

The Central Mediterranean Route

Law Enforcement without the Rule of Law

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Abstract: It could be successfully argued that there is a general obligation to save lives in danger at sea and that this obligation is moral in nature. Such reasoning, however, is not the specific aim of this paper. Instead, this paper focuses on the legal obligations of the European Union (EU), its Member States, other neighbouring countries, and the EU Border and Coast Guard, towards migrants attempting the risky journey to Europe, in order to find out whether there are any legal steps that can be taken in order to help eliminate deaths in the Mediterranean. The article focuses on the main International Conventions on maritime law, international human rights law, international asylum law, the relevant legislation and regulations of the European Union and Italian law, offering an assessment on the legality of the EU border control operations at sea. The main argument of this paper is that the European policy on the enforcement of border control at sea fails to respect the basic principle of legality, and therefore it is against the Rule of Law.

[Key Words: Migration at sea, European Union, Border Control, Asylum, Human Rights]

1. Introduction: Background and Objective of This Paper

The Central Mediterranean Route is the maritime path that migrants sailing from the Libyan coasts take in the attempt to reach Maltese or Italian shores. This passage is longer and more perilous,¹ if compared to the shorter Eastern Aegean route from Turkey to Greece. It is a fact that the highest number of deaths of migrants at sea was recorded² on this route.

Official UNCHR data indicate that 171,332 people reached the territory of the European Union by sea in 2017 (119,369 disembarked on Italian ports), while 362,753 people arrived by sea in 2016 (compared to 1,015,078 in 2015).³ Many of these migrants,

¹ Consistent UNHCR and IOM reporting document that the Mediterranean is the sea where the highest number of migrants lost their life, and in particular, the Central Mediterranean Route is the deadliest passage. See, among other sources, 31 May 2016 “Mediterranean death toll has reached at least 1,000 this week,” says IOM”, *The Guardian*, available at: <http://www.theguardian.com/world/2016/may/31/mediterranean-death-toll-880-last-week-unhcr-migration> (accessed on 19 September 2016).

² The Missing Migrants Projects collects and reports estimates of death and missing migrants at sea across the world from media and authoritative sources, including IOM. See: <http://missingmigrants.iom.int/> (accessed on 18 January 2018).

³ See the status of the situation in the Mediterranean by the UNHCR, available at: <http://data.unhcr.org/mediterranean/regional.php> (last accessed on 26 January 2016). Between January and March 2015, 497 migrants died or disappeared at sea. In April 2015 it is estimated that 1,308



who, risking their lives, undertook an extremely dangerous journey from the North and West African coasts to look for a better life in Europe or to access international protection, died because they were not rescued in time. The majority, according to official reports and independent surveys,⁴ flee their countries because of violence, conflict or persecutions. While in 2017 the official estimate of dead and missing was 3,081 people, in the period between January and December 2016, the number of recorded dead or missing persons was 5,096.⁵ In 2016, IOM reported that on the Central Mediterranean passage linking Libya and Italy the death toll was also higher than during the same period in the previous year. The Missing Migrants Project reported 2,764 drowned or missing in the Central Mediterranean Route from January to December 2015, compared with 3,054 from just January to September in 2016,⁶ on the same maritime route, indicating an increase of 6 percent.

As reported by independent observers, and by the migrants who reached Italian shores, Sub-Saharan, including Nigerian, Gambian, Malian, and Somali citizens, people from Maghreb, Ethiopia and Eritrea, and others coming from East-Asia (Bangladesh) reach Libya through risky trips, some by crossing the Sahara desert, others by air, and always with the help of the smugglers. The survivors of the dangerous trips often need to remain in Libya for quite a long time,⁷ in order to make enough money to pay the smugglers and move forward with their journey. In some cases they are subject to sexual

died while crossing the sea in an attempt to reach the Italian shores. The number of people drowning dropped down to 68 in May and 12 in June 2015, increased again after the decision by Frontex to withdraw some of its boats.

⁴ A recent report by the International Organisation for Migration states that at least 55% of the migrants reaching Italy flee from persecution and violence. See: International Organization for Migration (IOM), *Analysis: Flow Monitoring Surveys July 2017*, 2017, p. 7, available at: http://migration.iom.int/docs/Flow_Monitoring_Survey_Analysis_July_.pdf (accessed 20 January 2018). Similarly, the results of the data collection carried out within the project: “Evi-Med Constructing an evidence base of contemporary Mediterranean Migration”, forthcoming report, on file with author, confirm that the majority of migrants crossing the Central Mediterranean escapes violence and persecution.

⁵ See <http://data2.unhcr.org/en/situations/mediterranean> (accessed on 18 January 2018).

⁶ See: <http://missingmigrants.iom.int/mediterranean> (accessed on 11 November 2016).

⁷ S. Bredeloup, O. Pliez, Research Report Case Study, *The Libyan Migration Corridor*, Eu-US Immigration Systems 2011/03, available at: <http://hdl.handle.net/1814/16213> (accessed on 11 November 2016). The research by Bredeloup and Pliez highlights the historical dimension and consequences of the passage of migrants in the Sahara as well as the transformations operated by migrants residing in Libya while waiting to move forward towards Europe.



and work exploitation, they are kidnapped and tortured.⁸ Many of them remain captives in Libyan detention centres in dreadful conditions for months, until they are able to pay the jailers. While in detention they are subject to severe violence, torture, inhuman and degrading treatment.⁹

The accounts of the organisation of the trips to cross the sea are similar across testimonies by survivors¹⁰ and in the records by independent reporters.¹¹ On the day set for departure, the smugglers inflate precarious rubber boats on the shore. Then they load them up with people, sometimes using violence and threats, and through these same coercive means they choose a pilot from among the passengers, if no one “volunteers”. The overcrowded boats sail off with insufficient fuel for the whole journey. Their destiny is clear from the beginning: in the majority of cases they would not be able to make it to Malta, or Italy.

It could be successfully argued that there is a general obligation to save lives in danger at sea and that this obligation is moral in nature. A thorough investigation of this claim, however, is not the specific aim of this paper. Instead, we want to focus on the legal obligations of the European Union (EU), its Member States, other neighbouring countries, and the EU Border and Coast Guard, towards migrants attempting this risky journey, in order to find out whether there are any legal steps that can be taken in order to help eliminate deaths in the Mediterranean.

The article focuses on the main International Conventions regarding maritime law, international human rights law, international asylum law, the relevant legislation and regulations of the European Union, and Italian law, offering an assessment of the legality of the EU border control operations at sea. The EU Member States carry out external sea

⁸ 24 January 2018, L. Cremonesi, “Inferno in Libia: ‘Oggi vi ammazziamo tutti’: i migranti torturati e i video per chiedere il riscatto. Plastica fusa sulla schiena, frustate su tutto il corpo: tutto ripreso con i cellulari e poi inviato ai parenti delle vittime. Il governo libico: ‘Catturati gli aguzzini autori delle torture’”, *Il Corriere della Sera*, available at http://www.corriere.it/video-articoli/2018/01/24/inferno-libia-oggi-vi-ammazziamo-tutti-migranti-torturati-video-chiedere-riscatto/2a2dce8c-0144-11e8-b515-cd75c32c6722.shtml?refresh_ce-cp (accessed on 26 January 2018).

⁹ N. Porsia, 20 February 2017, “The kingpin of Libya’s human trafficking mafia, TRT World, available at <https://www.trtworld.com/magazine/the-kingpin-of-libyas-human-trafficking-mafia-301505> (accessed on 18 January 2018).

¹⁰ Since September 2015, the author has interviewed several migrants while working as a lawyer at the Legal Clinic of Human Rights of the University of Palermo and in her legal practice, in particular defending victims of human trafficking.

¹¹ N. Porsia, *op. cit.*



borders surveillance operations aimed at preventing unauthorized border crossings. During such operations they may intercept or rescue persons. When this happens, the EU member states are bound by international and European law to assist and protect them. The main argument of this paper holds that European policy on the enforcement of border control at sea fails to respect basic principles of the Rule of Law, first of all the principle of legality (here, defined as: action in compliance with the law and respect for law by executive powers). This paper argues that through engagement in the management of migration flows of third countries that are not part of the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol, and which are in addition well-known for providing few guarantees for human rights on their territories, the EU Member States are substantially evading the principle of *non-refoulement*.¹²

2. The EU State Members' Obligation to Search and Rescue at Sea

The obligation to rescue persons in distress at sea has been traditionally considered a sacred duty. Today, this is also a positive legal obligation provided by international maritime law,¹³ as well as by the domestic law of many of the EU Member States, including Italy. Let us illustrate the content of the most important provisions, adopting a critical view towards their interpretation and application.

Amongst other legal instruments, the International Convention on Salvage of 1989 imposes a positive obligation on contracting states (EU Members States included) to render assistance to any person in danger of being lost at sea. The EU Member States also have further positive obligations under international and European law in order to ensure the safety of those seeking international protection and to prevent loss of life at sea.

The United Nations Convention on the Law of the Seas (UNCLOS), establishes the duties to render assistance to any person found at sea in danger of being lost, and to

¹² However, this paper does not discuss the most recent developments, and in particular the widely discussed Code of Conduct for NGOs who carry out search and rescue operations in the Mediterranean sea. On the "Code of Conduct for NGOs Involved in Migrant's Rescue at Sea" see Immigration Legal Studies Association (ASGI) "Position paper", available at https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf (accessed on 19 January 2018).

¹³ The United Nations Convention on the Law of the Sea of 1982, (UNCLOS); the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS); the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR); the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).



proceed with all possible speed to the rescue of persons in distress. The obligation to comply with such duties are borne on the shipmaster.¹⁴ States must require the master of a ship flying its flag to comply with these obligations, in so far as s/he can do so without serious danger to the ship, the crew or the passengers.

The obligation to rescue is triggered when the shipmaster apprises or “is informed of the need of assistance, in so far as such action may reasonably be expected of him”.¹⁵ Whenever a collision occurs at sea, the obligation arises to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of the rescuing ship, its port of registry and the nearest port at which it will call.¹⁶ However, in the context of the Mediterranean crossings by migrants described above, it is not easy to establish a clear responsibility for search and rescue operations amongst many different actors (Frontex, Eunavformed, Italian Coast Guard, NGOs, private and commercial ships, etc.) without a general framework agreement on the matter involving all of them.

Italian law reinforces the obligation to rescue by providing criminal liability in case of omission to offer assistance and rescue to a vessel or its passengers (in the cases specified respectively by articles 489 and 490 of the *Codice della Navigazione*).¹⁷ Under Italian law, when the maritime authorities are informed of a “situation of distress at sea, they must immediately provide rescue; or, in case of need, they must alert other authorities that are able to intervene, and order that the vessels and their crew located in the harbour or in the proximity to stay at their disposal” (Italian Maritime Law Code, Articles 69 and 70).

International maritime law also establishes a positive obligation on coastal States to be proactive and provide *effective search and rescue services* in their own search and

¹⁴ Art. 98 (1) (a) UNCLOS.

¹⁵ Art. 98 (1) (b) UNCLOS.

¹⁶ Art. 98 (1) (c) UNCLOS.

¹⁷ Art. 1158 Italian Maritime Law Code The Italian text of the article is reported here: Art. 1158: *Assistenza a navi o persone in pericolo: “Il comandante di nave, galleggiante o aeromobile nazionali o stranieri, che omette di prestare assistenza ovvero di tentare il salvataggio nei casi in cui ne ha l’obbligo a norma del presente codice è punito con la reclusione fino a due anni. /La pena è della reclusione da uno a sei anni se dal fatto deriva una lesione personale; da tre a otto anni se ne deriva la morte./ Se il fatto è commesso per colpa, la pena è della reclusione fino a sei mesi; nei casi indicati nel comma precedente le pene ivi previste sono ridotte alla metà”.*



rescue (SAR) zone. In particular, the UNCLOS requires the coastal States to: “promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”.¹⁸

The fundamental premise entailed in the above-mentioned dispositions is that the obligation to assist anyone found in distress at sea, as established by international conventions, is general, unconditional and universal: it is valid towards any person, regardless of her origin, nationality, citizenship, status, destination, and purpose.¹⁹ On the contrary, the political response of the European Union and its Member States to the migration flow by sea seems to be grounded on a set of altogether different premises and assumptions. First of all, “[t]he central political premise that all are refugees is no longer accepted”.²⁰ Second, the specific approach to border control activities at sea conflates border control, contrast to illegal immigration and international crime. The “Hot-spot approach to managing exceptional migratory flows”, proposed by the European Commission in the European Agenda on Migration, presented in May 2015, reflects a changed attitude towards migrants at sea. The 2015 “Italian Road Map” – the ministerial guidance formulated to implement the “Hot-spot approach” in Italy – is in line with this new political approach. What is missing in the picture is due consideration of the obligations established by international maritime law to provide a coordinated and *effective* system of search and rescue, adequate to the context and circumstances, whatever they are. Since the legal obligation to save life at sea is general, unconditional and universal, the circumstance that seas are being crossed by “mixed flows” of migrants, including both “persons in clear need of protections” and others, does not diminish its normative force. Moreover, it seems that the policy of the EU does not adequately take

¹⁸ Article 98 (2) UNCLOS – 1982.

¹⁹ Article 98 (1) (a) UNCLOS and Annex to the International Convention on Maritime Search and Rescue 2.1.10: “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found”.

²⁰ G.S. Goodwin-Gill, “Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea – The Need for a Long-Term, Protection-Centered Vision”, in V. Moreno Lax, E. Papastravridis (edited by), “*Boat Refugees and Migrants at Sea: a Comprehensive Approach. Integrating Maritime Security with Human Rights*”, Leiden, Boston, Brill/Nijhoff, 2016, pp. 17-18.



into account the obligations provided by human rights and refugee law at sea (this point will be argued in more details below).

To complete the review of the essential source of the States' obligations at sea, we must mention the 1979 International Convention on Maritime Search and Rescue (SAR Convention), signed in Hamburg in 1979, and related instruments. The SAR Convention pursues three core aims: 1) providing a framework for coordinating activities regarding safety on and over the sea among a number of inter-governmental organizations; 2) developing and promoting these activities by establishing an international maritime search and rescue plan responsible for the needs of maritime traffic for the rescue of persons in distress at sea; 3) fostering co-operation among search and rescue organizations around the world and among those participating in search and rescue operations at sea. The SAR Convention establishes that the rescue activities of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations, wherever an incident occurs. A revised Annex to the SAR Convention was adopted in May 1998 and entered into force in January 2000. The SAR zones established pursuant to the SAR Convention divide the waters in the Central Mediterranean Route between Italy, Malta and Libya. It is important to stress that the Italian and Maltese SAR areas overlap.

The State responsible for a SAR area is also responsible for the coordination of SAR operations in that area, and for the treatment of persons rescued at sea. The fulfilment of these obligations may be influenced by formal or informal bilateral agreements between states.

The State coordinating SAR operations must provide a place of safety for disembarkation or ensure that such a place is provided.²¹ According to EU law, "place of safety" means a location, specifically, where rescue operations are considered to terminate and where the survivors' safety and lives are not threatened; where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination, taking into account the protection of

²¹ Guidelines on the treatment of persons rescued at sea, adopted in May 2004 by the Maritime Safety Committee together with the amendments to the International Conventions on Maritime Search and rescue and for the Safety of Life at Sea.



their fundamental rights in compliance with the principle of *non-refoulement*.²² However, the interpretation of this disposition is not uncontroversial, and the identification of the “place of safety” has been and continues to be a matter of contention.

According to international refugee law and the EU law relating to asylum, the action of rescuing persons in distress and the individuation of the “place of safety” entail further responsibilities for the State of the vessel flying the flag, as well as for the State of disembarkation. In particular, as established by the so-called “Dublin III Regulation”, the Member State where the asylum seeker is first registered should be the State responsible for processing her asylum claim. Consequently, the joint application of international maritime law, international refugee law and EU asylum law generates a situation by which the European coastal States (Italy, Greece, Malta and Spain) bear the heaviest burden both in conducting SAR activities and in offering protection to asylum seekers.

This predicament was at the core of the dispute over SAR areas between Malta and Italy and resulted in two tragical shipwrecks in the proximity of Lampedusa on 3 and 11 October 2013 respectively.²³ After these dreadful events, the two States seem to have solved their conflict of competence over the overlapping zone by agreeing (informally) to systematic Italian intervention in the Maltese SAR zone, and to the disembarkation of rescued persons in Italian ports.²⁴ Even after the end of the Mare Nostrum operation (31 October 2014), the Italian interventions in the Maltese SAR zone continued, and the people rescued in Maltese SAR zone were consistently disembarked on Italian territory. It appears that this informal agreement between Italy and Malta is still enforced in the Central Mediterranean at present, and Italy is still intervening in the Maltese SAR zone on the route from Libya to Sicily.²⁵

²² Regulation 656/2014.

²³ See F. Gatti, 11 July 2013, “La verità sul naufragio di Lampedusa ‘Così l’Italia ci ha lasciati morire’”, *Espresso*, available at: <http://espresso.repubblica.it/inchieste/2013/11/07/news/la-verita-sul-naufragio-di-lampedusa-quella-strage-si-poteva-evitare-1.140363> (accessed on 19 January 2018).

²⁴ See K. Schembri Orland, “Malta-Italy migration secret deal resurfaces on the international media”, *The Independent*, available at: <http://www.independent.com.mt/articles/2016-04-09/local-news/Malta-Italy-migration-secret-deal-resurfaces-in-the-international-media-6736156026> (accessed on 19 January 2018).

²⁵ News reported that on 20 May 2016 Italy delegated Malta to intervene in response to a request (SOS) in Maltese waters. On its Eastern side, Maltese SAR confines with Greek SAR (North) and Egypt SAR (South). It is therefore plausible that Italian vessels would not be able to arrive on time in case a vessel is



Another problem in the context of the operations conducted jointly or individually by EU Member States at sea is the adoption of inconsistent standards in identifying the circumstances that trigger the declaration of a SAR event by the competent authorities of the Member States. The trigger for the legal obligation to render assistance at sea is a “distress situation”. The interpretation of this notion by the Member States is crucial.

The 1979 SAR Convention defines “distress” as: “A situation wherein there is *reasonable certainty* that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance [emphasis added]”. Different states have taken considerably different views in this respect. In particular, in the interpretation of the Maltese authorities, a vessel must be on the point of sinking and there must be a request of assistance. In the interpretation of the Italian authorities, unseaworthiness *per se* entails distress. As a result, consistent standards of safety are not applied in the central Mediterranean: one SAR authority may regard a boat as in distress, whereas another may view the same boat as able to continue its journey.

3. The Mandate of the Border Control Agency: Frontex, the Obligation to Search and Rescue, to Respect Human Rights and International Asylum Law

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (“the Agency”), also known as “Frontex”, was established by Council Regulation (EC) No 2007/2004 and started operating on 3 October 2005²⁶ with the mission to support, coordinate and develop European border management.

The Agency is responsible for the operational cooperation between Member States in the management of the external borders, including as regards border surveillance. The Agency is also responsible for assisting Member States in circumstances requiring increased technical assistance at the external borders, “taking into account the fact that some situations may involve humanitarian emergencies and rescue at sea”.

in distress on the route from Alessandria (Egypt) to Malta, South in respect to Peloponnesus and East in respect to Malta. This is probably the reason why Malta intervened in this case.

²⁶ Frontex was instituted by Regulation (CE) n. 2007/2004 of the Council of 26 October 2004 (GU L 349 of 25.11.2004), and started operating on 3 October 2005.



Council Regulation (EC) 2007/2004, as amended with Regulation (EC) N. 863/2007 and Regulation (EU) No 1168/2011, disciplined Frontex's structure and function with reference to contrasting illegal immigration but without reference to obligations including specific search and rescue operations or disembarkation in a "place of safety". Nevertheless, Regulation 2007/2004 made it clear that Frontex's mandate must be carried out in line with the Charter of Fundamental Rights of the European Union and other international obligations, including provisions on the right to asylum, international protection, and the principle of *non-refoulement*.

With regards to the treatment of persons on board, Regulation 656/2014 provides that Frontex has the obligation to assess the personal circumstances of the rescued persons (article 4(3) Regulation 656/2014). Fulfilling this obligation entails the support of medical staff, interpreters and other relevant experts of the host and participating Member States. In the case of the disembarkation of persons in need of international protection and other persons in particularly vulnerable situations, contact details of the national authorities responsible for providing follow-up measures upon disembarkation must be provided (art. 10 (2) together with art 4 (1) and (4) of Regulation 656/2014). If disembarkation in a Third Country is foreseen, a reference to the existing shore-based medical staff, interpreters and other relevant experts of the host and participating Member States to support the assessment of the personal circumstances of rescued and intercepted persons (Article 4(3) of Regulation 656/2014). The prohibition of violation of fundamental rights in Frontex's operations entails the obligation to:²⁷

- protect personal safety,
- provide the rescued persons with information about the proposed place for disembarkation,
- address the special needs of vulnerable persons, including unaccompanied minors, victims of trafficking in human beings, persons in need of urgent medical assistance, disabled persons, persons in need of international protection and other persons in a particularly vulnerable situation,

²⁷ Article 4 Regulation 2007/2004, as amended.



– protect rescued persons’ right to privacy. The exchange with third countries of personal data regarding intercepted or rescued persons obtained during a sea operation shall be prohibited where there is a serious risk of contravention of the principle of *non-refoulement*.²⁸

– full respect for human dignity and the principle of *non-refoulement*.

Although general in its terms, Frontex Regulation 656/2014²⁹ provides Frontex’s legal obligations regarding search and rescue activities. The same Regulation recalls the general obligations provided by international maritime law to render assistance to persons found in distress, if the need arises during a border surveillance operation at sea,³⁰ the European standards for the protection of human rights, and European asylum law.³¹ Regulation 656/2014 only applies to border surveillance operations carried out by Member States at their external sea border in the context of operational cooperation coordinated by Frontex. However, the situation is ambiguous because the Agency does

²⁸ This is very important to bear in mind should the dreadful proposal of floating hot spots become more than a proposal.

²⁹ This Regulation replaces Council Decision 2010/252/EU (2), annulled by the Court of Justice of the European Union by its judgment of 5 September 2012 in Case C-355/10. The CJEU argued that it was not within the executive competence of the Council to adopt such a decision, but within the competence of the legislative organ of the European Union.

³⁰ “During border surveillance operations at sea, Member States should respect their respective obligations under international law, in particular the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the United Nations Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child and other relevant international instruments” (Regulation 656/2014, “Whereas” (10)). In accordance with international law, every Member State must, require the master of a vessel flying its flag, in so far as possible without serious danger to the vessel, the crew or the passengers, render assistance without delay to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress Regulation 656/2014, “Whereas” (14)). Quite importantly, this is defined as a universal obligation, because it does not depend on the nationality or status of the persons to be assisted or of the circumstances in which they are found. Moreover, rescuing persons in distress at sea and bringing them to a place of safety cannot expose the crew and the shipmaster to criminal penalties (Regulation 656/2014, “Whereas” (14)).

³¹ In accordance with Regulation (EC) No 562/2006 of the European Parliament and of the Council (5) and general principles of Union law, any measure taken in the course of a surveillance operation should be proportionate to the objectives pursued, non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of *non-refoulement*. Member States and the Agency are bound by the provisions of the asylum acquis, and in particular of Directive 2013/32/EU of the European Parliament and of the Council with regard to applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of Member States.



not directly bear the responsibility for search and rescue, which rests on the host Member State or on the Member States participating in the joint operation. There is a clear problem in discerning the Agency's accountability and differentiating it from the responsibility of the Member States. Ultimately, it appears that the liability for the respect of positive obligations on search and rescue rests on the Member States of the European Union.

As already mentioned, the Central Command of the Italian Coast Guard (where a Frontex high officer sits as a member) has the authority, and the duty, to declare the SAR event should a situation of distress occur in the Italian (and Maltese) SAR areas of the Central Mediterranean sea. This is the area where Frontex conducts border surveillance activities (operation *Triton*).

If the Italian authorities declare a SAR event, any boat in the proximity must intervene, including patrol boats. The success of SAR operations is tightly linked to the number and characteristics of vessels deployed by Frontex and Eunavformed, which are present in the Central Mediterranean sea, and to their position in respect to where the need arises for a SAR operation, the majority of which occur within 30 nautical miles off the Libyan coasts.

Under article 33 UNCLOS patrols should be limited to the 24 nautical miles of the Italian contiguous zone.³² In this zone contiguous to the territorial sea, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. In actuality, patrol operations are also conducted beyond the contiguous zone in international waters. Moreover, Frontex's operation *Triton* was authorised to operate within 138 nautical miles off the Italian coasts after the disastrous shipwreck of 18 April 2018 where more than 700 people drowned off the Libyan coast.³³ There is evidence that, at least until the beginning of September 2016, the vessels deployed by the *Triton* joint operation tend to patrol at a far distance from the area where most of the

³² The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

³³ G. Cataldi, "Introduzione", in A. Antonucci, I. Papanicopolulu, T. Scovazzi (edited by), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, Torino, Giappichelli, 2016, p. XVII.



incidents of distress occur.³⁴ The retreat of Frontex vessels from the area where the majority of incidents takes place had severe consequences. In our opinion, supported by authoritative research results,³⁵ the increase in border control coupled with the lack of adequate SAR services in the Mediterranean has had a direct effect in the increase of number of deaths at sea. While in the first four months of 2014 more than 26.000 migrants had crossed the Mediterranean and 60 deaths had been recorded, in the same period of 2015, an almost identical number of crossings had occurred, but the number deaths had increased to 1.687 (UNHCR and IOM data).

4. EUNAVFOR MED (Operation Sophia), and the New European Border and Coast Guard Agency

Since autumn 2015 EUNAVFOR MED (European Navy For(ce) Mediterranean) operation – a military operation – has become more present than Frontex in the Central Mediterranean sea.³⁶

In December 2015 the European Commission published a proposal for a European Border and Coast Guard Agency. The new Agency replacing Frontex is meant to have a stronger character of monitoring and surveillance of illegal crossing of EU sea borders,³⁷ with enhanced regulatory and operational tasks, and with the attribution of a supervisory role. The Conclusions of the EU council meeting of 18 and 19 February 2016 under section II “Migration”, (8) (h) confirmed the need to proceed with the creation of the EU Border and Coast Guard with urgency. Two main criticisms were raised against the proposal with regard to SAR activities: 1) it did not address and resolve existing problems concerning the unclear division of responsibilities between the Agency and the Member

³⁴ Consistent information can be found in the blog by F. Vassallo Paleologo, <http://dirittiefrontiere.blogspot.it/> (last accessed on 27 January 2018).

³⁵ C. Heller and L. Pezzani, Report *The lethal effects of the EU's policies of non-assistance at sea*, 2016, available at: <https://deathbyrescue.org/> (accessed 19 January 2018).

³⁶ F. Vassallo Paleologo, 15 August 2015, “Frontex Triton sposta i suoi assetti ad Est di Malta”, available at: <http://dirittiefrontiere.blogspot.co.uk/2015/08/frontextriton-sposta-i-suoi-assetti-ad.html> (last accessed 27 January 2018). F. Vassallo Paleologo, 11 August 2015 “Dopo il parziale ritiro di Frontex/Triton le navi umanitarie non riescono a salvare tutti i migranti in difficoltà”, available at: <http://dirittiefrontiere.blogspot.co.uk/2015/08/dopo-il-parziale-ritiro-di.html> (last accessed 27 January 2018).

³⁷ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC.



States of the European Union; 2) it did not attribute specific competences and roles to the Agency with regard to SAR operations. Also, in the proposal for an EU Border and Coast Guard Agency there was no reference to Regulation 656/2014 and the operational plan on SAR activities adopted by Frontex pursuant this Regulation.

The study commissioned by the European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs at the request of the LIBE committee highlighted the critical aspects of the proposal and suggested "to include SAR provisions to allow the Agency to play a more active SAR role without affecting the international SAR framework".³⁸ The EU Regulation 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard, signed on 14 September 2016, entered into force on 6 October 2016. Some of the criticisms raised by the LIBE committee were received in the final version of the Regulation and the obligation of search and rescue was included in the final draft. However, Regulation 2016/1624 only recalls what the International Conventions on the law of the sea already established: once the national authorities declare a SAR event, they can request all the civil and military vessels that are in proximity of the persons in distress to intervene in order to rescue the victims of a shipwreck. Therefore, although the obligation to rescue is now mentioned, it is defined in general terms only, and maintains that the Member States have the power to decide when they should intervene and declare a SAR event (in order to trigger search and rescue activities). Article 4 of the new Regulation mentions explicitly the search and rescue obligations provided in Regulation 656/2014. It prescribes that the European integrated border management shall consist of the following components: (a) border control, including measures to facilitate legitimate border crossings and, where appropriate, measures related to the prevention and detection of cross-border crime, such as migrant smuggling, trafficking of human beings and terrorism, and measures related to the referral of persons who are in need of, or wish to apply for, international protection; (b) search and rescue operations for persons in distress at sea launched and carried out in accordance with Regulation (EU) No 656/2014 of the European Parliament and the

³⁸ Directorate-General for Internal Policies Policy Department Citizen's Rights and Constitutional Affairs, Study for the LIBE Committee, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?*, 2016.



Council and with international law, taking place in situations which may arise during border surveillance operations at sea. The new Regulation indicates therefore that single Member States have the primary responsibility for the fulfilment of search and rescue obligations.³⁹

The overall structure of the new Regulation appears to be oriented to stopping illegal immigration through agreements with the authorities of the countries of origin or transit; foreseeing a possibility for the cooperation in the search and rescue activities, and carrying out readmission operations (with the risk of *refoulement*) to the port of origin. In this respect, the new Regulation 2016/1624 created the legislative basis for the politics of externalisation of border control, thus far only agreed on between police, and without any legal basis. In substance, the new Regulation 2016/1624 enshrines an expansion of the Agency's activities and its augmented autonomy in setting up operations of repatriation or push back (entailing the actual risk of *refoulement*).

In addition, the new Agency should facilitate and encourage technical and operational cooperation between Member States and third countries in the framework of the European Union's policy of external relations. In this context, it should coordinate operational cooperation between Member States and third countries in the management of external borders, deploy liaison officers to third countries and cooperate with the authorities of third countries on return, including as regards the acquisition of travel documents. Nevertheless, in their cooperation with third countries, the Agency and Member States should comply with Union law at all times, including the set of provisions and standards on fundamental rights and the principle of *non-refoulement*.⁴⁰ Most

³⁹ Whereas (45), Regulation 2016/1624 specifies that: "The implementation of this Regulation does not affect the division of competence between the Union and the Member States under the Treaties, or the obligations of Member States under international conventions such as the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the International Convention for the Prevention of Pollution from Ships, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, and other relevant international maritime instruments".

⁴⁰ According to Whereas (47), Regulation 2016/1624, "The European Border and Coast Guard, which includes the Agency and the national authorities of Member States which are responsible for border management, including coast guards to the extent that they carry out border control tasks, should fulfil its tasks in full respect for fundamental rights, in particular the Charter of Fundamental Rights of the European Union ("the Charter"), the European Convention for the Protection of Human Rights and Fundamental Freedoms, relevant international law, including the United Nations Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Relating to the Status of Refugees and obligations related to access to international protection, in particular



importantly, they should do so when the cooperation with third countries takes place on the territory of those countries. The European standards on human rights, as established by the law and interpreted by the European Courts must be applied on the territories of third countries.⁴¹ In order to increase transparency and accountability, the Agency should report on cooperation with third countries in its annual report.

The new Regulation 2016/1624 does not institute any link between the new Agency (which is in fact a cosmetic transformation of Frontex, and maintains its legal personality) and the operation called EUNAVFOR MED (Operation “Sophia”, which has the task of combatting illegal immigration). As such, the agreements that have been made between EUNAVFOR MED and the Libyan Government of National Accord, based in Tripoli, and referring to the naval forces that it controls remain without legal basis.

In August 2016 a press release informed of the signature of a Memorandum of Understanding (MOU) between EUNAVFOR MED and top military officials of the Libyan Coast Guard. The Libyan Coast Guard is a military body that only obeys the commands of the Al Serraj government, established in Tripoli with the support of the United Nations, a government that the Parliament in Tobruck and the general Haftar (supported by the Egyptian forces) have not as yet recognised. The program will involve many other organisms, including EUBAM Libya, the European Agency Frontex and the United Nations.⁴²

the principle of *non-refoulement*, the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, and the International Convention on Maritime Search and Rescue. In accordance with Union law and those instruments the Agency should assist Member States in conducting search and rescue operations in order to protect and save lives whenever and wherever so required.

And also:

“This Regulation respects fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty on European Union (TEU) and reflected in the Charter. In particular, this Regulation seeks to ensure full respect for human dignity, the right to life, the right to liberty and security, the right to the protection of personal data, the right to asylum, the right to effective remedy, the rights of the child, the prohibition of torture and of inhuman or degrading treatment or punishment and the prohibition of trafficking in human beings. It also seeks to promote the application of the principles of non-discrimination and *non-refoulement*”.

⁴¹ “When cooperation with third countries takes place on the territory or the territorial sea of those countries, the Member States and the Agency should comply with norms and standards at least equivalent to those set by Union law.” Regulation 656/2014, Whereas (5).

⁴² F. Vassallo Paleologo, 17 settembre 2016, “Protocolli tra Eunavfor Med e milizie libiche. Blocchi in mare e detenzione a terra cancellano i diritti e le vite dei migranti”, available at: <http://www.adif.org/2016/09/17/protocolli-tra-eunavfor-med-e-milizie-libiche-blocchi-in-mare-e-detenzione-a-terra-cancellano-i-diritti-e-le-vite-dei-migranti/> (accessed on 20 September 2016).



In the context of an armed conflict which gets harsher day after day, with militias targeting ports and petrol plants, it is difficult to assess what is going to be the real impact of the cooperation that the so-called “Libyan Coast Guard” will be able to guarantee to the different European vessels carrying out search and rescue operations.

The destiny of persons who have been rescued by Libyan vessels in Libyan territorial waters or in the contiguous zone remains uncertain: will they be escorted back ashore and detained in one of the many detention centres that exist in Libya? These are detention centres where all sorts of abuses take place, as documented by consistent witness statements of migrants who managed to escape and eventually reach Italy.

The contents published in the Memorandum of understanding illustrate how, with funding supplied by the European Union, the training of the Libyan Border Guard and Coast Guard will soon start and operative memorandums will be agreed upon.

The cooperation between Libyan and EUNAVFOR MED (Operation Sophia) vessels, which already started long ago, has already caused a number of “incidents”. Libyan media announced that on 17 August 2016 a fast boat of the Libyan Coast Guard opened fire on the humanitarian vessel *Burbon Argos* of Doctors Without Borders, while it was carrying out search and rescue operations in the same zone where thousands of people have been rescued in the past. The press release of the Libyan Coast Guard⁴³ indicated that the armed men left the humanitarian boat after approximately 50 minutes from taking over the vessel, because they were informed that it “was part of Operation Sophia”. The “incident”, acknowledged by Libyans and reported by the *Guardian*, went otherwise unreported in the international media. A similar event happened a few days later, when two operators of the German humanitarian vessel *Sea Eye* were carrying out an operation on a rubber boat off the Libyan coast. The two operators were liberated after 48 hours, making it appear as if it was an “incident” caused by a lack of communication

⁴³ Libyan Express, 20 August 2016, “Al-Serraj urges west to press Libya’s neighbouring countries into protecting joint borders”, available at: <http://www.libyanexpress.com/al-serraj-urges-west-to-press-libyas-neighbouring-countries-into-protecting-joint-borders/> (accessed on 20 October 2016), and also: Analisi Difesa, 26 August 2016, “Eunavfor med addestrerà la Marina Libica”, available at: <http://www.analisedifesa.it/2016/08/eunavfor-med-addestrera-la-marina-libica-firmato-laccordo/> (accessed on 20 October 2016); and Stratford Worldview, 24 August 2016, “Libya, EU Come to an Agreement on Migrants”, available at: <https://www.stratfor.com/analysis/libya-eu-come-agreement-migrants> (accessed on 20 October 2016).



between the German vessel and the Libyan Coast Guard.⁴⁴ Similar hazardous incidents have continued to occur throughout the past two years.⁴⁵ Most recently, the Libyan Coast Guard intervened in international waters in order to prevent the rescue operations coordinated by the Italian authorities and carried out by vessels of humanitarian associations causing avoidable loss of life.⁴⁶ The International Criminal Court is currently investigating the attacks by the Libyan Coast Guard of humanitarian vessels conducting search and rescue operations. One organization, the German non-profit NGO “Sea Watch” filed a lawsuit.

5. Conclusions

The need to combat illegal immigration and the obligation to protect human life at risk at sea are in tension. The balancing between the two interests should be determined by making reference to the obligations provided by international, European and national law. However, in practice, very factual elements concur in determining this balance. As shown by the analysis above, the general obligations to rescue people in distress at sea and to respect the individual rights of every person, under international maritime law, SAR Conventions, international refugee law, international human rights law, European law (in particular Regulation 656/2014) and Italian law, establish the priority of rescue and protection over the interest of the States to patrol, and fight smugglers, traffickers, and illegal immigration. But in fact, the quantity and characteristics of the forces deployed by the EU Member States, and other coastal States, is a key factor in avoiding loss of life at sea. Moreover, political and military equilibriums between the actors involved (single

⁴⁴ F. Vassallo Paleologo, 1 September 2016, “La ‘Guardia costiera libica’ tra soccorsi e deportazioni. Accordi con UNHCR, OIM ed EUNAVFOR MED. L’Unione Europea esternalizza i respingimenti collettivi in mare e fornisce uomini e mezzi”, available at: <http://dirittiefrontiere.blogspot.it/2016/09/la-guardia-costiera-libica-tra-soccorsi.html> (accessed on 20 October 2016).

⁴⁵ S. Scherer, 26 September 2017, “Rescue ships says Lybian coast guard shot and boarded it, seeking migrants. World News”, *Reuters*, available at: <https://www.reuters.com/article/us-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUSKCN1C12I4> (accessed on 16 January 2018). See also 26 September 2017, “Report: Libyan coast guard shot and boarded rescue ship” Middle East Monitor, available at: <https://www.middleeastmonitor.com/20170926-report-libyan-coast-guard-shot-at-and-boarded-rescue-ship/> (accessed on 16 January 2018).

⁴⁶ Most recently, F. Albanese, 27 January 2018, “Ottocento migranti salvati in mare, due morti. Ed è scontro Ong- Guardia costiera libica”, available at: <http://www.lastampa.it/2018/01/27/italia/cronache/ottocento-migranti-salvati-in-mare-due-morti-ed-scontro-tra-ong-e-guardia-costiera-libica-4kf5LgLMNcr44MRfXKmuDM/pagina.html> (accessed 27 on January 2018).



Member States, the European Union, the Council of Europe, third countries of provenience, countries of origin) also influence the balance, regardless of the existing legal framework.

The EU and its Member States' political approach to the phenomenon of migration at sea tends to conflate two classical interests of the sovereign State: security (interpreted as "securitisation") and border control.⁴⁷ It has been persuasively argued that this association produces avoidable lethal effects, and that the two interests could be better pursued by separating immigration control from security or securitisation.⁴⁸

The rules of codified international maritime law, including the discipline on search and rescue, certainly apply to border surveillance operations and interception at sea (even if they were not created to address the phenomenon of migration flows).⁴⁹ Moreover, any operation at sea involving migrants entails the application of international human rights and refugee law as well. For this reason, scholars⁵⁰ advocated an integrated approach, balancing the interests of States to prevent unauthorised border crossing, control migration flows, and combat international crime, with the respect and protection of the migrants' individual rights in a "long-term, protection-centered vision".⁵¹ On the contrary, as has emerged from the analysis in the previous pages, the recent EU Regulation on the European Border and Coast Guard Agency mainly emphasises border control and prohibiting unauthorised border crossing.

As argued in this paper, the cooperation between EUNAVFOR MED, Italian and Libyan authorities aimed at preventing illegal border crossings at sea entails the actual risk of violation of the principle of *non-refoulement* and the right of asylum.

The sharp rise in refugees and migrants prepared to risk long journeys in rickety, overcrowded boats is not just the product of increased instability in the Middle East, African countries and of the deterioration of the situation in Libya over the last two years. It is also a consequence of the progressive sealing off of Europe's land borders and the

⁴⁷ I. Tani, "Le forme di contrasto al fenomeno dell'immigrazione irregolare attraverso il Mediterraneo nell'ambito dell'Unione europea" in A. Antonucci, I. Papanicolopulu, T. Scovazzi, *op. cit.*, pp. 154-235.

⁴⁸ E. Nanopoulos, E. Guild, K. Weatherhead, *Securitisation of Borders and the UN's Global Compact on Safe, Orderly and Regular Migration*, Queen Mary School of Law Legal Studies Research Paper No. 270/2018. Available at SSRN: <https://ssrn.com/abstract=3099996> (accessed 15 January 2018).

⁴⁹ G. Cataldi, *op. cit.*, p. XXII.

⁵⁰ V. Moreno-Lax, "Introduction", in V. Moreno Lax, *op. cit.*

⁵¹ G.S. Goodwin-Gill, *op. cit.*, p. 18.



absence of legal channels for migrants and refugees to reach the European Union safely. For so long as the EU continues to push back those fleeing conflict or poverty to take dangerous sea journeys, it must be prepared collectively to meet its obligations to save lives.

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