

SYNTHETIC  
TASK FORCE  
REPORTS

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ReSOMA Task Force

ASYLUM - MIGRATION - INTEGRATION

## Identifying Priorities & Discussing Policy Options in EU Migration, Asylum and Integration Policy



## Synthetic Task Force Reports

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## INTRODUCTION

EU policy debates on migration and asylum over the course of 2019 revolved around the need to abandon crisis-led policy-making that had dominated EU policy responses in the aftermath of the so-called 'refugee crisis' from 2015 onward. The need for a "fresh start" out of the toxic and polarized debates of the post-crisis period is the reason behind the choice of the new President of the Commission Ursula von der Leyen to develop a New Pact on Migration and Asylum, which is expected to strike a delicate compromise between the different interests and priorities of member states.<sup>1</sup>

During the first Resoma Task Force Consultation, which took place on 21 November 2018, participants underlined how the 'refugee crisis', while providing a window of opportunity for renewed action at the EU level, had been nevertheless accompanied by a number of controversial policy developments.<sup>2</sup> Emergency measures adopted during that period, including informal and extra-EU Treaty instruments of cooperation with third countries, ended up bypassing the system of remedies and checks and balances foreseen by the EU legal system, raising concerns regarding the respect of EU rule of law and fundamental rights principles and standards.

It was underlined how the politically-motivated exploitation of the crisis legitimized restrictive approaches in the area of migration and asylum at both the EU and national level, which in turn have resulted in increasing policing activities towards civil society actors providing support to refugees and migrants. Following that analysis, participants to the previous Task Force Consultation agreed on the need to 'normalise' EU policy debates on migration, as a precondition to replace short-term and emergency-measures with a sustainable and long-term approach to migration and asylum issues.

Policy developments over 2019, however, have underlined once again how difficult the transition from a crisis-led to normal policy making in the area of migration and asylum is proving to be. Ad hoc arrangements for the relocation of migrants rescued at sea negotiated and implemented during 2018 and 2019 are a clear example of how, in the absence of a structural responses based on the reform of EU rules, intergovernmentalism, 'variable geometry', and flexible forms of cooperation continue to play an important role in EU migration and asylum policy.

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<sup>1</sup> Ursula von der Leyen, President of the European Commission. Mission letter to Ylva Johansson, Commissioner for Home Affairs, Brussels, 1 December 2019.

<sup>2</sup> See 'Synthetic Task Force Reports. Identifying Priorities and Discussing Policy Options in EU Migration, Asylum and Integration Policy, March 2019, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/RESOMA%20TASK%20FORCE%20REPORT%20final.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/RESOMA%20TASK%20FORCE%20REPORT%20final.pdf)

Against the previous background, the second edition of the ReSOMA Task Force Consultation, which took place on 8 November 2019, focused in depth on three key topics which were identified by Resoma partners as particularly salient in light of current policy developments at the EU and national levels (see box below). Relying on the participation of policy-makers from relevant EU institutions and agencies, international organisations and civil society, the Task Force consultation aimed to exploring the underlying assumptions and perceived trade-offs that underpin policy choices at the EU level. In addition, the Task Force aimed at advancing policy options that could advance reform paths and deliver more sustainable policy responses on each of the three identified policy issues.

### **The Task Force topics**

- 1) Search and rescue, disembarkation and relocation arrangements in the Mediterranean
- 2) Criminalisation of Solidarity in the EU: What Impacts?
- 3) Shaping and reshaping public opinion on EU's migration policies

In terms of methodology, the TF Consultation was implemented in the form of three thematic sessions (one for each of the three identified topics), moderated by CEPS and MPG researchers. One Co-rapporteur for each of the three thematic sessions was appointed. Co-rapporteurs were selected among members of the ReSOMA research team and tasked with presenting the key conclusions of the thematic sessions during the concluding plenary discussion.

The thematic sessions interrogated the motivations for adopting specific policy choices, the linkages between policy priorities, and the evidence base on which adopted policy measures were built upon. The ensuing plenary session allowed the TF participants to comment and exchange ideas on the key findings emerged during the three thematic sessions.

The three Synthetic Task Force Reports draw on the debate that took place during the Thematic Sessions, and present the key findings highlighted by Co-rapporteurs in their interventions during the Task Force plenary session. A full list of participants to the three thematic sessions can be found in the Appendix.

# 1. SEARCH AND RESCUE, DISEMBARKATION AND RELOCATION ARRANGEMENTS IN THE MEDITERRANEAN<sup>3</sup>

## 1.1 Introduction

Search and Rescue and disembarkation of people rescued at sea in the Mediterranean became a thorny political issue during the summer of 2018, after the decision by the former Italian Interior Minister, Matteo Salvini, to close Italian ports to NGOs and other vessels carrying migrants and asylum seekers found in distress at sea.

In the following period, cases of delayed disembarkation were addressed through ad hoc disembarkation and relocation arrangements. These arrangements involved a small group of Member States willing to relocate, on a voluntary basis, a limited share of rescued asylum seekers disembarked in Italy, Malta and Spain.<sup>4</sup>

Ad hoc arrangements were initially conducted in a purely intergovernmental fashion, and without fulfilling the requirements and procedures foreseen by EU asylum law. Since early 2019, the Commission started playing the role of ‘facilitator’ or ‘deal broker’ among member states taking part the pledging exercise for relocation. EU agencies, chiefly the European Asylum Support Office (EASO) and Frontex, were mobilised and deployed in Italy and Malta to provide support to participating member state authorities in a number of procedural steps following the disembarkation of rescued persons.

Following lengthy negotiations within the Council of the EU during 2019 on the issue of ‘temporary arrangements for disembarkation, an initiative led by four Member States (Germany, France, Italy, Malta) over the summer resulted in a Ministerial Meeting in Valletta on 23 September 2019. The declaration adopted by the four countries in that context – the so-called ‘Malta Declaration’ – aims to overcome the previous ‘ship by ship’ approach by setting in place a “more predictable and efficient temporary solidarity mechanism”. The solidary mechanism foresees inter alia relocation of asylum seekers disembarked in Italian and Maltese ports on the basis of pre-declared pledges and through a fast track system taking no more than four weeks. The Declaration was further 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.<sup>5</sup>

Debates and initiatives at the EU level on SAR and disembarkation are happening against the background of a stalled reform of the Common European Asylum system (CEAS), which has been put on hold by persisting disagreements among member states in the Council

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<sup>3</sup> By Roberto Cortinovis, CEPS.

<sup>4</sup> S. Carrera and R. Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?*, CEPS Paper in Liberty and Security in Europe, No. 2019-10, June 2019, <https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/>

<sup>5</sup> S. Carrera, R. Cortinovis, *The Malta declaration on SAR and relocation. A predictable EU solidarity mechanism?* CEPS Policy Insight, No 2019-14 / October 2019, <https://www.ceps.eu/ceps-publications/the-malta-declaration-on-sar-and-relocation/>

over issues related to solidarity and fair sharing of responsibility, and specifically the contested introduction of a system of mandatory relocation of asylum seekers among member states.

The purpose of this TF section was to discuss the main features of the previously mentioned developments on SAR and disembarkation, providing an assessment of the initiatives taken so far and discussing what additional steps in this area can be expected from the recently appointed Commission and European Parliament, as well as the upcoming EU Presidencies of the Council.

Specifically, the TF session was structured around the following three main questions:

- What are the main features and implications of recent EU initiatives on disembarkation of people rescued at sea, including arrangements involving the relocation of rescued people among EU member states?
- What are the main lessons learned from cooperation with third countries on SAR and disembarkation? What key issues does cooperation in this area raise from the perspective of third countries?
- What policy options should be considered, both in the short and in the long term, to ensure the rapid disembarkation of people rescued at sea in line with international law and the fair sharing of responsibility for rescued migrants and asylum seekers among EU member states?

## **1.2. Taking stock and assessing EU policy initiatives on SAR and disembarkation**

The TF session started with an assessment of the political context in which the latest policy developments on SAR and disembarkation at the EU level have unfolded. Participants pointed to the highly politicized context in which debates and political initiatives over SAR and disembarkation have been taking place over the last year. During the first half of 2019, the Commission and the Romanian Presidency of the Council had worked to establish a more predictable and stable mechanism of disembarkation to overcome the 'ship by ship' approach adopted during the previous period. However, discussions held in EU fora did not materialise into any concrete proposal until the adoption of the Malta declaration. There was agreement among participants on the fact that the main driver for adopting the Malta Declaration in September 2019 was the unexpected change of government in Italy over the summer, which allowed to establish a less confrontational climate and explore more cooperative solutions at the EU level.

While recognizing the window of opportunity offered by the Malta Declaration for renewing cooperation at the EU level on disembarkation and relocation, participants also underlined a number of issues concerning both the form and content of the initiative.

First, it was underlined how the Malta Declaration is currently focusing only on the Central Mediterranean route (Italy and Malta), which however has not been the main entry point of migration flows to the EU in 2019. Unlike the situation during 2016 and 2017, only 14% of

the 102,338 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 (58% of the total) and Spain (26%).<sup>6</sup>

The narrow focus of the Malta declaration on the Central Mediterranean has caused other EU member at the EU external sea border, such as Spain and Greece, to express discontent with the initiative. 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>7</sup>

Participants also critically assessed the provisions on solidarity laid down in the Malta Declaration, and specifically the non-compulsory and voluntary mechanism of relocation it envisages. One participant described the Malta declaration as an 'empty' document, which represents the political price to be paid to the Italian government for its change of course over migration. Apart from its political significance, however, it is questionable if the Declaration provides for a predictable framework to address disembarkation and relocation issues, in particular in the case arrivals will substantially increase in the coming months.

Participants agreed on the need to disentangle the different policy issues that fuel SAR and disembarkation controversies among EU Mediterranean states. Search and rescue of people of sea as such has to do with the international law of the sea and not with migration and asylum law and policies. Controversies between Italy and Malta over disembarkation have been traditionally fuelled by the specific configuration of their respective SAR regions in the Mediterranean basin, and specifically by the enormous extension of the Maltese SAR zone and the overlap between the Italian and Maltese SAR regions.

Participants underlined the need to shift from the political to the technical level in order to properly assess the possible impact on the Malta declaration and how it can work concretely. The high politicisation and media attention that surrounded the Maltese informal summit implied that the text of the Malta declaration was necessarily framed in rather vague terms. It can be expected that ensuing technical discussions over its implementation will provide some more concrete results, for example through the adoption of Standard Operating Procedures (SOPs) for conducting relocation procedures.

The intergovernmental track which led to the adoption of the Malta declaration raises specific concerns about its compliance with EU asylum law. It was recalled how, in the context of ad hoc arrangements during 2018, episodes were reported of people disembarked in Malta who were prevented from applying to asylum in that country, and of relocation procedures being conducted without fulfilling the requirements foreseen by the Dublin Regulation. The lack of publicly available information about the implementation of relocation arrangements, including the number and profiles of relocated individuals, has further exacerbated concerns about possible violations of the rights of asylum seekers foreseen by EU law, including the principle of non-discrimination.

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<sup>6</sup> See UNHCR, Mediterranean situation, <https://data2.unhcr.org/en/situations/mediterranean>

<sup>7</sup> J. Barigazzi, "It's not all about Italy! 3 EU countries call for change to migration focus", Politico Europe, 10 July 2019, <https://www.politico.eu/article/migrant-route-eastern-mediterranean-sea-not-all-about-italy-3-eu-countries-call-for-change-to-migration-focus/>

More fundamentally, the flexible and voluntary approach to relocation envisaged in the Malta Declaration raises the question about the correct interpretation and implementation of the principle of solidarity and fair sharing of responsibility in migration and asylum matters included in Art. 80 of the TFEU. One participants quoted the words recently used by Advocate General Sharpston in her opinion on the case brought by the Commission before the CJEU against Poland, Hungary and the Czech Republic) for failure to comply with the emergency relocations decisions adopted by the Council in of 2015. The Advocate General pointed out that: "Solidarity is the lifeblood of the European project. 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>8</sup>

Participants agreed on the need to consider current SAR and disembarkation controversies in the broader political context picture in which they unfold, in particular persistent tensions among EU member states over the reform of EU asylum rules. This is the reason why, while advocating on member states to step up SAR capacities in the Mediterranean, the European Parliament has consistently underlined that this should be accompanied by a reform of the Dublin system that correct current distortions in the allocation of responsibility for asylum seekers among member states.

In light of the previous, the discussion turned to assessing the main prospects of the New Pact on Migration and Asylum announced by the President of the European Commission Ursula Von der Leynen. According to the Commission's official statement, the new Pact should involve a comprehensive approach including the reform of EU asylum rules, a reliable and permanent approach to search and rescue, as well as actions to restore a fully functioning Schengen area. The President of the Commission has tasked the Vice-President for Promoting our European Way of Life, Margaritis Schinas, and the Commissioner for Home Affairs, Ylva Johansson to coordinate and develop the Pact in close cooperation with the European Parliament and the member states.

Participants recognised the promise that new Pact hold in finding viable compromises among member states on some delicate and controversial migration and asylum issues. It was underlined how, after the failed reform of the CEAS and in context of tensions over SAR and disembarkation, EU institutions are not allowed to fail anymore. In relation to this, the Commission is talking about a 'Pact' as an attempt to put forward a more positive narrative. Acknowledging that the Dublin reform has become a toxic issue within the Council due to divergent positions on responsibility sharing, the Pact is expected to forge a renewed consensus among member states on the priorities to be pursued in the field of asylum and migration.

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<sup>8</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.

While acknowledging the potential of the Pact to provide for a new start to the reform process, participants underlined how the potential success of this initiative will largely depend on the main strategic lines and objectives around which this initiative will be shaped.

It was underlined how the positions within the Council on the reform of asylum rules are still entrenched and polarised, so that a common understanding on how to reform the CEAS looks still far from being achieved. It is also very difficult to predict how the current deadlock could be overcome if certain member states' governments openly support Eurosceptic positions, which consider the EU in itself as part of the problem. The fact that some member states are currently confronting the rise of radical right parties internally is a factor that makes achieving a consensus even more difficult.

Some participants pointed out that the Commission disqualified itself in the eyes of member states when it came up with its proposal for reforming the Dublin Regulation in 2016. The proposal to establish a mandatory corrective relocation mechanism included in the proposal, in particular, was firmly rejected by some member states, which came to the conclusion that the Commission was not offering any viable solution from their perspective. To set the stage for a relaunch of the reform process, and before coming up with any new proposal, the Commission needs to rebuild trust with member states through increased dialogue and consultation.

While recognising that overcoming current divergences will necessarily take some time, participants underlined the urgency to delineate the main points of the new Pact in the next few months. If it can be expected that negotiations of next Multiannual Financial Framework (MFF) for 2021-2027 will likely occupy the agenda of EU institutions in the first semester of 2020, it is crucial for the Commission to keep momentum on the reform agenda and come up with a set of new proposals to relaunch the reform process during the second part of the year. Otherwise, the risk is that a worsening migration scenario over the summer could once again create the conditions for a 'crisis situation' in the EU.

Some participants underlined in this regard the importance of focusing on the 'process' for delivering the Pact, and in particular on the need to ensure its inter-institutional dimension. While it is crucial that Schinas and Johansson reach every European capital and lay down the basis for a compromise between the member states, it is also key to ensure full ownership and contribution of the European Parliament in the process.

It was argued in this regard that policy responses at the EU level in the aftermath of the refugee crisis in 2015 have been characterized by increasing intergovernmentalism and by attempts to bypass the EU system of democratic accountabilities. This is not only the case of initiatives concerning SAR and disembarkation, but it also extends to the increasing use of extra-EU budget funding instruments, as is the case of EU Trust Funds (EUTF), which were rushed through the Parliament, or approved retrospectively after their adoption. This way of doing has not allowed the EP to fully exercise its right of information and democratic scrutiny and has reinforced the impression among MEPs that the Parliament was not being taken seriously by member states governments.



Besides procedural aspects, participants also reflected on the substantive aspects which should be included in the Pact. One participant argued that the Pact should reaffirm the intrinsic link between the Dublin and the Schengen systems. To that aim, a participant observed that EU institutions should consider amending current legislation to allow for the suspension of the Schengen system in case of failures of member states to uphold their commitments and responsibilities under the CEAS, including in the area of solidarity and fair sharing of responsibility.

In a non-paper titled 'Food for Thought. Outline for reorienting the Common European Asylum System' of 13 November 2019,<sup>9</sup> the German Minister of Interior has identified a set of proposals which deserve specific consideration in light of the fact that Germany will take up the rotating presidency of the Council in the second half of 2020. The German document, in particular, foresees to grant the new European Union Asylum Agency (EUAA), whose mandate is under negotiation, the authority to register asylum applicants into Eurodac and to conduct an initial assessment of their asylum claims, with a view "to gradually take over both tasks in the longer term".

The German proposal also foresees putting aside the principle of first irregular entry establishing a new system for distributing fairly asylum seekers among member states on the basis of a fair share based on criteria such as population size and economic strength (GDP). At the same time, the non-paper includes a number of controversial proposals, such as the introduction of mandatory border procedures, reduced legal safeguards for asylum seekers in case of rejection of their asylum claim, and the introduction of punitive measures towards asylum seekers engaging in secondary movements, which raise important concerns regarding their compatibility with fundamental rights standards laid down in EU treaties.

A final observation that was made during the discussion is that it should not be excluded that the Pact could end up taking the form of a rather vague political document, leaving to the technical level the task to define a number of key procedural aspects. It was underlined in this regard the important role that international organisations, UNHCR and IOM, could play in this process: first, by highlighting a number of 'red lines' when it comes to protection standards and respect of asylum seekers and migrants' fundamental rights and, second, advancing proposals at the technical level to improve the effectiveness and sustainability of adopted policies.

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<sup>9</sup> See 'Food for Thought (13 November 2019) Outline for reorienting the Common European Asylum System', <http://www.state-watch.org/news/2019/dec/eu-asylum-FoodForThought-GermanNoPaper.pdf>

### 1.3 Cooperation with 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 controversial concept of 'regional disembarkation platforms', in close cooperation with relevant third countries as well as UN-HCR and IOM.

The idea of establishing 'regional disembarkation platforms' has been the object of strong criticisms from several sides. It was underlined in particular how 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.

Participants commented that EU proposals on 'disembarkation platforms' were very poorly elaborated and presented and ended up being counterproductive in light of the objective of establishing trust-based relations with third countries. These proposals triggered the immediate reaction of African countries, which equated disembarkation platforms to the establishment of *de facto* detention centres in their territory and refused to cooperate with the EU in the implementation of those plans.

Disembarkation platforms, which were further elaborated during the Austrian Presidency of the Council in the second half of 2018, were centred on a narrow focus on containment, failing to put migration and asylum issues in the framework of broader relations with third countries. According to a participant, migration should be framed instead as a 'joint challenge' to be addressed by EU member states and countries on the other shore of the Mediterranean. North African countries, such as Morocco, Tunisia and Libya, are not only countries of origin, but also countries of transit of migration from sub-Saharan Africa. This implies that those countries are facing a specific set of challenges that should be taken into account by the EU when engaging those countries on migration matters. The strong focus on migration in EU Libya relations is difficult to understand from a Libyan point of view, considering the range of fundamental challenges that country is currently facing.

Participants reflected on the fact that no later than ten years from now, migration issues occupied a relatively less important place in the EU external relations, while currently they are over dominating the EU external agenda. One participant underlined possible side effects resulting from attempts by Ministers of interiors to impose their own external agenda, by putting readmission and return issues at the hearth of cooperation with third countries.

It was underlined how the EU has no legitimacy whatsoever to engage in any partnership with third countries as long as "it does not put its house in order". The situation on the Greek islands is possibly the most dramatic example of the EU's failure to ensure within its territory respect of standards provided by EU law, notably in relation to reception and treatment of asylum seekers.

The discussion then turned to the assessment of the framework of cooperation between the EU and Turkey. It was underlined how the 2016 EU-Turkey Statement increased dependency of the EU from the Turkish government and can hardly be considered as a sustainable solution. EU policy makers 'jumped' into the conclusion of the Statement in a desperate attempt to limit the number of refugees arriving in Greece from Turkey. The Statement was driven by a logic of containment, which exacerbated the flaws of the Greek reception system and aggravated the humanitarian situation of people hosted in reception centres on the Greek islands. Furthermore, as recognized by a number of observers, in an attempt to ensure the implementation of the Statement and the return of all asylum seekers and migrants to Turkey, pressures were put by EU institutions on the Greek authorities to revise their asylum law and conduct asylum procedures in ways that are not in line with EU asylum standards.

More fundamentally, it was underlined how cooperation with countries such as Turkey and Libya that are responsible for fundamental rights and crimes against humanity within their borders is the 'elephant in the room' to be addressed when assessing the legitimacy and credibility of EU external migration policy. The Commission should consider conducting fundamental rights' impact assessment before implementing interventions in third countries and make sure that proper monitoring and democratic accountability mechanisms are taken into account when developing EU external action.

This round of discussion was closed with the observation that the temptation to rely predominantly on cooperation with third countries to address migration and asylum challenges instead of focusing on improving policy responses within the EU and reforming the current legislative framework should be resisted. It was stressed how, in light of a volatile situation in the EU neighbourhood (including in Libya and Syria) and the politicisation of migration issues within the EU, even a small increase in the number of migrants arriving in the EU is enough to raise tensions among member states and triggers a 'crisis' situation. To avoid such a scenario, Member states and EU institutions should focus on addressing the main limitations of EU internal policy and legal framework instead of relying overwhelmingly on external policies.

#### **1.4. Policy options**

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, which are covered by Regulation 656/2014. The Frontex Maritime Surveillance Regulation applies to all joint operations at sea coordinated by the agency 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 law of the sea 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 practices by EU member states in the Mediterranean can be assessed.

A participant to the session suggested that a possible way to address current uncertainties concerning legal obligations of member states for rescuing and disembarking people in distress at sea could be that of making the provision on SAR and disembarkation included in the Maritime Surveillance Regulation applicable not only when SAR activities are conducted in the context of Frontex-coordinated operations, but also when member states are coordinating and conducting their own SAR activities. The inclusion of rules on SAR and disembarkation in the Schengen Border Code would allow addressing ambiguities in the current legal framework, preventing disagreements among Mediterranean coastal governments over the interpretation and applicability of the international law of the sea.

Participants agreed on the fact that a long-standing response to current challenges in the Mediterranean cannot be focused only on clarifying the legal framework on SAR and disembarkation. Controversies among member states over disembarkation are linked to the unfairness and inefficiencies of the system of allocation of responsibilities for asylum seekers within the EU. Relaunching the reform of the CEAS is thus a key condition for establishing a more predictable and sustainable SAR regime in the Mediterranean.

The new Pact on Migration and Asylum announced by the Commission represents the political framework in which an agreement on the reform of asylum and migration rules will be sought in the first half of 2020. While the responsible Commissioners have already started a tour of European capitals to discuss the content of the Pact with member states' ministries, participants underlined the importance of fully including the European Parliament in the consultation process. The Pact should be framed in terms of achieving a renewed 'inter-institutional consensus' or it risks being built on fragile grounds. In order to overcome the stalemate of the previous reform, the Pact needs to rely on an inclusive method, based on the involvement and contribution of relevant institutional actors, and on the identification of a set of key priorities on which the new consensus should be grounded.

In relation to the concrete proposals that could be discussed by EU institutions in a future reform of the CEAS, the already mentioned German non-paper seems to go in the direction of further expanding the role of EU agencies, Frontex and EASO. The German proposal envisages the possibility to entrust EASO (to be renamed as EU Asylum Agency) with the task of conducting an admissibility procedure at the EU borders, after which people eligible for asylum would be immediately channelled into a relocation system based on a set of parameters (such as population and GDP).

While recognising the potential added value of this approach, participants underlined some aspects that should be taken into account in order to ensure its feasibility as well as its compliance with EU asylum standards. First, it was stressed that admissibility procedures of asylum claims should not only concern manifestly unfounded claims, but also (as proposed by the UNHCR) manifestly founded applications, and carried out in a way that combine speed with the respect of relevant procedural safeguards. Second, it was underlined the importance of taking adequately into account the preferences and legitimate motivations (e.g. family links or other motivations based on humanitarian grounds) that asylum-seekers may have for asking protection in a specific member state.

In relation to the increasing responsibilities and tasks assigned to both the European Border and Coast Guard (Frontex) Agency and EASO, participants underlined that ensuring the accountability and transparency of these expanding organisations should be a key priority for EU legislators. The recently approved reform of the Frontex Agency foresees the establishment of a new standing corps of 10 000 EU border guards with executive powers by 2027. In parallel, the proposal is currently under negotiation to transform EASO into a fully-fledged European Union Asylum Agency (EUAA), which would significantly expand the mandate and resources of the new agency. The increasing operational role granted to Frontex and EASO calls for the establishment of effective mechanisms to ensure compliance by the two agencies with fundamental rights in the course of their activities, including through the establishment of complaint mechanisms accessible to any person who consider that her or his fundamental rights have been breached during the execution of the agencies' activities.

A specific attention was devoted during the discussion to the issues raised by EU cooperation with third countries on asylum and migration issues. There was agreement among participants on the need to correct the overwhelming focus on migration control and containment that has dominated EU policy discourses and informed a number of policy initiatives undertaken during the last few years. It was underlined the need to put migration in its proper place within the broader framework of cooperation with third countries. Initiatives such as the African-Europe Alliance and the EU's External Investment Plan underpinning it, represent promising partnerships and instruments to boost the economic development of third countries, allowing to address the underlying factors of migration movements in a long term perspective. Cooperation with third countries, however, should not be subordinated to a logic of conditionality, which makes financial support provided by the EU dependent on third countries' short term commitments to contain migration flows.

Participants welcomed the positive achievements of EU member states in the field of resettlement over the last years. Since 2015, almost 63,000 refugees have been resettled through two successive EU-coordinated resettlement schemes. In the framework of the resettlement scheme proposed by President Juncker in September 2017, whose implementation is still ongoing, Member States committed to resettle over 50,000 persons in need of international protection over the following two years. Participants underlined how commitments in the field of resettlement and complementary pathways to protection (such as humanitarian visas) are a key objective of the Global Compact on Refugees (GCR) endorsed by the UN General Assembly in December 2018. It was stressed that the EU should aim at playing a key role in the implementation of the GCR. This requires developing a coherent approach towards the achievement of the Compact's objectives at the EU level, including by coordinating efforts in the field of resettlement and other legal pathways of admission.

## 2. CRIMINALISATION OF SOLIDARITY IN THE EU: WHAT IMPACT?<sup>10</sup>

ReSOMA research shows that criminalisation of solidarity is a broad phenomenon ranging from suspicion and harassment to prosecutions of volunteers and NGOs helping migrants. An initial overview of cases and investigations on grounds of human smuggling found that at least 158 individuals have been criminalised across the EU between 2015 and the first quarter of 2019.

### 2.1 The implementation of the UN Smuggling Protocol and the Facilitation Directive: keys issues and gaps

Task Force participants underlined the existence of a gap concerning the implementation of the UN Smuggling Protocol in the Member States which often lack to take into account the definition of smuggling as provided by international law. The UN Protocol shifted from being a criminal justice tool to a migration management instrument. It was emphasised that from a UN perspective the right to life must be preserved and cannot be neglected by security issues. A tension between criminal justice and migration management approaches emerge in relation to the implementation of anti-smuggling policies at national level. In addition, participants raised concerns in terms of the increasing amount of public resources invested to criminalise humanitarian action. Police officers, law enforcement agencies and prosecutors face several difficulties to work in this context.

Participants also outlined that legal proceedings against SAR NGOs and volunteers mainly end with acquittals or dismissals of the cases because of the lack of solid evidences. Gaps emerge in relation to the numbers of criminal proceedings and actual convictions. Cases against humanitarian are not always based on criminal justice premises and therefore prosecutors fail to find evidences to convict individuals. The ongoing criminalisation of solidarity seems to be widely motivated by the political objective to shrink spaces for civil society and deter migration. Against this background, the experts highlighted the emergence of a trade-off between current political goals and the criminal justice system's scope. Moreover, civil society highlights that the broad gap between investigations and convictions can be framed as 'judicial harassment' having chilling effects on civil society, considering that prosecutions should not even start against NGOs acting on humanitarian grounds.

Participants pointed out that EU law bridges international commitments to fight human smuggling and EU objectives to tackle crimes against the state and manage the protection of border. The Commission carried out the evaluation of the Facilitation Directive to measure the impact and the convictions related to criminal justice instruments. The evaluation finds no sufficient data and evidences on cases and convictions related to the Facilitative Directive. The ReSOMA project provided some evidences of criminal prosecutions of NGOs and individuals assisting migrants, but few cases of convictions. Some participants stressed that there are no solid grounds to revise the Directive and it is difficult to link the Facilitators

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<sup>10</sup> By Carmine Conte, MPG.

Package and the ongoing cases. The EP in fact asked for the adoption of guidelines to interpret the Directive instead of reopening the Directives.

It has also been discussed that policing humanitarians is not strictly related to the EU legal framework per se, which instead affect criminals conducts and penalties. However, civil society underlined that policing is enabled by vague EU rules and provisions. Civil society criticising migration management policies are policed in the EU and accused of facilitating illegal entry, while Member States have the obligation to welcome migrants and consider asylum requests. A broad definition of 'facilitation of entry' leaves wide margin of appreciation to prosecutor to initiate procedures against NGOs and civil society.

Experts also pointed out that people have been criminalised for 18 years since the adoption of the Facilitation Directive in 2002, but in the last years there is a significant increase in the number of individuals prosecuted on grounds of human smuggling. Criminalisation of solidarity is not only a law enforcement issue related to a single persecution, but it is a widespread trend in the EU political discourse and narrative. The experts also highlighted that the EU is actively preserving humanitarian operations and defending human rights defenders abroad, but similar approaches are lacking inside the EU. As a result, the rescue of migrants without a financial benefit can still be prosecuted under EU law. On the other side, the French Constitutional Court interpreted the principle of 'fraternity' as covering "the freedom to help others for humanitarian purposes, without consideration for the legality of their stay on national territory".

## **2.2. Criminalisation of solidarity: how to frame the issue?**

Task Force participants also discussed how other issues concerning rule of law and protection of human rights are highly related to the ongoing criminalisation of solidarity. For instance, formal and informal punishments of humanitarian work are producing a chilling effect on civil society, restricting their freedom of association and their right to participate in the decision-making process. In Bulgaria, a political party advanced a legislative proposal allowing prosecutors to deregister the NGO Helsinki Committee, accused of organising meetings with judges that could interfere with the independence of the judiciary. Similarly, in Poland sex education has been criminalised for achieving domestic political purposes.

Other participants emphasised the importance of properly framing the issue of 'criminalisation of solidarity' in strict legal terms and avoiding a vague language. The emphasis on the legal framework is important to not exceed the remit of national and EU competences: the duty to rescue people at distress comes from international law, while NGOs disembarkation issues fall under EU law. On the other side, experts underlined that 'criminalisation of solidarity' is only one of the multiple definitions framing this issue ('policing humanitarianism', 'criminalisation of solidarity', 'shrinking civil society spaces', 'blaming the rescuers' and finally 'humanitarian smuggling'). However, despite the existence of many different labels of this phenomenon, there are clear and precise legal issues behind it. In particular, the Facilitators Package constitutes the cornerstone of European policies tackling migrant smuggling and enshrines several gaps that need to be addressed. Participants discussed that the adoption of guidelines would be an effective solution to resolve the implementation gaps affecting the Facilitation Directive.

Participants finally outlined the role of the EU Ombudsman which can deal with cases of maladministration by European Union institutions, bodies, offices and agencies. The Ombudsman can have a direct and effective role when cases at national level are inspired by EU law and asylum seekers and refugees interact with EU administration.

## **2.3 Humanitarian work and border management**

Some participants emphasised that humanitarian conducts can sometimes conflict with national sovereignty priorities and not all humanitarian concerns can prevail over migration management objectives. However, other experts argued that humanitarian law has a primary role in the hierarchy of rules in International Law. Criminal justice instruments used as legitimate tools to control irregular migration can be very detrimental for the protection of fundamental rights. It was noted that the power of prosecutors to investigate should not be restricted, but the case of Carmelo Zuccaro was very political oriented and the level of independency of prosecutors widely differs in the Member States. In case of political-motivated investigations, the revision of EU law would not be effective to avoid criminalisation of solidarity. Some participants also pointed out that not every case involving SAR NGOs can be assumed to be based on humanitarian reasons and that there are limits applying to NGOs. By contrast, other participants replied that the EU legal framework should aim to fight criminal organisation and NGOs should be therefore not criminalised. In this regard, the introduction of a compulsory humanitarian clause and the financial benefit to trigger the crime of facilitation of entry would be crucial provisions to avoid the criminalisation of humanitarians.

The discussion was particularly fruitful on what can be considered humanitarian activity. Participants highlighted the need for guidelines and a common understanding of humanitarian assistance that can apply in different countries. The lack of a common approach on this topic can be detrimental to the protection of human rights and some experts recalled the definition included in the Humanitarian Consensus on Humanitarian Aid.

Participants raised that border management activities should be in line with the EU's Fundamental Rights Charter, but there is no common definition and understanding of humanitarian assistance. It was indeed discussed whether to limit the concept of humanitarian assistance only to pure humanitarian work or also to include 'activism' under this definition. For instance, it was emphasised that, if a person helps a migrant to cross the Italian border, the conduct cannot always be considered legal unless there is a clear state of necessity according to national law.

It was debated whether the humanitarian work of activists could be directly covered by the EU Charter and the humanitarian clause of the Facilitation Directive. Some participants proposed a narrow definition of humanitarian aid that should be separated from the human defenders' international framework. It was also underlined that activists can also pursue goals not in line with humanitarian activities. An exemption excluding individuals merely because they belong to an NGO raised some concerns between a few participants.



## 2.4 Conclusive remarks

Most of the participants emphasised that the adoption of guidelines would be crucial to address the ongoing criminalisation of solidarity and better implement the Facilitation Directive. Also, the EU framework for human rights defenders should guarantee coherence between EU external and internal action. Others instead suggested to provide for a binding humanitarian exemption under EU law. A few participants underlined the difficulties in identifying a common understanding of 'humanitarian assistance' from a legal point of view. FRA however committed to continue the collection of data and cases in this area. It was noted that 20 years after the adoption of the UN Smuggling Protocol, it is very important to clarify its scope and assess the impact across the Member States of the Protocol.

### 3. SHAPING AND RESHAPING PUBLIC OPINION ON EU'S MIGRATION POLICIES<sup>11</sup>

The aim of this session was to obtain feedback from communications actors in the EU on the dynamics and obstacles they face when communicating about migration.

#### 3.1 How EU policy makers interpret and respond to public opinion

There was general agreement that EU institutions are aware of the dynamics and developments of public opinion on migration, namely through Eurobarometer and other studies at the national level. However, participants acknowledged that whilst awareness exists, the EU are cautious on communicating on migration related issues and are therefore more reactive rather than proactive. This is mainly since migration is considered a sensitive topic in the Member States and due to lack of time and resources. For instance, in 2015, only two staff members worked in the communications department of Directorate-General for Migration and Home Affairs. Further, public opinion is viewed as a topic that's owned by the Member States, and the EU is weary of its communication being perceived as a 'Brussels interpretation'.

Due to the above-mentioned reasons, the EU's communication has focused its efforts in countering disinformation. A notable example is the Migration Compact, where the European Commission responded to false information and disputed the narrative centrally on social media and through representations across the European Union; however, the EU cannot control whether national medias will be receptive to their messages. Participants also questioned this approach, considering recent studies that demonstrate that myth-busting approaches are counter-productive since they can psychologically reinforce the myths.

#### 3.2 Obstacles when communicating about migration

Participants identified a number of constraints that EU institutions face when communicating about migration. Firstly, due to the varying narratives and framings in the EU Member States – such as the difference between the rhetoric in Hungary and in Spain or Portugal – the EU finds it challenging to generalise one communication about migration and to be balanced. One participant also noted that there are no clear guidelines on how to communicate on an EU-level. Secondly, migration is a politically sensitive topic and the EU – not Member States – are often blamed on the way they are handling it. Hence, EU institutions are careful about communicating on migration. Participants mentioned instances where the EU sought to communicate about legal migration and resettlement numbers but were informed that governments were against publicising the numbers because they worried about the publics' reaction. As such, the EU has to be cautious about communicating about certain topics in order to not undermine constructive policies. The final limitation iden-

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<sup>11</sup> By Hind Sharif, MPG.

tified was the lack of trust in institutions and expert opinion and the ineffectiveness of traditional expert channels. Countering this by using social media channels also causes difficulties since messages can be interpreted differently and due to the necessity of resources to manage the discussions and reactions. However, some participants suggested that the use of third-party endorsements can be a solution to this limitation.

### **3.3. Strategic communications**

Participants confirmed that the EU is seeking to develop proactive and strategic communications on migration, which is why the communications department of the Directorate-General for Migration and Home Affairs is creating a communications strategy at the time of writing and enlarging its team and resources. The EU also seeks to move beyond focusing on numbers by strengthening its communication on positive and hope-based stories on integration, such as cities work in this area. Some participants highlighted that an emphasis also needs to be placed on the visuals – not just the content. Participants recommended staying away from visuals that provoke feelings of threat, a 'crisis' and large numbers, since they can dehumanise migrants and refugees and give a message that the issue is out of control.

In terms of messaging, there was general consensus that the EU's communication on migration lacks strategic content on solutions. By only communicating about problems, rather than policy solutions, the EU will continue to be blamed on migration and the narrative of a 'crisis' will persist. For instance, cities prioritise solution-based communications on migration by recognising the challenges of migration but also highlighting solutions and positive measures to assure citizens. Participants acknowledged that the EU has not been able to do this because they did not have a solution at the time of the 'crisis', and that the EU should now be more prepared.

### **3.4 Messengers and third-party endorsements**

A key part of the discussion focused on the importance of messengers and third-party endorsements. Considering that messengers are a critical element of strategic communications, participants questioned whether the EU – or institutions in general – are the appropriate messengers for communicating on migration. This is particularly due to a rise of distrust in institutions and a need to identify alternative voices to channel messages. Further, participants stated there is an increasing shrinking space to discuss legal and economic migration with Member States due to the competency levels of the EU and Member States.

To address these constraints, participants stressed the importance of identifying strategic messengers for different topics on migration. Examples included using doctors, business societies, employers and unions to speak about the shortage of labour and the necessity of labour migration – rather than institutions and experts. Foundations and employers were also mentioned as messengers for the essential role of employers on integration in the labour market. Third-party endorsements, such as civil society organisations, corporations, football organisations, UN refugee teams, can also be used as messengers to speak about human

stories on migration. A participant noted that for instance, Mohamed Salah, a football player of the Premier League club Liverpool was used as a messenger to compact the narrative on islamophobia. Another participant mentioned that in order to involve civil society in communicating outputs and taking ownership as messengers, they need to be involved from the beginning, for instance in writing recommendations or providing feedback on content.

Another highlighted aspect was the EU's role in connecting people together and financing projects on integration and awareness raising with civil society, cities and local actors. Some participants stated that the EU perceives its funding role to be more effective and impactful due to awareness of their limitations as a messenger. As such, the EU does not see a need to claim ownership if it is more effective to use messengers or third parties.

Finally, participants noted the importance of institutions balancing when to communicate and when to avoid communicating about certain topics. There was agreement that there were instances when the EU should have communicated in order to fill a gap. However, there are times when the EU prefers to not communicate to avoid giving visibility to disinformation campaigns.

## APPENDIX – LIST OF TASK FORCE PARTICIPANTS

### **Thematic Session 1: Search and rescue, disembarkation and relocation arrangements in the Mediterranean**

Michele Amedeo (Head of the Centre of Thematic Expertise of Migration, European Commission, DG NEAR)

Sergio Carrera (Senior Research Fellow and Head of the Justice and Home Affairs Unit at CEPS)

Roberto Cortinovis (Researcher in the Justice and Home Affairs Unit, CEPS)

Jean-Louis De Brouwer (Director European Affairs Programme, Edgmont Institute)

Emilio De Capitani (Visiting Professor, Department of Law, Queen Mary University of London and former Head of the LIBE Secretariat)

Alexandra Embiricos (Policy and Legal Support Unit, UNHCR Regional Representation for EU Affairs)

Danai Papadopoulou (Administrator, LIBE Committee)

Georgia Papagianni (Deputy Head of Division at the MENA.3 Maghreb Division, EEAS)

Catarina Pinheiro Nunes (Policy and Legal Support Unit, UNHCR Regional Representation for EU Affairs)

Patrice Quesada (Senior Regional Emergency and Post Crisis Specialist, IOM)

Daphné Bouteillet-Paquet (Senior Legal Officer, ECRE)

### **Thematic Session 2: Criminalisation of Solidarity in the EU: What Impacts?**

Carmine Conte, Legal Policy Analyst, MPG

Marie Debievre (Unit C1 – Irregular Migration and Return Policy, DG Home, European Commission)

Isabel Diaz Goncalves (Administrator, LIBE Committee)

Marta Gionco (Advocacy Officer, PICUM)

Tamas Molnar (Legal Research Officer, FRA)

Morgane Nicot (Crime Prevention and Criminal Justice Expert at UNODC)

Koen Roovers (Case handler, Strategic Inquiries Unit, European Ombudsman)

Edyta Tuta (Human Rights Consultant, Regional Office for Europe, United Nations High Commissioner for Human Rights)

Lina Vosyliute (Research Fellow in the Justice and Home Affairs unit, CEPS)

### **Thematic Session 3: Shaping and reshaping public opinion on EU's migration policies**

Jan Braat (Senior policy advisor migration and integration, City of Utrecht, Netherlands)

Tommaso Chiamparino (European Commission Coordinator on combating anti-Muslim Hatred)

Laura Corrado (Head of Unit, Legal pathways and Integration, DG HOME)

Thomas Huddleston (Research Director, MPG)

Geertrui Lanneau (Senior Labour Mobility and Human Development Specialist, IOM)

Rossella Nicoletti (Project coordinator migration & integration, EUROCITIES)

Niene Oepkes (Senior policy advisor migration and integration, City of Utrecht, Netherlands)

Milica Petrovic (Communication Advisor, Cabinet of the Commissioner for Migration, Home Affairs and Citizenship)

Shannon Pfohman (Policy and Advocacy Director, Caritas Europa)

Hind Sharif (Communication and Community Coordinator, MPG)

Irina Csender (LIBE Secretariat)

Blanca Tapia (Project Manager - Communicating Rights, Communication & Events Unit, FRA)

# ReSOMA

RESEARCH SOCIAL  
PLATFORM ON MIGRATION  
AND ASYLUM

## 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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