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ASYLUM

Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing away from responsibility

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ReSOMA identifies the most pressing topics and needs relating to the migration, asylum and integration debate. Building on the identification of pivotal policy topics, the **ReSOMA Policy Briefs** provide an overview of available evidence and new analysis of the policy alternatives. They take stock of existing literature on policy solutions for asylum, migration and integration. The analysis of existing research has been conducted under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG).

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Policy Option Brief

Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing away from responsibility?*

1. INTRODUCTION

Search and Rescue (SAR) and disembarkation of persons in distress at sea in the Mediterranean continue to fuel divisions among some EU member states. The 'closed ports' policy declared by the Italian ministry of interior in June 2018, and the ensuing refusal to let non-governmental organisation (NGO) ships conducting SAR operations enter Italian ports, triggered new diplomatic confrontations between the Italian government and other EU governments regarding which state should assume responsibility for accepting disembarkation of people rescued at sea.[1]

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

Some of the proposals discussed during the second half of 2018, such as 'regional disembarkation platforms', which aim at shifting responsibilities for the disembarkation of rescued persons to North African countries, are both practically and legally unfeasible (Carrera et al., 2018). The European Commission also acknowledged that disembarkation platforms would be contrary to EU principles and 'values' laid down in the Treaties and member states' constitutional and human rights traditions (European Commission, 2018a).

From the summer of 2018 onwards, cases of disembarkation following SAR operations

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

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

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

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

Neither national governments, nor the European institutions and agencies are free to 'cherry pick' from their rule of law and human rights responsibilities enshrined in national constitutions, EU Treaties and secondary law, which apply to all individuals, including those found in distress at sea and seeking international protection in the EU. The direct and indirect action and/or inaction of those actors are captured by the concept of *portable justice*, according to which responsibilities and potential liabilities follow not only wherever they exercise *de facto* or *de jure* control and decisive influence over individuals, but also

when their practices fall within the scope of EU law and financial instruments (Carrera et al. 2018).

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

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

2. A PERSISTENT SAR GAP IN THE CENTRAL MEDITERRANEAN

On Sunday 10 June 2018, the *Aquarius* ship, operated by Doctors without Borders (MSF) and the German NGO SOS Méditerranée, was heading North after having rescued 629 migrants in the course of six different SAR operations coordinated by the Italian Maritime Rescue Coordination Centre (MRCC) in international waters off the Libyan coast. The boat was halted on instruction from the Italian authorities when it was located at 35 nautical miles from Italy and 27 nautical miles from Malta (SOS Méditerranée, 2018). The Italian government refused the *Aquarius* access to Italy's territorial waters, arguing that Malta should take responsibility for disembarking the migrants on board the vessel. The Maltese authorities denounced the Italian government's stance as a manifest violation of international law and refused authorisation to dock in the port of La Valletta. This disagreement led to a diplomatic standstill and a consequent operational impasse that impeded the swift disembarkation of rescued people in a place of safety. Eventually, the dispute over the fate of the *Aquarius* was broken by the decision of the Spanish government to allow disembarkation of the migrants on board in the port of Valencia.[2]

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

Since the *Aquarius* incident, a number of other cases of SAR operations conducted by NGOs have produced similar situations of delayed disembarkation and have forced rescued individuals to a prolonged period at sea in precarious and unsafe conditions (ECRE, 2019a), as well as additional cases of prosecutions of involved NGOs (FRA, 2019). In January 2019, the NGO vessel *Sea Watch 3* carrying 47 people was permitted to dock at the port of Catania in Italy, after spending two weeks at sea, only when an agreement involv-

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

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

ing relocation in a group of member states could be agreed.[4] Soon afterwards, the Italian authorities refused to allow disembarkation from the NGO ship *Mare Jonio*, belonging to the Italian citizen-financed initiative 'Mediterranea – Saving Humans', after it had saved 49 people in international waters.[5] In addition, over the last two years, reports have drawn attention to several episodes of aggression and acts of hostility by the Libyan Coast Guard authorities towards NGOs intervening in rescue operations within the Libyan SAR zone (Cuttitta, 2018).

EU member state politics of SAR disengagement have also included a tactical choice to reduce the new mandate and operational area of the Frontex Joint Operation Themis in the Central Mediterranean, which was launched in January 2018 to replace the previous Operation Triton (initiated in 2014). A key change in the scope of the Themis operation was reducing even further its operational area to the Italian SAR zone and, in contrast to the Triton operation, not covering the Maltese SAR area any longer.[6] The Maltese government refused to take part in Themis Joint Operation in the absence of a clear rule foreseeing the disembarkation in Italian ports of people rescued in the Maltese SAR zone, which was the case under Triton's operational plan based on a bilateral deal between Italy and Malta. [7]

Divisions between member states on disembarkation have also led to a downgrading of the Common Security and Defence Policy (CSDP) operation EUNAVFOR-MED Sophia, launched in 2015 with the main goal to disrupting "criminal networks of smugglers and traffickers in the Southern Central Mediterranean". The overall rationale and effectiveness of the operation has been fundamentally questioned, including its negative contribution to the militarisation of maritime surveillance and the side effect of making trips more perilous as a result of its policy of destroying and confiscating boats (Carrera, 2018).[8] While SAR was not formally included in the mandate of the mission, since its inception in 2015, the operation is reported to have rescued around 49,000 migrants.[9]

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

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

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

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

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

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

At the end of 2018, the continuation of Operation Sophia became another source of contention between participating member states after a request by the Italian government to revise the mandate of the mission, and specifically the rule according to which all asylum seekers rescued in the framework of the mission should be disembarked in Italian ports.[10] Due to the impossibility to reach an agreement on a new disembarkation arrangement, in March 2019, participating states decided to prolong the mission for a further six months but without deploying naval ships (to avoid involvement in SAR operations), focusing instead on air patrols and training of the Libyan Coast Guard (EEAS, 2019).

The stepping up of the Libyan Coast Guard in SAR operations constituted another important piece of the puzzle (UNHCR, 2019a). This development is directly related to the choice of the Italian government to progressively cede control to Libyan forces over SAR operations outside Libyan territorial waters. Italy had assumed de facto SAR responsibilities over this area since 2013, when it began its humanitarian naval operation, Mare Nostrum. Libyan authorities submitted a declaration on a Libyan Search and Rescue Region (SRR) in December 2017, which was then officially validated by the International Maritime Organisation (IMO) in June 2018[11]. The Libyan move was made possible by the operational and financial support provided to the Libyan authorities by the EU and Italian authorities (*see section 3.2*). According to UNHCR, during the second half of 2018, 85% of individuals rescued or intercepted in the newly established Libyan SAR region were disembarked in Libya, where they faced inhuman and degrading treatment in Libyan detention centres (UNHCR, 2019a).

The politics of criminalisation of NGOs and disengagement from SAR operations have contributed to making migrant journeys across the Mediterranean even more dangerous than in the past. According to UNHCR, an estimated 1,311 migrants lost their lives along the Central Mediterranean route connecting Libya to Italy during 2018. While the total number of deaths along this route more than halved in 2018 compared to 2017, the rate of deaths per number of people attempting the journey increased sharply. In particular, the rate went from one death for every 38 arrivals in 2017 to one for every 14 arrivals in 2018, and to one death for every 3 arrivals in the first four months of 2019 (UNHCR, 2019a, 2019b).[12]

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

[11] See Parliamentary questions. Answer given by Mr Avramopoulos on behalf of the European Commission. Question reference: P-003665/2018, 4 September 2018. Retrievable from http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html; Euronews, 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants', 7 August 2018. Retrievable from: https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants

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

3. SEARCH AND RESCUE AT SEA: INTERNATIONAL AND EU LEGAL STANDARDS

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

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

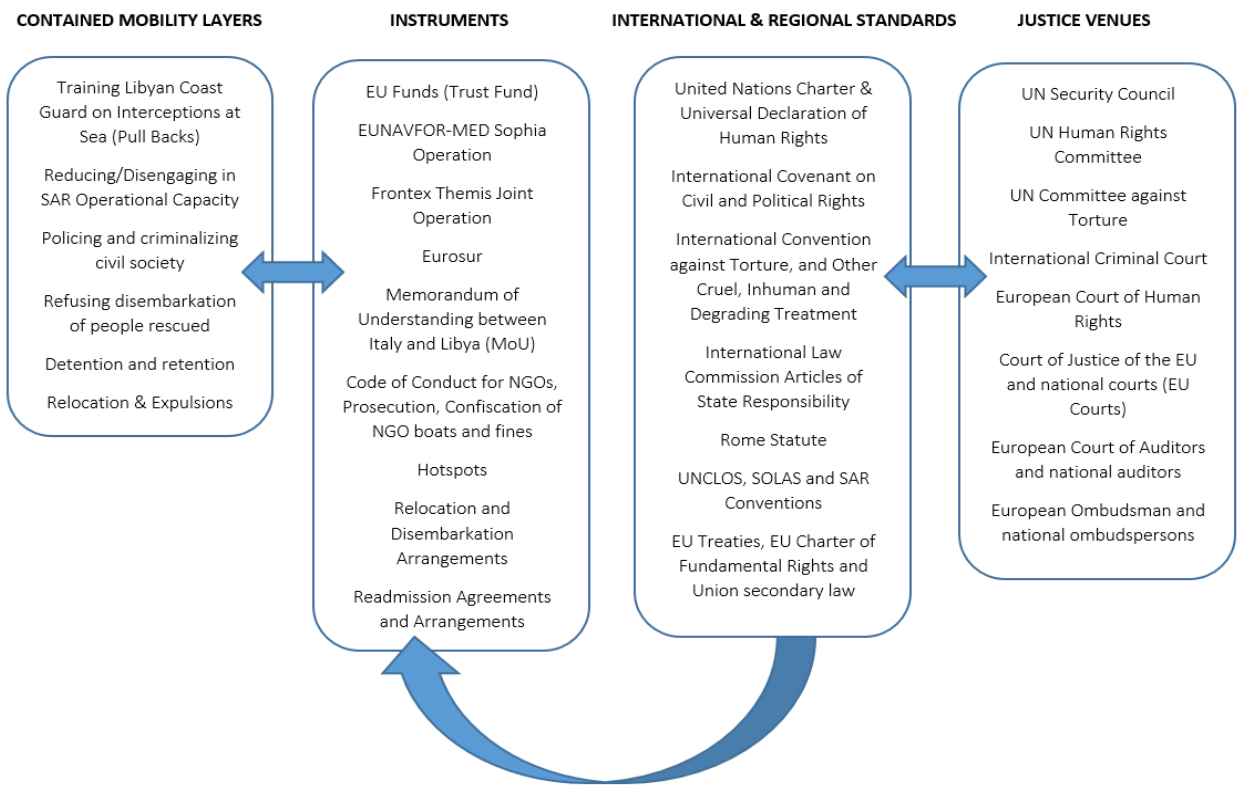
Figure 1 also identifies the set of legal, political and financial instruments used to implement the various contained mobility layers, which are of financial, political, legal and operational nature, and which have increasingly been designed as extra-EU Treaties. The two last fields of the figure lay down the main international, regional and EU legal instruments, as well as a selection of monitoring, judicial and administrative actors acting as 'justice venues' with a mandate to scrutinise, enforce or adjudicate on individuals' cases and complaints.[13] The arrow at the bottom of the figure aims at illustrating how, while unlawful practices and human rights violations and crimes emerging from contained mobility layers and instruments still experience substantial barriers for ensuring effective remedies to victims, they can nonetheless be potentially captured by the concepts of *portable responsibility* and *justice*.

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

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

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

Figure 1. Contained mobility and portable justice



Source: Authors, 2019.

The multi-layered containment approach enacted by the EU and some EU member state governments in the Mediterranean seems to be based on the assumption that relevant EU member states can in fact be 'exonerated' of their legal responsibilities and escape accountability under international, regional and EU standards and venues. However, such an

assumption is misleading. Contained mobility instruments at sea fall within the scope of international and regional standards laid down in international maritime law (*see Section 3.1. below*) and human rights law (*see Section 3.2*), and pose profound challenges to their faithful implementation. They also stand at odds with the principle of sincere and loyal cooperation found at the basis of EU law, including EU rules on maritime and border surveillance law (*see Section 3.3.*) (Moreno-Lax and Papastavridis, 2016; Carrera et al., 2018).

3.1. International maritime law

The most relevant international treaties covering SAR at sea include, first, the 1982 United Nations Convention on the Law of Sea (UNCLOS). Art. 98 of this Convention lays down a duty to every state to render assistance to any person found at sea in danger and to proceed with all possible speed to the rescue of persons in distress. The obligation to secure the right to life constitutes international customary law. The UNCLOS Convention foresees the need for coastal states to establish, operate and maintain adequate and effective SAR services, which may include cooperation with neighbouring states and the conclusion of mutual regional arrangements (Art. 98.2).[14] Similar requirements are included in the 1974 International Convention for the Safeguard of Life at Sea (SOLAS Convention), specifically the obligation for shipmasters to provide "with all speed" assistance at sea.[15] The SOLAS Convention also states the need for states to ensure that "any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts" and to communicate and coordinate SAR activities, including through the establishment of SAR facilities.

A set of more detailed provisions are included in the 1979 International Convention on Maritime Search and Rescue (the so-called SAR Convention), which stipulates a common definition of 'rescue' entailing "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a *place of safety*" (*emphasis added*).[16] The SAR Convention underlines the need for states to set up a Search and Rescue Region (SRR) and a Maritime Rescue Coordination Centre (MRCC) responsible for "promoting efficient organisation of search and rescue services and for coordinating the conduct of search and rescue operations" within their respective SAR region.

Important amendments to the SOLAS and SAR Conventions were introduced in 2004 to strengthen the search and rescue system and minimise the risk that commercial ships refrain from providing rescue to boats in distress (Barnes, 2010). The amended Paragraph 3.1.9 of the SAR Convention specifies that the state responsible for the SAR region where

[14] The UNCLOS framework foresees a dispute settlement procedure, some of which are considered compulsory and which states parties may declare preference for in light of Article 287 Section 2 of the Convention. These may include the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal established under Annex VII of the Convention or a special arbitral tribunal under Annex VIII. For the purposes of this paper it is important to highlight that Italy has declared as preferred venues for dispute resolution the ITLOS and the International Court of Justice. Refer to D. R. Rothwell and T. Stephens (2016).
[15] Regulation 10 Ch. 5 of SOLAS.
[16] The SAR Convention (para. 1.3.13) defines a "distress phase" as a "situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance".

assistance has been rendered is *primarily responsible* for "ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a *place of safety*, taking into account the particular circumstances of the case and guidelines developed by the Organization" (*emphasis added*). The MRCC of the relevant SAR state is also required to initiate the process of identifying the most appropriate place of disembarkation of persons in distress at sea. [17] Moreover, the same paragraph 3.1.9 requires states to cooperate to ensure that shipmasters providing assistance to persons in distress at sea are released from their obligations with minimum further deviation from their intended voyage, as long as this does not endanger their safety. This applies both to commercial ships and those of NGOs, and aims at incentivising the former to intervene in cases of boats in distress at sea.

The interpretation of the 2004 amendments to the SOLAS and SAR Conventions based on the principle of effectiveness would lend support to a default obligation of disembarkation on the SAR responsible state. However, divergent practices and interpretations of states underline how this is still a matter of contention (Trevisanut, 2010; Di Filippo, 2013). Papastavridis has argued that a key shortcoming of the international maritime Treaty system is that "it does not formally obligate the coastal State responsible for the Search and Rescue Area to disembark rescued persons on its own territory, but only impose rather an obligation of conduct" (Papastavridis, 2018; Papastavridis, 2017). However, such an '*obligation of conduct*' may in fact become an *obligation to disembark* if no other option ensuring the *safety* of the rescued people and the swift conclusion of the disembarkation operation exists.

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

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

3.2. International, regional and EU human and fundamental rights

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

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

Within the international human rights framework, the principle of *non-refoulement* comprises the obligation not to extradite, deport or otherwise transfer (directly or indirectly) a person to a third country, thus not exposing her/him to a personal, foreseeable risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. A joint communication by UN Special Procedures to the Italian government on 15 May 2019 states that "practices whereby countries of destination cooperate with another to prevent migrants and refugees from arriving have been characterized as 'pullbacks' and as violations of the principle of *non-refoulement*, which constitutes an integral part of the absolute and non-derogable prohibition of torture and other ill-treatment enshrined in Article 3 CAT and Articles 6 and 7 of ICCPR". The communication also encouraged Italian judicial authorities to take into account its findings.[18]

The EU Fundamental Rights Agency (FRA) has emphasised that "state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations" (FRA, 2016). This corresponds with Articles 16, 17 and 18 of the International Law Commission Draft Articles on Re-

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

sponsibility of States for Internationally Wrongful Acts (ARSIWA), which regulate state responsibilities when aiding or assisting other states in the commission of an "internationally wrongful act", including grave human rights violations.[19] The European Court of Human Rights (ECtHR) has made use of the ARSIWA when ascertaining whether states' responsibility is engaged because of either their duty to refrain from wrongful conduct or their positive obligations under the convention.[20]

When any states engages, directly or indirectly, in internationally wrongful acts and grave human rights violations, their practices also fall within the framework of the Rome Statute and the jurisdiction of the International Criminal Court (ICC).[21] A recent Communication to the Office of the Prosecutor of the International Criminal Court (ICC) titled "EU Migration Policies in the Central Mediterranean and Libya" points out that in the name of the so-called "European humanitarian refugee crisis" in 2015, the EU and its member states consciously enacted a "deterrence-based policy of premeditated and intentional practice of non-assistance to migrants in distress at sea", which has determined "a lethal gap in the relevant SAR zone, in an area under the effective control of the EU and its member states' actors."[22] Particular attention is paid to the deathly effects of the strategy to reduce and limit the operational area of intervention of subsequent Frontex joint maritime operations such as Triton. That Communication further states that "The strategy followed by the EU consisted of the externalization of maritime and human rights obligations that comes with its effective control over the said zones to non-state actors, para-state actors and foreign partners, in a (failed) attempt to avoid exposure to these legal responsibilities",[23] and adds that "the only remaining question to resolve relates to the identity of the most responsible perpetrators, which requires intense investigations in the European apparatus and State members bureaucracies."[24]

Member states' human rights responsibilities under the Council of Europe (CoE) and the European Convention of Human Rights (ECHR) require a protection-driven approach. CoE states parties involved in SAR operations have to take all necessary measures to protect

[19] Article 16 ARSIWA states: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

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

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

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

[23] Paragraph 480 adds that "The manner in which these crimes have been committed is the result of a systematization of impunity set up through a complex structure of power with diverse types of State and non-State actors, and a combination of co-perpetrators at different levels operating both within and outside an area of armed conflict. This apparatus allowed the executors to act without fear of retaliation, and the planners to be certain that they would never face any kind of accountability".

[24] Ibid., paragraph 503.

the lives of individuals in situations of distress who are within their jurisdiction and influence. This principle was recently reiterated by the European Court of Human Rights (ECtHR) in an interim measure of 29 January 2019 concerning the case of the NGO vessel *Sea Watch 3*. The boat carried 47 rescued migrants on board, who were not allowed by the Italian authorities to go ashore. While the Court did not grant the applicants' request to be disembarked as requested by the Captain of the ship, it requested the Italian government "to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary".[25] This has been confirmed by a more recent ECtHR interim measure also at the request of Sea Watch 3, where the Court insisted on the obligation by the Italian authorities "to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health".[26] This Interim Measure leaves however unanswered the extent to which people rescued by NGO boats need to go through the painful suffering of waiting indefinitely at sea and eventually become 'vulnerable' for a government such as Italy to be imposed an obligation to disembark.

The ECtHR case law has found that jurisdiction may be present in cases of both *de jure* as well as *de facto* (indirect) control by state actors, both territorially and extraterritorially. The extraterritorial application of the ECHR was recognised by the ECtHR in the *Hirsi Jamaa and Others v. Italy* of February 2012 (Giuffre, 2016). The Strasbourg Court ruled that – in the context of the "pushback operations" to Libya conducted by the Italian Navy forces – Italy had assumed both continuous and exclusive *de jure* and *de facto* control over the affected applicants by bringing them on board Italian navy vessels and returning them to Libya.[27]

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

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

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

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

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

The applicants claim that the intervention of the Libyan coast guard was partly coordinated by the MRCC in Rome, while an Italian navy ship, part of the Italian Mare Sicuro operation, was also closed to the area of intervention. In addition, the episode should be read in the context of the terms of the 2017 Italy-Libya Memorandum of understanding, as well as financial support provided to the Libyan Coastguard by the EU, including through the EU Trust Fund for Africa. These circumstances, they argue, establishes Italy's legal responsibility under the ECHR for the actions of Italian and Libyan vessels in the case under consideration. [28]

3.3. EU rules on maritime and border surveillance

SAR and disembarkation activities of EU member states are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea (Carrera and den Hertog, 2015), which are covered by Regulation 656/2014[29] and the Schengen Borders Code (SBC).[30] Regulation 656/2014 applies to all Frontex-coordinated maritime border surveillance operations and includes a set of SAR and disembarkation obligations for 'participating units' (i.e. the law-enforcement vessels of member states). The main merit of Regulation 656/2014 is that of providing interpretative clarity on some SAR and disembarkation issues under the international maritime law framework by including more detailed and precise rules. It also foresees EU definitions of autonomous nature and shared standards that can be seen as 'benchmarks' against which current malpractices by some EU member states in the Mediterranean can be assessed.

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

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

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

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

protection of their fundamental rights in compliance with the principle of non-refoulement".

Article 4 of the regulation includes provisions on protection of fundamental rights and *non-refoulement*, which apply to all cases of disembarkation in the context of sea operations conducted by the Frontex agency (Peers, 2014). In line with the *Hirsi Case* of the ECtHR discussed above, the regulation lays down a set of procedural steps to be followed when considering disembarkation of rescued migrants in a third country. Article 4 requires, in the context of planning a sea operation, that the host member state, in coordination with participating member states and the Frontex agency, takes into consideration the general situation in the third country concerned, based on information derived from a broad range of sources, including evidence provided by international organisations, EU bodies and agencies, before disembarking rescued persons in a third country.

The regulation also foresees in Art. 4.3 a central EU benchmark: before any rescued person is disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. The rescued persons will also need to be offered the possibility "to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-*refoulement*". In practice, Art. 4.3 makes it mandatory that the rescued persons are in fact disembarked in EU member states for such an individual assessment to be carried out properly. The Maritime Surveillance Regulation provides a template to be used in future EU-coordinated SAR operations, and to assess the legality of the indirect support and co-operation between the EU, Frontex, the Italian government and the Libyan Coast Guard authorities.

4. TAKING STOCK OF POLICY PROPOSALS ON SAR AND DISEMBARKATION IN THE MEDITERRANEAN

4.1. Controlled centres and regional disembarkation platforms

Basaran (2014) has argued that in recent years "an increasing number of laws, regulations and practices on national, regional and international levels have effectively discouraged rescue at sea and encouraged seafarers to look away, leading to the incremental institutionalization of a norm of indifference to the lives of migrants". EU policy discussions continued this worrying course of action during the second half of 2018 under the Austrian Presidency of the EU.

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

The concepts of 'disembarkation platforms' and 'controlled centres' were further elaborated by the European Commission in two informal 'non-papers' released in June and July 2018 (European Commission 2018b, 2018c). Discussions regarding the operationalisation of the two concepts have also been conducted within an EU Council Working Group (Council of the EU, 2018). However, 'disembarkation platforms' or 'arrangements' (as they were subsequently defined by the Commission) as well as 'controlled centres' have remained insufficiently developed and characterised by a worrisome lack of legal certainty (European Parliament, 2018a).

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

The establishment of 'controlled centres' has raised serious concerns regarding their potential negative impact on protection standards in the EU, which would rather make of them 'uncontrolled centres' from a human rights perspective. A joint communication is-

sued by UN Special Procedures (five UN Rapporteurs and two Working Groups) to the European institutions on 18 September 2018[31] emphasised the difficulties that such centres would face in ensuring due process guarantees and legal safeguards, "including proper individual assessments and safeguards against arbitrary detention".

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

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

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

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

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

"de facto detention centres", and calls on African states to refuse to cooperate with the EU in the implementation of those plans.[32]

4.2. Ad hoc disembarkation and relocation arrangements

In the background of these disagreements, since the summer of 2018, cases of disembarkation following SAR operations conducted by civil society and other vessels have been addressed through new instruments called *ad hoc* or "temporary" disembarkation and relocation arrangements. [33]These 'arrangements' have in practice involved a small group of member states willing to relocate a share of disembarked asylum seekers from Spain, Italy and Malta (ECRE, 2019).

The arrangements have mainly covered situations of migrants rescued in Libyan or international waters by civil society actor boats and for which there is no agreement between EU member states, notably between Italy and Malta, over who should take responsibility for disembarkation. The arrangements have been described as 'ad hoc' in nature, and have followed a boat-by-boat approach aimed at breaking political standoffs between governments forbidding or delaying disembarkation in their ports (ECRE 2019). Table 2 below outlines the only existing publicly available information about the outputs of member state arrangements during the second half of 2018, which reveals a limited number of people subject to relocations.[34]

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

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

[34] As stressed by ECRE (2019), the lack of publicly available information on ad hoc relocation arrangements does not allow adequate oversight of member states' compliance with their relocation commitments in practice.

Table 1. Ad hoc disembarkation and relocation arrangements (June – October 2018)

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

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

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

Since early 2019, upon request from concerned member states, the European Commission has in some way been involved in the implementation of informal relocation arrangements after disembarkation and the development of a so-called 'supportive platform for operational cooperation".[35] The Commission has played the role of a 'facilitator' or 'deal broker' in the context of member states pledging exercise. Upon request for assistance from a member state, either Italy or Malta, the Commission proceeds with putting together a group of EU member states interested or willing to make 'pledges' from those people disembarked.

The voluntary nature of the system has meant that the implementation of relocation arrangements has been based on the "good will" of participating member states. This has

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

not helped in clarifying the concrete circumstances justifying the triggering of these arrangements by the requesting Member States. Table 3 below provides an updated overview of the disembarkation and relocation arrangements implemented in the first half of 2019, which shows how relocation arrangements have involved only a limited number of disembarked persons.[36]

Table 2. Ad hoc and relocation arrangements facilitated by the Commission and EU agencies (January – June 2019)

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

Sources: Author's interviews and media sources.

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

EASO has played a more substantive role in both Malta and Italy. EASO support has materialised in different activities for different countries involved in these arrangements since the beginning of 2019. These have often included, for instance, the provision of information on the international protection procedure, registration of applications for interna-

[36] The total number of relocated people as well as the number of people relocated to each participating member states is not publicly available for the relocation arrangements reported in the table.

tional protection for relocation purposes, support to Member States' delegations in planning and running the interviews of candidates, the selection and matching processes of applicants (preparation of selection/matching lists).

The matching process has been heterogeneous and inconsistent, with no clear distribution key mechanism being applied. Interviews conducted for this paper revealed that since the beginning of 2019 the distribution was decided on the basis of a "kind of matching system" where elements considered included family unity, or the family links of applicants with a specific country. EASO support aimed at moving towards a "fairer and proportionate distribution" system among the participating governments when matching asylum applicants to specific states, in particular by allocating to each of the participating member states a proportional share of applicants with high and low recognition rates.[37] This has been confirmed by a Working Paper titled "Guidelines on Temporary Arrangements for Disembarkation" of 12 June 2019 prepared by Romanian Presidency of the EU, according to which the composition of the 'relocation pool' is determined by "the indications by the Member States of relocation of the profiles that these Member States are willing to accept (variable geometry)."[38] It remains however unclear how the Commission's and EASO involvement has prevented member states from only accepting applicants from nationalities with high recognition rates, and avoiding the inherent discrimination based on 'cherry picking' or 'first comes, first served basis' practices.

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

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

[37] EASO, Request for Access to Document (No. 03753), EASO/ED/2019/283, Valetta, 14 June 2019. The answer to this Request did not include information on the total number of applicants relocated by Member States involved. As an example, in the case of disembarkation of 47 people by the NGO *Sea Watch 3* on 31 January 2016 reported in Table 3, seven member states contributed to the relocation of a total of 30 people: France, Germany, Lithuania, Luxembourg, Malta, Portugal and Romania (EASO 2019).

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

To remedy some of these deficiencies, human rights organisations called on EU governments to establish, as an interim measure, a predictable arrangement or 'mechanism' for disembarking and relocating people rescued at sea among member states (Amnesty International and Human Rights Watch, 2019; ECRE, 2019; Council of Europe, 2019). They also recommended that relocation of asylum seekers rescued at sea should fully comply with the CEAS rules and make sure that disembarked people are granted access to an asylum procedure and adequate reception conditions, and that the transfers should be carried out in accordance with the Dublin Regulation.

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

The principle of solidarity and fair sharing of responsibility enshrined in the Lisbon Treaty should not be considered as a pick and choose or '*à la carte*' option for national governments and their ministries of interior. It implies equality among all EU member states and that a common EU response to that common challenge should be prioritised and preferred (Carrera and Lannoo, 2018). This understanding of the EU principle of solidarity as "*equal solidarity*" – whereby responsibility is upheld and equally shared among all Schengen countries – was reflected in the ruling by the Court of Justice of the EU in the judgement on relocation quotas against Hungary and Slovakia.[39] The Court emphasised that "When one or more Member States are faced with an "emergency situation characterized by a sudden inflow of nationals of third countries" (Art. 78.3 TFEU), the responses "must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy".

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

CONCLUSIONS: EQUAL SOLIDARITY

This Policy Options brief has underlined how the highly politicised and long-standing debates on SAR and disembarkation among some EU member states continue preventing sustainable, common and principled policy responses ensuring international protection standards and preventing deaths in the Mediterranean. The multi-layered legal framework governing SAR and disembarkation provides, however, a set of obligations upon member state governments, including the absolute and non-derogable commitment to preventing loss of lives at sea, and a due diligence duty to coordinate effective and timely SAR responses and guarantee international protection and *non-refoulement* of rescued people. Member states are not free to tactically choose not to save lives at sea or disembark people to safety or to evade their own legal responsibilities under EU and national constitutional law when cooperating with third countries.

European institutions should resist arguments based on the current impasse in the reform of the EU Dublin system, as excuses by some member state governments and ministries of interior to avoid complying with their obligations under international, regional, EU and constitutional fundamental rights standards. Relocation arrangements among a few EU member states for people disembarked in the Mediterranean have in fact entailed 'less EU' and damaged the furthering of European integration in the CEAS, and its reform. Ideas to pursue 'coalitions of the willing' or 'solidarity pacts' among a reduced group of governments to foster variable solidarity in the field of asylum may at first sight be attractive, but they bring major risks poisoning the sustainability and consistency of the CEAS and the Schengen system. They may also bring Europeanisation 'backwards' in the areas of asylum and Schengen by setting up differing and competing areas of solidarity inside the Union.

The European Commission and the European Parliament should make sure that all EU member states fully and effectively comply with their commitments under international maritime, refugee and human rights standards and EU law. Efficient and timely enforcement of current standards – including infringement proceedings by the Commission – should become a clear priority during the next legislature. The EU counts with sound legal competences in the areas of border surveillance in the Schengen Borders Code and access to international protection and reception conditions in existing EU directives composing the CEAS. There is also a common set of legal standards on SAR and disembarkation applying in the context of Frontex-led maritime joint operations, which constitute 'benchmarks' when assessing the legality of current member state practices.

No EU member state should be permitted to police or criminalise civil society actors involved in SAR or humanitarian assistance in the Mediterranean. Such actions constitute an illegitimate restriction of the fundamental right of freedom of association enshrined in Article 11 of the EU Charter of Fundamental Rights and the independence of human rights defenders safeguarded by the UN Declaration on Human Rights Defenders. The criminalisation of NGOs constitutes a major threat to the EU's founding values enshrined in Article 2 TEU, which lay at the very basis of mutual-trust cooperation in the EU. The current EU legal

framework on migrant smuggling should be amended to include an obligation for member states not to criminalise humanitarian assistance to asylum seekers and irregular immigrants (Carrera et a. 2019b).

Current ad hoc and 'informal' disembarkation and relocation arrangements supported and coordinated by the European Commission and EASO since early 2019 constitute extra-Treaty and intergovernmental initiatives standing at odds with EU principles. As guardian of the Treaties, the European Commission should only support initiatives unequivocally falling within EU remits of action, so that any administrative cooperation among member states takes place in the scope of protection standards envisaged in EU law.

During the previous legislature, a logic of 'consensus' or de facto unanimity drove negotiations on the CEAS reform files inside the Council and the European Council.[40] This was the case in spite of the qualified majority voting rule formally foreseen in the EU Treaties under the ordinary legislative procedure and the existence of clear indications that a large group of member states exceeding qualified majority were in favour of engaging with the European Parliament in the negotiations of the CEAS reform package. Such a political choice is not in compliance with the decision-making rules on asylum in the Treaties and violates the principle of sincere cooperation among European institutions. As a consequence of the 'package approach' linking the approval of the recast Dublin Regulation to all the other CEAS legislative instruments under negotiation, the whole reform of EU asylum rules has been put on hold. The decision-making rules and procedures in the Lisbon Treaty (QMV) should be re-applied and the 'package approach' abandoned.

Pending a comprehensive reform of the Dublin system, member states may decide to take up responsibility to assess an application for international protection, even if they are not responsible following the Dublin Regulation criteria based on the "humanitarian clause" foreseen by Article 17 of the Dublin Regulation ('Discretionary Clauses'). Based on all the challenges identified in this paper about the disembarkation and relocation arrangements, any new relocation system linked to disembarkation in the Mediterranean should, however, take place under a clear EU remit and be strictly linked to the swift adoption of the proposed reformed of the Dublin Regulation. The setting up of a permanent corrective (relocation) mechanism for sharing responsibility on asylum applicants should not be *à la carte* but involve *all* EU member states (European Parliament, 2017). The guiding principle should be one of '*equal solidarity*', whereby all EU member states share fairly and equally the responsibility over asylum seekers across the Union in full compliance with EU constitutive principles and fundamental rights.

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

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

EU funding instruments must not be used as an attempt to bypass the Treaties, national constitutions and international commitments. The EU should stop funding migration management-driven training and 'incapacity building' on SAR and border maritime surveillance in unsafe third countries such as Libya through EU Trust Funds. These activities are illegal and incompatible with the above-mentioned standards, which bind the European institutions and agencies. The European Court of Auditors (ECA) should carry out an investigation into the ways in which the EU Trust Fund for Africa has supported the activities of the Italian ministry of interior with regard to "strengthening capacity of Libyan authorities on search and rescue" and "tackling irregular border crossings".[41] The EU could establish an EU SAR fund to help reinforce a coordinated EU SAR response (European Parliament, 2018b), and to strengthen EU member state disembarkation capacities, reception facilities and domestic asylum systems.

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

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