

ASYLUM

POLICY OPTION  
BRIEF

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## Search and Rescue and disembarkation in the Mediterranean



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Under nine different topics, ReSOMA Policy Option Briefs capture available evidences and new analysis of the policy alternatives. They take stock of existing literature of policy solutions on asylum, migration and integration. This brief has been written under the supervision of Sergio Carrera (CEPS/EUI). Based on the Policy Option Briefs, other ReSOMA briefs outline scenarios for reform paths in the asylum, migration and integration areas in line with realities on the ground, the rule of law and human rights standards. This brief focuses on various options for strategic litigation and democratic accountability venues to stop and prevent policing of humanitarianism.

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## Policy Option Brief

# Search and Rescue and disembarkation in the Mediterranean

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## 1. INTRODUCTION

The informal summit between the interior ministers of Italy, Malta, France, Germany held in La Valletta on 23 September 2019 has been presented as a milestone in breaking a long-standing controversy over Search and Rescue (SAR) and disembarkation of asylum seekers and migrants in the Mediterranean. The disembarkation of people rescued by civil society actors became a thorny political issue during the summer of 2018 following the decision by the former Italian Interior Minister, Matteo Salvini, to close Italian ports to people rescued at sea.

The outcome of the informal summit in Malta was the adoption of a 'Joint declaration of intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism'.<sup>1</sup> The objective was to come up with an early contribution to be discussed at the Justice and Home Affairs (JHA) Council meeting of 7 and 8 October 2019, with a view to broadening participation in the mechanism to other EU member states.

Media sources<sup>2</sup> covering this JHA Council meeting reported however that the mechanism failed to gain the necessary support, with some interior ministers even disagreeing among each other in the aftermath of the meeting on exactly how many EU governments could be expected to join the initiative. While the German Interior Minister, Seehofer, stated that a total of 12 governments would be ready to join the initiative (including the four launching it), according to the Luxembourg Interior Minister Asselborn only three additional Member States (Portugal, Ireland and Luxembourg) had expressed a clear interest in supporting it.<sup>3</sup>

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<sup>1</sup> The text of the Joint Declaration is available at the following link: <http://www.state-watch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

<sup>2</sup>B. Riegert, 'EU fails to cement agreement on migrants rescued at sea, DW Europe', 8 October 2019, <https://www.dw.com/en/eu-fails-to-cement-agreement-on-migrants-rescued-at-sea/a-50743383>

<sup>3</sup>N.Nielsen, 'EU migrant boat plan fails to get extra support, euobserver', 9. October 2019, <https://eu-observer.com/migration/146214>

The lukewarm reception of the Joint Declaration among member states contrasts with the high political attention it raised as a possible “shift” in EU asylum policy in line with the expectations of the newly formed Italian government.<sup>4</sup> The current Italian Interior Minister, Luciana Lamorgese, welcomed the agreement as “a first, concrete step towards real common European action”, adding that “as of today, Italy and Malta are no longer alone”.<sup>5</sup> Some NGOs and civil society actors have welcomed the mechanism as a step forward in establishing a reliable system to ensure that people rescued in the Central Mediterranean are promptly and safely disembarked and that EU member states share responsibility for them, while others have opposed ad hoc temporary arrangements operating outside the EU legal framework as jeopardizing refugee protection and respect for human rights and called for a structural solution based on fair responsibility sharing and.<sup>6</sup>

A closer look at the declaration reveals, however, a number of outstanding questions and doubts about its actual added value, and the effects that it can be expected to have in ensuring a predictable, fundamental rights and EU rule of law-compliant solidarity mechanism in the Mediterranean.

## 2. WHAT'S IN THE MALTA DECLARATION?

The ‘mechanism’ put forward by the group of interior ministers during the informal summit in La Valletta took the shape of a ‘joint declaration of intent’. This is not an EU legal act, nor an international agreement. It is used in international relations when parties aim at concluding non-legally binding instruments. In the case of this declaration, ministers taking part in the initiative have “jointly committed” to undertake a number of measures on a non-compulsory or voluntary basis.

This voluntarism applies for instance to what is perhaps one of its most relevant components, the possibility (outlined in Paragraph 1) to propose an alternative place or port of safety for disembarking rescued migrants, different from the member state that would otherwise be responsible. This alternative would be reserved for situations where Italy or Malta would be facing a “disproportionate migratory pressure” calculated on the basis of “limitation in reception capacities, or a high number of applications for international protection”.

The declaration aims in this way at breaking up the set of criteria currently envisaged in the much criticised EU Dublin Regulation, according to which responsibility for the reception and assessment of asylum seekers’ applications lies most often disproportionately with the first

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<sup>4</sup> J. Barigazzi, ‘4-country deal points to shift in EU migration policy, Politico Europe’, 20 September 2019, <https://www.politico.eu/article/leaked-document-shift-eu-migration-policy/>

<sup>5</sup> ‘Italy’s Lamorgese hails deal on sharing migrant burden’, Ansa English, 23 September 2019 [http://www.ansa.it/english/news/politics/2019/09/23/italy-hails-deal-on-migrants\\_11c20b80-fc46-4000-96fe-b587c12f2d03.html](http://www.ansa.it/english/news/politics/2019/09/23/italy-hails-deal-on-migrants_11c20b80-fc46-4000-96fe-b587c12f2d03.html)

<sup>6</sup> This Policy Options Brief takes into account the main points and recommendations raised by civil society stakeholders that took part in the Resoma Transnational Feedback meeting ‘An agreement on Disembarkation’, which was held in the framework of the ECRE General Annual Conference, Brussels, 23 October 2019. See also P. Scholten and Z. Kaşlı, ‘How could the EU support Search and Rescue operations and disembarkations?’ National Stakeholder Report, 2019, <http://www.resoma.eu/node/1853>

country of irregular entry into Schengen territory, including for those persons rescued in the Mediterranean Sea (Maiani, 2016).

The solidarity mechanism envisaged by the joint declaration is however limited in scope to people disembarked following SAR operations conducted in the high seas, and falling under the responsibility of the Italian and Maltese governments. Its limited focus on the Central Mediterranean has caused other EU member states that also maintain the common EU external sea border, such as Spain and Greece, to reject and express discontent with the Malta declaration.<sup>7</sup>

The governments of Greece, Cyprus and Bulgaria even issued a joint statement calling on other member states to extend the relocation mechanism to asylum seekers arriving by sea in their countries.<sup>8</sup> Unlike the situation during 2016 and 2017, only 14% of the 67,000 migrants and asylum seekers who arrived in the EU by sea in 2019 landed in Italy or Malta. Most of them in fact entered via Greece (56% of the total) and Spain (29%).<sup>9</sup>

In Paragraphs 2, 4 and 5, the Malta declaration envisages a rather loose relocation distribution system of asylum seekers disembarked in Italy and Malta among participating member states – so far mainly France and Germany, which will then take responsibility for assessing the asylum claims of relocated applicants.

The 'mechanism' states that participating states "shall contribute" to the swift relocation (no longer than 4 weeks) of rescued asylum seekers based on pre-declared pledges before disembarkation. No further detail is provided in the text regarding the specific procedures through which these pledges will be made, or about the exact percentages, distribution key and selection criteria that will be used.

It is not clear if the authorities of participating states will be allowed to pre-select and unlawfully discriminate among profiles of potential beneficiaries based on their own political preferences – e.g. specific nationalities, only families, etc. The declaration only makes reference to the intention of "building on and improving existing practices by streamlining procedures". This can be seen as a reference to the 'ad hoc disembarkation and relocation arrangements' implemented since the summer of 2018. These arrangements have involved a small group of member states willing to accept a share of asylum seekers disembarked in Italy and Malta on a voluntary basis and following an *ad hoc* or 'ship by ship' approach (Carrera and Cortinovis, 2019).

These ad hoc arrangements were of a predominantly intergovernmental nature, falling outside the EU legal framework. Since early 2019, the Commission started playing the role of 'facilitator' or 'deal broker' among member states involved in the pledging exercises. EU agencies, chiefly the European Asylum Support Office (EASO) and Frontex, were mobilised

<sup>7</sup> L. Abellán, 'España y Grecia rechazan el reparto de migrantes que lideran París y Berlín', El País, 26 September 2019, [https://elpais.com/internacional/2019/09/25/actualidad/1569429682\\_572055.html](https://elpais.com/internacional/2019/09/25/actualidad/1569429682_572055.html)

<sup>8</sup> Agence Europe, 'Malta Agreement' on allocation of migrants struggles to bring together a majority of EU countries', 9 October 2019, <https://agenceurope.eu/en/bulletin/article/12344/6>

<sup>9</sup> See UNHCR, 'Mediterranean Situation', <https://data2.unhcr.org/en/situations/mediterranean>

and deployed in Italy and Malta to provide 'support' to participating member state authorities dealing with specific procedural steps following the disembarkation of rescued persons by NGOs. This has included support in the identification and fingerprinting of disembarked people, registration of asylum applications and in the pre-selection phases of relocation procedures (including the development and application of relocation matching criteria).

The Commission argued that the ad hoc disembarkation and relocation arrangements fell within the remits of the discretionary clause envisaged in Article 17.2 of the EU Dublin Regulation, which allows EU member states to take responsibility for asylum applicants irrespective of the EU Dublin Regulation criteria.

Yet, the indirect involvement of EU actors has not helped in overcoming the overriding intergovernmental nature of these arrangements, or in bringing legal certainty and ensuring full compliance with EU asylum procedures standards during their operationalisation. They have continued to present a disproportionate level of informality, secrecy and lack of accountability. The Malta deal brings these very same concerns into focus.

Besides sketching out a relocation mechanism for migrants rescued at sea with the purported aim of strengthening solidarity among a group of 'willing' member states, the declaration includes a number of worrying provisions dealing with civil society, the Libyan coast guard and cooperation with North African countries in the field of SAR and disembarkation.

The document adopts a 'compulsory tone' in paragraph 9. It calls on SAR vessels, chiefly those owned by NGOs and private actors, "to comply with instructions given by the competent rescue coordination centre" and not to obstruct search and rescue activities conducted by the Libyan Coast Guard. This provision blatantly disregards the wealth of evidence showing the criminalisation policies towards SAR NGOs and the threat that these constitute for the respect of the rule of law principle enshrined in Article 2 TEU, mainly the independence of civil society organisations providing humanitarian assistance to those in need (Carrera et al. 2019). It also disregards the fact that many of the civil society ships are currently confiscated or blocked by state authorities.<sup>10</sup>

The reference to SAR operations conducted by the Libyan coast guard is equally striking. This should be taken in conjunction with declarations from the new Italian Interior Minister in the aftermath of the summit, according to which the current cooperation framework with Libya based on the 2017 Italy-Libya Memorandum of Understanding (MoU) will be preserved because the Libyan coastguard is doing a "good job".<sup>11</sup> The EU has indirectly financially supported the Libyan coastguard through the EU Trust Fund for Africa.<sup>12</sup>

<sup>10</sup> See 'Joint press release of the Palermo Charter Platform Process on the results of the EU Summit of Home Affairs Ministers on 23 September in Malta and the consequent negotiations on 8 October in Luxembourg, 10 September 2019, <http://www.statewatch.org/news/2019/oct/eu-palermo-charter-pr-solidarity-mechanism-9-10-19.pdf>

<sup>11</sup> A. Ziniti, Sbarchi, accordo tra i ministri Ue. Lamorgese: "Da oggi l'Italia non più sola", *La Repubblica*, [https://www.repubblica.it/cronaca/2019/09/23/news/ocean\\_viking\\_messina\\_malta\\_vertice\\_ue\\_immigrazione\\_ridistribuzione-236702123/](https://www.repubblica.it/cronaca/2019/09/23/news/ocean_viking_messina_malta_vertice_ue_immigrazione_ridistribuzione-236702123/)

<sup>12</sup> See the website of the EUTF for Africa, [https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase\\_en](https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en)



There is widespread evidence of unlawful conduct and acts of violence perpetrated by the Libyan coastguard towards rescued migrants in the context of 'pullbacks' to unsafe Libyan ports leading to a direct violation of the principle of *non-refoulement*.<sup>13</sup> The Malta declaration disregards widespread and well-founded criticism concerning the complicity of Italian and EU actors in international wrongful acts and crimes against humanity regarding migrants and asylum seekers in Libya. Those intercepted by Libyan Coast guard actors have been sent to arbitrary detention, enslavement, torture, and other inhuman treatments in detention camps.

Similarly, Paragraph 14 of the declaration "encouraging UNHCR and IOM to support disembarkation modalities in full respect of human rights" in North African countries echoes proposals discussed during the Austrian EU presidency in the second half of 2018 to set in place "regional disembarkation platforms" (European Council, 2018) in third countries, which have spurred widespread criticism from stakeholders (ECRE, 2018), the African Union<sup>14</sup> and academics due to their political, legal and practical unfeasibility (Maiani, 2018).

The Malta declaration also frames as a suitable policy option an enhanced EU-led aerial surveillance in the southern Mediterranean, instead of a fully-fledged EU SAR operation<sup>15</sup> across the Mediterranean. The focus on 'aerial surveillance' is in line with the revised mandate<sup>16</sup> of the EUNAVFOR-Med Operation Sophia. Since March 2019, this military operation does not foresee any further deployment of naval assets, but is only focused on aerial surveillance and reinforced support to the Libyan Coast Guard. EUNAVFOR-Med has also engaged in the sharing of information on sightings of vessels with Libyan Coast Guard actors, a form of cooperation which raises similar serious concerns about its incompatibility with international and EU law.<sup>17</sup>

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<sup>13</sup> 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), <http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>

<sup>14</sup> D. Boffey, 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>

<sup>15</sup> I. Borshoff, 'EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019', *Politico Europe*, 7 August 2019, <https://www.politico.eu/article/german-minister-calls-on-eu-to-launch-refugee-rescue-missions/>

<sup>16</sup> See 'EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019', *Council of the EU Press Release*, 29 March 2019, <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/>

<sup>17</sup> See: [http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-aug-2019\)1362751%20Rev.pdf](http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-aug-2019)1362751%20Rev.pdf)

### 3. SOLIDARITY À LA CARTE IN EU ASYLUM POLICY

The intergovernmental nature of the 'mechanism' foreseen by the Malta deal opens up fundamental questions concerning its relationship and compatibility with EU rule of law as enshrined in the Treaties. A 'pick and choose' approach by some EU interior ministries in asylum policies is simply incompatible with the principles laid down in the Lisbon Treaty and the well-advanced stage of Europeanisation characterising EU asylum and border policies.

Proposals for 'flexible integration' or 'solidarity à la carte' run the risk of turning the clock back three decades in European integration and re-injecting intergovernmentalism into fields that – after the entry into force of the Lisbon Treaty in 2009 – are under clear EU competence and scrutiny remits. This includes SAR and disembarkation activities, for instance when these fall within the scope of joint operations at sea conducted by the European Border and Coast Guard (EBCG or Frontex Agency),<sup>18</sup> or in the case of member state border surveillance actions, as these are subject to the Schengen Borders Code (SBC).<sup>19</sup>

The EU principle of solidarity in the field of asylum enshrined in Article 80 of the Treaty on the Functioning of the European Union (TFEU) should not be understood as an 'anything goes' option for national governments and their interior ministries (Vanheule et al. 2011). This principle implies equality among all EU member states. Equal membership rights entail the expectation of equal responsibilities. It should not be only for the governments of France and Germany to take up a responsibility which must be shared among all EU Schengen countries.

This has been confirmed by the Luxembourg Court in the 2017 ruling that dismissed the actions brought by Slovakia and Hungary against the emergency relocation decisions adopted by the Council in 2015.<sup>20</sup> In that circumstance, the Court made it clear that EU 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". The same concept was reiterated by Advocate General Sharpston in a recent opinion on the case brought by the Commission before the CJEU against Poland, Hungary and the Czech Republic for failure to comply with their obligation under the emergency relocations decisions. Sharpston pointed out that "Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' [...] also requires one to shoulder collective responsibilities and (yes) burdens to further the common good".<sup>21</sup>

<sup>18</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 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, OJ L 189, 27.6.2014, p. 93–107.

<sup>19</sup> European Court of Human Rights, Case of Hirsi Jamaa and others v. Italy (Application no. 27765/09)

<sup>20</sup> Court of Justice of the European Union PRESS RELEASE No 91/17 Luxembourg, 6 September 2017 Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>

<sup>21</sup> Opinion of Advocate General Sharpston delivered on 31 October 2019 (1), Case C-715/17. European Commission v Republic of Poland, Case C-718/17 European Commission v Republic of Hungary, Case C-719/17 European Commission v Czech Republic.



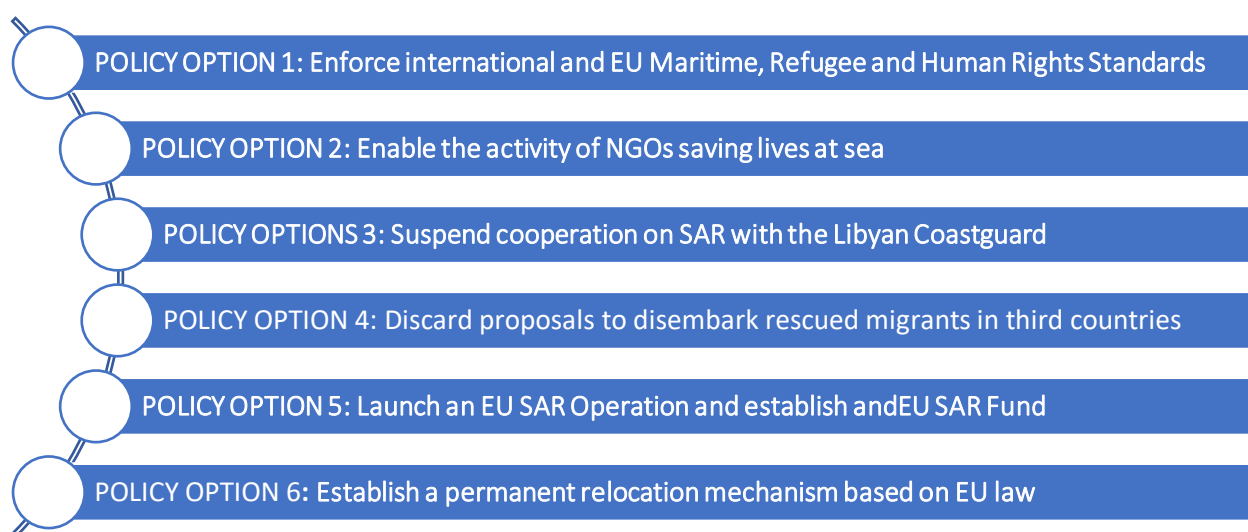
During the previous legislature, moreover, the European Council gave preference to a logic of consensus and de facto unanimity among EU member states during negotiations on the CEAS reform files (Carrera and Cortinovis, 2019). This is in direct violation of the Lisbon Treaty and the application of the Qualified Majority Voting (QMV) rule under the ordinary legislative procedure for asylum-related legislative initiatives. This political choice should be abandoned as it has undermined the chances for any moving forward in the reform of the EU asylum system, as recommended by the previous European Parliament (European Parliament, 2017).

## 4. CONCLUSIONS AND POLICY OPTIONS

The Malta declaration does not provide a basis for a predictable EU solidarity mechanism. A common EU response based on equal solidarity and clear legally-binding commitments for all EU member states in line with Treaty-decision making procedures should be prioritised instead. This is the key recipe for strengthening the Union's legitimacy and credibility in asylum and migration policies, both internally and in its relations with third countries.

In light of the above, what are the Policy Options for possible ways forward? We suggest six main Policy Options, which are visually illustrated in Figure 1 below. They are in line with the EU acquis on asylum and borders control, as well as with standards laid down in the EU Charter of Fundamental Rights. The Policy Options would seek to involve and cover all EU Member States in line with the decision-making and voting procedures foreseen by the Treaties for policies in the field of asylum and border surveillance and facilitate compliance with the principles of solidarity and fair sharing of responsibility and of loyal and sincere cooperation. They also foresee a key role for EU agencies, the EBCG (agency) and EASO in supporting member states' authorities and fostering sharing of responsibility at the EU level.

**Figure 1: EU Policy Options on SAR & disembarkation**



Source: Authors' own elaboration

## **POLICY OPTION 1: Enforce international and EU Maritime, Refugee and Human Rights Standards**

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. The EU counts with clear legal competences in the areas of border surveillance in the Schengen Borders Code and in the areas of access to international protection and reception conditions for asylum seekers in relevant EU Directives of the CEAS. The EU has also a common set of legal standards on SAR and disembarkation in the context of Frontex-led maritime joint operations, which constitute 'benchmarks' when assessing the adequacy and legality of current Member States practices.

International and regional maritime, refugee and human rights commitments lay at the foundations of EU border and asylum policies and are the *sine qua non* for their legitimacy and effectiveness. EU Member States should not be allowed to apply them 'flexibly' or not comply all together with their legal obligations in the context of SAR and disembarkation. Disengaging from saving lives at sea, criminalizing civil society and private actors engaging in SAR and indirectly supporting or cooperating with third countries in interception and illegal 'pull back' activities risk producing grave human rights violations, constituting international wrongful acts and exposing victims to crimes against humanity such as death, torture, inhuman and degrading treatment and arbitrary detention in unsafe countries.

## **POLICY OPTIONS 2: Enable the activity of NGOs saving lives at sea**

The criminalisation of SAR NGOs has become a significant phenomenon in several EU member states, including Greece, Italy, Malta. In these EU countries, actions taken to disrupt the activity of SAR NGOs have included the seizing and confiscation of NGO boats, the application of a 'code of conduct' limiting their independence, the launch of formal prosecutions based on unfounded allegations of facilitating irregular immigration and human smuggling, the refusal to allow access to national ports and, recently, the imposition of administrative fines against those organisations. These policies have contributed to substantially widen the gap in SAR capabilities in the Central Mediterranean (Carrera and Cortinovis, 2019).

EU institutions and member states should maintain their ports open to NGO vessels and ensure that NGOs can continue to contribute to rescuing refugees and migrants at sea, in compliance with relevant international law and standards.

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 actors 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 EU cooperation. 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 al., 2019).

### **POLICY OPTION 3: Suspend cooperation on SAR with the Libyan Coastguard**

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 rate of deaths at sea, grave human rights violations and crimes against humanity. Member states should urgently review all their co-operation activities and practices with the Libyan Coast Guard and other relevant entities, and identify which of these contribute, directly or indirectly, to the violation of human rights return of persons intercepted at sea and returned to Libya. Until clear guarantees of full human rights-compliance are in place, cooperation with Libyan authorities on SAR and disembarkation should be suspended.

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 'capacity building' on SAR and border maritime surveillance in third countries that are not safe for refugees and migrants, such as Libya, through EU funding. These forms of cooperation are illegal and incompatible with EU fundamental rights standards laid down in the EU Charter of Fundamental Rights, which bind the European institutions and agencies. Interventions in third countries should be accompanied by regular assessment of the impact on fundamental rights. Special focus should be given to ensuring that the migration-related objectives pursued through EU external funding are not inconsistent with (or run contrary to) other EU policies and objectives, including on democracy, the rule of law and human rights, as well as respect of UN principles and instruments.

### **POLICY OPTION 4: Discard proposals to disembark rescued migrants in third countries**

In the midst of controversies of disembarkation triggered by the 'closed ports' policy of the Italian government in the summer of 2018, the European Council held in June the same year called on the Council and the Commission to explore the concept of "regional disembarkation platforms", in close cooperation with relevant third countries as well as UNHCR and IOM (European Council, 2019).

The possibility of disembarking individuals in distress at sea on the territory of a third country is conditional on the respect of states' legal obligations under international and EU law, including the principle of non-refoulement as codified in the Geneva Convention and other relevant provisions under the ECHR and the EU CFR. As already clarified in the case of similar proposals advanced in the past, delegating responsibility of disembarkation to third countries, in particular those with weak asylum systems, only increases the risk of refoulement and other human rights violations. As long as functioning asylum system in any of the North African countries are not in place, disembarkation of those rescued on the high seas by vessels

under an EU member state's flag, by commercial or by NGOs vessels should take place in an EU member state.

### **POLICY OPTION 5: Establish a new EU SAR Operation involving EU Agencies and set up an EU SAR Fund**

The EU primary focus should be on devising a long-term intra-EU response to SAR challenges. Following previous calls made by international, regional and EU actors, the EU should seriously consider the feasibility of setting up and implementing a new SAR joint operation in the Mediterranean (European Parliament, 2015). EU Agencies, the EU Border and Coast Guard Agency (Frontex) and EASO, could be assigned coordinating and supporting tasks in different phases of the proposed EU SAR Joint Operation, including in assessing protection needs of disembarked people and implementing relocation based on a stable distribution model and on a clear legal framework (Carrera and Lannoo, 2018).

The Operation should be primarily – if not solely - focused on SAR (saving lives) and safeguarding international protection of people rescued at sea. EU Agencies must rigorously comply with international, regional and EU fundamental rights and refugee standards, and be subject to a robust and impartial monitoring and independent complaint mechanism before the European Ombudsman, in cooperation with national complaint mechanism bodies (Carrera and Stefan, 2018). The possibility should also be considered to establish an EU SAR fund to help reinforce a coordinate EU SAR response. Falling under EU Budget instruments, and subject to ex ante, ongoing and ex post accountability, the envisaged EU SAR fund would be primarily aimed at strengthening EU Member States disembarkation capacities, reception facilities and domestic asylum systems.

### **POLICY OPTION 6: Establish a permanent relocation mechanism based on EU law**

*Ad hoc* and informal relocation arrangements supported and coordinated by the European Commission and EASO since early 2019 should be put to an end. They constitute extra-Treaty and intergovernmental initiatives standing at odds with EU principles and providing an extremely weak coordination role for the Commission and EASO. 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. Similarly, EASO should be only involved in supporting the coordination of Member States initiatives which are in accordance to the EU law and asylum *acquis*-proof.

The use of variable geometry or enhanced cooperation in asylum and SAR policy would risk undermining the common EU asylum system and the principle of solidarity and fair sharing of responsibility which applies to *all* EU Member States as members of the Schengen (free movement) area. It would create different and potentially competing 'areas' of asylum and international protection inside the EU, resulting in the application of different rules and procedures depending on the specific circumstances of arrivals into the EU. Henceforth,

the Treaty objective to establish a uniform status of asylum valid throughout the EU would be jeopardized.

During the previous legislature, a logic of 'consensus' or *de facto* unanimity has driven negotiations on asylum issues inside the Council and the European Council. This was the case in spite of the qualified majority voting rule formally foreseen in the EU Treaties. Such a political choice is not in compliance with the envisaged decision-making rules on asylum in Article 78 TFEU. As a consequence of the 'package approach' linking the approval of the reform of the Dublin Regulation to all the other legislative instruments under negotiation, including the new mandate of EASO (and its conversion into an EU Asylum Agency) as well as all the rest of recast asylum Directives and Regulations, the whole reform of EU asylum rules has been put on hold. The decision-making procedures in the Treaties (QMV) should be faithfully 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 discretionary clauses included in Article 17 of the Dublin Regulation. In light of the challenges identified in relation to implementation of ad hoc 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 or 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.

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### **ReSOMA - Research Social Platform on Migration and Asylum**

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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