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Interdiction in the Mediterranean Sea: From Unilateral to Multilateral Cooperation

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I. Introduction

The Mediterranean route has been the most prevalent 'way out' for migrants and asylum seekers fleeing from life-threatening conditions to reach European shores. Numbers speak for themselves. In 2020, 1152 deaths of migrants were recorded in the Mediterranean, while more than 25000 people have perished their lives therein since 2014, according to the International Organization for Migration (IOM) (https://missingmigrants.iom.int/region/mediterranean). All these tragic deadly sea incidents mark the significance and perseverance of the problem of migration by sea. Indeed, thousands of people continue to undertake very perilous journeys, putting their lives into serious danger in order to flee from their country of origin. And they flee by whatever means possible, including overcrowded and unseaworthy vessels. Such vessels are often at risk of sinking, and indeed many do sink, with the tragic result of thousands of lives to be lost especially in the Mediterranean.

States and the international community, including the European Union (EU) have not remained idle; yet, the response is more tailored towards averting the 'threat' posed by maritime migration to their 'territorial integrity' rather than saving these people's lives. Amongst the various initiatives, coined as 'European integrated border management' (FRONTEX Regulation, Article 3), prevalent are interdiction practices aiming at effectively guarding the external borders of the EU Member States.

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Notwithstanding the lack of a commonly accepted definition of '*interdiction*', in the United Nations High Commissioner for Refugees' (UNHCR) understanding, its notion often serves as an *umbrella* term for all 'measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination' (UNHCR 2000, Moreno Lax 2017, p.14). When it comes to maritime interdiction, closely related concepts, such as 'push-backs' (Klein 2014, and Ghezelbash et al. 2018) and 'pull-backs' (Moreno-Lax et al 2019, p. 723) fit neatly to the conception of 'interdiction at sea'.

A scrutiny of these interdiction practices in the Mediterranean Sea reveals that they have never been exclusively unilateral or multilateral. In fact, they have been practiced by States in various formats and settings, initially as unilateral policies of coastal States, yet, very quickly, as part of bilateral or multilateral cooperative schemes, involving not only the relevant coastal States but also the EU itself.

It is not the purpose of this Chapter to provide an exhaustive treatment of these interdiction practices; rather, its purpose is to map out the main features of such practices and offer some critical remarks as to their legality under international law, including the law of the sea and international human rights law. Thus, the remainder of this Chapter is structured as follows: we provide a typology of the push-back operations that have traditionally been practiced in the region in different formats and consider their legal basis and lawfulness (Section II). In the next Section, we move to the more recent and subtle bilateral/multilateral 'pull-back' policies, involving mainly search and rescue practices, criminalization of Non-Governmental Organizations (NGOs), and outsourcing to third countries (Section III). By way of conclusion, in Section IV, we argue that the interdiction practices are far from the appropriate tool to address the persistent 'refugee crisis', nor to safeguard the European public order, which is premised upon the rule of law.

II. Push-Back Practices

1. A panorama of the relevant practices

'Push-back' practices appear the most readily available tool in the States' arsenal in their efforts to control migration flows under unprecedented conditions (UNHCR 2009, Human Rights Watch 2009). Regrettably, such practices often involve

refusals of entry and *de facto* forced/violent returns without any individual assessment of protection needs. In practice, systematic push-backs have amounted to summary returns of vulnerable migrants or refugees who –being cut out of legal routes of entry- are left in a legal limbo at sea or in front of a precarious future upon disembarkation to unsafe ports. Considered as part of national policies and EU response to the refugee crisis, 'push-back' practices have been widespread across European maritime borders.

'Push-backs' have been first practiced unilaterally at a national level: As early as in 1997, Italy was engaged in interdicting vessels coming from Albania (ECtHR, *Xhavara* case 2001), while in 2005, the Maltese authorities were accused of their involvement in violent interdictions of migrants in the Mediterranean crossings (Human Rights Watch 2009, p. 38). However, the most high-profile unilateral practice had not been other than the Italian 'push-backs' to Libya that publicly commenced in May 2009 (UNHCR 2009, Human Rights Watch 2009). Pursuant to an agreement between Italy and Libya, Italian patrol vessels began to systematically intercept migrant boats in the Libyan waters or on the high seas without any identification process based on their individual situation/status. The Italian authorities forced the boat migrants onto Libyan vessels or took the migrants directly back to Libya. Upon disembarkation to Libyan territory, migrants and asylum seekers were confronted with deplorable detention conditions and ill treatment. What is more, NGOs heavily criticized the Italian partnership with Libya, since the latter is not a signatory to the 1951 Refugee Convention and the intercepted migrants were forcibly detained and abused in the absence of asylum procedures in conformity with international refugee standards. As a rule, Libyan authorities still make no distinction based on their legal characterization as refugees, asylum-seekers or undocumented/irregular migrants. Such a distinction is absent also in the bilateral agreements subsequently concluded between the two States (Giuffré 2013, p. 703).

Admittedly, the bilateral cooperation at sea deployed by Italy and Libya was rooted in their strong political will to cooperate in order to combat drug trafficking, migrant smuggling and irregular migration. Albeit unclear at the outset, this political will was given shape and form in a bilateral agreement in 2000 (Moreno Lax et al 2019 p.8; Paoletti 2011). Yet, it was not until 2007 that the decisive step was taken with the adoption of the first bilateral agreement with the aim to prevent clandestine migration. Under the said agreement, both countries agreed to undertake the organization of joint maritime patrols using six ships made available by Italy with mixed crews on board.

Having also adopted several bilateral agreements from 2007 to 2009 -one of the foremost of which was the 2008 Friendship Treaty-, Italy and Libya opted for enhancing cooperation in migration management ever since due to the deterrent effect of the entire Italian non-arrival strategy. Although this Italian-Libyan cooperation in migration management was suspended during the Arab Spring and the Libyan Revolution in 2011 (Giuffré 2013, p.714; Pijnenburg 2018, p. 397), it never formally ceased (Statewatch 2012). In 2017, a Memorandum of Understanding between the two countries reinforced their '*unholy alliance*', i.e. it facilitated both push-backs and 'pull-back' operations conducted by Libya (2017 MoU).

In addition, EU Member States have also delegated to the European Border and Coast Guard Agency (previously, and still known as, 'FRONTEX') the powers to coordinate joint border management operations, including at sea (Munganiu 2016). Mandated to assist EU Member States in the implementation of EU legislation and in the surveillance of the EU borders, FRONTEX has coordinated numerous joint maritime operations executed primarily by the EU Member States. (Papastavridis 2010, p.79).

FRONTEX-led operations have attracted considerable public attention, as they have been accused of push-back practices in the Central Mediterranean (Goodwin-Gill 2011, p.451-452, Moreno Lax 2017, pp.153-199). In fact, some of the Italian operations that, allegedly, amounted to arbitrary *refoulement* were coordinated by FRONTEX. During the former *Nautilus* operation (up to 2010) NGOs denounced the participation of the Agency in Italian forced returns to Libyan shores in the absence of identification/registration of the intercepted persons. Although FRONTEX denied involvement in these incidents (FRONTEX Press Release 2009), the FRONTEX Deputy Executive Director, Gil Arias Fernández was reported as espousing the deterrent effect of the bilateral agreements between Italy and Libya (Human Rights Watch 2009, p. 37). In addition to national operations coordinated by Frontex, EU has conducted naval missions for counter-immigration purposes, such as the EUNAVFOR *Operation Sophia*, which was established in 2015 with the purpose of suppressing the smuggling of migrants from Libya. *Operation Sophia* has prompted many concerns regarding its accordance with international human rights and refugee law (Bevilacqua 2017, Papastavridis 2016). Overall, the controversial EU involvement in maritime border control has never ceased to elicit criticism, including in terms of its accountability for violation of international protection standards (Fink 2020).

Alongside this multilateral context, there are still bilateral cooperative frameworks; suffice it to mention that the aforementioned 2017 Memorandum of Understanding signed by Italy and Libya was renewed for an additional 3-years period in February 2020. According to Amnesty International records 'during the three years since original deal was struck, at least 40,000 people, including thousands of children, have been intercepted at sea, returned to Libya and exposed to unimaginable suffering.' (Amnesty International 2020).

Finally, it is noteworthy that the new trend in such operations is the privatization of push-backs. For example, in 2020, Global Legal Action Network (GLAN) lodged a complaint against Italy before the UN Human Rights Committee on behalf of the applicant who was intercepted on the high seas by a commercial ship. The communication targets the looming phenomenon of "privatized push-backs", as has been coined (HRC Communication, *SDG against Italy* 2020). One way or another, interdiction at sea through push-back policies remains a recurring problem in European setting. Recently the Parliamentary Assembly of the Council of Europe issued a Resolution[i] which urges not only the State Parties to refrain from such practices and to address the root causes of mass migration flows but also the involved EU agencies to enhance their internal reporting system for human rights violations (CoE Resolution 2299(2019)).

2. Legal Barriers

Notwithstanding the ill-defined legal scope of push-backs, the legal repercussions of this well-documented phenomenon are far from been overlooked. Given the mosaic of interconnected state obligations in this field, push-backs at sea involve the application of numerous obligations under international law.

Firstly, in the realm of the law of the sea, the UN Convention on the Law of the Sea Convention (UNCLOS) offers a solid legal basis for a number of rights and duties bestowed upon states that are systematically involved in interdiction at sea.

In brief, a coastal State has, subject to the provisions of UNCLOS setting out primarily the right of innocent passage of all vessels therein, the exclusive right to undertake enforcement activity within its territorial sea, which may extend up to 12 nautical miles (n.m.) from the 'baseline' (UNCLOS Art. 3). In addition, as Art. 33(1) of UNCLOS provides 'in a zone contiguous to its territorial sea, described as the

contiguous zone, the coastal State may exercise the control *necessary* to: (a) prevent infringement of its (….) immigration or sanitary laws and regulations within its territory or territorial sea'. Although the term 'necessary' appears to leave certain leeway to coastal states to adopt the measures that suit best to their sovereign interests, such an activity can be exercised if the contested infringement took place within its territory or territorial sea.

On the high seas the fundamental principle is that the flag States exercise exclusive jurisdiction over vessels flying their flag (Art. 92 UNCLOS). This is subject to certain exceptions, predominantly, the right of visit under Art. 110 UNCLOS, which encompasses the right to board vessels, including stateless vessels, in order to check the vessel's documents and, if suspicions remain, to search the vessel (Papastavridis 2020, p.427-428). It is another issue, however, whether the boarding States may also exercise further enforcement powers onboard the stateless vessel, such as the seizure of the vessel or persons suspected of being engaged in smuggling of migrants.

There is no easy answer to this question. Far from being perceived as *res nullius* susceptible to excessive control of boarding states, the 'stateless vessel' concept gives unavoidably rise to serious concern related with the normative basis upon which these States would have to rely in order to exercise jurisdiction over persons on these vessels. The absence of nationality of the ship does not give *per se* legal ground for the arrest and detention of people on board. Bearing also in mind that the *ratio* of Art.110(d) UNCLOS revolves around the maintenance of the *ordre public* on the high seas, the opposite understanding of this rule would amount to an unprecedented disruption of the public order in this maritime area.

Moreover, the mere navigation of stateless vessels sailing the high seas -which is the only option of migrants and asylum seekers crossing the Central Mediterranean- cannot be considered a crime in breach of the immigration laws of the coastal state in a maritime area where the coastal state does not have exclusive jurisdiction. This premise does not sit comfortably with an overly expansive understanding of the right of visit, suggested by the states (Papastavridis 2010, pp.556-559).

In addition, the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol) may also serve as the legal basis for the boarding and searching ships flagged to other State parties to the Protocol. Art. 8 of the Smuggling Protocol provides that a warship of State party to the Protocol having

reasonable grounds to suspect that a foreign vessel flying the flag of another State party is engaged in migrant smuggling may request the consent of the flag state and take 'appropriate measures' against that vessel, 'as authorised by the flag state'. Given the lack of nationality of the vessels that migrants mainly use to cross the Mediterranean under inhumane condition, the legal treatment of 'stateless vessels' becomes extremely crucial when examining the applicable the 'appropriate measures' being adopted 'with relevant international law' in the terms of Art. 8 of the Protocol. As Moreno Lax et al relatedly assert "there is, however, no consensus as to whether the 'appropriate measures' provision provides proper legal grounding to detain the ship and/or the persons on board, especially if human rights guarantees are taken into account." (Moreno Lax et al. 2019, p.5)

All that said, neither the relevant provisions of UNCLOS nor the Protocol creates a legal basis for violent interdiction at sea and forced push-backs to unsafe states of destination. Also, it must be underscored that any exercise of enforcement jurisdiction at sea shall be in conformity with the relevant provisions of UNCLOS or other applicable treaties and with the principles of reasonableness, necessity, and proportionality under international law (*Duzgit Indemnity case* 2016 para 209).

Such applicable treaties unquestionably include international human rights law treaties. Indeed, irrespective of the zone of maritime jurisdiction in which the operations are conducted, the States are bound by the international human rights obligations by virtue of their universal nature and their extraterritorial application. Accordingly, responsibility for pushback activity may be incurred for violation of the international human rights law as well as international refugee law. Regime interaction in the sense of coexistence of parallel legal regimes such as the law of the sea, human rights law and refugee law is supported not only by the relevant treaties but also by the relevant jurisprudence (Pijnenburg 2018, p. 400). For instance, since these widely-debated operations are often described by the involved States as search and rescue (SAR) operations, the European Court of Human Rights (hereinafter ECtHR or 'Strasbourg Court') has declared that a State cannot invoke its obligations under other legal instruments to evade its obligations under the Convention (ECtHR, *Hirsi Jamaa and others v. Italy* para.79).

The concept of jurisdiction, however, also remains important as a threshold criterion of responsibility for human rights violations. While the notion of 'jurisdiction' is tailored within the confines of general international law encompassing 'the legal

competence of the state-judicial, legislative and administrative - 'often referred to as sovereignty''(Goodwin-Gill 2011, p.452), for Brownlie, the concept of 'jurisdiction' can be also broadly construed as including enforcement or prerogative jurisdiction which is 'the power to take executive action in pursuance of or consequent on the making of decisions or rules '(Brownlie 2008, p.299).

Interdiction operations, hence, serve as an emblematic example of such an understanding of 'jurisdiction' and goes *hand in hand* with the Strasbourg's concept of jurisdiction, reaffirmed in the famous *Hirsi* jurisprudence. For the ECtHR, the jurisdictional nexus between the State and the incident is indissolubly linked to the kind of control that the State exercises. The flexible, yet old-style, conception of 'jurisdiction' extends not only within the territorial borders of the State (*de jure* control) but also extraterritorially, either on the basis of the power or control actually exercised over the person of the applicant—*ratione personae* control—or on the basis of control actually exercised over the foreign territory in question—*ratione loci* control. It is through this prism that the Court traditionally sees the 'under its jurisdiction' clause of Art.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This interpretation applies also to cases brought by forcibly intercepted migrants attempting to access European territory via sea routes (Guilfoyle and Papastavridis 2014, p. 8).

Admittedly, pushback practices might be also seen as new type of *refoulement* practices. The *non-refoulement* principle is laid down in Article 33(1) of the 1951 United Nations Convention Relating to the Status of Refugees ('Refugee Convention').[ii] Under the said provision, 'no Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' Its extraterritorial reach perfectly aligns with the current challenges in the maritime area posed by the 'borderless' migration control that States routinely exercise (Trevisanut 2014, p.667). It is exactly this generally accepted understanding of the *non-refoulement* rule as a principle applicable wherever the State exercises jurisdiction that brings us back to the question of jurisdiction.

At the international level, the *non-refoulement* obligation is guaranteed also by provisions under human rights treaties, such as Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Art. 7 of

the International Covenant on Civil and Political Rights (ICCPR). At the regional level, the prohibition against *refoulement* is encompassed in Art. 3 ECHR, Art. 22(8) of the 1969 American Convention on Human Rights (ACHR)and Art. 5 of the African Charter on the Protection of Human and Peoples' Rights. In the EU context, the *non-refoulement* principle is guaranteed by Art.4 of the Charter of Fundamental Rights of the EU, which bids the EU organs and Agencies, including FRONTEX, and EU Member State when applying EU law. The EU Charter also sets forth the right to asylum for migrants in Art. 18 and the prohibition of collective expulsions in Art. 19. These articles can also apply extra-territorially, for instance if EU Agencies, like FRONTEX, operate outside EU territory.

Amid these safeguards, the ECHR rules have hitherto offered the more enhanced protection to asylum seekers and thus, the ECtHR has been the leading judicial forum for the protection of boat refugees facing the risk of *refoulement*. Against this background, the pushback policies trigger the absolute protection offered by Art.3 ECHR (prohibition of torture or inhumane/degrading treatment) and Art.4 Prot.4 ECHR (prohibition of collective expulsions). Human rights judicial (or *quasi*) mechanisms has repeatedly emphasized the prohibition upon *refoulement* within the ambit of the prohibition of inhumane /degrading treatment. In fact, it could be argued that the application of this principle as inherent in a non-derogable right, namely the prohibition of torture/ill-treatment, comes in support of the peremptory character of *non-refoulement* under international law. At the same time, the proliferation of non-State actors involved in maritime affairs has revealed the legal vacuum related to accountability, particularly concerning the EU agencies operating in the field, i.e. Frontex, EASO (Melanie Fink 2020, Lilian Tsourdi 2020).

The seminal *Hirsi Jamaa* judgment is illustrative of the pressing human rights questions arising in this field. *In casu*, the Strasbourg Court seized the opportunity to denounce the common state practice of forcibly intercepting migrants' boats and returning them back to where they had come from in the absence of individual assessment. The Court found that the pushback of 11 Somalis and 13 Eritreans back to Libya fell within the scope of application Art.3 and Art.4 Prot.4 ECHR. According to the Court's reasoning, the bilateral agreements between Italy and Libya do not constitute a lawful legal basis for illicit push-backs in violation of Italy's obligations under the ECHR (para 129).

The Court has reiterated its well-established approach when it comes to countries that fail to enforce human rights despite their participation in international human rights treaties (ECtHR *MSS v. Belgium and Greece*). Given the level of human rights protection of migrants in Libya and the relevant NGO reports, the Strasbourg Court found an infringement of Art.3 since Italian authorities knowingly exposed the intercepted asylum seekers to the risk of ill-treatment upon their return to Libya. Moreover, the Court interestingly found that the massive interdiction of asylum seekers at sea falls also within the ambit of collective expulsion (Art.4 Prot.4 ECHR) due to the complete lack of identification/registration process on the basis of individual assessment. However, the added value of the famous *Hirsi Jamaa* case lies not only in the complete condemnation of the pushback policies but also in the broad findings of the Grand Chamber concerning the set of human rights obligations in migration cases. Indeed, it shed light on the positive obligations of the involved States pertaining to border control operations and fleshed out the content of the *non-refoulement* prohibition falling over the intervening states (Marie-Benedicte Dembour 2012, Trevisanut 2014 p. 664 ff, Giuffré 2012, p.743).

Despite the unequivocal impact of the Hirsi litigation to the application and national policies of migration control or the relevant EU rules (Giuffré 2012, Den Heijer 2013, p. 285 ff), some of the shortcomings of the judgment (Trevisanut 2014 p.669; Pijnenburg 2018, p.401-402) have also reappeared in the recent *N.D & N.T v. Spain* judgment of the Grand Chamber on push-backs case at the land border of Melilla. While reaffirming the *Hirsi* robust pronouncements still applicable in push-backs and –by extension- the narrow reading of the judgment within the limits of the present case, the said Judgment prompted heated debates in academic circles (Nora Markard 2020, Hanaa Hakiki 2020). According to the Grand Chamber's reasoning, the applicants' *own culpable conduct* and their massive and violent attempt to reach irregularly the Spanish soil climbing the *Melilla* wall justify their forced and summary return to Morocco. Whether the Court draws an implied distinction between asylum seekers and irregular migrants in general when assessing the risk of push-backed persons or whether the *own culpable* test will apply to future push-back cases, remains to be seen.

Since more litigation on push-backs is expected soon from the Court, one may hope that these newly-introduced elements will be further and more adequately explained (ECtHR *L.A. and others v Greece and AA. v. Greece*, pending).

III. Pull-Back Practices

Push-back actions are closely related to "pull-backs", with both phenomena resembling two sides of the same coin. Pull-backs are containment actions and measures employed by states, in order to avert migrants from entering other States' borders, and are implemented by means of joint patrols in the sea borders, bilateral agreements, and in some cases funding for the management and containment of migration flows.

In the aftermath of *Hirsi Jamaa*, and the 2015 refugee crisis, the EU and its Member States adopted various measures aimed at ensuring the better management of its external borders, their monitoring and control, while priority was given to the maritime borders over territorial. These measures included: (a) the strengthening of EU maritime border control through the enhanced cooperation in Search and Rescue (SAR) activities in the Central and Eastern Mediterranean among EU states, also materialized through the criminalization of humanitarian SAR vessels, and (b) the sharing management of migratory movements through the externalization of border-crossing control. All these initiatives form part of what has been described as "cooperative deterrence" or "cooperation-based non-entrée" (Gammeltoft-Hansen/Hathaway, 2015), marking an era of excessive border control in the southern borders of the EU, and of outsourcing of the migratory burden.

1. EU Maritime Operations: from "cooperation to protect" to "cooperation to deter"

As the ECtHR has confirmed several times in the past, and just recently in *N.D. & N.T. v. Spain*, States have the right to control the entry, residence and removal of aliens, stressing at the same time the importance of managing and protecting their borders (ECHR, *N.D. & N.T. v. Spain*, 2020, para 167*)*. In exercising this right to control borders and the entry of aliens in recent years, the EU moved from Italy's *Mare Nostrum* operation in 2014 to the FRONTEX Joint Operation *Triton* in 2014, and later in 2015 to the European Union Naval Force Mediterranean (EUNAVFOR MED) Task Force, widely made known as *Operation Sophia*. Both operations had a broader

mandate and signaled a shift of focus from protecting people at distress at sea, to deterring them from starting their journey to Europe in the first place.

April 2015 was a watershed moment in the EU migration policy. Admittedly, until then, the EU had not given the issue of irregular migration the necessary attention and all maritime operations with the mandate either to control unauthorized entries, or to undertake SAR activities, were developed unilaterally by the Member States, at national level. This was so admitted by the EU High Representative for Foreign Affairs and Security Policy Federica Mogherini in the launch of the EUNAVFOR Med. Notably, Italy's *Mare Nostrum* operation in 2014, a humanitarian operation established in response to the 2013 incident in Lampedusa, with the mandate to rescue migrants in distress in the Central Mediterranean, was the first of its kind to proactively search those sea vessels carrying migrants, rescue them and provide humanitarian aid.

Operation *Mare Nostrum* was terminated a year after, and the next steps to control migration at sea were taken by the EU in a spirit of cooperation among EU states, with the establishment of the Joint Operations *Triton* and *Poseidon*, coordinated by FRONTEX. The reason why it was decided to deploy a new operation (Operation *Triton*) and not to reinforce the activities of operation *Mare Nostrum* is probably linked to concerns expressed that the latter actually served as a pull-factor for increased migration flows, arguably leading migrants to believe that the crossing towards Europe had become safer and in case of danger, they would be saved by *Mare Nostrum* (Cusumano/Villa).

Henceforward, the EU scaled back its SAR activities and moved to a deterrence policy to address "migratory challenges and potential future threats at those borders" (EU Commission Regulation 2016/1624, pp 251/2). It was made clear that a strategy directed only to humanitarian response and SAR activities was not an option, and that border control and the flow containment of irregular migrants would now be its political priority, an approach consistent with Art. 79 par. 1 of the Treaty on the Functioning of the European Union, according to which the EU "shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". This detour in EU policy can also be explained by the weakness of the

Common European Asylum System (CEAS) to ensure a fair burden-sharing system among EU Member States, especially in relation to the Dublin III Regulation (O'Nions 2014).

Operation *Triton*'s primary focus was to coordinate EU border patrol activities, and to assist Italy in carrying out maritime border control and surveillance, while SAR activities were to be implemented whenever needed. More diverse was the role of Operation Poseidon in Greece, performing not only border surveillance and SAR, but also assisting the Greek authorities in returns and readmissions from the hotspots to Turkey. Later, in May 2015, the EUNAVFOR Med Operation *Sophia* and FRONTEX's Operation *Themis*, the latter replacing Operation Triton, marked the securitization of SAR activities within the EU (Ciliberto, 2018). From that moment onwards, EU maritime operations would be developed with the mission to offer a comprehensive response to irregular migration, aiming to tackle cross-border crime, such as human smuggling and trafficking. It is true that, as also stated above, the said operations elicited controversy on their legality, and their compatibility with the applicable rules and principles of international law (Papastavridis, 2016).

Operations *Themis* and *Poseidon* are still ongoing and are complemented by Operation *Indalo* that is deployed in the Western Mediterranean. What all current and former FRONTEX and EUNAVFORMED operations (now called Operation *Irini* and mainly targeting arms trafficking to Libya) have in common is that they have tried, and to a certain degree succeeded, to gradually disengage from SAR activities and delegated such tasks to third neighbouring countries. In fact, when during border surveillance and patrols, they find or become aware of vessels in distress at sea, they neither rescue them and bring them to EU ports, nor do they send those vessels back to the ports of disembarkation ("push-backs"). Instead, they stand passive observers, refraining from intervening, and letting the rescue operations to be conducted by third countries, such as Libya, Morocco or Turkey.

Moreover, the prevention of migration flows to the EU external sea borders has been also buttressed through the criminalization of rescues performed by private vessels (Cusumano/Villa 2020, Atak and Simeon 2018) and the enforcement of more restrictive border policies (Moreno Lax 2017). Humanitarian NGOs operate along the Mediterranean migratory routes, trying to fill in the gap created not only by the changes

in the mandate of FRONTEX's operations, as described above, but also by the unwillingness of coastal states to proceed to SAR operations and, consequently, to assume responsibility for the persons aboard.

Notably, according to Art. 98 para 2 UNCLOS, coastal states have a duty to "maintain an adequate and effective search and rescue service" and to ensure co-ordination of search and rescue operations. Also, flag States "shall require masters of a vessel, in so far as they can do so without serious danger to the ship, its crew or passengers, to a) render assistance to any person found at sea in danger of being lost; and b) proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him or her" (Article 98 para 1 UNCLOS).

The same duty to render assistance to persons or vessels in distress at sea is also found in the SAR and SOLAS Conventions and is today recognized as a rule of customary law (Trevisanut, 2014). More importantly, it applies 'regardless of the nationality or status of such persons or the circumstances in which they are found', therefore it applies in respect of all refugees and migrants in distress at sea, regardless of their legal status or the circumstances that caused the flight or transpired during rescue. In implementing this duty to render assistance, which extends to delivering the persons in a place of safety (Art. 3 SAR Convention), neighboring states may enter into bilateral agreements, with the view to maintaining effective SAR operations.

In addition, European States' aim has been to ensure that migrants rescued or intercepted in their SAR area are not disembarked in their territory and are instead brought back to the port of departure. Undoubtedly, it is the right of every coastal state to deny entry, with the exception of ships in distress (Papastavridis 2018). Therefore, next to the securitization of EU maritime operation, the inviolability of "Fortress Europe" is ensured by the enforcement of criminalization practices, used as a prevention mechanism (Mitsilegas 2015). States have closed their ports to rescue vessels, be these merchant or NGOs vessels, and have also proceeded with criminalizing such rescues, without though drawing the necessary distinction or balance between dismantling smuggling rings and complying with relevant human rights obligations. The examples are numerous and have given rise to a host of legal considerations, including concerning the principle of *non-refoulement*, the duty to a

safe disembarkation of survivors, as well as other issues of cooperation between the actors involved in SAR responses (UNHCR Note, 2017). Suffice it to mention incidents such as the seizure of the vessel *Iuventa*, registered with the NGO Jugend Rettet, by the Italian authorities on 2 August 2017 on allegation of cooperation with migrant smugglers and the encouraging of illegal immigration, or the banning from Italian ports of the 'Médecins Sans Frontiers' vessel, "Aquarius", the latter being the last humanitarian rescue vessel to end its activities in 2018. Overall, NGOs rescue ships have been either impounded, seized, or otherwise restrained or penalized.

Commercial ships may also face allegations of being involved in smuggling of migrants in case that conduct maritime rescue activities, and this is another reason why shipmasters are reluctant to proceed with rescues, let alone that they risk delays in their itineraries, or being left with stranded migrants and no place to disembark them. All these policies have received extensive criticism, due to the increased death rates at sea coming as a direct consequence of the EU's approach to the migration/refugee crisis.

The much-anticipated EU Pact on Migration and Asylum announced September 2020 does not change substantially the context of SAR operations. Relying on lessons learnt from previous practice, in point 4.3 it recognises SAR as a key element of the European integrated border management and proclaims the Recommendation on cooperation between Member States in the context of operations carried out by vessels owned or operated by private entities for the purpose of performing regular rescue activities (Commission Recommendation C(2020) 6468), issued with a view to maintaining safety of navigation and ensuring effective migration management).

2. Outsourcing Border Control

Besides pull-back policies related to SAR activities, the EU and its Member States have opted also for an approach based on the 'full externalization of border controls', and subsequently the "off-shoring" of their responsibility regarding the rescue, disembarkation and overall protection of migrants. Such approach aims at creating a legal framework that would allow the returns of third-country nationals to be handled instantly by the countries of origin, without any further involvement or intervention of diplomatic channels. Alongside these arrangements, development aid, visa facilitation, technical cooperation and labour exchange enhance the legal arsenal

of the EU to promote its immigration policy. In this context, it is called into question, first, whether these forms of control have achieved the objective of obverting migration movement towards the EU, and, in any case, whether they are in accordance with international law.

The first steps for cooperation commitments where taken by the EU Members States themselves, through the conclusion of bilateral readmission agreements with non-EU member states, a strategy that marked a new era in 2016 with the EU-Turkey statement *(*Adepoju *et al. 2010 and* Giuffré *2020)* Italy had been a pioneer in this respect, and concluded agreements initially with Albania and later with Libya (Papastavridis 2013, 283-285), whereas the readmission agreement between Spain and Morocco that has been in force since 2012, became pertinent quite recently following the *ND & NT v.* Spain judgement of the ECtHR. This case is particularly interesting not only for the prohibition of collective expulsions and the legality of push-backs at the borders, as discussed earlier, but also because Spain defended the "asylum-specific zones" in its territory as a new deterrence tool, arguing that if the ECtHR were to legitimize entry of aliens without any checks, it "would create an undesirable "calling effect" and would result in a migration crisis with devastating consequences for human rights protection" (ECtHR, *ND & NT v. Spain*, para 129).

At a strategic level, the EU has taken steps to enhance its partnerships and cooperation with third countries and organizations and tackle the root causes of migration in the countries of origin, by legitimizing the externalization of the responsibility for the rescue and disembarkation of migrants. New forms of *non-entrée* include, among others, direct financial incentives to departure or transit states, mainly through EU Development Aid, and capacity building, through the provision of training to coastal guards and provision of equipment (Markard, 2016). The EU Trust Fund for Africa is nothing more than an externalization of the migration management in the countries of origin, this time investing not on pulling migrants back to the countries of departure, but also on providing anti-incentives. In November 2017, a joint migration task force with the African Union and the UN was created with the view to responding to migration challenges in Africa and in particular Libya. In a similar vein, the EU established the European Border Surveillance System (EUROSUR) to better monitor the seas and entry points of the EU.

Inevitably, as has been substantiated above, all these marks a significant turn from push-backs to pull-backs, to which significant role played the landmark judgement of the ECtHR in *Hirsi Jamaa*. Thereby, from coastguards of states of destination pushing back boats on the high seas to the place of departure, we have moved to coastguards of departure countries pulling back the flows before they manage to reach international waters (Jan Kühnemund 2018 p.. 92).

What is common to all these pullback arrangements, is the shift of the burden of migration control from the countries of destination to the countries of origin, thereby entrusting third countries, such as Libya, with the obligation to patrol the territorial waters and international waters and prevent unauthorized entries in Europe, establishing what has been described as "contactless control" (Moreno Lax and Giuffré, 2019). As was stated above, the Italy-Libya Memorandum of Understanding (MoU) of 2 February 2017 is the last of a series of cooperation agreements between the two countries, according to which, Italy provides training, financing, equipment and other material support to the Libyan coastguard when the latter intercepts vessels and returns migrants Libya (Giuffré, 2013, pp. 700-703). The MoU constitutes the legal basis for several pull-backs following its entry into force, and has also been credited with dramatically lowering the number of migrants arriving in Italy. The EU has also been involved in reinforcing the cooperation with Libya and under the Malta Declaration, commits to provide training, equipment, and support to the Libyan Coastal Guard, also extending the mandate of EUNAVFOR to include this activity (Council of the EU Malta Declaration 2017 para 6(c)).

Along the same lines, the infamous EU-Turkey Statement in its point 3 stipulates that "Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU and will cooperate with neighbouring states as well as the EU to this effect." Indeed, with the view to strengthening cooperation in the area of migration management, Turkey undertook to strengthen border controls, and, in exchange, the EU would provide trainings and equipment to the Turkish Coast Guard and would lift visa requirements for Turkish citizens travelling to the EU's Schengen Zone. As a result of the EU-Turkey statement, the number of clandestine border crossings has dropped significantly (FRONTEX, Risk Analysis for 2019; European Commission, COM(2016) 349 final).

Acting as a remedy to Dublin III Regulation shortcomings (Boeles *et al.,* 2014), all these externalization arrangements have given rise to concerns regarding grave human rights violations, including torture, *non-refoulement,* and slavery. For example, it has been lamented that the Operation *Sophia* established the "outsourcing" of border control to Libya Coastal Guard, in the context of which several migrants were intercepted and returned to Libya where they faced ill-treatment, arbitrary detention and other violations of human rights including *jus cogens* norms (OHCHR, 2018; Moreno Lax, 2020). As Giuffré observes, "Libya's cooperation on patrolling sea and land borders, and readmission of undocumented TCNs intercepted by Italian authorities, results in push-backs by proxy (pull-backs) carried out directly by Libyan authorities" (Giuffre, 2020). This is exactly the case of *SS a.o. v. Italy,* currently pending before the ECtHR. The case concerns a rescue operation performed on 6 November 2017, by the Libyan Coastal Guard's patrol vessel "Ras Jadir" and the NGO vessel "Sea Watch 3", the former vessel acting in implementation of the Italy-Libya MoU. The LYCG vessel had been donated by Italy, in the context of the MoU, as part of the wider plan to render Libyan SAR reliable and effective. The Libyan coastguard allegedly interfered with the efforts of Sea Watch 3 to rescue 130 migrants from a sinking dinghy, resulting in 20 people dying in the incident, while survivors were pulled back to Libya, where they faced detention and were subjected to extreme violence in inhumane conditions, with two survivors being "sold" and electrocuted (Moreno Lax, 2020).

S.S. and others v. Italy is illustrative of the complexity of *non-entrée* policies employed by EU states. Whether the EU states can escape responsibility is dubious, and as Goodwin-Gill has argued "no state can avoid responsibility by outsourcing or contracting out its obligations, either to another state, or to an international organization" (Goodwin-Gill, 2007, p.34). The issue of state responsibility, state jurisdiction and contactless control, runs through *S.S. and others v. Italy,* as well as *C.O. and A.J. v. Italy* and *Safi and others v. Greece,* both pending before the ECHR (Papastavridis, 2020).

IV. Concluding Remarks

It is evident that the 'refugee crisis', as it has been conveniently described, that Europe has been facing more than 10 years now, mainly due to civil-wars, economic

injustices and other calamities around the world, has ushered in an entirely new era in the context of immigration control. The 'European Integrated Border Management', as professed by the EU, requires an entirely new architecture, at the heart of which rest concepts such as 'contactless control', 'outsourcing', 'push and pull-backs' et al. Central to all these practices is the idea of cooperation not only among EU Member States, but also between the EU itself and third States of origin or transit (e.g. Libya, Turkey). Such cooperative schemes have remarkably shifted from bilateral (Italy-Libya, 2009) to multilateral (FRONTEX operations and EUNAVFOR Operation *Sophia*) and again back to bilateral mechanisms (EU-Turkey, 2016 and Italy-Libya, 2017). Common feature is that all the above 'non-entrée' policies result in the interdiction of people prior reaching their 'Land of Promise' in Europe.

The question however persists: are these policies enough? Are they fit for their purposes, including to control migratory flows, protect those needed, and safeguard lives at sea? All these legitimate goals are included in the draft EU Pact on Migration and Asylum, currently under discussion in the EU, but it cannot but noticed that the policies are more tailored towards averting migratory flows from coming to Europe rather than saving people's life and protecting their fundamental rights. It is time thus that Europe, in the context of the New Pact on Migration and Asylum under discussion, reorientated its policy and held the need for the protection of human beings as its utmost priority. Till then, we are afraid that the death toll of people crossing our seas will steadily increase.

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