



DISCUSSION
BRIEF

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Search and Rescue and disembarkation in the Mediterranean

ASYLUM





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The **ReSOMA Discussion Policy Briefs** aim to address key topics of the European migration and integration debate in a timely manner. They bring together the expertise of stakeholder organisations and academic research institutes to identify policy trends, along with unmet needs that merit higher priority. Representing the second phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced covering the following topics:

- Secondary movements within the EU
- Implementation of the Global Compacts on Refugees (GCR)
- SAR and Dublin: Ad hoc responses to refusals to disembarkation
- Funding a long-term comprehensive approach to integration at the local level
- Public opinion on migrants: the effect of information and disinformation about EU policies
- Integration outcomes of recent sponsorship and humanitarian visa arrivals
- Strategic litigation of criminalisation cases
- Implementation of the Global Compacts on Migration (GCM)
- The increasing use of detention

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Policy Brief

Search and Rescue and disembarkation in the Mediterranean

By Roberto Cortinovis, [Centre for European Policy Studies](#)

1. SCOPING THE DEBATE

This Discussion Brief examines recent political controversies and policy developments on search and rescue (SAR) and disembarkation in the Mediterranean. 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

Disputes in this area among Mediterranean coastal states are by no means a novelty. They find their roots in long-

standing disagreements over the interpretation and applicability of relevant International maritime law obligations and by the inability of EU member states to devise cooperative agreements among them to enhance the effectiveness and efficiency of SAR operations (Papastavridis, 2017; Moreno-Lax and Papastavridis, 2017). However, over the last few years, those disputes have been emphasized by the increasing politicization of SAR and disembarkation issues at the EU and national levels (ECRE, 2019) and by the emergence of increasingly restrictive policy responses towards migrants and asylum seekers attempting to cross the Mediterranean Sea (Moreno-Lax and Giuffré, 2017; Carrera and Cortinovis, 2019).

1.1 The politics of SAR criminalisation and disengagement

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., 2019). The latter have materialized in a number of interrelated policy responses. First, the increasing policing and criminalisation of civil society actors and

¹ See Politico, 'Spain will welcome migrant rescue ship turned away by Italy', 6 November 2018, <https://www.politico.eu/article/spain-will-welcome-migrant-rescue-ship-turned-away-by-italy-pedro-sanchez-matteo-salvini/>; Euractiv, 'UNHCR concerned over lack of Mediterranean rescue capacity', 1 October 2018, <https://www.euractiv.com/section/justice-home-affairs/news/unhcr-concerned-over-lack-of-mediterranean-rescue-capacity/>; on more recent disputes related to disembarkation of rescued migrants see: The Guardian, 'Migrant rescue ship defies Salvini's ban to enter Italian port', 26 June 2019, <https://www.theguardian.com/world/2019/jun/26/ngo-boat-carrying-migrants-defies-matteo-salvini-veto-lampedusa-italy>



non-governmental organisations involved in SAR activities. Since 2017, actions taken to disrupt the activity of SAR NGOs have included the seizing and confiscation of NGOs boats, the launch of formal prosecutions based on unfounded allegations of facilitating irregular immigration and human smuggling, the refusal by the Italian government of allowing access to national ports and, recently, the imposition of administrative fines against those organisations (Vosiliute and Conte, 2018; FRA, 2018; Carrera and Cortinovis, 2019a).

Second, the strategic disengagement of national and EU actors from SAR activities in the Central Mediterranean. This approach has translated into the incremental 'backing out' and reduction of the operational space of Frontex Joint Maritime Operation Themis (launched in 2018)², as well as the withdrawal of the naval means and SAR-related activities of EUNAVFOR-MED Operation 'Sophia' (launched in 2015) (EEAS, 2019). Member states and EU disengagement from SAR activities has come along with the progressive delegation of containment tasks to Libyan authorities, including in the forms of 'pullbacks' to Libya of boats carrying migrants headed to Europe. Support by the EU and Italian government has materialized in the provision of funding, training, equipment aimed at increasing the capacity of the Libyan Coast Guard to conduct interdiction operations at sea, enabling Libyan authorities to establish a Libyan Search and Rescue Region (SRR), and setting up of a Maritime Rescue Co-

ordination Centre (MRCC).³ The European Commission has provided indirect financial support to these activities through the EU Trust Fund for Africa.⁴

While in 2018 the total number of irregular entries by sea through the Central Mediterranean to Italy reached the lowest level since 2012, the negative effects of these policies have been well documented and internationally criticised. The shrinking of the SAR humanitarian and operational space has led to an increase in the total number of deaths in the Mediterranean, with the International Organisation for Migration (IOM) estimating more than 15,000 deaths only in the Central Mediterranean route from 2014 to 2018.⁵ Moreover, the United Nations High Commissioner for Refugees (UNHCR) estimated that more than 45,000 people have been 'intercepted or rescued' by the Libyan Coast Guard authorities between 2016 and first half of 2019, and therefore exposed to grave human rights violations and crimes against humanity in

² 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>

³ 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

⁴ 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-firstphase_en and https://ec.europa.eu/trustfundforafrica/partner/italian-ministry-interior_en

⁵ 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



country that remains largely unsafe and in conflict.⁶

1.2 Ad hoc disembarkation and relocation arrangements

Against the background of member states' disagreements over SAR and disembarkation responsibilities, since the summer of 2018, some cases of disembarkation following SAR operations conducted mainly by civil society vessels have been covered through new instruments called ad hoc or "temporary" disembarkation and relocation arrangements. These arrangements have involved a small group of member states willing to accept a share of asylum seekers disembarked in Spain, Italy and Malta and involved only a modest number of asylum seekers (ECRE, 2019). While labelled as expressions of 'pragmatism' by some EU policy makers, their informal or extra-Treaty nature raises concerns regarding their compliance with EU asylum standards, EU Treaty principles and fundamental rights (Carrera and Cortinovis, 2019a).

Since early 2019, the European Commission has been involved in the implementation of informal relocation arrangements after disembarkation from Italy and Malta (European Commission, 2019). The Commission has played the role of 'facilitator' among member states involved in the pledging exercise, and between those states and the Italian and Maltese governments. EU agencies, EASO and Frontex, have been also mobilized to

provide 'support' to member states' authorities concerning disembarked persons, chiefly first reception, information provision, registration, and pre-relocation selection procedures (Council of the EU, 2019; EASO, 2019).⁷

The exact implementation of these arrangements has been described by the Commission as a "workflow" (European Commission, 2019). The Commission and EU agencies were only involved in specific stages and limited tasks of the relocation procedure, and prevented from exercising any monitoring role regarding the compliance of adopted procedures with EU standards and the fundamental rights of asylum seekers. In spite of the involvement of the Commission and UE agencies, relocation arrangements have remained intergovernmentally driven and implemented under secretive and unaccountable patterns of cooperation. There continues to be no official publication of the number of migrants or asylum seekers involved, or any available piece of legislation laying down the exact administrative procedures and relocation distribution criteria being applied on the ground (Carrera and Cortinovis, 2019a).

⁶ See UNHCR Libya Update, June 2019, retrievable from: <https://data2.unhcr.org/en/documents/download/69930>

⁷ 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.



2. KEY ISSUES AND CONTROVERSIES

2.1 International and EU legal standards

The range of policies aimed at restricting SAR operational capacities and criminalize humanitarian actors involved in SAR operations may be understood as different components of a strategy of *contained mobility* which aim at limiting and filtering migrants and asylum seekers' movements at different stages of their mobility trajectories. Contained mobility policies have been implemented through a matrix of legal, financial and operational instruments involving EU and Member States actors, which have increasingly taken the form of 'extra-EU Treaty tools, such as emergency funds, Memoranda of Understanding and informal readmission arrangements (Carrera et al., 2018; Carrera and Cortinovis, 2019b).

Policies adopted and/or implemented by European institutions, EU agencies and national authorities have been instrumentally designed with the aim of escaping legal accountability and liabilities. However, despite the many barriers that still exist to ensure effective justice and remedies for the victims, those policies do not happen in a legal vacuum. In particular, the legality and legitimacy of EU and national policies in the field of SAR and disembarkation depend on their compatibility with legal standards stemming from the law of the sea, as well as international and regional human rights law.

First, the law of the sea provides a clear duty for every shipmaster to render assistance in case of vessels or persons in distress at sea and considers the right to life

as customary international law. Coastal states have the obligation to establish effective SAR services ensuring the provision of assistance to any person in distress at sea. The state responsible for the search and rescue region (SRR) where assistance has been rendered has also primary responsibility for coordinating SAR activities in due diligence and 'good faith' with other states, as well as taking the lead in finding a port for disembarkation in a place of safety (Papastavridis, 2017).

States retain the right to allow or deny access to their national ports. International maritime law only imposes an 'obligation of conduct' to guarantee swift disembarkation in a place of safety of people in distress at sea. However, such an 'obligation of conduct' may become an *obligation to disembark* if no other option is available to ensure the *safety* of people on board or when the human rights of rescued people would be jeopardized by delayed disembarkation. While political controversies have continued regarding the exact scope of the concept of 'place of safety' in international maritime law, the International Maritime Organization (IMO) and UNHCR have emphasized that states should avoid actions or inactions leading to disembarkation in unsafe territories and putting people at risk of torture, and/or inhuman or degrading treatment.⁸

⁸ IMO, Guidelines on the Treatment of Persons Rescued At Sea. See also, UNHCR (2002). Background note on the protection of asylum-seekers and refugees rescued at sea, <https://www.unhcr.org/protection/globalconsult/3>



Second, EU Member States obligations under international maritime law must be read in light of their obligations under international and regional human rights and refugee law. A Joint Communication by no less than Five United Nations Special Procedures to the Italian Government issued in May 2019 concluded that the politics of SAR criminalisation and disengagement pursued by that government, including deterring migrants from arriving and facilitating 'pullbacks' by Libyan authorities, bring about grave human rights violations of non-derogable and absolute rights, such as the right to life and *non-refoulement*, which are in violation of the International Covenant of Civil and Political Rights (ICCPR), the UN Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment (CAT).⁹

The European Court of Human Rights (ECtHR) in the landmark 2012 *Hirsi* case confirmed the extraterritorial reach of the human rights protection regime when assessing Italian authorities 'pushbacks' to Libya of people intercepted at sea (Giuffré, 2016). The *Hirsi* doctrine represents a basis for tackling some of the more sophisticated containment policies currently deployed in the Mediterranean,

[e5f35e94/background-note-protection-asylum-seekers-refugees-rescued-sea.html](https://www.unhcr.org/refugees-rescued-sea.html)

⁹ 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 4/2019.

including those involving the provision of financial, technical and operational support to third countries authorities for preventing migrants boat to reach European shores (so-called 'pullbacks') (Baumgärtel, 2018; Pijnenburg, 2018; Global Legal Action Network, 2018).

2.2 Lasting vs Unequal Solidarity in EU asylum policy

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 is subject to debate as 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).

While it is true that European cooperation in the framework of the Schengen and Dublin systems started in an inter-governmental fashion with the involvement of only a few EU Member States, it is crucial to remind that, almost three decades after, policies in the areas of border control and asylum have been to a very large extent 'Europeanised' and brought under the Community framework, with the EU exercising either shared or exclusive legal competence.

It is therefore central to consider what current proposals for enhanced cooperation or any new "mechanism" or "solidarity pact" among a "coalition of the willing" in the field of asylum would actually



mean in light of EU law and the Treaties, as well as their longer-term implications for EU asylum and borders policies. Policy ideas driven by 'flexibility' and 'pragmatism' raise questions regarding the challenges that they pose to the very consistency of the foundations and principles of the CEAS, as well as more generally the respect of the rule of law laid down in EU Treaties, including the safeguarding of the principle of sincere and loyal cooperation (Klamert, 2014).

The principle of solidarity and fair sharing of responsibility enshrined in the Lisbon Treaty implies equality among all EU Member States and that a common EU response to common challenge in the area of migration and asylum should be prioritized 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.¹⁰ The Court emphasized 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".

¹⁰ 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>



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