 4.2*). The Commission has played the role of 'facilitator' or 'deal broker' among member states involved in the pledging exercise, and between those states and the Italian and Maltese governments. EU agencies, chiefly the European Asylum Support Office (EASO) and Frontex, have also been mobilised to provide 'support' to member states' authorities concerning disembarked persons, first reception, information provision, registration, and pre-relocation selection procedures.

The exact implementation of these arrangements has been described by the Commission as a "workflow" or "step-by-step work plan". The Commission or EU agencies were only involved in specific stages and limited tasks of the relocation procedure, and were prevented from exercising any monitoring role regarding the overall compliance of adopted procedures with EU standards and the fundamental rights of asylum seekers. In spite of the involvement of the Commission and EU agencies, relocation arrangements have remained intergovernmentally driven and implemented under secretive and unaccountable patterns of cooperation. There continues to be no official publication of the number of migrants or asylum seekers involved, or any available piece of legislation laying down the precise administrative procedures and relocation distribution criteria being applied on the ground. The extent to which the involvement of Commission and EU agencies has helped in ensuring compliance with EU law, in particular by preventing discriminatory distribution of applicants and their fundamental rights between participating member states, is therefore by and large unclear (*Section 4.2.1*).

The way forward: equal solidarity

The implementation of ad hoc disembarkation and relocation arrangements has not helped in moving forward with the much-needed reform of the Common European Asylum System (CEAS) and the adoption of a permanent corrective relocation mechanism. The arrangements took place alongside a political choice by successive EU Presidencies of the Council to apply a logic of 'consensus' or *de facto* unanimity inside the Council rooms during the negotiations of

the CEAS reform package. This was the case in spite of the existence of a large group of member states – exceeding the threshold for a qualified majority – in favour of engaging in negotiations with the European Parliament on at least some of the legislative files. The choice to pursue unanimity in the Council has undermined the decision-making rules on asylum envisaged in the Treaties – which require Qualified Majority Voting (QMV), and has violated the principle of sincere cooperation among EU institutions.

Based on the above, this paper argues that 'differentiated integration' in the form of 'temporary arrangements' risks leading to unequal rather than lasting solidarity in the CEAS. Similarly, the use of variable geometry or the establishment of 'coalitions of the willing' in asylum policy do not further the objectives of the EU and do not reinforce the integration process. Despite their deficiencies and imperfections, EU asylum policies have, to a very large extent, been 'Europeanised' and brought under the Community framework. Proposals for flexible integration or *'solidarité à la carte'* in these fields would be turning the clock backwards three decades and re-injecting intergovernmentalism into fields that now are – despite their current deficiencies and limits – clearly under the remit of an EU competence (*Section 4.2.2*). This would also allow some member states to lower their own standards and indulge in 'free riding' on existing EU and international standards, opening the way for 'coalitions of the unwilling' implementing diverging and competing areas of asylum within the Schengen area.

The principle of solidarity and fair sharing of responsibility enshrined in Article 80 of the Lisbon Treaty implies equality among all EU member states and a common EU response to the common challenges witnessed in the Mediterranean. The way forward should be guided by a paradigm of *'equal solidarity'*, whereby all EU member states share fairly and equally the responsibility for asylum seekers across the Union in full compliance with EU constitutive principles and fundamental rights. This would translate into the enactment of a set of policies (See *Section 5* of the paper) that put EU and national constitutions principles first, as these constitute pre-conditions for legitimate EU policies in the areas of asylum, migration and borders based on mutual trust.

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Refugees attempting to escape Africa do not claim a right of admission to Europe.
They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality.
That is a very modest plea, vindicated by the European Convention on Human Rights.
We should not close our ears to it.

Judge Pinto Albuquerque
Concurring Opinion
2012 *Hirsi Jamaa and Others v. Italy Judgment*
European Court of Human Rights

1. Introduction

Search and Rescue (SAR) and disembarkation of persons in distress at sea in the Mediterranean continue to fuel divisions among some EU member states. The 'closed ports' policy declared by the Italian ministry of interior in June 2018, and the ensuing refusal to let non-governmental organisation (NGO) ships conducting SAR operations enter Italian ports, triggered new diplomatic confrontations between the Italian government and other EU governments regarding which state should assume responsibility for accepting disembarkation of people rescued at sea.

Disembarkation issues reignited in a context characterised by a widening SAR gap in the Central Mediterranean resulting from the penalisation of humanitarian actions and the strategic disengagement from SAR activities by the EU and its member states. Far from being a novelty, disputes over SAR and disembarkation are rooted in long-standing political controversies (Carrera and den Hertog, 2015; Parliamentary Assembly, Council of Europe, 2012; Basaran, 2014). The latest debates at the EU level unfold against the background of disagreements among Mediterranean coastal governments over the interpretation and applicability of the international law of the sea (Papastavridis, 2017; Moreno-Lax and Papastavridis, 2017).

Some of the proposals discussed during the second half of 2018, such as 'regional disembarkation platforms', which aim at shifting responsibilities for the disembarkation of rescued persons to North African countries, are both practically and legally unfeasible (Carrera

[1] The authors would like to express their gratitude to representatives from the European Commission, the European Parliament (LIBE Secretariat), EU agencies (Frontex and EASO), UNHCR and civil society actors who were interviewed for the purposes of this paper. They would also like to thank Efthymios Papastavridis (Faculty of Law, University of Oxford), Michele Levoy and Marta Gionco (PICUM) and Kris Pollet (ECRE) for their comments on a previous draft of this paper.

et al., 2018). The European Commission also acknowledged that disembarkation platforms would be contrary to EU principles or 'values' laid down in the Treaties and member states' constitutional and human rights traditions (European Commission, 2018a).

From the summer of 2018 onwards, cases of disembarkation following SAR operations conducted by NGOs and other vessels in international waters have been addressed through so-called "relocation and disembarkation arrangements". These arrangements have consisted of voluntary, ad hoc and 'ship-by-ship' relocation schemes, involving a small group of member state governments 'willing' to accept a share of individuals disembarked in Spain, Malta and Italy. During the second half of 2018, these arrangements were conducted in a purely 'intergovernmental' and *ad hoc* fashion, falling completely outside the EU framework.

Since the beginning of 2019, disembarkation arrangements have counted with the involvement of the European Commission and EU agencies, including the European Asylum Support Office (EASO) and Frontex. The Commission has played the role of 'facilitator' among interested member states making pledges for relocations, while EASO and Frontex have provided support in the phases of first reception, provision of information and registration of disembarked persons upon request of the governments of Italy and Malta (European Commission, 2019). In spite of the Commission's attempt to increase 'predictability and transparency' of relocation arrangements, the predominantly informal, secretive and intergovernmental nature of these instruments has prevailed. A profound lack of public accountability has characterised the entire relocation procedure, including regarding the number of people disembarked and relocated, participating member states, and respect of the rights of asylum seekers 'pushed around' participating member states through informal relocations.

This paper aims at critically examining recent developments on disembarkation and relocation arrangements in the Mediterranean. It argues that there is a wrong assumption behind current EU and national proposals and developments on SAR, disembarkation and their linkage with the allocation of responsibility for assessing asylum applications among EU member states. The prevailing idea seems to be that 'contained mobility policies' currently implemented in the Mediterranean are legitimate migration management strategies (Carrera and Cortinovis, 2019); i.e. that policies and instruments aimed at disengaging from SAR operations, criminalising SAR civil society actors, financing, training and sharing information on sightings of boats with the Libyan Coast Guard for the sake of 'pulling migrants back' to Libya, delaying or refusing disembarkation of rescued people, and disregarding the rights of people disembarked during informal relocations escape the rule of law, and therefore accountability and legal responsibility for crimes and human rights violations. However, EU and member state containment-driven action and inaction in the Mediterranean do not happen in a legal vacuum.

Neither national governments, nor the European institutions and agencies are free to 'cherry pick' from their rule of law and human rights responsibilities enshrined in national constitutions, EU Treaties and secondary law, which apply to all individuals, including those found in distress at sea and seeking international protection in the EU. The direct and indirect action and/or inaction of those actors are captured by the concept of portable justice,

according to which responsibilities and potential liabilities follow not only wherever they exercise *de facto* or *de jure* control and decisive influence, but also when their practices fall within the scope of EU law and financial instruments.

The use of non-legally binding instruments such as disembarkation and relocation 'arrangements' and the informalisation of relocations among a small group of EU member states bring profound risks to European integration. Unlike with the beginnings of European cooperation on asylum policies in the early 1990s, the current level of Europeanisation in these areas is – while imperfect –well advanced. 'Flexible integration' or 'solidarity *à la carte*' in the area of asylum may not further but actually reverse integration and undermine the objectives set out in the EU Treaties. It would allow some member states to free ride and lower down on existing EU asylum standards, and create 'coalitions of the unwilling' implementing diverging and competing areas of asylum within the Schengen area. These arrangements are deliberately 'extra-legal' and therefore challenge key EU rule of law principles set in the Treaties and national constitutions. They pose profound risks to the consistency of the EU asylum and borders *acquis* and the right to seek asylum in the EU.

After this Introduction, Section 2 of the paper briefly outlines the evolution of the SAR scenario in the Central Mediterranean over the last few years, underlining the emergence of what we call the politics of SAR criminalisation and disengagement in the Mediterranean. Section 3 brings to light the main legal obligations and accountability venues of member states and EU actors regarding SAR and disembarkation stemming from the international law of the sea, international and regional human rights standards and secondary EU legislation in the field of border surveillance and asylum. Section 4 provides an analysis of the latest policy proposals that have been discussed and implemented in the EU context between the second half of 2018 and first half of 2019. The conclusions highlight the need for the EU to come back to the notion of 'equal solidarity', whereby responsibility is upheld and equally shared among all Schengen countries, and firmly rooted in EU principles and fundamental rights laid down in the Treaties and member states' constitutional traditions.

2. The politics of SAR criminalisation and disengagement in the Central Mediterranean

2.1 Policing SAR NGOs

On Sunday 10 June 2018, the *Aquarius* ship, operated by Doctors without Borders (MSF) and the German NGO SOS Méditerranée, was heading North after having rescued 629 migrants in the course of six different SAR operations coordinated by the Italian Maritime Rescue Coordination Centre (MRCC) in international waters off the Libyan coast. The boat was halted on instruction from the Italian authorities when it was located at 35 nautical miles from Italy and 27 nautical miles from Malta (SOS Méditerranée, 2018). The Italian government refused the *Aquarius* access to Italy's territorial waters, arguing that Malta should take responsibility for disembarking the migrants on board the vessel. The Maltese authorities denounced the Italian government's stance as a manifest violation of international law and refused

authorisation to dock in the port of La Valletta. This disagreement led to a diplomatic standstill and a consequent operational impasse that impeded the swift disembarkation of rescued people in a place of safety. Eventually, the dispute over the fate of the *Aquarius* was broken by the decision of the Spanish government to allow disembarkation of the migrants on board in the port of Valencia.[2]

The refusal to allow access to Italian ports for NGO vessels conducting SAR operations represents only the last and most extreme of a series of legal and political attacks against civil society ships involved in SAR activities in the Mediterranean (Carrera et al., 2019a). Over the last three years, humanitarian civil society actors have been subject to increasing policing and criminalisation dynamics, which have resulted in preventing them from pursuing SAR activities (Commissioner for Human Rights, 2019).[3] Actions taken to disrupt NGO activities have included politically-driven criminal investigations for facilitating irregular entry, the confiscation of NGO vessels, the attempt to limit their activities by imposing 'codes of conduct' as well as recurrent de-legitimisation and criminalisation campaigns by some politicians and media outlets accusing, without evidence, NGOs of collusion with smugglers (Vosiliute and Conte, 2018; Cuttitta 2018; FRA, 2018a; Basaran, 2011).

Since the *Aquarius* incident, a number of other cases of SAR operations conducted by NGOs have produced similar situations of delayed disembarkation and have forced rescued individuals to a prolonged period at sea in precarious and unsafe conditions (ECRE, 2019a), as well as additional cases of prosecutions of involved NGOs (FRA, 2019). In January 2019, the NGO vessel *Sea Watch 3* carrying 47 people was permitted to dock at the port of Catania in Italy, after spending two weeks at sea, only when an agreement involving relocation in a group of member states could be agreed.[4] Soon afterwards, the Italian authorities refused to allow disembarkation from the NGO ship *Mare Jonio*, belonging to the Italian citizen-financed initiative 'Mediterranea – Saving Humans', after it had saved 49 people in international waters.[5]

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[2] See Politico, 'Spain will welcome migrant rescue ship turned away by Italy', 6 November 2018, online: https://www.politico.eu/article/spain-will-welcome-migrant-rescue-ship-turned-away-by-italy-pedro-sanchez-matteo-salvini/; Reuters, 'Boat caught in Europe's migration spat brings hundreds to Spain', 17 June 2018, online: https://www.reuters.com/article/us-europe-migrants-italy-spain/migrant-boat-turned-away-by-italy-arrives-in-spain-idUSKBN1JD033

[3] Commissioner for Human Rights, Council of Europe, Letter to Prime Minister of Italy, Strasbourg, 31 January 2019. The letter stated: "I am deeply concerned, however, about some recent measures hampering and criminalising the work of NGOs who play a crucial role in saving lives at sea, banning disembarkation in Italian ports, and relinquishing responsibility for search and rescue operations to authorities which appear unwilling or unable to protect rescued migrants from torture or inhuman or degrading treatment."

[4] See Reuters 'Migrants disembark in Italy as Rome vows to continue hard line', 31 January 2019, online: https://www.reuters.com/article/us-europe-migrants-italy/migrants-disembark-in-italy-as-rome-vows-to-continue-hard-line-idUSKCN1PP1Y7

[5] The *Mare Jonio* was allowed to disembark in the Italian port of Lampedusa the day after, on 19 March. The boat was seized immediately afterwards by order of the Italian Prosecutor in the context of an investigation into possible aiding and abetting of "illegal immigration". See: Infomigrants, 'Italy seizes migrant rescue boat Mare Jonio', 20 March 2019, online: https://www.infomigrants.net/en/post/15804/italy-seizes-migrant-rescue-boat-mare-jonio

In addition, over the last two years, reports have drawn attention to several episodes of aggression and acts of hostility by the Libyan Coast Guard authorities towards NGOs intervening in rescue operations within the Libyan SAR zone (Cuttitta, 2018).

The escalation in the degree of penalisation of SAR civil society boats was taken to a new level by the Italian government with the adoption of Directive 14100/141(8) of March 2018.[6] This 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. Five United Nations Special Rapporteurs issued a joint communication on 15 May 2019 calling on the Italian government to withdraw the directive, and they put forward a number of serious concerns about the human rights violations resulting from its application. The joint communication acknowledged that there are reasonable grounds to believe that the directive was issued with the aim of directly targeting the SAR operations of the NGO boat *Mare Jonio*. The Special Rapporteurs highlighted that it "represents yet another political attempt to criminalise search and rescue operations carried out by civil society organisations in the Mediterranean…[and] intensifies the climate of hostility and xenophobia against migrants".[7] The directive was subsequently followed by the adoption of a decree imposing financial penalties of up to €50,000 and seizure of the vessel for those NGOs that disregard the prohibition to enter Italian territorial waters.[8]

As Table 1 below shows, the number of migrants rescued at sea along the Central Mediterranean to has substantially decreased over the last four years. However, the politics of criminalisation of NGOs and disengagement from SAR operations have contributed to making migrant journeys across the Mediterranean even more dangerous than in the past. According to UNHCR, an estimated 1,311 migrants lost their lives along the Central Mediterranean route connecting Libya to Italy during 2018. While the total number of deaths along this route more than halved in 2018 compared to 2017, the rate of deaths per number of people attempting the journey increased sharply. In particular, the rate went from one death for every 38 arrivals

[6] Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration according to Article 11 of Legislative Decree n. 286/1998, alias Ministerial Circular n. 14100/141(8), issued in March 2019.

[7] United Nations Human Rights Special Procedures, Joint Communication, by the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children, 15 May 2019, ALITA 4/201 9.

[8] On the so-called "Decreto Sicurezza bis" see 'Comunicato stampa del Consiglio dei Ministri n. 61, 11 Giugno 2019', online: http://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-61/12168; and EUobserver, 'EU mute on new Italian decree to fine NGO boats', 12 June 2019, online: https://euobserver.com/migration/145135

in 2017 to one for every 14 arrivals in 2018, and to one death for every 3 arrivals in the first four months of 2019 (UNHCR, 2019a, 2019b). [9]

The decrease in the number of entries cannot either hide the high number of people prevented from leaving Libyan territory, and exposed to grave human rights violations and crimes against humanity. Table 1 demonstrates how the total number of people "rescued or intercepted" by the Libyan Coast Guard authorities increased during 2017 and 2018 to more than 15,000 people each year. According to UNHCR, during the second half of 2018, 85% of individuals rescued or intercepted[10] in the newly established Libyan SAR region were disembarked in Libya, where they faced inhuman and degrading treatment in Libyan detention centres (UNHCR, 2019a).

Table 1. Number of Persons Rescued under the Coordination of Italian MRCC and Number of People Intercepted and Returned to Libya by the Libyan Coast Guard

	2016	2017	2018	2019[11]
Italian Coast Guard (Guardia Costiera)	35,875	22,014	3,987	40
Italian Military (Marina Militare)	36,084	5,913	642	
Guardia di Finanza	1,693	1,184	1,842	
Carabinieri	174	79	215	
Foreign Military Vessels	7,404	1,495	42	
EUNAVFOR-MED Sophia Operation	22,885	10,669	2,310	
Commercial Vessels	13,888	11,355	1,438	
Civil Society and NGOs	46,796	46,601	5,204	97
Frontex	13,616	14,976	4,046	35
TOTAL[12]	**178,415**	**114,286**	**19,778**	**172**
People rescued/intercepted by Libyan Coast Guard[13]	**14,332**	**15,358**	**15,235**	**2,887**

Source: Authors' own elaboration based on statistics provided by Italian Coast Guard, Frontex and UNHCR

[9] The numbers reported above should be read in the context of an overall decrease in arrivals through the Central Mediterranean route over the last three years: 181,436 arrivals in 2016, 119,369 in 2017, 23,370 in 2018 and 2,447 in the first six months of 2019. See UNHCR, Mediterranean situation, Italy, https://data2.unhcr.org/en/situations/mediterranean/location/5205. According to IOM, from 2014 to 2018, an estimated 15,062 people died while crossing the Central Mediterranean route, making it the deadliest migration route in the world. See, IOM missing migrant project, https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376&migrant_route%5B%5D=1377&migrant_route%5B%5D=1378

[10] Ryan has qualified "interdiction" as a form of extraterritorial immigration control. The interdiction of vessels at sea, differently from SAR, aims at "preventing sea-borne migrants from reaching their intended destination". He qualifies the notion of 'interception' as "the identification of vessels, with a view to the arrest of vessels and their passengers once they entered territorial waters" (Ryan, 2010, pp. 22 and 23).

[11] The statistics under this column cover the first semester of 2019, with the exception of the Frontex statistics that correspond with the month of April 2019, based on the Frontex Press Pack, mid-May 2019.

[12] Refer to the Italian Coast Guard website: https://www.guardiacostiera.gov.it/attivita/ricerca

[13] Data covering 2019 extends until 14 June 2019. See UNHCR (2019d). Libya Update, June 2019, retrievable from https://data2.unhcr.org/en/documents/download/69930; UNHCR (2019e). Libya: Activities at Disembarkation, monthly update February 2019 (available at https://data2.unhcr.org/en/documents/download/68273); UNHCR (2018). Libya: Activities at Disembarkation, monthly update December 2018 (available at https://data2.unhcr.org/en/documents/download/67499).

2.2 Shrinking EU operational space and delegating containment

Divisions between member states on disembarkation have also led to a downgrading of the Common Security and Defence Policy (CSDP) operation EUNAVFOR-MED Sophia, launched in 2015 with the main goal to disrupting "criminal networks of smugglers and traffickers in the Southern Central Mediterranean". The overall rationale and effectiveness of the operation has been fundamentally questioned, including its negative contribution to the militarisation of maritime surveillance and the side effect of making trips more perilous as a result of its policy of destroying and confiscating boats (Carrera, 2018).[14] While SAR was not formally included in the mandate of the mission, since its inception in 2015, the operation is reported to have rescued around 49,000 migrants.[15]

At the end of 2018, the continuation of Operation Sophia became another source of contention between participating member states after a request by the Italian government to revise the mandate of the mission, and specifically the rule according to which all asylum seekers rescued in the framework of the mission should be disembarked in Italian ports.[16] Due to the impossibility to reach an agreement on a new disembarkation arrangement, in March 2019, participating states decided to prolong the mission for a further six months but without deploying naval ships (to avoid involvement in SAR operations), focusing instead on air patrols and training of the Libyan Coast Guard (EEAS, 2019).

EU member state politics of SAR disengagement have also included a tactical choice to reduce the new mandate and operational area of the Frontex Joint Operation Themis in the Central Mediterranean, which was launched in January 2018 to replace the previous Operation Triton (initiated in 2014).[17] A key change in the scope of the Themis operation was reducing even further its operational area to the Italian SAR zone, and in contrast to the Triton operation, not covering the Maltese SAR area any longer. The Maltese government refused to take part in Themis Joint Operation in the absence of a clear rule foreseeing the disembarkation in Italian ports of people rescued in the Maltese SAR zone, which was the case under Triton's operational plan based on a bilateral deal between Italy and Malta.[18]

Another fundamental change in the mandate of the Frontex Themis operation in comparison with Triton is that disembarkation points are now identified on a 'case-by-case' basis by the

[14] Politico, 'Europe's deadly migration strategy. Officials knew EU military operation made Mediterranean crossing more dangerous', 28 February 2019, online: https://www.politico.eu/article/europe-deadly-migration-strategy-leakeddocuments/

[15] Euobserver, 'Sophia in limbo: political games limit sea rescues', 4 March 2019, https://euobserver.com/opinion/144304

[16] Euractiv, 'Italy to push EU for reform of 'Operation Sophia'', 30 August 2018, online: https://www.euractiv.com/section/justice-home-affairs/news/italy-to-push-eu-for-reform-of-operation-sophia/

[17] See News Release, Frontex launching new operation in Central Med, https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7

[18] The Malta Independent, "Italian MEP asks Brussels about 'secret Malta-Italy migrants for oil deal'", 18 October 2015, http://www.independent.com.mt/articles/2015-10-18/local-news/Italian-MEP-asks-Brussels-about-secret-Malta-Italy-migrants-for-oil-deal-6736143776.

Italian Maritime Rescue and Coordination Centre (MRCC) on the basis of international law.[19] The limited involvement of the Frontex operation Themis in SAR activities is just the last step in disengagement from SAR activities in the Central Mediterranean that was initiated with the choice in 2014 to replace the *Mare Nostrum* operation with the much less ambitious (in terms of SAR capacity) Frontex-led Operation Triton (Carrera and den Hertog, 2015 ; Nielsen, 2014: Campbell, 2017). As Table 1 also shows, the overall result has been an increasingly and progressively minor involvement and contribution by Frontex of SAR operations in the Central Mediterranean.

The stepping up of the Libyan Coast Guard in SAR operations constituted another important piece of the puzzle (UNHCR, 2019a). This development is directly related to the choice of the Italian government to progressively cede control to Libyan forces over SAR operations outside Libyan territorial waters. Italy had assumed de facto SAR responsibilities over this area since 2013, when it began its humanitarian naval operation, Mare Nostrum. Libyan authorities submitted a declaration on a Libyan Search and Rescue Region (SRR) in December 2017, which was then officially validated by the International Maritime Organisation (IMO) in June 2018[20]. The Libyan move was made possible by the operational and financial support provided to the Libyan authorities by the EU and Italian authorities. According to a leaked letter[21] signed by the Director General of DG Home at the European Commission, Paraskevi Michou, and addressed to the Frontex Director, Fabrice Leggeri, on 18 March 2019, the Commission considered that it would be lawful for the operational plan of the Frontex Themis operation to include procedures for notifying sightings of boats in "distress" at sea to the Libyan Coast Guard, including data on vessel monitoring and detection through satellite technology that is part of the EUROSUR (The European Border Surveillance System) Fusion Services.[22] The letter also revealed that the aerial

[19] Interview with Frontex Official conducted by the authors. See also https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7

[20] See Parliamentary questions. Answer given by Mr Avramopoulos on behalf of the European Commission.

Question reference: P-003665/2018, 4 September 2018. Retrievable from http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html; Euronews, 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants', 7 August 2018. Retrievable from: https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants

[21] Retrievable from http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf The letter states that "With regard to the statement on following procedures and notifying sightings of "distress" at sea to the "Responsible" MRCC (i.e. MRCC Libya) and also to neighbouring MRCCs (i.e. those of Italy and Malta) and EUNAVFOR MED Headquarters, I would like to note that Italy, despite the fact that it cannot be considered a "neighbouring MRCC" because it does not border the Libyan SRR, is supporting the Libyan Coast Guard a lot in particular in acting during the SAR event as a "communication relay". In that regard, together with Malta, and following the standard practice, it would be appropriate to include Tunisia and Egypt as well."

[22] EUROSUR purposes are "to detect, prevent and combat irregular immigration and cross-border crime", and contribute to the protection and saving of lives of migrants at sea. According to a leaked document on Operation Sophia, Libya is also connected to the 'Service Oriented Infrastructure for Maritime Traffic Tracking (SMART)' - an Internet-based secured communication network provided by the Italian Navy. The leaked document states that "SMART will work as the main communication and information exchange channel in the training of the Libyan Navy and Naval Coastguard (…) SMART is already being gradually augmented by EUROSUR, starting with FRONTEX METEO services, which will be made available to the Libyan Navy and Naval Coastguard through a technical

assets of the EUNAVFOR MED Sophia operation had shared similar information with the Libyan authorities.

The position of the European Commission laid down in the above-mentioned letter stands in stark contradiction with the fact that several authoritative United Nations actors have clearly emphasised that Libya cannot be considered as a "safe port" and that "those rescued and intercepted at sea should not be returned there" (OHCHR and UNSMIL, 2018; IOM, 2019; UNHCR, 2019c). The letter also surprisingly disregards the incompatibility and unlawfulness inherent in EU agencies indirectly cooperating with Libyan authorities in sharing information on 'sightings' and therefore facilitating and being complicit with interceptions and 'pullbacks' leading to violations of the principle of *non-refoulement* and other severe human rights violations.

3. International and EU legal standards: portable justice

The range of policies aimed at restricting SAR capacities and criminalizing civil society actors involved in SAR activities may be understood as components or 'layers' of a broader strategy of *contained-mobility* whose aim is that of deterring, limiting and filtering asylum seekers' movements at different stages of their mobility trajectories. This contained mobility strategy combines measures aimed at preventing people from leaving third country territories and entering the Schengen area – e.g. border surveillance and interception at sea – along with limited mobility opportunities, in the forms of selective and discriminatory admission opportunities for refugees and applicants for international protection (Carrera and Cortinovis, 2019). Figure 1 below starts by showing how in the context of the Central Mediterranean EU and member state containment strategies are made up of various 'layers', which can be summarised as follows.

First, engaging third countries to conduct 'migration management' on their behalf as part of what has been called a 'consensual or delegated containment' approach (Moreno-Lax and Giuffré, 2017); this includes delegating the enactment and implementation of interception measures ('pullbacks') to countries in North Africa, notably to Libya, taking the form of EU financing, training and the sharing of information with third country authorities gathered through maritime satellite surveillance systems or aerial and vessel assets; second, strategically disengaging from SAR operations, including by reducing the operational areas of EU-coordinated maritime operations (e.g. Frontex joint operation Themis); third, policing and criminalising civil society actors conducting SAR operations and shrinking their operation space in the Mediterranean; fourth, refusing to allow disembarkation of migrants rescued at sea in

interface of SMART. EUROSUR could then be a complimentary system for information exchange, having an operational picture and situational awareness," European External Action Service (EEAS), Sophia End of Month 6 Report, 2016. See also Politico (2019), 'Europe's Deadly Migration Strategy: Officials Knew EU Military Operation made Mediterranean crossings more Dangerous', 28.2.2019. See Regulation establishing the European Border Surveillance System (EUROSUR) No 1052/2013, 22 October 2013, OJ L295/11. On EUROSUR and its place in the EU's integrated border management, see Jeandesboz (2012); and on how EUROSUR affects fundamental rights, see FRA (2018b).

national ports; and fifth, applying substandard asylum procedures in the context of 'hotspots' and ad hoc relocation arrangements.

Figure 1 also identifies the set of legal, political and financial instruments used to implement the contained mobility 'layers' identified above, which are of financial, political, legal or operational nature, and which have increasingly been designed as extra-EU Treaties". The two last fields of the figure lay down the main international, regional and EU legal instruments, as well as a selection of monitoring, judicial and administrative actors acting as 'justice venues' with a mandate to scrutinise, enforce or adjudicate on individuals' cases and complaints.[23] The arrow at the bottom of the figure aims at illustrating how, while unlawful practices and human rights violations and crimes emerging from 'contained mobility' layers and instruments still experience substantial barriers in ensuring effective remedies to victims, they can nonetheless be potentially captured by the concepts of 'portable responsibility' and 'portable justice' (Carrera et al. 2018).

The concepts of 'portable responsibility and justice' are premised on the existence of a 'functional approach' to the applicability of EU fundamental rights in cases of extraterritorial policies and practices. This implies that the EU CFR applies whenever a situation falls under the remit of EU law, with territoriality not being a decisive criterion (Moreno-Lax and Costello, 2014; Carrera and Stefan, 2018; Carrera et al. 2018).

A 'functional approach' to the applicability of EU law in the context of border surveillance operations at sea was confirmed by a 2009 Letter of the European Commission to the LIBE Committee of the European Parliament, which was referred to in the European Court of Human Rights (ECtHR) ruling *Hirsi Jamaa and Others v. Italy* of February 2012 (*see Section 3.2 below*). When examining the applicability of EU law in the context of interceptions of migrants in international waters and 'pushbacks' to Libya 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 12 of the SBC.[24]

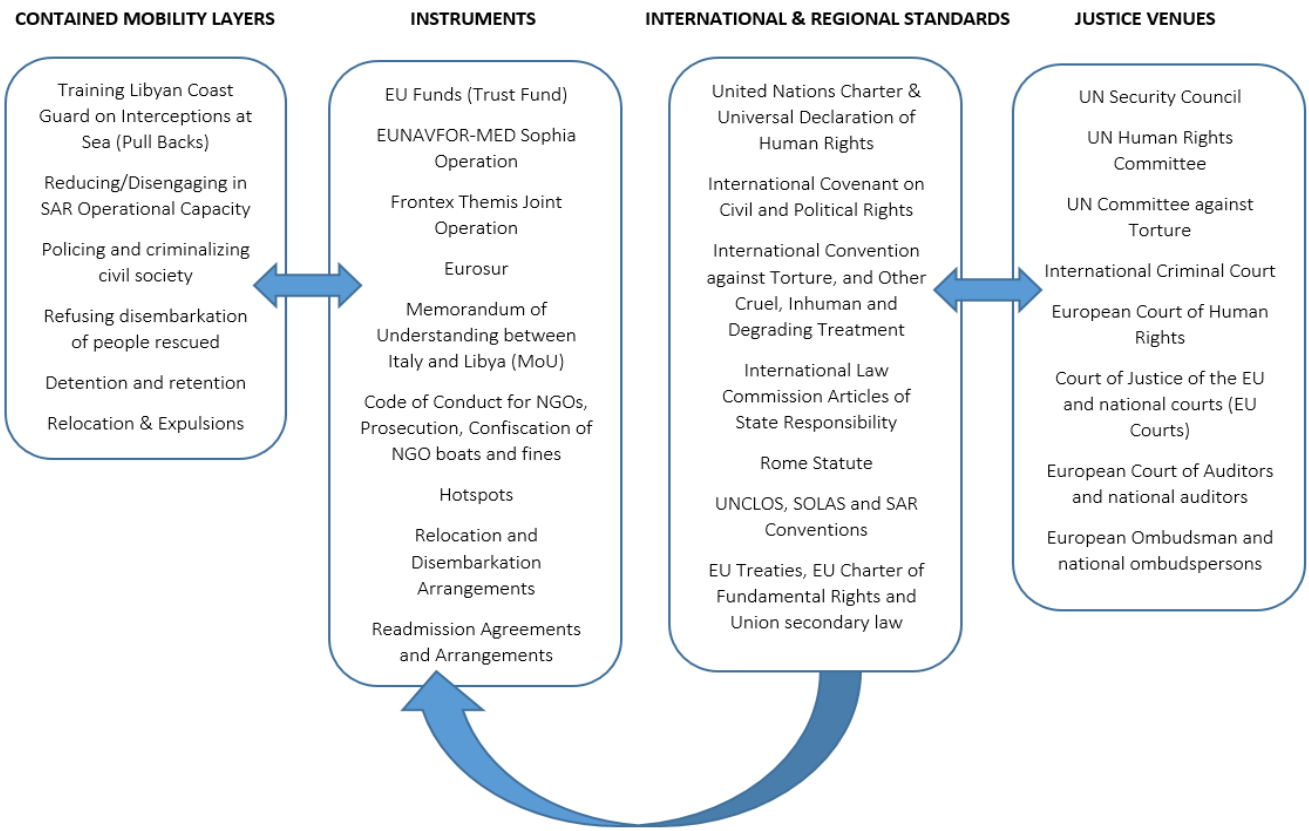
The concept of portable responsibility in the context of EU law entails that, whenever member states or EU authorities cooperate with third-country authorities – directly or indirectly through the provision of 'support', in the form of funding, training, equipment and any other kind of assistance – their responsibilities need to be assessed against the EU's fundamental rights and legal standards. This requires compliance with the right to asylum (Art.18) and to an effective remedy (Art. 47) under the EUCFR (Carrera et al. 2018). If an EU Member State or an EU institution or agency provide direct or indirect financial and/or technical "assistance" to a third

[23] For an overview of existing international dispute settlement mechanisms and justice venues dealing exclusively with the law of the sea refer to D. R. Rothwell and T. Stephens (2016), pp. 473-505, and Y. Tanaka (2015), pp. 417-452.

[24] Paragraph 34 of the Hirsi judgment, referring to a letter of 15 July 2009 from Mr Jacques Barrot, Vice-President of the European Commission. The letter also stated that the obligation to respect the non-refoulement principle "must be fulfilled when carrying out any border control in accordance with the SBC, including border surveillance activities on the high seas".

country that result in fundamental rights violations, they could be considered liable in light of their obligations under the EU CFR before the Court of Justice of the EU (CJEU).

Figure 1. Contained mobility and portable justice



Source: Authors, 2019.

Contrarily to the "portable responsibility" approach outlined above, the multi-layered containment strategy enacted by the EU and some EU member state governments in the Mediterranean seems to be based on the assumption that relevant EU member states can in fact be 'exonerated' of their legal responsibilities and escape accountability under international, regional and EU standards and venues. However, such an assumption is misleading. As described in the following three sections, contained mobility instruments at sea fall within the scope of international and regional standards laid down in international law of the sea (*see Section 3.1. below*), human rights law (*see Section 3.2*), and EU rules on maritime and border surveillance law (*see Section 3.3.*), and pose profound challenges to their faithful implementation (Moreno-Lax and Papastavridis, 2016; Carrera et al., 2018).

3.1 International law of the sea

The most relevant international treaties covering SAR at sea include, first, the 1982 United Nations Convention on the Law of Sea (UNCLOS). Art. 98 of this Convention lays down a duty for every state to render assistance to any person found at sea in danger and proceed with all possible speed to the rescue of persons in distress. The obligation to secure the right to life

constitutes international customary law. The UNCLOS Convention foresees the need for coastal states to establish, operate and maintain adequate and effective SAR services, which may include cooperation with neighbouring states and the conclusion of mutual regional arrangements (Art. 98.2).[25] Similar requirements are included in the 1974 International Convention for the Safeguard of Life at Sea (SOLAS Convention), specifically the obligation for shipmasters to provide "with all speed" assistance at sea.[26] The SOLAS Convention also states the need for states to ensure that "any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts" and to communicate and coordinate SAR activities, including through the establishment of SAR facilities.

A set of more detailed provisions are included in the 1979 International Convention on Maritime Search and Rescue (the so-called SAR Convention), which stipulates a common definition of 'rescue' entailing "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a *place of safety*" (*emphasis added*).[27] The SAR Convention underlines the need for states to set up a Search and Rescue Region (SRR) and a Maritime Rescue Coordination Centre (MRCC) responsible for "promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations" within their respective SAR region.

Important amendments to the SOLAS and SAR Conventions were introduced in 2004 to strengthen the search and rescue system and minimise the risk that commercial ships refrain from providing rescue to boats in distress (Barnes, 2010). The amended Paragraph 3.1.9 of the SAR Convention specifies that the state responsible for the SAR region where assistance has been rendered is *primarily responsible* for "ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a *place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organization" (*emphasis added*). The MRCC of the relevant SAR state is also required to initiate the process of identifying the most appropriate place of disembarkation of persons in distress at sea. [28] Moreover, the same paragraph 3.1.9 requires states to cooperate to ensure that shipmasters providing assistance to persons in distress at sea are released from their obligations with minimum further deviation from their intended voyage, as long as this

[25] The UNCLOS framework foresees a dispute settlement procedure, some of which are considered compulsory and which states parties may declare preference for in light of Article 287 Section 2 of the Convention. These may include the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal established under Annex VII of the Convention or a special arbitral tribunal under Annex VIII. For the purposes of this paper it is important to highlight that Italy has declared as preferred venues for dispute resolution the ITLOS and the International Court of Justice. Refer to D. R. Rothwell and T. Stephens (2016).

[26] Regulation 10 Ch. 5 of SOLAS.

[27] The SAR Convention (para. 1.3.13) defines a "distress phase" as a "situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance".

[28] See IMO (Maritime Safety Committee), amendments to both the International Convention on Maritime Search and Rescue (SAR) and the International Convention for the Safety of Life at Sea (SOLAS) (adopted May 2004, entered into force 1 July 2006). Resolutions MSC.155 (78) and MSC.153 (78), 20 May 2004.

does not endanger their safety. This applies both to commercial ships and those of NGOs, and aims at incentivising the former to intervene in cases of boats in distress at sea.

The interpretation of the 2004 amendments to the SOLAS and SAR Conventions based on the principle of effectiveness would lend support to a default obligation of disembarkation on the SAR responsible state. However, divergent practices and interpretations of states underline how this is still a matter of contention (Papastavridis, 2018). The situation in the Mediterranean epitomises such contrasts: Malta has not accepted disembarkation of asylum seekers and third country nationals rescued in its SAR zone, arguing that this should happen in the 'nearest safe haven', namely the port closest to the location of the rescue which may be deemed as a place of safety (Gammeltoft-Hansen, 2016). Controversies between Italy and Malta over disembarkation have been fuelled by the specific configuration of their respective SAR areas in the Mediterranean basin, and specifically by the enormous extension of the Maltese SAR zone and by the overlapping of Italian and Maltese SAR regions (Trevisanut, 2010; Di Filippo, 2013).

The international law of the sea recognizes the right of coastal states to take "necessary steps" in their territorial sea to prevent foreign vessels' passage which is not innocent, that is prejudicial to the peace, good order or security of the coastal State. However, states' right to take action to guarantee order and security within their borders must not be used as a way to evade obligations to ensure safety and protect the right of people rescued at sea.[29] Papastavridis has argued that a key shortcoming of the international maritime Treaty system is that "it does not formally obligate the coastal State responsible for the Search and Rescue Area to disembark rescued persons on its own territory, but only impose rather an obligation of conduct" (Papastavridis, 2018; Papastavridis, 2017). However, such an '*obligation of conduct*' may in fact become an *obligation to disembark* if no other option ensuring the *safety* of the rescued people and the swift conclusion of the disembarkation operation exists.

Indeed, the international law of the sea requires delivery of rescued persons as soon as possible to a 'place of safety' that is nevertheless not defined either in the SOLAS or in the SAR Convention. To address this gap, in 2004 the International Maritime Organization (IMO) issued 'Guidelines on the Treatment of Persons Rescued At Sea' which state the need, in the case of persons seeking international protection "to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened". UNHCR has underlined that the place of safety concept must correspond with a place where rescued persons are not at any risk of persecution and where asylum seekers have access to fair and efficient asylum procedures and reception conditions (UNHCR, 2002). As is further developed in Section 3.3 below, EU maritime surveillance rules provide for a clearer EU concept of 'place of safety' that is international protection and fundamental rights driven.

[29] See Art. 19 and 25 of the UNCLOS.

3.2 International, regional and EU human rights law

The international legal regime governing SAR at sea and international and EU human rights instruments are interlinked and must be read in conjunction. The faithful application of international, regional and EU human rights standards substantially restricts the scope for non-disembarkation (and denying entry) strategies adopted by some Mediterranean states, as these fall within the scope of human rights jurisdiction. While a 'migration management approach' is driving current SAR and disembarkation activities in the Mediterranean, governments cannot evade or strategically avoid their previously-contracted international obligations towards migrants, asylum seekers and refugees even in the context of extraterritorial migration management operations (Moreno-Lax and Giuffré, 2017).

The relevant provisions concerning SAR and disembarkation outlined in the previous section should be read in light of relevant human rights standards, including for instance those covering the right to respect and protect life, the respect of the *non-refoulement* principle and the prohibition to expose people to death, torture or inhuman and degrading treatment, and the right to life. All these are enshrined not only in the 1951 UN Refugee Convention, but also in other key international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT), as well as regional human rights frameworks, notably the European Convention of Human Rights (ECHR). Moreover, attacks on SAR civil society actors and their criminalisation are incompatible with the UN Declaration on Human Rights Defenders.

Within the international human rights framework, the principle of *non-refoulement* comprises the obligation not to extradite, deport or otherwise transfer (directly or indirectly) a person to a third country, thus not exposing her/him to a personal, foreseeable risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The above-mentioned joint communication by UN Special Procedures to the Italian government on 15 May 2019 states that "practices whereby countries of destination cooperate with another to prevent migrants and refugees from arriving have been characterized as 'pullbacks' and as violations of the principle of *non-refoulement*, which constitutes an integral part of the absolute and non-derogable prohibition of torture and other ill-treatment enshrined in Article 3 CAT and Articles 6 and 7 of ICCPR". The communication also encouraged Italian judicial authorities to take into account its findings.

The EU Fundamental Rights Agency (FRA) has emphasised that "state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations" (FRA, 2016). This corresponds with Articles 16, 17 and 18 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which regulate state responsibilities when aiding or assisting other states in the commission of an "internationally wrongful act", including

grave human rights violations.[30] The European Court of Human Rights (ECtHR) has made use of the ARSIWA when ascertaining whether states' responsibility is engaged because of either their duty to refrain from wrongful conduct or their positive obligations under the convention.[31]

When any states engages, directly or indirectly, in internationally wrongful acts and grave human rights violations, their practices fall within the framework of the Rome Statute and the jurisdiction of the International Criminal Court (ICC).[32] A joint letter issued in March 2018 by a group of academics expressed deep concerns about the ongoing Italian ministry of interior policy against civil society actors engaged in SAR activities.[33] The letter underlined that under international law, shipmasters are under a clear obligation to assist people in distress at sea, and to bring them to a place of safety. By requiring vessels' captains to hand over rescued people to the Libyan Coast Guard and by seizing SAR NGO boats the Italian government has exposed rescued people to grave human rights violations and crimes against humanity. The same letter called the UN Security Council to consider Italy's actions as a threat to international peace and security and to promote a coordinated approach to SAR in the Mediterranean. It also asked the Prosecutor of the International Criminal Court to initiate *proprio motu* an investigation into high-ranking Italian authorities as regards their complicity in the crimes against humanity taking place in Libya; and it asked Council of Europe members to file an inter-state complaint against the Italian government before the European Court of Human Rights.

The ICC Prosecutor opened an investigation into the situation in Libya back in 2011 over crimes against humanity and war crimes.[34] As reported by the ICC Prosecutor before the United Nations Security Council in 2017 and 2018,[35] the investigation also covers crimes against

[30] Article 16 ASR states: "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." As Frenzen has argued in this regard, "the practical problem presented when seeking to analyse or challenge EU member state assistive practices is establishing the nature of the specific migration control practice". See Frenzen N. W. (2017), "The Legality of Frontex Operation Hera-Type Migration Control Practices in Light of the Hirsi Judgement", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, Abingdon and New York, NY: Routledge (2017), pp. 294-313.

[31] See 'Study of the CEDH case-law Article 1 and 5', Report prepared by the Research and Library division, Directorate of the Jurisconsult, European Court of Human Rights. https://www.echr.coe.int/Documents/Research_report_articles_1_5_ENG.pdf

[32] See "Elements of Crimes", International Criminal Court, in particular explanations on Art. 7 (Crimes against Humanity), https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf In particular explanations on Art. 7 (Crimes against Humanity).

[33] See Statement by 29 academics on Italy seizing the rescue boat Open Arms, retrievable from http://statewatch.org/news/2018/mar/open-arms-statement.pdf

[34] See ICC Prosecutor (2011), Situation in Libya: ICC-01/11, March 2011. https://www.icc-cpi.int/libya

[35] See ICC Prosecutor Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 8 November 2018; Available at https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc Paragraph 41 of her speech stated that "I come back to the issue of crimes against migrants as it is a serious matter that continues to preoccupy me and my Office. I have instructed my Office to continue its inquiries into the alleged crimes against migrants transiting through Libya. Depending on the precise facts and circumstances that might be established in the course of a full investigation, such crimes may fall within the jurisdiction of the Court. This issue

migrants transiting through Libya, including those in official and unofficial detention centres. Mann, Moreno-Lax and Shatz (2018) have correctly argued that not investigating collusion by European actors and "investigating exclusively crimes by human traffickers […] reflects an unacceptable bias, and would likely amount to selective prosecution". This corresponds with the position expressed in a report of February 2018 by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, which calls on states and the ICC Prosecutor to investigate crimes resulting from "direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement."[36]

A recent Communication to the Office of the Prosecutor of the International Criminal Court (ICC) titled "EU Migration Policies in the Central Mediterranean and Libya" points out that in the name of the so-called "European humanitarian refugee crisis" in 2015, the EU and its member states consciously enacted a "deterrence-based policy of premeditated and intentional practice of non-assistance to migrants in distress at sea", which has determined "a lethal gap in the relevant SAR zone, in an area under the effective control of the EU and its member states' actors."[37] Particular attention is paid to the deathly effects of the strategy to reduce and limit the operational area of intervention of subsequent Frontex joint maritime operations such as Triton.[38] It states that "The strategy followed by the EU consisted of the externalization of maritime and human rights obligations that comes with its effective control over the said zones to non-state actors, para-state actors and foreign partners, in a (failed) attempt to avoid exposure to these legal responsibilities",[39] and adds that "the only remaining

must be decided through a case by case analysis based on the relevant facts and an assessment of my Office's jurisdiction. Such work will be strictly within our mandate as set by the Rome Statute."; See ICC Prosecutor Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 2 November 2018, paragraphs 16 and 18 of her speech also https://www.icc-cpi.int/Pages/item.aspx?name=20181102-otp-stat

[36] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018. See Recommendation 65.j of the Report. Retrievable at https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf

[37] Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019), paragraph 32 http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf

[38] It expressly states that "[…] In contrast with Operation Mare Nostrum, Triton was not primarily tasked with Search and Rescue (SAR) operations but with "deterrence objectives", was provided with far fewer means and resources, and its operational scope did not cover the critical SAR area where most migrant boats are likely to be in distress. The consequence of this decision was the creation of a lethal SAR gap, in an area in the Mediterranean that is under the effective control of the European Union, in which thousands would drown… Building on the lethal act of deterrence, namely punishing one to discourage others, this policy was unlawful per se... EU officials and agents were not only aware. This was both their intention, and the direct consequence of their decision to move from Mare Nostrum to Triton, namely to assign a drastically smaller budget and fewer vessels for SAR, to locate them farther away so they would not be assigned command over the rescue … [this] meant the sacrifice of life of thousands of helpless persons in distress at sea". paragraphs 520-523 and paragraphs 555, 561 and 562 of the communication.

[39] Paragraph 480 adds that "The manner in which these crimes have been committed is the result of a systematization of impunity set up through a complex structure of power with diverse types of State and non-

question to resolve relates to the identity of the most responsible perpetrators, which requires intense investigations in the European apparatus and State members bureaucracies."[40]

Member states' human rights responsibilities under the Council of Europe (CoE) and the European Convention of Human Rights (ECHR) require a protection-driven approach. CoE states parties involved in SAR operations have to take all necessary measures to protect the lives of individuals in situations of distress who are within their jurisdiction and influence. This principle was recently reiterated by the European Court of Human Rights (ECtHR) in an interim measure of 29 January 2019 concerning the case of the NGO vessel *Sea Watch 3* (*see Section 4.2.1 below on disembarkation and relocation arrangements since the beginning of 2019*). The boat carried 47 rescued migrants on board, who were not allowed by the Italian authorities to go ashore. While the Court did not grant the applicants' requests to be disembarked as requested by the Captain of the ship, it requested the Italian government "to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary".[41] This has been confirmed by a more recent ECtHR interim measure also at the request of Sea Watch 3, where the Court insisted on the obligation by the Italian authorities "to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health".[42] This Interim Measure leaves however unanswered the question if rescued by NGO boats need to necessarily go through the painful suffering of waiting indefinitely at sea and eventually become 'vulnerable' for a government such as Italy to be imposed an obligation to disembark.

The ECtHR case law has found that jurisdiction may be present in cases of both *de jure* as well as *de facto* (indirect) control by state actors, both territorially and extraterritorially. The extraterritorial application of the ECHR was recognised by the ECtHR in the *Hirsi Jamaa and Others v. Italy* of February 2012 (Giuffre, 2016). The Strasbourg Court ruled that – in the context of "pushback operations" to Libya conducted by the Italian Navy forces – Italy had assumed both continuous and exclusive *de jure* and *de facto* control over the affected applicants by bringing them on board Italian navy vessels and returning them to Libya.[43] In a Concurrent Opinion to this judgment, Judge Pinto de Albuquerque highlighted that "excision" of a part of the territory of a state from the migration zone in order to avoid the application of general legal

State actors, and a combination of co-perpetrators at different levels operating both within and outside an area of armed conflict. This apparatus allowed the executors to act without fear of retaliation, and the planners to be certain that they would never face any kind of accountability".

[40] Ibid., paragraph 503.

[41] See "ECHR grants an interim measure in case concerning the Sea Watch 3 vessel". European Court of Human Rights, Newsletter - February 2019.

[42] See "The Court decides not to indicate an interim measure requiring that the applicants be authorised to disembark in Italy from the ship Sea-Watch 3", European Court of Human Rights Press Release, 25.6.2019.

[43] *Hirsi Jamaa and Others* v. *Italy*, para. 81.

guarantees to people arriving at that part of "excised" territory represents a blatant circumvention of a state's obligations under international law".[44]

The ECtHR confirmed its *Hirsi* doctrine of *de jure* and *de facto* control in respect of extraterritorial jurisdiction in *N.D. and N.T.* v. *Spain*,[45] which concerned border-control practices, chiefly the so-called 'hot returns' or automatic expulsion or pushbacks by Spanish authorities from Ceuta and Melilla to Morocco. Furthermore, the Strasbourg Court has also determined responsibility for human rights violations in situations where the threshold of full and exclusive control over a ship set by the *Hirsi* case was not met. In the 2009 case *Women on Waves v. Portugal*,[46] in particular, the Court assumed that the combination of a government notification to the captain of an NGO boat prohibiting to enter Portuguese waters and the presence of a war ship blocking its entry constituted strong enough indicators for unlocking the application of the ECHR (Fink and Gombeer, 2018).

The ECtHR jurisprudence described above represents a basis for addressing some of the more sophisticated containment policies currently deployed in the Mediterranean, including those involving the provision of financial, technical and operational support to third countries authorities for preventing asylum seekers and migrants' movements (Baumgärtel, 2018; Pijnenburg, 2018; Global Action Network, 2018).

In May 2018, a coalition of NGOs and scholars filed an application against Italy with the ECtHR concerning an incident on 6 November 2017 in which the Libyan Coast Guard interfered with the efforts of the NGO vessel Sea-Watch 3 to rescue 130 migrants from a sinking dinghy in international waters. According to the applicants, more than 20 persons drowned before and during the operation, while 47 others were 'pulled back' to Libya, where they endured detention in inhumane conditions, beatings, extortion, starvation, and rape (Global Legal Action Network, 2018). [47]

The applicants claim that the intervention of the Libyan coast guard was partly coordinated by the MRCC in Rome, while an Italian navy ship, part of the Italian Mare Sicuro operation, was also closed to the area of intervention. In addition, the episode should be read in the context of the terms of the 2017 Italy-Libya Memorandum of understanding, as well as financial support

[44] Judge Pinto Albuquerque, Concurring Opinion,2012 *Hirsi Jamaa and Others v. Italy Judgment,* European Court of Human Rights, page 76 of the judgement. Reference was here made to Ryan (2010).

[45] *N.D. and N.T.* v *Spain*, Application nos. 8675/15 and 8697/15, ECtHR (3 October 2017), para. 54. On 29 January 2018, the case was referred to the Grand Chamber and final judgement is still pending.

[46] *Women on Waves v. Portugal*, Application No. 31276/05, ECtHR, 3 February 2009. The applicants in this case were three NGOs that used a ship providing information on abortion and reproductive rights to women and which when attempting to enter Portugal to hold information meetings with interested women were refused entry by the Portuguese authorities in a way that the ECtHR found to be a disproportionate interference with the human right of freedom of expression.

[47] The application made use of evidence compiled by Forensic Oceanography, part of the Forensic Architecture agency based at Goldsmiths, University of London, which has produced a detailed reconstruction using video footage of the sequence of the events. See: https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard.

provided to the Libyan Coastguard by the EU, including through the EU Trust Fund for Africa. These circumstances, they argue, establishes Italy's legal responsibility under the ECHR for the actions of Italian and Libyan vessels in the case under consideration. [48]

3.3 EU maritime and border surveillance standards

SAR and disembarkation activities of EU member states are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea (Carrera and den Hertog, 2015), which are covered by Regulation 656/2014[49] and the Schengen Borders Code (SBC).[50] Regulation 656/2014 applies to all Frontex-coordinated maritime border surveillance operations and includes a set of SAR and disembarkation obligations for 'participating units' (i.e. the law-enforcement vessels of member states). The main merit of Regulation 656/2014 is that of providing interpretative clarity on some SAR and disembarkation issues under the international law of the sea framework by including more detailed and precise rules. It also foresees EU definitions of autonomous nature and shared standards that can be seen as 'benchmarks' against which current (mal)practices by some EU member states in the Mediterranean can be assessed.

In the case of disembarkation following a SAR operation, the regulation establishes that the member state hosting the operation and participating member states shall cooperate with the responsible Rescue Coordinating Centre (RCC) to identify a place of safety and ensure that disembarkation of rescued persons is carried out rapidly and effectively. In case it is not possible to ensure that, the participating unit shall be authorised to disembark the rescued persons in the member state hosting the operation (Art. 10.1). Art. 2.12 provides a clear and protection-driven definition of 'place of safety', which could be considered as an autonomous EU legal concept. According to this provision the notion of 'place of safety' means a "location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic needs can be met and from which transportation arrangements can be made […] taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement".

Article 4 of the regulation includes provisions on protection of fundamental rights and *non-refoulement*, which apply to all cases of disembarkation in the context of sea operations conducted by the Frontex agency (Peers, 2014). In line with the *Hirsi Case* of the ECtHR discussed above, the regulation lays down a set of procedural steps to be followed when considering disembarkation of rescued migrants in a third country. Article 4 requires, in the

[48] For an overview of events providing evidence of direct and indirect involvement of EU and member states' authorities in interception, detention and pullback operations conducted by the Libyan Coast Guard, see Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019) 1.3.3 and 1.3.4.

[49] Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 15 May 2014, OJ L 189.

[50] Regulation on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) 2016/339, 9 March 2016, OJ L 77/1.

context of planning a sea operation, that the host member state, in coordination with participating member states and the Frontex agency, takes into consideration the general situation in the third country concerned, based on information derived from a broad range of sources, including evidence provided by international organisations, EU bodies and agencies, before disembarking rescued persons in a third country.

The regulation also foresees in Art. 4.3 a central EU benchmark: before any rescued person is disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. The rescued persons will also need to be offered the possibility "to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-*refoulement*". In practice, Art. 4.3 makes it mandatory that the rescued persons are in fact disembarked in EU member states for such an individual assessment to be carried out properly. This corresponds with the protections provided in the SBC concerning 'border surveillance' activities, which apply "without prejudice of ... the rights of refugees and persons requesting international protection, in particular as regards non-refoulement" (Art. 3.b SBC). The Maritime Surveillance Regulation provides a template to be used in future EU-coordinated SAR operations, and to assess the legality of the indirect support and cooperation between the EU, Frontex, the Italian government and the Libyan Coast Guard authorities.

4. Taking stock of policy proposals on SAR and disembarkation in the Mediterranean

4.1 Controlled Centres and Regional Disembarkation Platforms

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". EU policy discussions continued this worrying course of action during the second half of 2018 under the Austrian Presidency of the EU.

The European Council held in June 2018 under the Austrian Presidency paved the ground by calling for 'a new approach based on shared or complementary actions among member states to the disembarkation of those who are saved in SAR operations. To identify concrete proposals in this area, EU heads of state called on the Council and the Commission to swiftly explore the controversial concept of "regional disembarkation platforms", in close cooperation with relevant third countries as well as UNHCR and IOM. On the same occasion, the European Council agreed to explore the possibility for those disembarked on the EU territory to be transferred to so-called "controlled centres" in EU member states (European Council, 2018).

The concepts of 'disembarkation platforms' and 'controlled centres' were further elaborated by the European Commission in two informal 'non-papers' released in June and July 2018 (European Commission 2018a, 2018b). Discussions regarding the operationalisation of the two concepts have also been conducted within an EU Council Working Group (Council of the EU,

2018). However, 'disembarkation platforms' or 'arrangements' (as they were subsequently defined by the Commission) as well as 'controlled centres' have remained insufficiently developed and characterised by a worrisome lack of legal certainty (European Parliament, 2018a).

'Controlled centres' would mean that migrants disembarked in an EU member state would be transferred to these centres for an assessment of their international protection needs. They would essentially entail the continuation and further expansion of the hotspot approach deployed in Greece and Italy since 2015, albeit with a more formalised and systematic *de facto* use of 'administrative detention'. In its elaboration of the concept, the Commission specified that migrants and asylum seekers disembarked in those centres would be registered and processed in an "orderly and effective way", with full EU support, including for the sake of voluntary relocation. The Commission recommended an expanded use of accelerated and border procedures, followed by a quick return procedure in case of negative decisions (European Commission, 2018a, 2018c).

The establishment of 'controlled centres' has raised serious concerns regarding their potential negative impact on protection standards in the EU, which would rather make of them 'uncontrolled centres' from a human rights perspective. A joint communication issued by UN Special Procedures (five UN Rapporteurs and two Working Groups) to the European institutions on 18 September 2018[51] emphasised the difficulties that such centres would face in ensuring due process guarantees and legal safeguards, "including proper individual assessments and safeguards against arbitrary detention".

An expansion of the hotspots model is indeed problematic, in light of the wealth of evidence of forced fingerprinting of individuals, quasi-detention practices, degrading and inhuman reception conditions and expedited and discriminatory admissibility interviews occurring in the hotspots in Italy and Greece (ECRE, 2016; Danish Refugee Council, 2019). Hotspots have been criticised as an additional manifestation of EU containment policies attempting to establish an 'informal' system of sub-standard asylum procedures operating at the borders, whose main objective is that of reducing and filtering access to international protection in the EU (Maiani 2018: ECRE 2018b; Caritas Europa 2018; PICUM, 2017).

Discussions on the possible establishment of 'controlled centres' have been additionally caught up on controversial issues that have prevented member states from finding an agreement on the reform of the CEAS, such as relocation of asylum seekers and the expanded use of so-called 'border procedures' (European Commission, 2016a, 2016b). In the absence of a new common approach on responsibility sharing, frontline member states, including countries like Italy, have excluded the possibility of hosting 'controlled centres' on their territory, claiming that this would actually imply additional 'structural burdens' on their asylum systems and increase their responsibility over migrants and asylum seekers (ECRE, 2018a). Interestingly, despite the lack of clarity and consensus on what 'controlled centres' were, the European Commission included

[51]See https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL_OTH_64_2018.pdf

them in the proposals on the reform of the European Border and Coast Guard (EBCG) Agency presented in September 2018. The reference was finally scrapped from the compromise text reached by the co-legislators in April 2019 upon request of the European Parliament.[52]

The idea of establishing "regional disembarkation platforms" has also been the object of strong criticism. The possibility of disembarking individuals in distress at sea on the territory of a third country is *conditional* on the respect of legal obligations under international and EU law, including the principle of *non-refoulment* as codified in the Geneva Convention and other relevant provisions under the ECHR and the EU CFR (see Section 3 above; Carrera and Lannoo, 2018). UNHCR and IOM have clearly identified a set of conditions that should underpin any cooperation approach to disembarkation following SAR operations in the Mediterranean. First, the determination of places of disembarkation should be carried out in a manner that ensures respect for human rights and the principle of *non-refoulement*.

Second, people rescued at sea should be granted adequate, safe and dignified reception conditions and have access to asylum procedures in line with relevant international and national standards. Finally, arrangements with countries outside the EU should be coupled with clear commitments from the EU side to provide solutions for refugees, including resettlement and other forms of admission, such as expanded family reunification opportunities (UNHCR-IOM, 2018). All these conditions make the various 'policy options' or 'scenarios' laid down by the European Commission non-paper on disembarkation platforms in Africa unfeasible.

Stakeholders have opposed plans to disembark asylum seekers rescued at sea in North African countries, underlining a set of issues concerning the right to access protection and the treatment that asylum seekers would face in those countries. ECRE dismissed disembarkation in third countries as an 'externalisation fantasy', concluding that "in the absence of a functioning asylum system in any of the North African countries and for as long as they are not in place, disembarkation of those rescued on the high seas or in the SAR zone of Libya by vessels under an EU member state's flag, by commercial or by NGOs vessels should take place in an EU member state" (ECRE 2018c). The already mentioned joint communication issued by UN Special Procedures (five UN Rapporteurs and two Working Groups) to the European institutions on 18 September 2018[53] stated that

> Outsourcing responsibility of disembarkation to third countries, in particular those with weak protection systems, only increases the risk of refoulement and other human rights violations. As similar models have shown elsewhere, external disembarkation and processing centres do not provide durable solutions and result in numerous grave human rights violations, including breaches of the non-

[52] See Provisional agreement resulting from interinstitutional negotiations. Proposal for a regulation European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council (COM(2018)0631 – C8-0406/2018 – 2018/0330A(COD)).

[53] See https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL_OTH_64_2018.pdf

refoulement obligation, torture and ill treatment, confinement amounting to arbitrary or indefinite detention, and violations of the right to life.

Major political and operational obstacles associated with involving third countries in disembarkation arrangements should also be underlined. Both the Commission and the Council have underlined the need to secure the agreement of third countries through financial and operational support, as well as resettlement pledges and other protection pathways (European Commission, 2018b; Council of the EU, 2018). African states' reluctance to accept disembarkation of migrants rescued at sea on their territory clearly emerges from a common African Union (AU) position paper leaked to the press, which equates the establishment of disembarkation platforms in their territories to the creation of "de facto detention centres", and calls on African states to refuse to cooperate with the EU in the implementation of those plans.[54]

4.2 Ad hoc disembarkation and relocation arrangements

4.2.1. Ad hoc relocation arrangements explained

In the background of these disagreements, since the summer of 2018, cases of disembarkation following SAR operations conducted by civil society and commercial vessels have been addressed through new instruments called *ad hoc* or "temporary" disembarkation and relocation arrangements.[55] These 'arrangements' have in practice involved a small group of member states willing to relocate a share of disembarked asylum seekers in Spain, Italy and Malta (ECRE, 2019a). Apart from a few media articles, there has been very little public knowledge and disclosed information about them. Unlike the 2015 'temporary relocation decisions',[56] there is not any official document laying down the actual rules and procedures covering these arrangements. Interviews conducted for the purposes of this paper revealed

[54] The Guardian, African Union seeks to kill EU plan to process migrants in Africa, 24 February 2019, https://www.theguardian.com/world/2019/feb/24/african-union-seeks-to-kill-eu-plan-to-process-migrants-in-africa

[55] Ad hoc arrangements on disembarkation and relocation have been referred to in different ways in EU debates. The European Commission has referred to them as "temporary arrangements on disembarkation" (European Commission, 2019), a terminology that has also been followed in the context of debates conducted under the Romanian Presidency of the Council (Council of the EU, 2019a). The same arrangements were also defined as "transitory measures" in a discussion paper prepared by the Romanian Presidency for an Informal meeting of the strategic committee on immigration, frontiers and asylum (SCIFA) held in Bucharest on March 2019 (Council of the EU, 2019b). While defining these arrangements as "temporary" or "transitory" points to the fact that they are limited in time and only apply to very specific situations, this terminology may be misleading in the absence of a clear indication of the period of time during which these arrangements will remain applicable. For the purposes of this paper, we chose to refer to them as 'Ad hoc disembarkation and relocation arrangements'.

[56] Council of the European Union (2015), "Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection", 11131/15, ASIM 63, Brussels, 22 July (https://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf); and Council of the European Union (2015), Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 12098/15, ASIM 87, Interinstitutional File: 2015/0209 (NLE), Brussels, 22 September (https://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf).

that the member states concerned did not want to have any written record or bring any public accountability to the arrangements.

The arrangements have mainly covered situations of migrants rescued in Libyan or international waters by civil society boats and for which there is no agreement between EU member states, notably between Italy and Malta, over who should take responsibility for disembarkation. The arrangements have been described as 'ad hoc' in nature, and have followed a 'boat-by-boat approach' aimed at breaking political standoffs between governments forbidding or delaying disembarkation in their ports (ECRE 2019a). Table 2 below outlines the only existing publicly available information about the outputs of member state arrangements during the second half of 2018, which reveals a limited number of people subject to relocations.[57]

Table 2. Ad hoc disembarkation and relocation arrangements (June – October 2018)

Ship	Date	Port	DE	BE	ES	FR	IE	LU	NL	NO	PT	TOTAL
Aquarius	17/06/18	Valencia, ES	-	-	-	78	-	-	-	-	-	**78**
Lifeline	27/06/18	Valletta, MT	-	6	-	52	26	15	20	7	-	**126**
Open Arms	09/08/18	Algeciras, ES	-	-	-	20	-	-	-	-	-	**20**
Aquarius	15/08/18	Valletta, MT	50	-	60	60	17	5	-	-	30	**222**
Aquarius	01/10/18	Valletta, MT	15	-	15	18	-	-	-	-	10	**58**
TOTAL	-	-	**65**	**6**	**75**	**228**	**43**	**20**	**20**	**7**	**40**	**504**

Source: German Federal Ministry of Interior, Reply to parliamentary question by AfD, 19/6235, 3 December 2018, http://dipbt.bundestag.de/dip21/btd/19/062/1906235.pdf

While often labelled as 'practical' or expressions of 'pragmatism' by some EU policymakers, their informal or extra-Treaty nature raises serious concerns regarding their compliance with EU asylum standards, EU Treaty principles and fundamental rights. Cases have been reported of asylum applicants disembarked in Malta who have been arbitrarily detained until their transfer to other member states, without allowing them the possibility to lodge an asylum claim. Similarly, it has been reported that persons disembarked in Spain have been subject to transfer procedures under relocation arrangements without prior registration of their asylum claim and without reception conditions in line with existing EU asylum standards (ECRE, 2019a).

During his State of the Union Speech of September 2018 former president of the European Commission Juncker made an indirect reference to the issue of 'relocation arrangements' by stating that "We cannot continue to squabble to find ad hoc solutions each time a new ship arrives. Temporary solidarity is not good enough. We need lasting solidarity – today and forever more."[58] The Commission then underlined the objective to move from ad hoc, temporary and

[57] As underlined by ECRE (2019a), the lack of publicly available information on ad hoc relocation arrangements does not allow adequate oversight of member states' compliance with their relocation commitments in practice.
[58] See https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf page 7.

limited solutions carried out in the previous months to the adoption of a "transparent step-by-step work plan that would ensure that the Member State concerned receive the operational and effective assistance it needs from the Commission, EU agencies and other Member States"(European Commission, 2019).[59]

Since early 2019, upon request from concerned member states, the European Commission has in some way been involved in the implementation of informal relocation arrangements after disembarkation and the development of a so-called 'supportive platform for operational cooperation".[60] During an 'exchange of views' on "temporary arrangements" in the asylum policy" with the European Parliament LIBE Committee in February 2019,[61] the Commission stated the need for an "organised form of coordination" and a "commonly agreed voluntary framework". It mentioned recent cases in which the Commission was providing "coordination and assistance" to member states with the deployment of a representative on the ground, as well as financial support to the implementation of these arrangements through the EU budget and specifically the AMIF emergency funding (Article 18 of AMIF Regulation).

This declaration notwithstanding, interviews conducted for this paper revealed that the Commission role should be better understood as that of a 'facilitator' or 'deal broker' in the context of member states pledging exercise. Upon request for assistance from a member state, either Italy or Malta, the Commission proceeds with putting together a group of EU member states interested or willing to make 'pledges' from those people disembarked. The voluntary nature of the system has meant that the implementation of arrangements has been based on the "good will" of participating member states. This circumstance has not helped in clarifying the concrete circumstances justifying the triggering of these arrangements in the requesting Member States. Table 3 below provides an updated overview of the disembarkation and relocation arrangements implemented since the first half of 2019, which shows how these arrangements have involved only a limited number of disembarked persons.[62]

[59] The Romanian Presidency of the Council (first half of 2019) also tried to foster a commitment for a structured response to disembarkation through a "temporary arrangement on relocation" based on voluntary participation of member states. See intervention by Mr. Raducu-Catalin Burlacu, representative of the Romanian Presidency at the LIBE Committee meeting "Exchange of views on "temporary arrangements" in the asylum policy", 19.02.2019. Online: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20190219-1615-COMMITTEE-LIBE

[60] According to a Working Paper titled "Guidelines on Temporary Arrangements for Disembarkation" of 12 June 2019 prepared by Romanian Presidency of the EU, the following actors participate in this 'platform': "Commission, the Presidency, the requesting Member State, participating Member States, relevant EU agencies, Council Secretariat", Council of the EU (2019), Guidelines on Temporary Arrangements for Disembarkation, WK 7219/2019 INIT, Brussels, 12 June 2019.

[61] Online: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20190219-1615-COMMITTEE-LIBE

[62] The total number of disembarked persons relocated by participating member states is not publicly available for the relocation arrangements reported in the table.

Table 3. Ad hoc disembarkation and relocation arrangements facilitated by the Commission and EU agencies (January – June 2019)

Ship	Date	Place of disembarkation	N° of people disembarked	EU agencies involved
Sea Watch 3 and *Sea-Eye* 'Alan Kurdi' (NGOs vessels)	9.01.2019	La Valletta (Malta)	49	EASO
Sea Watch 3 (NGO vessel)	31.01.2019	Catania (Italy)	47	EASO/FRONTEX
Sea-Eye 'Alan Kurdi' (NGO vessel)	13.04.2019	La Valletta (Malta)	62	EASO
Stromboli (Italian naval ship)	10.05.2019	Augusta (Italy)	36	EASO/FRONTEX
Cigala Fulgosi (Italian naval ship)	2.06.2019	Genoa (Italy)	100	EASO/FRONTEX

Sources: Author's interviews and media sources.

EU agencies, chiefly EASO and Frontex, have been mobilised to provide support to member state authorities in dealing with specific procedural steps following the disembarkation of rescued persons, including first reception, registration of asylum applications, relocation and return. The role of Frontex in ad hoc disembarkation arrangements has only covered Italy. It has been mainly focused on conducting 'hotspot-related tasks', mainly identification and nationality determination, fingerprinting and registration of disembarked individuals in EU information systems such as Eurodac and Schengen Information System (SIS) II, upon request of concerned member states.

EASO has played a more substantive role in both Malta and Italy. EASO's support in the context of relocation arrangements is in practice formalised through a 'bilateral exchange of letters' with the requesting EU member state government, laying down the 'terms' of EASO support and providing the bases for EASO involvement in the arrangements. Through its involvement in relocation arrangements EASO is "operating in a grey zone". This kind of activity is not reflected in its current mandate. EASO support has materialised in different activities for different countries involved in these arrangements since the beginning of 2019. These have often included, for instance, the provision of information on the international protection procedure, registration of applications for international protection for relocation purposes, support Member States' delegations missions, the selection and matching processes of applicants to be relocated (preparation of selection/matching lists).

The process of 'matching' candidates for relocation to member states has been heterogeneous and inconsistent, with no clear distribution key mechanism being applied. Our interviews revealed that since the beginning of 2019 allocation was conducted based on a "kind of matching system" where elements considered included family unity, or the family links of

applicants with a specific country. EASO support aimed at moving towards a "fairer and proportionate distribution" system among the participating governments when matching asylum applicants to specific states, in particular by allocating to each of the participating member states a proportional share of applicants with high and low recognition rates.[63] This has been confirmed by a Working Paper titled "Guidelines on Temporary Arrangements for Disembarkation" of 12 June 2019 prepared by Romanian Presidency of the EU, according to which the composition of the 'relocation pool' is determined by "the indications by the Member States of relocation of the profiles that these Member States are willing to accept (variable geometry)."[64] It remains unclear how the Commission's and EASO involvement has prevented member states from only accepting applicants from nationalities with high recognition rates, and avoiding the inherent discrimination based on 'cherry picking' or 'first comes, first served basis' practices.

Our interviews revealed that some EU member states had expressed interest or "preferences" for specific "profiles" of applicants – such as specific nationalities, families or only those qualified as 'vulnerable'. The exact implementation procedure of relocation arrangements was described by the Commission in terms of a 'workflow' or "step-by-step work plan that would ensure that the Member State concerned receives the operational and effective assistance it needs from the Commission, EU agencies and other Member States" (European Commission, 2019). This notion, however, is in itself alien to any existing EU legal act and implies that the procedure remains outside any meaningful legal framework.

The concept of 'workflow' has in practice meant that the Commission and EU agencies are only involved at very specific phases of the 'workflow', and are allowed by member states to perform only a weak role consisting of a limited number of well-defined tasks and preventing overall involvement and supervision. Yet, this does not exonerate them of *chain responsibility* for possible fundamental rights violations resulting from the entire procedure. EASO is for instance not directly involved in the actual implementation of the relocation procedure, and on the decision regarding who is to be relocated when, and where, which remains with the member states concerned. Neither are the Commission and EU agencies exercising any monitoring role on the extent to which Malta and Italy, or any of the receiving member states, are applying the guarantees envisaged in the EU Dublin Regulation, or the impacts of the arrangements on the rights of asylum seekers, including non-discrimination.[65]

[63] EASO, Request for Access to Document (No. 03753), EASO/ED/2019/283, Valetta, 14 June 2019. The answer to this Request did not include information on the total number of applicants relocated by Member States involved. In the case of disembarkation of 47 people by the NGO *Sea Watch 3* on 31 January 2019 reported in Table 3, seven member states contributed to the relocation of a total of 30 people: France, Germany, Lithuania, Luxembourg, Malta, Portugal and Romania (EASO, 2019).

[64] Council of the EU (2019a), Guidelines on Temporary Arrangements for Disembarkation, WK 7219/2019 INIT, Brussels, 12 June 2019. The Guidelines also foresee that Member States willing to relocate voluntarily will receive a lump sum of 6000 EUR per applicant, in line with the amended Article 18 of the AMIF Regulation 516/2014.

[65] Ad hoc relocation 'arrangements' have covered a different personal scope to the one applicable in the case of the two emergency relocation decisions adopted and implemented since 2015. Under those two decisions, only asylum seekers belonging to nationalities with a high recognition rate, mainly Syrians and Eritreans, and for some

The contribution by the European Commission and EU agencies since the beginning of 2019 has not helped in bringing full legal certainty to the operationalisation of relocation arrangements. The procedure has remained intergovernmental and characterised by a high level of informality and lack of transparency. Arrangements have been designed in a way that makes it impossible to fully guarantee that EU asylum *acquis* standards are complied with by EU member state authorities across the various phases comprising the 'workflow'.

To remedy some of these deficiencies, human rights organisations called on EU governments to establish, as an interim measure, a predictable arrangement or 'mechanism' for disembarking and relocating people rescued at sea among member states (Amnesty International and Human Rights Watch, 2019; ECRE, 2019a; Council of Europe, 2019). They also recommended that relocation of asylum seekers rescued at sea should fully comply with the CEAS rules and make sure that disembarked people are granted access to an asylum procedure and adequate reception conditions, and that the transfers should be carried out in accordance with the Dublin Regulation. The exact scope of these proposals however is not clear and, as explained in the next section, depending on their design and legal nature, they may entail a number of profound risks for the future development of EU asylum and migration policy.

4.2.2. Differentiated integration in EU asylum policy: lasting or unequal solidarity?

Ad hoc disembarkation and relocation arrangements could be seen as an instance of flexible and 'differentiated integration' in EU asylum policy (De Witte, Ott and Vos, 2017). However, the extent to which 'flexible integration' in the area of asylum and relocation may further the objectives of the EU and reinforce the integration process in this area remains doubtful. The EU Treaties clearly talk about the development of a common EU asylum policy and a uniform status of asylum valid throughout the Union (Article 78.1 and 78.2 TFEU). Informal or even formalised 'variable geometry' in this domain, with a small group of member states cooperating among themselves, would put at risk the objective of the Treaties of having a single and unique area of asylum common to all EU member states (which are also members of the Schengen system). It would also pose fundamental challenges to the effective and equal implementation of existing EU asylum *acquis* across the Union.

While it is true that European cooperation in the framework of the Schengen and Dublin systems started in an intergovernmental fashion with the involvement of only a few EU member states, it is crucial to remind ourselves that, almost three decades later, policies in the areas of border control and asylum have been to a very large extent 'Europeanised' and brought under the Community framework, with the EU exercising either shared or exclusive legal competence. Proposals for flexible integration or *'solidarity à la carte'* in these fields would be turning the clock back three decades and re-injecting nationalism and intergovernmentalism into fields that are now – despite their current deficiencies and limits – clearly under an EU remit.

time Iraqis, were considered eligible for relocation. The persons involved were relocated as 'asylum applicants' and the actual asylum procedure took place in the country of destination (Council of the EU, 2015a; 2015b).

It is therefore central to give very careful consideration to what the current proposals for enhanced cooperation or any new "mechanism" or "solidarity pact" among a "coalition of the willing" (ECRE, 2019b; Vignon, 2019)[66] in the field of asylum would actually mean in light of EU law and the Treaties, as well as to its longer-term implications for EU asylum and border policies. Policy ideas driven by 'flexibility' and 'pragmatism' in this area may seem attractive at first sight but, when examined in detail, they in fact raise profound questions regarding the challenges that they pose to the very consistency of the foundations and principles of the CEAS, as well as more generally the respect of the rule of law laid down in the EU Treaties, including the safeguarding of the principle of sincere and loyal cooperation. This principle, which is anchored in Article 4.3 TEU, requires member states to facilitate the achievement of the Union's tasks and to refrain from any measure that could jeopardise the attainment of the Union's objectives. It also entails European institutions not affecting the principle of inter-institutional balance by fully complying with their attributed roles in the Treaties (Klamert, 2014).

The enactment of a flexible approach would risk ending up in the establishment of competing areas and dispersed levels of Europeanisation and integration of EU asylum policy, preventing equal treatment and a uniform status of asylum valid throughout the EU as stipulated in Art. 78.2.a TFEU. A 'multi-speed' EU would risk a fast reversal of Europeanisation in asylum policy. It could also lead to the establishment of different 'areas of asylum' in the EU and put at stake the political project of having a unique Area of Freedom, Security and Justice (AFSJ), which is guaranteed across the Union. Research has shown how the use of variable geometry in the context of 'opt-out' clauses granted to Denmark, has allowed the Danish government to introduce international protection standards that are below those provided by EU asylum law (Walter-Franke, 2019).

"Ever changing 'flexibility' can reach a degree of complexity that may paralyse the everyday cooperation of national authorities" (Carrera and Geyer, 2007). While flexibility may overcome obstacles posed by some member states when moving forward in supranational cooperation, it may bring about risks of parallel and even competing 'areas' across the Union, which will add to increasing dispersion, legal uncertainty and fragmentation in European integration (Carrera and Guild, 2015). Differentiated integration would also allow some member states to lower existing EU and international standards and to go ahead in establishing 'coalitions of the unwilling'.

The use of enhanced cooperation as foreseen in the EU Treaties would not be a panacea for EU asylum policy either, as the establishment in 2017 of a European Public Prosecutor's Office (EPPO) has shown well (Carrera, 2018).[67] It took four and half years of long and arduous

[66] See, for instance, Vignon, J. (2019). *For a European Policy on Asylum, Migration and Mobility*, Jacques Delors Institute. The report calls for the creation of "... a new solidarity pact between a group of voluntary Member States and the others, especially those at the external borders".

[67] The European Parliament and the Council (2017), Directive 2017/1731 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L198/29, 28.7.2107 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN).

negotiations before formal adoption of this instrument under enhanced cooperation. The original proposal presented by the Commission in 2013 was significantly watered-down inside the Council "rooms". Member states that have not participated in the EPPO, such as Hungary,[68] still had the possibility to participate in the negotiations of the mandate and negatively affect its final shape in ways that have been considered to challenge the overall EU value-added and overall effectiveness of the current EPPO model (Mitsilegas and Giuffrida, 2017). Moreover, as Peers (2018) has underlined, until present the use of enhanced cooperation has been minor and mainly confined to fields subject to unanimity voting. During the previous legislature, a logic of 'consensus' or *de facto* unanimity drove negotiations on the CEAS reform files inside the Council and the European Council. This was the case in spite of the qualified majority voting rule formally foreseen in the EU Treaties under the ordinary legislative procedure and the existence of clear indications that a large group of member states exceeding qualified majority were in favour of engaging with the European Parliament in the negotiations of the CEAS reform package. [69] Such a political choice is not in compliance with the decision-making rules on asylum in the Treaties and violates the principle of sincere cooperation among European institutions.

The principle of solidarity and fair sharing of responsibility enshrined in the Lisbon Treaty is not a pick and choose or '*à la carte*' option for national governments and their ministries of interior. It implies equality among all EU member states and that a common EU response to that common challenge should be prioritised and preferred (Carrera and Lannoo, 2018). This understanding of the EU principle of solidarity as "*equal solidarity*" – whereby responsibility is upheld and equally shared among all Schengen countries – was reflected in the ruling by the Court of Justice of the EU in the judgement on relocation quotas against Hungary and Slovakia.[70] The Court emphasised that "When one or more Member States are faced with an "emergency situation characterized by a sudden inflow of nationals of third countries" (Art. 78.3 TFEU), the responses "must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy".

[68] So far, 22 member states are participating in the EPPO. The following EU countries do not take part in the EPPO: Denmark, Ireland, the United Kingdom, Sweden, Poland and Hungary.

[69] European Parliament, Letter by Claude Moraes (Former Chair of the LIBE Committee in the European Parliament) to Permanent Representation of Austria before the EU, 3 December 2018, IPOL-COM-LIBE D(2018) 46538 (in possession of the authors), which stated that "… in last week's coreper (sic) meeting the Presidency decided to the texts on the updated mandates prepared at technical level by the Council Presidency and to refer them back to technical level for further drafting despite clear indications that a large number of Member States exceeding qualify (sic) majority were in favour of reengaging in negotiations with the Parliament on the basis of the proposed texts… I would like to recall that Articles 16.3 TEU, 78.2 and 294 TFEU read in combination provide that decisions fall under ordinary legislative procedure and must be taken in Council by qualified majority. These rules need to be respected to allow for decisions to be taken in an area of great importance for European citizens and to ensure the principle of sincere cooperation among institutions".

[70] See Judgment in Joined Cases C-643/15 and C-647/15 Press and Information Slovakia and Hungary v Council https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf

5. Conclusions: equal solidarity

This paper has underlined how the highly politicised and long-standing debates on SAR and disembarkation among some EU member states continue preventing sustainable, common and principled policy responses ensuring international protection standards and preventing deaths in the Mediterranean. The multi-layered legal framework governing SAR and disembarkation provides, however, a set of obligations upon member state governments, including the absolute and non-derogable commitment to preventing loss of lives at sea, and a due diligence duty to coordinate effective and timely SAR responses and guarantee international protection and *non-refoulement* of rescued people. Member states are not free to tactically choose not to save lives at sea or disembark people to safety or to evade their own legal responsibilities under EU and national constitutional law when cooperating with third countries. Current contained mobility policies in the EU are unlawful and illegitimate. They stand in violation of relevant EU and international human rights instruments and unlock accountability and liability for grave human rights violations and crimes against humanity.

European institutions should resist arguments based on the current impasse in the reform of the EU Dublin system, as excuses by some member state governments and ministries of interior to avoid complying with their obligations under international, EU and constitutional fundamental rights standards. Under no circumstances should member state disagreements allow for continuing to put the lives and safety of people rescued at sea in jeopardy.[71] Relocation arrangements among a few EU member states for people disembarked in the Mediterranean have in fact entailed 'less EU' and damaged the furthering of European integration in the field of asylum, preventing a reform of the CEAS. Ideas to pursue 'coalitions of the willing' or 'solidarity pacts' among a group of governments to foster variable solidarity in the field of asylum may seem attractive at first sight, but they bring major risks of undermining the sustainability and consistency of the CEAS and the Schengen system. They may also bring Europeanisation 'backwards' in the areas of asylum and Schengen by setting up differing and competing areas of solidarity inside the Union.

States and the ICC Prosecutor should fully investigate the complicity of EU agents and the Italian government, including the direct and indirect consequences of contained mobility policies, in crimes against humanity affecting migrants in Libya. Relevant international justice venues dealing with law of the sea disputes could be also involved. The European Commission and the European Parliament should make sure that all EU member states fully and effectively comply with their commitments under international maritime, refugee and human rights standards and EU law. Current responsibilities must be upheld. Efficient and timely enforcement of current standards – including infringement proceedings by the Commission – should become a clear priority during the next legislature. The EU counts with sound legal competences in the areas of border surveillance in the Schengen Borders Code and access to international

[71] Council of Europe (2019), which states that "Further resolution of questions about responsibility for the reception and processing of rescued migrants should take place after disembarkation, rather than leaving rescued migrants stuck without a place of safety."

protection and reception conditions in existing EU directives composing the CEAS. There is also a common set of legal standards on SAR and disembarkation applying in the context of Frontex-led maritime joint operations, which constitute 'benchmarks' when assessing the legality of current member state practices. These EU standards make unlawful any indirect forms of cooperation and sharing of information with North African countries to carry out 'pullbacks' of migrants rescued at sea.

No EU member state should be permitted to police or criminalise civil society actors involved in SAR or humanitarian assistance in the Mediterranean. Such actions constitute an illegitimate restriction of the fundamental right of freedom of association enshrined in Article 11 of the EU Charter of Fundamental Rights and the independence of human rights defenders safeguarded by the UN Declaration on Human Rights Defenders. The criminalisation of NGOs constitutes a major threat to the EU's founding values enshrined in Article 2 TEU, which lay at the very basis of mutual-trust cooperation in the EU. The current EU legal framework on migrant smuggling should be amended to include an obligation for member states not to criminalise humanitarian assistance to asylum seekers and irregular immigrants (Carrera et a. 2019b).

Current ad hoc and 'informal' disembarkation and relocation arrangements supported and coordinated by the European Commission and EASO since early 2019 constitute extra-Treaty and intergovernmental initiatives standing at odds with EU principles. As guardian of the Treaties, the European Commission should only support initiatives unequivocally falling within EU remits of action, so that any administrative cooperation among member states takes place in the scope of protection standards envisaged in EU law. Any joint action should fall within the scope of the Treaties and engage the whole EU decision-making process and the principle of EU inter-institutional balance, subject to full scrutiny by the European Parliament and the Court of Justice of the EU. EASO and Frontex should be only involved in activities which fall within the scope of their official mandates, and in supporting the coordination of member state initiatives which are asylum *acquis* and fundamental rights-proof. All the relevant information on the workings, outcomes and outputs of these arrangements should be brought to the attention of the wider public. There should be an independent investigation into the operability and actual results of these arrangements, as well as their impacts on asylum seeker rights.

As a consequence of the 'package approach' linking the approval of the recast Dublin Regulation to all the other CEAS legislative instruments under negotiation, the whole reform of EU asylum rules has been put on hold. The decision-making rules and procedures in the Lisbon Treaty (including the use of QMV in the Council) should be re-applied and the 'package approach' abandoned.

Pending a comprehensive reform of the Dublin system, member states may decide to take up responsibility to assess an application for international protection, even if they are not responsible following the "humanitarian clause" foreseen by Article 17.2 of the Dublin Regulation. In light of the challenges related to disembarkation and relocation arrangements identified in this paper, however, any new relocation system linked to disembarkation should take place under a clear EU remit and be strictly linked to the swift adoption of the proposed

reformed of the Dublin Regulation. The setting up of a permanent corrective (relocation) mechanism for sharing responsibility on asylum applicants should not be *à la carte* but involve *all* EU member states (European Parliament, 2017). The guiding principle should be one of *'equal solidarity'*, whereby all EU member states share fairly and equally the responsibility over asylum seekers across the Union in full compliance with EU constitutive principles and fundamental rights.

The politics of criminalisation and disengagement in SAR operational capacities in the Mediterranean, and the EU indirect cooperation and support to Libyan Coast Guard actors to carry out unlawful 'pullbacks', has resulted in an increase in the rate of deaths at sea, grave human rights violations and crimes against humanity. EU policies of containment as well as SAR disengagement should be abandoned. Instead, the EU should reconsider the feasibility of setting up a new SAR joint operation in the Mediterranean (European Parliament, 2015 2016, 2018b; UNHCR, 2015; Amnesty International, 2015). EU agencies, such as Frontex and EASO, could be assigned to coordinating and supporting tasks in different phases of the proposed EU SAR Joint Operation (Carrera and Lannoo, 2018).[72] Any future operational support should be focused on SAR and safeguarding international protection of people rescued at sea.

EU funding instruments must not be used as an attempt to bypass the Treaties, national constitutions and international commitments. The EU should stop funding migration management-driven training and 'incapacity building' on SAR and border maritime surveillance in unsafe third countries such as Libya through EU Trust Funds. These activities are illegal and incompatible with the above-mentioned standards, which bind the European institutions and agencies. The European Court of Auditors (ECA) should carry out an investigation into the ways in which the EU Trust Fund for Africa has supported the activities of the Italian ministry of interior with regard to "strengthening capacity of Libyan authorities on search and rescue" and "tackling irregular border crossings" and internationally wrongful acts.[73] The EU could establish an EU SAR fund to help reinforce a coordinated EU SAR response (European Parliament, 2018b), and to strengthen EU member state disembarkation capacities, reception facilities and domestic asylum systems.

We cannot close our ears to the deadly effects and human rights and rule of law violations emerging from current contained mobility policies in the EU. For the Union to safeguard its legitimacy and continue justifying its value added, these principles must be non-negotiable and always come first. A common EU response involving all member states in a spirit of equal solidarity should be the way forward.

[72] EU agencies must rigorously comply with international, regional and EU fundamental rights and refugee standards, and be subject to a robust and impartial monitoring and independent complaint mechanism (in addition to the one operated by the Frontex Fundamental Rights Officer) before the European Ombudsman, in cooperation with existing national complaint mechanism bodies (Carrera and Stefan, 2018).

[73] See "Support to Integrated border and migration management in Libya" https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en and https://ec.europa.eu/trustfundforafrica/partner/italian-ministry-interior_en

List of abbreviations

AFSJ	Area of Freedom, Security and Justice
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COM	European Commission
CSDP	Common Security and Defence Policy
DG	Directorate General
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EPPO	European Public Prosecutor's Office
EUCFR	EU Charter of Fundamental Rights
EUNAVFOR-MED	European Union's Naval Force – Mediterranean Operation 'Sophia'
EUROSUR	European Border Surveillance system
EUTF	EU Trust Fund
FRA	European Union Agency for Fundamental Rights
FRONTEX	EU External Borders Agency (see also EBCG)
HOME	DG Migration and Home Affairs
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

IMO	International Maritime Organisation
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
LIBE	Civil Liberties, Justice and Home Affairs Committee, European Parliament
MRCC	Maritime Rescue Coordination Centre
QMV	Qualified Majority Voting
SAR	Search and Rescue at Sea
SBC	Schengen Borders Code
SRR	Search and Rescue Region
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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