

# The Human Dimension: The Great Forgotten Factor in Migration Along the Central Mediterranean Sea

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*Abstract:* Every year thousands of people risk their lives trying to cross the Mediterranean through its central route. Mediterranean migration is not a spontaneous phenomenon favoured by geographical proximity, but rather a structured one, with organized crime planning and overseeing every step of the migrants' perilous and lengthy trips. Once at sea, assistance to any person found in distress at sea is supposedly guaranteed. The rights of migrants are granted not only by human rights law but also by treaties from other branches of public international law which should permeate the whole system. However, the protection of migrants' human rights has not played a prevalent role in migration policies at the European Union level. Sea rescues have been relegated to only what is routinely demanded by maritime obligations. Migration by sea is primarily presented from a securitized approach, with a focus on the reduction of arrivals and a downgrading of the human dimension.

*Keywords:* Migration Human dimension Central Mediterranean EU

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## (A) INTRODUCTION

The Universal Declaration of Human Rights<sup>1</sup> states that “all human beings are born free and equal in dignity and rights” and that they are all “entitled to all the rights and freedoms set forth in this Declaration”.<sup>2</sup> Realistically, geography plays a large part in the perceived rights and freedoms for many.

The right of individuals to leave their country is unarguable. The right to emigrate is enshrined in the 1948 United Nations (UN) Declaration of Human Rights, where article 13(2) states that “[e]veryone has the right to leave any country, including his own, and to return to his country”. The corresponding right to immigrate though, is not generally recognized, and any State may adopt regulations determining whether or not migrants may enter its territory.<sup>3</sup>

There is no formal legal definition of migrant. According to the International Organization for Migration (IOM),<sup>4</sup> a migrant is “an umbrella term reflecting the common lay understanding of a person who moves away from his or her place of usual residence,

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<sup>1</sup> Universal Declaration of Human Rights (UN), GA Res. 271 A (III), Article 1.

<sup>2</sup> *Ibid.*, Article 2.

<sup>3</sup> See T. Scovazzi, ‘The Particular Problems of Migrants and Asylum Seekers Arriving by Sea’, in S. Juss, T. Scovazzi and L. Westra (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge, London, 2015) 177-232, at 178.

<sup>4</sup> IOM, ‘Who is a Migrant?’, accessed 1 June 2024.

whether within a country or across an international border, temporarily or permanently, and for a variety of reasons". The term migrant refers to foreign-born, foreign citizens, or people who have moved to another country. In either scenario, we are addressing persons to whom the principle of human dignity unquestionably applies. The inherent dignity of the human being constitutes the real basis of human rights.

At first glance, migration is seen in economic and development terms. There is a tendency to explain the phenomenon as a response to economic disparities and the lack of job opportunities. The protection of migrants' human rights has not played a prevalent role in migration policies. Following this interpretation, migrants may come to be regarded as commodities, rather than as individuals entitled to the full enjoyment of their human rights.<sup>5</sup>

The Mediterranean Basin is one of the main migration arenas in the world. It is also, however, one of the most border-controlled areas since it constitutes the outer border of the European Union (EU) on its southern side.<sup>6</sup> The former UN High Commissioner for Human Rights has expressed her concern about the "lethal disregard for desperate people"<sup>7</sup> in the central Mediterranean Sea. This is borne out by the actions of several EU countries to criminalize, impede or halt search and rescue (SAR) activities, which have had deadly consequences for adults and children seeking safety.<sup>8</sup> This paper will assess to which extent (if any) the human dimension<sup>9</sup> inspires the migration policies which govern the Mediterranean Sea, or, on the contrary, the reduction of arrivals which is at the center of the debate.<sup>10</sup>

This work consists of five main sections. After this introduction, Section B focuses on the main characteristics of the Central Mediterranean Route. This brief historic journey contextualizes the research. Section C outlines safety of life at sea as an international obligation. It provides a detailed analysis of the main legislative instruments addressing the duty to render assistance at sea. Section D delves into the political action in the Mediterranean. It concentrates on answering the question "is the human dimension reflected?". For that purpose, it analyses the individual responses and the EU reactions to the migration by sea phenomenon. Conclusions resulting from the previous research are reflected in Section E.

## (B) THE CENTRAL MEDITERRANEAN ROUTE

The Central Mediterranean route is one of the most active and dangerous migration routes worldwide. The route has not only gained notoriety due to the increasing flow of migrants but also due to the high death rate. Mediterranean migration is not a spontaneous phenomenon favoured by geographical proximity, but rather has developed into an organized crime, overseeing every step of the migrants' perilous and lengthy trips.

<sup>5</sup> Office of the UN High Commissioner for Human Rights (OHCHR), 'Migration and Development: A Human Rights Approach', *UN Publications* (2008) at 4.

<sup>6</sup> C. Wihtol de Wenden, 'Migrations in the Mediterranean Region', *IEMed Mediterranean Yearbook* (2015) 126-131, at 126.

<sup>7</sup> OHCHR, 'Lethal Disregard. Search and rescue and the protection of migrants in the central Mediterranean Sea', *UN Publications* (2021) at iv.

<sup>8</sup> *Ibid.*

<sup>9</sup> Since at the core of this phenomenon lie vulnerable persons on the move.

<sup>10</sup> The author acknowledges the importance of the European Court of Justice's case law in inspiring and shaping European policies. However, an analysis of the case law is beyond the scope of this paper.

The central route stretches from the north of Africa – mainly Libya and Tunisia – to Italy and Malta. Throughout the 1990s, there was some limited boat migration from North Africa across the Central Mediterranean. The main country of departure during that period was Tunisia.<sup>11</sup> The departures from Libya date back to around the year 2000 when the migration patterns moved eastwards as Tunisian authorities started to impose stricter border controls. As a consequence, Libya became the main country of departure towards Europe in the Central Mediterranean area.<sup>12</sup>

For years, Libya practiced an open-door policy towards sub-Saharan countries, becoming a destination for people hailing from countries in the region.<sup>13</sup> During the Gaddafi era, many sub-Saharanans had stable jobs and could send remittances to their countries of origin.<sup>14</sup> By the end of the first decade of the 21st century, unprecedented numbers of people started taking dangerous journeys across the Mediterranean from Libya. The country ceased to be a destination to become a transit State. However, for European leaders, Gaddafi's presence served as a guarantee of political and migratory stability in the Mediterranean.<sup>15</sup>

While migrations in the Mediterranean were mostly linked to employment opportunities before 2011, the situation changed in the aftermath of the Arab uprisings. In the wake of the Arab Spring and the civil war in Libya, significant waves of migration crossed the Mediterranean. Just after the revolution started, Tunisia and Libya became points of departure for boats heading towards the Italian shores.<sup>16</sup> The numbers dropped again in 2012 and 2013, which coincides with years of relative stability in Libya.

The arrivals through the Central Mediterranean route dominated the landscape between 2014 and 2017 except for 2015, when the Eastern Mediterranean route witnessed an exceptionally high number of arrivals. The number of people crossing the Central Mediterranean peaked in 2016, with over 180,000 people arriving by sea.<sup>17</sup>

The drop in departures from Libya in 2018 and 2019 coincides with a number of initiatives designed to decrease movements to Italy.<sup>18</sup> In 2017, Italy signed an MoU with the Libyan Government of National Accord (GNA) on cooperation in the fight against “illegal immigration” and on “reinforcing the security” of their borders.<sup>19</sup>

<sup>11</sup> *Ibid.*

<sup>12</sup> D. Lutterbeck, ‘The Central Mediterranean Migration Route: Rise, Fall, and Rise Again’, *Med Agenda – Special Issue [Perspectives in a Changing Mediterranean]*, MEDAC Publications in Mediterranean IR and Diplomacy (2016), 56-69, at 57.

<sup>13</sup> The journey towards Europe started long before people reach the coast of North Africa.

<sup>14</sup> E. Borgnäs, L. Cottone and T. Teppert, ‘Labour Migration Dynamics in Libya’, *IOM Publications* (2020) 298-310, at 299.

<sup>15</sup> G. Noll, M. Giuffré, ‘EU migration control: made by Gaddafi?’, *Open Democracy*; published on 25 February 2011, accessed 3 October 2024.

<sup>16</sup> P. Fargues, C. Fandrich, ‘Migration After the Arab Spring’, *Migration Policy Center, Research Report 2012/09, European University Institute* (2012) at 4.

<sup>17</sup> A. Malakooti, C. Fall, ‘Migration Trends Across the Mediterranean. Piecing Together the Shifting Dynamics’, *Global Initiative Against Transnational Organized Crime* (2020) at 5.

<sup>18</sup> *Ibid.*

<sup>19</sup> Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed in Rome on 2 February 2017. This MoU topped off the relationship forged for decades between the two States on migration matters: the 2006 Memorandum

The EU endorsed the MoU in its legally non-binding Malta Declaration, in which the European Council also agreed to “take additional action to significantly reduce migratory flows along the Central Mediterranean route”.<sup>20</sup> These actions included the intensification of efforts to stop smugglers from operating out of Libya or elsewhere, supporting the frontline Member States, enhancing humane reception conditions, voluntary humanitarian returns, cooperation with other countries of origin and transit, as well as voluntary resettlement.<sup>21</sup>

The COVID-19 pandemic changed the pattern again. Migratory flows were not immune to the effects of the pandemic and the subsequent health crisis. With the arrival of the virus in the West, most European and North African countries imposed restrictions to prevent its spread. Measures such as lockdowns, border closures, and stay-at-home policies affected the free movement of persons.<sup>22</sup> In April 2020, the number of irregular crossings detected at European borders along the main routes dropped to 900, the lowest total figure since Frontex began collecting border data in 2009.<sup>23</sup> However, during the first six months of 2020, arrivals on the central Mediterranean route increased compared with the same period in 2019.<sup>24</sup> According to IOM data, arrivals to Italy increased by 150 per cent and to Malta by 33 per cent. In fact, arrivals to Italy and Malta only fell in March, rising again in April.<sup>25</sup>

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for the cooperation against illegal migration, the 2007 Protocol and Additional Protocol to the 2006 Memorandum (Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista (Tripoli, 29 December 2007); Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione Clandestina (Tripoli, 29 December 2007), the 2008 Treaty on Friendship, Partnership and Cooperation (Trattato di Amicizia, Partenariato, e Cooperazione (Bengazi, 30 August 2008), and the 2009 Executive Agreement (Protocollo Aggiuntivo Tecnico-Operativo concernente l’aggiunta di un articolo al Protocollo firmato a Tripoli il 29 December 2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione clandestina (Tripoli, 4 February 2009).

<sup>20</sup> European Council, ‘Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route’, 3 February 2017, accessed 3 October 2024.

<sup>21</sup> European Council, ‘Conclusions 28 June 2018’, published on 29 June 2018, accessed 3 October 2024.

In 2020, Malta and GNA also signed an MoU in order to set up two coordination centers in Tripoli and Valletta for supporting “operations against illegal migration”. Memorandum of Understanding between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the Field of Combatting Illegal Immigration, signed in Tripoli, 25 May 2020.

<sup>22</sup> Á. Jiménez García-Carriazo, ‘La ruta migratoria del Mediterráneo central en tiempos de pandemia: ¿cambio en las reglas del juego?’, in A. del Valle (Dir.) *Immigración y Derechos Humanos en las Fronteras Exteriores del Sur de Europa* (Dykinson, Madrid, 2021) 157-164, at 161.

<sup>23</sup> Frontex, the European Border and Coast Guard Agency, supports EU Member States and Schengen-associated countries in the management of the EU’s external borders and the fight against cross-border crime. Based in Warsaw, it was established by Regulation (EU) No 2016/1624 of 14 September 2016 OJ L 251 (European Border and Coast Guard Regulation). It emerged from the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU which was established in 2004 by Council Regulation (EC) 2007/2004 of 26 October 2004 OJ L 349 (Frontex-Regulation). Frontex, ‘Situation at EU external borders in April – Detections lowest since 2009’, accessed 1 June 2024.

<sup>24</sup> I. Schöffberger, M. Rango, ‘COVID-19 and Migration in West and North Africa and across the Mediterranean’, in IOM, *Migration in West and North Africa and Across the Mediterranean. Trends, Risks, Development* (IOM Publications, 2020) xx-xxiii, at xxiii.

<sup>25</sup> *Ibid.*

The Central Mediterranean continued to be the most used path to Europe for the fourth year in a row in 2023 as over 157,500 migrants were detected on this route.<sup>26</sup> Since 2014, the IOM's Missing Migrants Project has documented over 23,000 people who have died or gone missing crossing the Central Mediterranean route.<sup>27</sup> In 2024 1,154 people have lost their lives in the Central Mediterranean as of 3 October.<sup>28</sup> Deaths along the Central Mediterranean route comprise 69% of all migrant deaths in the entire Mediterranean Sea.<sup>29</sup>

Moved by the recurring and avoidable deaths of migrants at sea, non-governmental organizations (NGOs) and civil society groups have played a crucial role in conducting SAR operations off the Libyan coast. Since 2014, many migrants in distress at sea have been saved by vessels operated by NGOs.<sup>30</sup> These ships aim to decrease fatalities and bring rescued migrants to the EU safely. However, since 2018, NGOs have encountered numerous obstacles to carrying out SAR missions in the Mediterranean. Italy and Malta have filed criminal and administrative proceedings against crew members or vessels and launched initiatives to restrict NGO vessel activities and their access to EU ports. Additionally, disinformation campaigns have severely hindered the NGOs' life-saving work at sea.<sup>31</sup>

### (C) SAFETY OF LIFE AT SEA: AN INTERNATIONAL OBLIGATION

According to human rights law, which is based upon the inherent dignity of every person, migrants enjoy the fundamental rights afforded to all persons regardless of their legal status in a State.<sup>32</sup> Since international customary law and international human rights instruments are of universal application, they lay down migrants' rights and the obligations of States toward migrants. Various other international instruments grant rights to migrants by virtue of their humanity.<sup>33</sup>

<sup>26</sup> Frontex, 'Significant rise in irregular border crossings in 2023, highest since 2016'.

<sup>27</sup> IOM, 'Missing Migrants Project', accessed 3 October 2024.

<sup>28</sup> *Ibid.*

<sup>29</sup> OHCHR, 'Lethal Disregard', *supra* n. 7, 3.

<sup>30</sup> Operations have been carried out by Médecins Sans Frontières, Migrant Offshore Aid Station, Sea-Eye, Sea-Watch, SOS Méditerranée, Save the Children, LifeBoat, ProActiva Open Arms, Jugend Rettet, Boat Refugee Foundation, Mission Lifeline, Boat Refugee Foundation, and Mediterranean Saving Humans. An indirect role in SAR operations has also been played by Alarm Phone, an NGO operating a hotline for migrants in distress in the Mediterranean Sea. E. Cusumano, M. Villa, 'From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy', 27(1), *European Journal on Criminal Policy and Research* (2021), at 3 [doi: <https://doi.org/10.1007/s10610-020-09464-1>].

<sup>31</sup> F. Romana Partipilo, 'The Role of NGOs within Search and Rescue Activities at Sea', *Lebanese American University*, published on 6 April 2022, accessed 3 October 2024.

<sup>32</sup> See *Safi and Others v. Greece*, ECHR (2022) 5418/15, 235.

<sup>33</sup> The international human rights treaties and their associated additional protocols that grant rights to migrants by virtue of migrants' humanity are: Universal Declaration of Human Rights, 10 December 1948, 217 A (III); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, in UNTS vol. 660, p. 195; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in UNTS vol. 993, p. 3; International Covenant on Civil and Political Rights, 16 December 1966, in UNTS vol. 999, p. 171; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, in UNTS vol. 660, p. 195; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, in UNTS vol. 1249, p. 13; Convention

The rights of migrants are granted not only by human rights law but also by treaties from other branches of public international law, including but not limited to refugee law; transnational criminal law, especially treaties relating to human trafficking and smuggling of migrants; humanitarian law; labour law; and the law of the sea.<sup>34</sup> Some treaties expressly recognize the human dimension. This is particularly clear in the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air,<sup>35</sup> which aims to “prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end while protecting the rights of smuggled migrants”.<sup>36</sup>

Focusing on migration by sea, emphasis must be placed on the law of the sea and international maritime law. The duty to render assistance at sea is a long-standing rule of international law.<sup>37</sup> A range of actors have obligations to mitigate the loss of life during sea border crossings, including flag States, the captains of ships, coastal States, and States responsible for the coordination of relevant SAR zones. The duty to assist in distress as such is not geographically limited in any way.<sup>38</sup> Irrespective of where a vessel encounters another vessel in distress, it is obliged to assist it.

This international custom is codified in a number of international treaties, including the 1958 Geneva Convention on the High Seas,<sup>39</sup> the UN Convention on the Law of the Sea (UNCLOS)<sup>40</sup> and conventions adopted under the auspices of the International Maritime Organization (IMO), in particular the International Convention for the Safety of Life at Sea (SOLAS Convention)<sup>41</sup> and the International Convention on Maritime Search and Rescue (SAR Convention).<sup>42</sup>

UNCLOS gives incidental protection through Article 98, which can be considered as the most important expression of the duty to render assistance at sea. The first paragraph, which repeats the content of Article 12(1) of the 1958 Convention on the High

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Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, in UNTS vol. 1465, p. 85; Convention on the Rights of the Child, 20 November 1989, in UNTS vol. 1577, p. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, in UNTS vol. 2220, p. 3; Convention on the Rights of Persons with Disabilities, 13 December 2006, in UNTS vol. 2515, p. 3; International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, in UNTS vol. 2716, p. 3. IOM, ‘Migrant Rights’, accessed 1 June 2024.

<sup>34</sup> *Ibid.*

<sup>35</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, in UNTS vol. 2237, p. 319.

<sup>36</sup> Emphasis added. *Ibid.*, Art. 2 – Statement of purpose.

<sup>37</sup> See E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (London, 1758) at 170; R. P. Pedrozo, ‘Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective’, 94 *International Law Studies* (2018) 101-126, at 106.

<sup>38</sup> A. T. Gallagher, F. David, *The International Law of Migrant Smuggling* (Cambridge University Press, Cambridge, 2014) at 447.

<sup>39</sup> Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962), UNTS vol. 450, p. 11, Art. 12.

<sup>40</sup> UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

<sup>41</sup> SOLAS Convention (adopted 1 November 1974, entered into force 25 May 1980), UNTS vol. 1184, 1185, p. 2.

<sup>42</sup> SAR Convention (adopted 27 April 1979, entered into force 22 June 1985), UNTS vol. 1405.

Sea, places an obligation on shipmasters to assist<sup>43</sup> any person found at sea who is in danger of being lost:

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

The phrase “any person found at sea in danger of being lost” makes no distinction between persons; therefore, the obligation extends from seafarers to irregular migrants in need of assistance at sea.

Additionally, Article 98(2) spells out the positive obligation of coastal States to cooperate with neighbouring States to promote effective SAR services: “Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”.

The SOLAS Convention similarly provides that any ship master at sea who is in a position to assist, upon receiving information that persons are in distress at sea must proceed with all speed to their assistance, and that “[u]his obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found”.<sup>44</sup>

The SAR Convention directs coastal States to establish national SAR regions in cooperation with neighbouring States and to take primary responsibility for responding to SAR incidents that occur within their region.<sup>45</sup> It specifies that “[p]arties 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 such person is found”.<sup>46</sup> The SAR Convention also requires States that provide the overall coordination of such SAR zones, on receiving information that a person is in distress within their SAR zone, to “take urgent steps to provide the most appropriate assistance available”.<sup>47</sup>

Following the 2004 amendments to the SAR Convention,<sup>48</sup> where such assistance is rendered, the coordinating State must take primary responsibility for ensuring effective co-ordination and co-operation “so that survivors assisted are disembarked from the

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<sup>43</sup> An obligation of conduct, not of result.

<sup>44</sup> SOLAS Convention, chapter V, Regulation 33(1). See also Regulation 7(1).

<sup>45</sup> SAR Convention, Annex 2.1.3.

<sup>46</sup> SAR Convention, Annex, chapter 1, para. 1.3.2.

<sup>47</sup> SAR Convention, chapter 2, para. 2.1.9.

<sup>48</sup> As a reaction to the *Tampa* affair, the Maritime Safety Committee of the IMO at its 78th session adopted by resolution MSC.155(78), amendments to Chapter II (organization and co-ordination) relating to definition of persons in distress, Chapter III (co-operation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety, and Chapter IV (operating procedures) relating to rescue co-ordination centers initiating the process of identifying the most appropriate places for

assisting ship and delivered to a place of safety”.<sup>49</sup> In this regard, the government in charge of the SAR region in which the survivors are recovered is held responsible for providing a place of safety on its territory or ensuring that such a place of safety is granted.

The SAR Convention “was neither foreseen, nor intended” to respond to mass mixed migration by sea.<sup>50</sup> The 2004 amendments give a fresh veneer by introducing the undefined “place of safety” into the legal framework governing SAR operations. However, considerations of humanity are not at the forefront of the convention application.

The SAR Convention does not provide specific rules for interpretation and does not identify which is the State, among a number of neighbouring States, which should provide assistance in a given case. The fact that the Government of the SAR region in which the survivors are recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided, means that migrants in distress at sea are sometimes brought to the SAR region of another State.<sup>51</sup> Against this backdrop, reluctance, and refusal to disembark rescued sea migrants on land are common responses among coastal States.<sup>52</sup>

In the absence of a legal definition, and with the aim of guaranteeing that persons rescued at sea are provided with a place of safety regardless of their nationality, status, or the circumstances in which they are found, the Guidelines on the Treatment of Persons Rescued at Sea were adopted by the IMO.<sup>53</sup> Although the Guidelines do not establish any binding duty, they provide some guidance on the interpretation of the obligations to render assistance at sea.<sup>54</sup> The Guidelines define a place of safety as “a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met”.<sup>55</sup>

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disembarking persons found in distress at sea. Resolution MSC.155(78), adopted on 20 May 2004, adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended.

<sup>49</sup> SAR Convention, as amended, IMO Doc. Resolution MSC.155(78), Annex 5, chapter 3, para. 3.1.9.

<sup>50</sup> IMO, ‘IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling’, Press briefing 45, 2015.

<sup>51</sup> J. Coppens, ‘The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin’, 44 *Journal of Maritime Law and Commerce* 89 (2013) at 4.

<sup>52</sup> A. Campàs Velasco, ‘Vulnerability and Marginalisation at Sea: Maritime Search and Rescue, and the Meaning of ‘Place of Safety’’, 18 *International Journal of Law in Context* (2022) 85-99, at 87, [doi: <https://doi.org/10.1017/S1744552322000076>].

<sup>53</sup> IMO Resolution MSC. 167(78), Annex 34, Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004.

<sup>54</sup> R. A. Barnes, ‘The International Law of the Sea and Migration Control’, in B. Ryan, V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, Leiden, 2010) 103-150, at 103.

<sup>55</sup> IMO Resolution MSC. 167(78), para. 6.12. The rescuing vessel cannot be seen as a place of safety: “An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made” (para. 6.13).

The interpretation of a place of safety might draw on human dignity reasoning. When the Guidelines specifically address the protection needs of refugees and asylum seekers found at sea in paragraph 6(17) by taking into account the need to avoid “disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened”, it is defensible that they are inspired by human rights law considerations.<sup>56</sup> A place cannot be deemed safe simply because distress at sea has been prevented.<sup>57</sup> Accordingly, delivery at a place of safety would necessarily exclude locations where there are substantial grounds for believing that there is a real danger or risk for rescued migrants’ lives, including being at risk of arbitrary immigration detention and facing obstacles to access immediate assistance such as medical care.<sup>58</sup>

In response to this situation, the Facilitation Committee of the IMO adopted (recommendatory) principles regarding the disembarkation of persons rescued at sea which specify that “[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support”.<sup>59</sup> The principles have not been successfully incorporated into the SAR Convention.<sup>60</sup> Today it is considered that the coastal State has only the obligation to ensure that a place of safety is provided to rescued people without being under an explicit obligation to allow disembarkation on its own territory.<sup>61</sup>

This progress notwithstanding,<sup>62</sup> the Guidelines and the Principles are not binding instruments but can only be regarded as soft law. The existence of a vast legal framework that aims to ensure the safety of life at sea does not prevent migrants from being exposed to life-threatening crossing conditions, devoid of protection of their fundamental human rights.<sup>63</sup> The security aspects of migration have largely overshadowed its humanitarian dimension.

#### (D) POLITICAL ACTION IN THE CENTRAL MEDITERRANEAN: IS THE HUMAN DIMENSION REFLECTED?

Migration across the Mediterranean is often presented in media as a single, transnational phenomenon, characterized by steady flow of people, seemingly guided

<sup>56</sup> Campàs Velasco, *supra* n. 52, at 90.

<sup>57</sup> A. Fischer-Lescano, T. Löhr, T. Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 21(2) *International Journal of Refugee Law* (2009) 256–296, at 290 [doi: <https://doi.org/10.1093/ijrl/eep008>].

<sup>58</sup> OHCHR, ‘Lethal Disregard’, *supra* n. 7, at v.

<sup>59</sup> IMO FAL.3/Circ.194, Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea, adopted on 22 January 2009, para. 3.

<sup>60</sup> Á. Jiménez García-Carriazo, ‘Small Island, Big Issue: Malta and its Search and Rescue Region – SAR’, 7 *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* (2019) 299–321, at 309 [doi: [http://dx.doi.org/10.25267/Paix\\_secur\\_int.2019.i7.10](http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10)].

<sup>61</sup> E. Papastavridis, ‘Rescuing ‘Boat People’ in the Mediterranean Sea: The Responsibility of States under the Law of the Sea’, EJIL: Talk!, published on 31 May 2011, accessed 1 June 2024.

<sup>62</sup> Which also includes the IMO/UNHCR/International Chamber of Shipping, ‘Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees’ (2015).

<sup>63</sup> Campàs Velasco, *supra* n. 52, at 86.

by uncontrollable forces.<sup>64</sup> Migration has gained salience and has become a political issue, which has been transferred from the traditional internal security domain to the international security agenda.<sup>65</sup>

The issue has become increasingly politicized due to polarized debates, divided electorates, and rising populism. Today, migration by sea is primarily presented from a security approach, with a focus on the reduction of arrivals.<sup>66</sup> The lack of protection for those crossing the Central Mediterranean has turned the situation into nothing less than a tragedy. Furthermore, the context of migration by sea is impacted by a failure of solidarity among States, as evidenced within the EU.<sup>67</sup>

### (1) Individual States' Responses to the Phenomenon

The abovementioned legal framework partially applies in the Central Mediterranean, including both transit and destination States. For example, although Libya is not a party to UNCLOS, most of its provisions (including Article 98)<sup>68</sup> have already achieved binding customary international law status. Italy, Malta, Tunisia, and Libya are parties to the SOLAS Convention and the SAR Convention. In principle, assistance to any person found in distress at sea is guaranteed in the area. Besides that, the most striking issue is the Maltese objection to the 2004 amendments to the SAR Convention.

Malta is rarely the intended destination for migrants; most aim at landing in Italy and either end up accidentally on Maltese territory or, more commonly, are rescued within the Maltese SAR region and subsequently disembarked in Malta. In contrast to the small size of its territorial waters, Malta maintains a vast SAR region, covering some 260,000 square kilometers.<sup>69</sup> Its SAR region coincides with the Malta Flight Information Region, which the State inherited from the British Flight Identification Region.<sup>70</sup> The SAR region of Malta overlaps with the Italian SAR region corresponding to Lampedusa and Lampione.

<sup>64</sup> A. D'Angelo, 'Flujos migratorios en el Mediterráneo: cifras, políticas y múltiples crisis', *Anuario CIDOB de la Inmigración* (2018), 30-46, at 31 [doi: doi.org/10.24241/AnuarioCIDOBInmi.2018.30].

<sup>65</sup> M. Ferreira, 'Risk Politicization Strategies in EU Migration and Asylum Policies', *Journal of Global Analysis* (2010) 153-183, at 156; Z. Gündüz, 'From 'Necessary' to 'Dangerous' and Back Again. The Economization, Securitization and Europeanization of Migration', 12 *Turkish Review of Balkan Studies* (2007) 751-777, at 775.

<sup>66</sup> Restrictive national migration policies are not only seen as serving the national interests of the countries of destination, but by referring "the graveyard of the Mediterranean sea" they are also presented as beneficial for countries of origin. See N. Lauwers *et al.*, 'The Politicization of the Migration-Development Nexus: Parliamentary Discourse on the European Union Trust Fund on Migration', 59(1) *Journal of Common Markets Studies* (2021) 72-90 [doi: https://doi.org/10.1111/jcms.13140].

<sup>67</sup> P. Mallia (Vella de Fremaux), F. Attard, 'Dehumanising the Human Element of Maritime Migrant Smuggling: A Discussion on the Application of Human Rights in the Maritime Sphere', 17 *Benedict's Maritime Bulletin* (2019) 1-25, at 4; M. Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Palgrave Macmillan, Abingdon, 2018).

<sup>68</sup> Barnes, *supra* n. 54, 134; B. H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', 36 *Columbia Journal of Transnational Law* (1998) 399-429, at 415 [doi: https://doi.org/10.18356/3e8c7ba4-en].

<sup>69</sup> P. Mallia (Vella de Fremaux), *Migrant Smuggling by Sea Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Brill, Leiden, 2009) at 13.

<sup>70</sup> J. Coppens, 'Search and Rescue', in E. Papastavridis, K. N. Trapp, *La criminalité en mer* (Académie de Droit International de la Haye, Martinus Nijhoff, Leiden, 2014), 381-427, at 404.

Within this geographical context, the Maltese authorities objected to the amendments to the SAR Convention arguing that they require the State responsible for the SAR region within which persons are rescued to assume responsibility for providing a safe disembarkation place.<sup>71</sup> Maltese authorities maintain that disembarkation must occur at the nearest safe port, which, as a result of the size of Malta's SAR region and the coordinates of rescues performed by the Armed Forces of Malta, is often Lampedusa.<sup>72</sup>

Malta's formal objection has tested its friendly relationship with Italy. This has led to constant diplomatic rows responding to the prevailing lacuna revolving around which State is to allow disembarkation.

In a field such as the protection of human rights in this critical migration crisis, the assessment of the Italian response is inevitably mixed. Italy has played a pivotal role as a front-runner in rescue strategies and has been responsible for bringing the Mediterranean migration high in the EU agenda.<sup>73</sup>

In October 2013 a unique momentum of political and public pressure towards a new strategy was registered. Following two mass drownings off the coast of Lampedusa amounting to 636 deaths, operation *Mare Nostrum* was launched by Italy on 18 October 2013<sup>74</sup> to rescue migrants in order to prevent other similar disasters in an area spanning from Italian waters up to the beginning of Libyan waters.

A number of State and non-State<sup>75</sup> actors worked together for operation *Mare Nostrum* to be successful. The operation employed both naval and coast guard vessels suitable for SAR missions.<sup>76</sup> The medical crew was in charge that all rescued persons underwent medical examination to determine their health conditions and necessary treatments.<sup>77</sup> In response to the high number of children arriving, an agreement with Save the Children Italy has provided for the presence of Save the Children staff in rescue efforts for information, support, legal counseling and cultural mediation targeting children and teenagers rescued at sea.<sup>78</sup>

<sup>71</sup> On 22 December 2005, the depositary received the following communication from the Ministry of Foreign Affairs of Malta: "[...] the Ministry wished to inform that, after careful consideration of the said amendments, in accordance with article III(2)(f) of this Convention, the Government of Malta, as a Contracting Party to the said Convention, declares that it is not yet in a position to accept these amendments". IMO, 'Status of IMO Treaties. Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions', accessed 1 June 2024.

<sup>72</sup> Malta thus adheres to the practice that all rescued persons within the Malta SAR region should be disembarked in the nearest place of safety as provided for in the pre-amendment legislation. Jiménez García-Carriazo, 'Small Island, Big Issue', *supra* n. 60, at 306.

<sup>73</sup> S. Panebianco, 'The Mare Nostrum Operation and the SAR Approach: the Italian Response to Address the Mediterranean Migration Crisis', *EUMedEA Online Working Paper Series* (2016) at 3.

<sup>74</sup> Enrico Letta was guiding the Italian government at that time, but in February 2014 Matteo Renzi became Prime Minister. Ministero della Difesa, *Mare Nostrum Operation*, accessed 1 June 2024.

<sup>75</sup> Including national authorities, local governments, social organizations, including cultural mediators and, doctors specialized in communicable diseases.

<sup>76</sup> H. Brady, 'Mare Europaeum? Tackling Mediterranean migration', *Brief European Union Institute for Security Studies* (2014) at 2.

<sup>77</sup> Panebianco, *supra* n. 73, at 2.

<sup>78</sup> Save the Children, 'Submission for the Office of the High Commissioner for Human Rights (OHCHR) report on migrants in transit (A/HRC/RES/29/2)' (2015) at 2.

Operation *Mare Nostrum* involved 34 warships and 900 sailors and contributed to the rescue of around 150,000 people.<sup>79</sup> However, this life-saving operation was always subject to criticism. Not only for the financial cost borne entirely by Italy<sup>80</sup> but for the supposed “pull factor” that encouraged more migrants to attempt the risky journey across the Mediterranean.

The operation was presented as a military-humanitarian mission in the Mediterranean targeted at both rescuing migrants and arresting smugglers.<sup>81</sup> The boost in capacity organized by the Italian Navy allowed the system to rescue thousands of people with appropriate and safe procedures. The Italian government wanted to leverage its future presidency of the European Council to get support from all EU Member States by using *Mare Nostrum* as a model for other nations. However, the Italian Navy mission was terminated as a result of Italian authorities’ dissatisfaction with the lack of EU burden sharing.<sup>82</sup>

Despite the goodwill and good intentions underpinning the operation, it soon became politically and economically unsustainable. However, operation *Mare Nostrum* had the merit of breaking the prevailing perception of migration as a security issue, initiating debate on the need for collective responses to the tragedies.<sup>83</sup>

In the years following operation *Mare Nostrum*, the political situation in Italy drastically changed. A campaign to redefine sea rescue as a crime was launched. Among the measures adopted, the closed-ports strategy was extended not only to NGO vessels but also to commercial and military ships that had carried out SAR activities in international waters.<sup>84</sup> Likewise, Italy funded the training of the Libyan coast guards and the establishment of the Libyan SAR region to close the Central Mediterranean route, transferring responsibility to the Libyan forces even in international waters.<sup>85</sup>

<sup>79</sup> Marina Militare Italiana, ‘Mare Nostrum – Riepilogo Attività’, accessed 3 October 2024; A. Patalano, ‘Nightmare Nostrum? Not Quite: Lessons from the Italian Navy in the Mediterranean Migrant Crisis’, 160(3) *RUSI Journal* (2015) at 14–19 [doi: <https://doi.org/10.1080/03071847.2015.1061253>].

<sup>80</sup> F. Trauner, ‘Asylum Policy: the EU’s ‘Crises’ and the Looming Policy Regime Failure’, 38 *Journal of European Integration* (2016) 311–325 [doi: <https://doi.org/10.1080/07036337.2016.1140756>]; G. Falkner, *EU Policies in Times of Crisis* (Routledge, New York, 2018) at 318.

<sup>81</sup> P. Musarò, ‘Mare Nostrum: the Visual Politics of a Military-Humanitarian Operation in the Mediterranean Sea’, 39(1) *Media, Culture & Society* (2017) 11–28, at 11 [doi: <https://doi.org/10.1177/0163443716672296>].

<sup>82</sup> E. Cusumano, ‘Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control’, 54(1) *Cooperation and Conflict* (2019) 3–24, at 9 [doi: <https://doi.org/10.1177/0010836718780175>].

<sup>83</sup> The situation in the Central Mediterranean is unique, although parallels with other responses might be found in critical moments. In the weeks after Russia’s full-scale invasion of Ukraine in February 2022, Poland immediately opened its borders and became the primary recipient of Ukrainian refugees. K. Golebiowska, M. Pachocka, S. Kubiciel-Lodzińska, ‘Poland has opened its arms to nearly 1 million Ukrainian refugees, but will they be able to stay for the long term?’, *The Conversation*, published on 27 February 2024, accessed 3 October 2024.

<sup>84</sup> Simone Marinai, ‘The Control of Migration Flows in the Central Mediterranean Sea: Insights from Recent Italian Practice’, 9 *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* (2021), at 3 [doi: [https://doi.org/10.25267/Paix\\_secur\\_int.2021.19.1701](https://doi.org/10.25267/Paix_secur_int.2021.19.1701)].

<sup>85</sup> Arci, ‘How Italy and Europe Funded the Libyan Coast Guards: 10 Years of Human Rights Violations’, accessed 1 June 2024.

## (2) EU Reactions to the Phenomenon

After the end of operation *Mare Nostrum*, European governments accepted the sharing of responsibility for patrolling the southern European border along the Italian and Maltese coasts. Under the coordination of Frontex,<sup>86</sup> joint operation *Triton* took over on 1 November 2014. The primary focus of operation *Triton* was “to control irregular migration flows towards the territory of the Member State of the EU and to tackle cross border crime”<sup>87</sup> in a 30 nautical miles stretch of water off the coasts of Italy and Malta.

Operation *Triton* was firmly criticized for being primarily an operation to intercept and block migrant vessels.<sup>88</sup> It was never endowed with the mandate and assets required to replace *Mare Nostrum* nor was it designed as a SAR mission.<sup>89</sup> As the European Commission confirmed, “Frontex is neither a search and rescue body nor does it take up the functions of a Rescue Coordination Centre, it assists Member States to fulfil their obligation under international maritime law to render assistance to persons in distress”.<sup>90</sup>

Sea rescues were thus relegated to only what was routinely demanded by maritime obligations.<sup>91</sup> How should one understand the shift from a protection-centered approach in operation *Mare Nostrum* to a security-based strategy in operation *Triton*? As Jumbert suggests, the shift to *Triton* must be regarded as a response to Italy’s call for assistance, as well as a reaction to the perception that *Mare Nostrum* served as a pull factor for migration.<sup>92</sup> It confirms long-held beliefs that border patrol has a deterrent effect on migrants.<sup>93</sup>

<sup>86</sup> F. Esteve García, ‘The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders’, 5 *Peace & Security – Paix et Sécurité Internationales* (Euroediterranean Journal of international Law and International Relations (2017), at 93–116 [doi: [https://doi.org/10.25267/paix\\_secur\\_intl.2017.i5.04](https://doi.org/10.25267/paix_secur_intl.2017.i5.04)].

<sup>87</sup> European Commission, ‘Frontex Joint Operation ‘Triton’ – Concerted Efforts for managing migratory flows in the Central Mediterranean’, Memo 31 October 2014, accessed 3 October 2024; Frontex, ‘Joint Operation Triton 2014’, accessed 1 June 2024; Frontex, ‘Operational Plan: EPN CONCEPT Joint Operation EPN Triton’ 2014/SBS/09; F. Esteve García, ‘El rescate como nueva función europea en la vigilancia del Mediterráneo’, 111 *Revista CIDOB d’afers internacionals* (2015), at 167.

<sup>88</sup> It has been described as a “renewed strategy of not letting people arrive”. M. Tazzioli, ‘Border Displacements. Challenging the Politics of Rescue between Mare Nostrum and Triton’, 4(1) *Migration Studies* (2016), 1–19, at 7 [doi: <https://doi.org/10.1093/migration/mnv042>].

<sup>89</sup> One should not forget that SAR is not a competence granted by the treaties to the EU, which prevents the adoption of adequate regulation in this regard. The poor regulation regarding maritime rescue in the EU is strictly linked to border control, where the EU does have powers. See the incidental protection awarded by Articles 9 and 10 of the Regulation (EU) 656/2014, of the European Parliament and of the Council of 15 May 2014 OJ L 189, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU.

<sup>90</sup> European Commission, *supra* n. 87.

<sup>91</sup> J. Arsenijevic, M. Manzi, R. Zachariah, ‘Defending Humanity at Sea: Are Dedicated and Proactive Search and Rescue Operations at Sea a “Pull-factor” for Migration and Do They Deteriorate Maritime Safety in the Central Mediterranean?’, *Médecins sans Frontières Report* (2017) at 5.

<sup>92</sup> M. G. Jumbert, ‘Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea’, 42(4) *Disasters* (2018) 674–696, at 688 [doi: <https://doi.org/10.1111/disa.12286>].

<sup>93</sup> *Ibid.*

In April 2015, moved by a terrible incident in which several hundreds of migrants lost their lives,<sup>94</sup> Frontex expanded the area to 138 nautical miles south of Sicily.<sup>95</sup> Despite the upgrade, the then Frontex's Executive Director stated that saving migrants' lives in the Mediterranean should not be the priority for the maritime patrols because "[t]his is not in Frontex's mandate, and this is in my understanding not in the mandate of the European Union".<sup>96</sup>

The Council of the EU acknowledged that operation *Triton* was not enough and established a military crisis management, operation EUNAVFOR MED *Sophia*,<sup>97</sup> which was implemented simultaneously<sup>98</sup> with the purpose of contributing to the disruption of the business model of human smuggling and trafficking networks in the south-central Mediterranean.

Operation *Sophia* brought to the picture a military response to a civilian crisis. The EU decided on a naval operation despite the humanitarian nature of the challenge. This appears even more striking in light of the harsh criticism that militarized naval interventions and restrictive border policies in the Mediterranean have drawn.<sup>99</sup>

The main objective of operation *Sophia* was to disrupt the business model of the human smugglers as a root cause. Rescuing people in distress at sea was not a stated objective of the mission.<sup>100</sup> Although it incidentally<sup>101</sup> contributed to several SAR operations, *Sophia* was restricted by its very nature. As the British House of Lords criticized, operation *Sophia* "responds to symptoms, not causes".<sup>102</sup> However, it is notable and praiseworthy that the mission saved thousands of people.<sup>103</sup>

<sup>94</sup> On 18 April 2015, a boat carrying around 800 migrant people capsized and sank off the coast of Libya. That was the largest single loss of life in the Mediterranean in decades. A. Bonomolo, S. Krichgaessner, 'UN says 800 migrants dead in boat disaster as Italy launches rescue of two more vessels', *The Guardian*, published on 20 April 2015, accessed 3 October 2024.

<sup>95</sup> Conclusions of the Joint Council of Justice and Home Affairs and Foreign Affairs, 20 April 2015; Frontex, 'Frontex expands its Joint Operation Triton', accessed 1 June 2024.

<sup>96</sup> P. Kingsley, I. Traynor, 'EU Borders Chief Says Saving Migrants' Lives "Shouldn't be Priority" for Patrols', *The Guardian*, published on 22 April 2015, accessed 1 June 2024; See, V. Moreno-Lax, J. Allsopp, E. Tsurudi, P. De Bruycker, 'The EU Approach on Migration in the Mediterranean', Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (2021), at 76.

<sup>97</sup> Council Decision (CSFP) 2015/778, of the Council of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122/31.

<sup>98</sup> N. Magugliani, 'From Mare Nostrum to Operation Themis: Losing track of protection in the Mediterranean?', *On Law, Rights, and Politics*, published on 2 February 2018, accessed 1 June 2024.

<sup>99</sup> R. Boşilca, M. Stenberg, M. Riddervold, 'Copying in EU Security and Defense Policies: the Case of EUNAVFOR MED Operation Sophia, European Security', *European Security* (2020), 218-236, at 218-219 [doi: <https://doi.org/10.1080/09662839.2020.1845657>]; V. Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: the 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm', 56(1) *Journal of Common Market Studies* (2018) 119-140 [doi: <https://doi.org/10.1111/jcms.12651>].

<sup>100</sup> While it is true that Recital (6) of the Council Decision stipulates that the operation shall be conducted in accordance with international law and, in particular, with the relevant provisions of UNCLOS, SOLAS, and SAR Convention, which include the obligation to assist persons in distress at sea.

<sup>101</sup> G. Bevilacqua, 'Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities', in G. Andreone (ed.) *The Future of the Law of the Sea. Bridging Gaps Between National, Individual and Common Interests* (Springer, New York, 2017) 165-190, at 186.

<sup>102</sup> House of Lords, EU Committee, 'Operation Sophia, the EU's Naval Mission in the Mediterranean: an Impossible Challenge', 14th Report of Session 2015-16, *HL Paper* 144, at 3.

<sup>103</sup> During the operation 44,916 persons were rescued. European Council, 'Infographic – Lives saved in EU Mediterranean operations (2015-2023)', accessed 1 June 2024.

The tensions regarding the distribution of migrants arriving at EU shores led to the termination of operation *Sophia* in 2020. It was progressively dismantled from March 2019, when the Council extended the operation's mandate but without naval assets.<sup>104</sup> This political decision stripped *Sophia* of her capabilities in the Mediterranean (preventing SAR operations thus), and further strengthened the securitization of migration, with Member States hiding behind a smokescreen.<sup>105</sup>

Operations *Triton* and *Sophia* were succeeded by the ongoing operations *Themis* and *Irini*, respectively. Operation *Themis* responds to EU member States politics of SAR disengagement.<sup>106</sup> It has taken a different mandate from its predecessor, with a stronger focus on law enforcement and border security and a reduction in the distance of patrolling.<sup>107</sup>

In this mission, disembarkation points are identified on a 'case-by-case' basis but at the closest port instead of only Italian ports, which was the case under *Triton*'s operational plan.<sup>108</sup> As a consequence, the Maltese government refused to take part in operation *Themis* in the absence of a clear rule foreseeing the disembarkation in Italian ports of people rescued in the Maltese SAR zone. The overall result for Frontex has been a gradual shift away from SAR in the Central Mediterranean.<sup>109</sup>

<sup>104</sup> While air surveillance capabilities would be strengthened instead. European Parliament, 'European Union Naval Force – Mediterranean Operation Sophia', Legislative Train Schedule, 20 November 2019, accessed 3 October 2024; Council of the EU, 'EUNAVFOR MED Operation Sophia: mandate extended until 31 March 2020', press release, published on 26 September 2019, accessed 3 October 2024.

<sup>105</sup> G. Mantini, 'A EU Naval Mission Without a Navy: The Paradox of Operation Sophia', *Istituto Affari Internazionali Commentaries* (2019) at 2-3; S. Yuksel, 'Operation Sophia – Past, Present and Future', *Beyond the Horizon*, published on 18 April 2019, accessed 1 June 2024.

<sup>106</sup> Frontex, 'Operational Plan: JO Themis 2019'; S. Carrera, R. Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean. Sailing Away from Responsibility?', *CEPS Paper in Liberty and Security in Europe*, No. 2019-10 (2019), at 7.

<sup>107</sup> Whereas *Triton*'s operational area was 30 miles from the Italian coast, *Themis* operates only 24 miles from the Italian coast and does not cover Maltese SAR area any longer. *Ibid.*

<sup>108</sup> News regarding a "secret deal" between Italy and Malta was circulating in European media when Matteo Renzi was in power in Italy. An alleged secret deal where Malta was supposed to have given up oil exploration areas in return for Italy taking in most rescued migrants in the Mediterranean came to light following a parliamentary question asked by an Italian Member of the European Parliament Elisabetta Gardini. The European Commission responded that it was not aware of such a deal, nor was it of any 'inactivity' by the Armed Forces of Malta in terms of responding to SAR duties: "The Commission is not aware of any bilateral agreement between the Maltese and Italian authorities concerning Search and Rescue (SAR) operations in the Mediterranean Sea. However, the Commission notes that the operational area of Joint Operation (JO) *Triton* hosted by Italy, also with the participation of the Maltese assets, covers a large part of the Maltese SAR area defined in accordance with the 1979 International Convention on Maritime Search and Rescue. The disembarkation rules for migrants intercepted/rescued during the OJ *Triton* are set out in the Operational Plan agreed by Frontex, Italy as a host Member State and the other participating Member States in accordance with Article 3a (1)(i) of the Frontex Regulation. The participating units are authorized by Italy to disembark in principle in its territory all persons intercepted in its territorial sea as well as in the entire operational area. It should also be noted that most of the SAR cases occur outside of the pre-defined operational area, largely within the Libyan SAR area". I. Sammut, 'A Tug of War of between Rights and Obligations: the Case of Migration from Malta's Perspective', in F. Ippolito, G. Borzoni, F. Casolari, *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (Edward Elgar Publishing, Cheltenham, Northampton, 2020) 48-65, at 60.

<sup>109</sup> M. Laux, 'The evolution of the EU's naval operations in the Central Mediterranean: A gradual shift away from search and rescue', *Heinrich-Böll-Stiftung*, published on 16 April 2021, accessed 1 June 2024.

This approach is particularly reflected in the EUNAVFOR Med operation *Irini*,<sup>110</sup> which aims to oversee the UN arms embargo for Libya. SAR is not even among the secondary tasks defined for the mission. This emphasizes the swing in the operations conducted by the EU. While all operations aimed at securing the EU's external borders (with different levels of human security), *Irini* is the first mission strategically conducted in an area where there is no migration route to circumvent the rescuing of people at sea.<sup>111</sup>

Apart from the operations deployed by the EU in the Mediterranean, soft law instruments have been adopted at EU level.<sup>112</sup> In November 2022, the European Commission presented the EU Action Plan on the Central Mediterranean.<sup>113</sup> The Plan proposes 20 measures aimed at reducing irregular and unsafe migration and insists on solidarity balanced against responsibility between member States. Although Recital 3 of the Action Plan states that SAR capacities will be reinforced “in full respect of fundamental rights and international obligations”, reports on attempted sea border crossings as well as migrants who died or went missing are not included. It seems that the Commission fails again to acknowledge the ongoing suffering that this structural situation causes to migrants as well as the increased risk that they confront while crossing.<sup>114</sup> Already criticized for being unworkable and recycling old mistakes,<sup>115</sup> the Plan alone will not provide a structural solution to the challenges in the Mediterranean.

On 14 May 2024, the Council adopted the EU's pact on migration and asylum.<sup>116</sup> The history of the Pact goes back to the autumn of 2020, when the Commission, following lengthy consultations, put forward a new set of regulations aimed at improving the EU's asylum system.<sup>117</sup> The Pact reflects the EU's attempt to learn from previous crises and better prepare for upcoming ones. It is comprised of ten legislative files intended to work as a system and marks a significant effort to establish a more cohesive, effective, and humane response to migration.<sup>118</sup> Member States have two years to implement the laws with the help of an implementation plan being prepared by the Commission.

<sup>110</sup> Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) ST/6414/2020/INIT, OJ L 101.

<sup>111</sup> Laux, *supra* n. 109.

<sup>112</sup> See the Malta Declaration above.

<sup>113</sup> European Commission, ‘EU Action Plan for the Central Mediterranean’, accessed 1 June 2024.

<sup>114</sup> E. Frasca, F. L. Gatta, ‘The EU Action Plan for the Central Mediterranean: Everybody knows that the boat is leaking’, *EU Immigration and Asylum Law and Policy*, published on 15 February 2023, accessed 1 June 2024.

<sup>115</sup> European Council on Refugees and Exiles (ECRE), ‘Mediterranean: Commission's Action Plan on the Central Med Endorsed by EU Interior Ministers Amid Critiques Over Recycling Old Mistakes, High-Profile EU Politicians Accused of Committing “Crimes Against Humanity” Over Cooperation with EU-Funded Libyan Coa’, published on 2 December 2022, accessed 1 June 2024.

<sup>116</sup> European Commission, Migration and Home Affairs, ‘Pact on Migration and Asylum’ published on 21 May 2024, accessed 1 October 2024; European Council, Council of the EU (Press Release), ‘The Council adopts the EU's pact on migration and asylum’, published on 14 May 2024, accessed 1 October 2024.

<sup>117</sup> C. González Enríquez, ‘The EU Pact on Migration and Asylum: context, challenges and limitations’, ARI 67/2024, Real Instituto Elcano, published on 14 May 2024, accessed 1 October 2024.

<sup>118</sup> P. Vella de Fremeaux, F. Attard, ‘Navigating the Human Rights Trajectory of the EU Migration and Asylum Pact in Search and Rescue Operations (Part One)’, *Opinio Juris*, published on 16 September 2024, accessed 2 October 2024.

### (3) Criminalizations of NGOs

NGOs have been running SAR operations in order to fill a gap in humanitarian protection in the Mediterranean. These missions have been accused of being a “pull factor” for migrants to attempt dangerous sea journeys. These perceptions have put NGOs at risk of persecution by public authorities.<sup>119</sup> Whereas the legal framework of their SAR activities is beyond the scope of this paper,<sup>120</sup> the “criminalization” of NGOs can be embedded in the political reaction to migration in the Mediterranean Sea.

As stated above, the successive missions deployed dwindling resources for operating without a rescue mandate. When the focus shifted from SAR to border control, civil society organizations attempted to step in and fill the gap. Their early presence was welcomed, as they relieved EU assets of part of the burden of rescuing missions,<sup>121</sup> and their cooperation with Italian and Maltese authorities run smoothly for a period of time.<sup>122</sup>

However, in 2017, Italy and Malta started to place limitations on the freedom of movement at sea upon rescue volunteers.<sup>123</sup> Following the signature of the MoU between Italy and Libya in February 2017,<sup>124</sup> and the adoption of the Code of conduct for NGOs involved in migrants’ rescue operations at sea in July 2017,<sup>125</sup> the situation grew more complicated.<sup>126</sup>

During the COVID-19 pandemic, SAR operations in the central Mediterranean were significantly affected by policy responses. In some instances, Italy and Malta denied a safe port to NGO vessels for the disembarkation and imposed restrictions on their operations on the grounds of public health.<sup>127</sup> On top of all this, in January 2023, Italy adopted a decree on urgent provisions for the management of migratory flows, which

<sup>119</sup> E. Cusumano, M. Villa, ‘Sea rescue NGOs: a Pull Factor of Irregular Migration?’, 22 *European University Institute, Robert Schuman Centre, Policy Brief* (2019) 1-10.

<sup>120</sup> In particular, the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17-18.

<sup>121</sup> See E. Cusumano, ‘Emptying the Sea With a Spoon? Non-governmental Providers of Migrants Search and Rescue in the Mediterranean’, 75 *Marine Policy* (2017) 91-98 [doi: <https://doi.org/10.1016/j.marpol.2016.10.008>].

<sup>122</sup> V. Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment’, *EU Immigration and Asylum Law and Policy*, published on 3 February 2021, accessed 1 June 2024.

<sup>123</sup> I. Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’, 21 *German Law Journal* (2020), 598-619, at 608 [doi: <https://doi.org/10.1017/glj.2020.30>].

<sup>124</sup> Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, signed in Rome on 2 February 2017.

<sup>125</sup> Italian Code of Conduct for NGOs Undertaking Activities in Migrants’ Rescue Operations at Sea. The Code of Conduct prohibits NGOs from entering Libyan territorial waters, envisages the presence of police officers aboard NGO vessels, bans NGOs to communicate with smugglers, forbids NGOs to switch off their transponders, and obliges them not to obstruct the Libyan coast guard.

<sup>126</sup> Former Italian Interior Minister Matteo Salvini is currently facing kidnapping and negligence charges over refusing to let Open Arms disembark in Italy in August 2019.

<sup>127</sup> OHCHR, ‘Lethal Disregard’, *supra* n. 7, at 3; Jiménez García-Carriazo, ‘La ruta migratoria’, *supra* n. 21, at 162.

makes SAR operations run by NGOs even more difficult.<sup>128</sup> The decree, passed into law in February,<sup>129</sup> orders NGOs vessels to request a port and sail to it<sup>130</sup> without delay after a rescue, even in the face of other boats in distress.

The final stage of this criminalization drive has been the prosecution of NGOs on the basis of accusations of breaching national legislation or instructions on disembarkation.<sup>131</sup> Since 2018, national authorities began administrative and criminal proceedings against crew members or vessels.

The EU Agency for Fundamental Rights (FRA) collects data on the operations of the NGOs.<sup>132</sup> This includes any legal proceedings against them, as well as on any difficulties in disembarking migrants in safe ports. The most recent figures make extremely disturbing reading: due to ongoing criminal and administrative proceedings, vessel seizures, and mandatory maintenance work, some assets are blocked at ports and cannot carry out SAR operations. In 2024, out of 20 assets, twelve were operational.<sup>133</sup>

Despite the EU efforts to affirm the legality of NGO-led SAR operations through the Commission Guidance on the facilitation Directive,<sup>134</sup> it seems that the Guidance has not gone far enough in ending their criminalisation.<sup>135</sup>

<sup>128</sup> Decree Law No. 1, of 2 January 2023, on urgent provisions for the management of migratory flows. The decree significantly increases the requirements on vessels carrying out rescue missions to enter or transit through Italian territory, including but not limited to, taking prompt initiatives to inform the persons taken on board of the possibility of requesting international protection, and requesting, immediately after the rescue, the assignment of a port of disembarkation, to which the vessel must proceed without delay. The new requirements increase the risks associated with carrying out SAR missions in respect of fines, detention, and confiscation of vessels. Council of Europe, 'Opinion on the compatibility with European standards of Italian Decree Law No. 1 of 2 January 2023 on the management of migratory flows', *Expert Council on NGO Law*, published on 30 January, 2023, accessed 1 June 2024. See S. Carrera, D. Colombi and R. Cortinovis, 'Policing Search and Rescue NGOs in the Mediterranean: Does Justice End at Sea?', *CEPS in-Depth Analysis*, published on 4 February 2023, accessed 1 June 2024, at 9-10.

<sup>129</sup> Amended by Law No. 15 of 24 February 2023.

<sup>130</sup> The assignment of distant ports for disembarkation of survivors has also been criticized as it keeps rescue ships away for days from the SAR area in the central Mediterranean where most distress cases occur. Moreover, the denial of disembarkation at the closest place of safety prolongs the suffering of those saved and delays the provision of adequate assistance to meet their basic needs. Frasca and Gatta, *supra* n. 114.

<sup>131</sup> See inter alia M. Gionco, 'Criminalisation of Solidarity is a Political Act', *Stories of Hope in Dark Times. Migrants' Rights Defenders*, accessed 1 June 2024; J. Coppens, 'Interception of Migrant Boats at Sea', in V. Moreno-Lax, E. Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill, Leiden, 2016) at 203; S. Carrera *et al.*, 'Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants', *Study for the European Parliament 2018 Update* (2018); D. Ghezlhash *et al.*, 'Securitization of Search and Rescue at Sea', 67 *International & Comparative Law Quarterly* 315 (2018) 347-349 [doi: <https://doi.org/10.1017/S0020589317000562>].

<sup>132</sup> FRA, 'June 2024 Update Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', published on 1 July 2024, accessed 3 October 2024.

<sup>133</sup> Eight of the deployed vessels were under maintenance and not currently operational (*Aita Mari*, *Louise Michel*, *Open Arms*, *Astral*, *ResQ People*, *Imara*, *Mare Jonio*, and *Sea Punk*). The remaining vessels and reconnaissance aircraft carried out monitoring activities.

<sup>134</sup> Communication from the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01, C/2020/6470, OJ C 323, 01/10/2020, p. 1 6.

<sup>135</sup> M. Wu, 'The EC's Guidance on the Facilitation Directive Ending the Criminalisation of NGO-led SAR Operations?', published on 30 October 2020, accessed 3 October 2024.

These facts demonstrate how the main defenders of the human dimension at sea were degraded. NGOs are losing their verve overwhelmed by red tape and procedures. The accusation of being a magnet to migrants has triggered a process of delegitimization of rescuing operations run by NGOs that has translated into decreasing funding, additional limitations, and growing risks of criminalization for civil society's missions offshore Libya.<sup>136</sup>

## (E) CONCLUSIONS

The past decade has been marked by actions, namely, security-based and military crisis management operations, resulting from the immense international pressure on the EU to take responsibility to tackle migratory flows at its doors and to prevent further tragedies through (incidental) SAR operations.

Although there is a legal framework which enshrines the duty to render assistance at sea as a rule of international law, its implementation has not always been smooth. SOLAS Convention and SAR Convention have been subject to several amendments aimed at protecting the human rights of migrants at sea and ensuring crime prevention in SAR operations. Furthermore, IMO has adopted guidelines and other soft law instruments, which, although non-binding, clarify further the obligations of States and shipmasters. Nonetheless, SAR and disembarkation activities of EU Member States are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea.

The EU's response has advanced in fits and starts. As a reaction to the humanitarian disasters, the speed of the launch of the operation was unprecedented in EU standards. However, the intensity of the action has not always matched the severity of the tragedies. Although the role of national courts and tribunals may be commended in multiple occasions,<sup>137</sup> the different interests and approaches of EU member States towards migration revealed a serious lack of cohesion and division of responsibilities.

What is happening to migrants along the central Mediterranean route is the result of a failed system of migration governance, one that fails to place the human rights of migrants at the center and for too long has been marked by a lack of solidarity.

One may say that the EU's decision to act in response to the migration crisis was driven, among other facts, by the humanitarian crisis unfolding at its borders, but it is also the result of a security imperative of border protection. Italy tried to secure its security and humanitarian policy goals through solitary action. During operation *Mare Nostrum*, Italy, with a proactive attitude, took up rescue missions beyond its SAR zone.

<sup>136</sup> Cusumano, 'Migrant', *supra* n. 82, at 12.

<sup>137</sup> See, among other cases: ECRE, 'Rome Court Orders Humanitarian Visas for Two Afghans Within Ten Days, Ocean Viking Blocked in Italy, Case Submitted to ICC over Malta and Italy's Complicity in Crimes in Libya', published on 21 January 2022, accessed 1 June 2024; ECRE, 'Court Ends Blockade of Rescue Vessel, Italy Releases 'Open Arms', Italy's Crackdown on People Saving Lives at Sea Condemned by UN, Unimaginable Horrors in Libya', published on 9 October 2020, accessed 1 June 2024; ECRE, 'Disembarkations in Italy, Rescues by Malta, Court release NGO Vessel', published on 7 February 2020, accessed 1 June 2024.

According to international law, Italy undoubtedly had the right to initiate a rescue effort at sea, and consequently, the duty to assist arose, even beyond Italy's maritime space. When the operation came to an end, the EU (through Frontex) deployed the much more limited operation *Triton*, which was eventually superseded by operation *Themis*.

The launch of the naval operation EUNAVFOR MED *Sophia* exacerbated the situation. The framing of operation *Sophia* was unexpected given the harsh criticism that militarized maritime interventions in the Mediterranean have drawn, which more often than not have aggravated both the security and the humanitarian situation.

In spite of the above, both Frontex and EUNAVFOR MED activities unintentionally evolved into rescue operations. However, in light of the rising incidence of maritime fatalities, instead of institutionalizing the SAR component within the scope of these missions, search operations and rescue coordination were not included as part of the mandate of operation *Irini*.

Does the human dimension inspire the migration policies which govern the Mediterranean Sea? The perception of migration as a threat to security has put security at the heart of the EU's approach to migration. However, it cannot be denied that over the years, the EU has deployed operational efforts in the Mediterranean. This has been a welcome response to the immediate humanitarian imperative to save lives. The human dimension has very subtly permeated the security approach. However, the EU disregards the root of the problem as it focuses on trying to prevent or discourage people attempting to make the dangerous crossing instead of understanding the reasons that lead people to attempt perilous journeys. Again, the EU responds to symptoms, not causes.

The securitisation approach does not seem to dwindle. Migration policies developed for the Euro-Mediterranean region must demonstrate greater willingness and cooperation between all actors involved. One-sided initiatives that distort the EU's image and foster mistrust in the relationship should be avoided. While border security cooperation is essential, it should only be one component of a larger, multifaceted approach that places the treatment of human beings at the centre of migration-related issues.

Only time will tell how successful the Pact or any new instrument is in defending the human dimension and enforcing solidarity. In any case, the EU has to understand that the same person who migrates, once at sea may become a shipwrecked person to be rescued. Framing the same person as in need of rescue and as a security risk prevents the EU from adopting a comprehensive regime in which SAR is a fundamental component and not merely relegated into the law-enforcement response to combat human smuggling at sea.