

The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-through-Interdiction/Rescue-without-Protection” Paradigm

ABSTRACT

This article looks at securitization/humanitarianization dynamics in the EU external sea borders to track and critique the substantial transformation of the role played by human rights in the Mediterranean. Mapping the evolution of maritime engagement up to the ‘refugee crisis’, it is revealed how the invocation of human rights serves paradoxically to curtail (migrants’) human rights, justifying interdiction (‘to save lives’), and impeding access to safety in Europe. The result is a double reification of ‘boat migrants’ as threats to border security and as victims of smuggling/trafficking. Through a narrative of ‘rescue’, interdiction is laundered into an ethically sustainable strategy of border governance. Instead of being considered a problematic (potentially lethal) means of control, it is re-defined into a life-saving device. The ensuing ‘rescue-through-interdiction’/‘rescue-without-protection’ paradigm alters the nature of human rights, which, rather than functioning as checks on interdiction, end up co-opted as another securitization/humanitarianization tool.

KEYWORDS

Securitization; humanitarian border; humanitarianization; Frontex; refugee crisis

Introduction

There has been increasing recognition of the EU’s subjection to human rights when intervening at sea in successive reforms of the Schengen/Frontex *acquis* (Rijpma:2013, 2016; Rijpma/Vermeulen:2015; Carrera/den Hertog:2016a, 2016b)—taken by some as a success case of comprehensive criticism by non-state actors (Slominski:2013). This has been mirrored by an evolution of the rhetoric employed to justify European involvement in the Mediterranean, accompanied by a parallel development in the perception of ‘boat migrants’. Although the tools employed (interdiction) and end result (diversion) remain the same, EU discourse reflects a change from a ‘pure’ securitizing logic of raw pre-emption of unauthorised movement, with irregular movers portrayed as near-criminals (Guild:2009), towards an increasingly human rights-friendly narrative that depicts migrants as victims and

smugglers as perpetrators of death and abuse at sea. In both cases, maritime intervention is presented as vital, with interdiction fulfilling the double role of ‘combating illegal immigration’ and ‘saving the lives of migrants’ (Articles 1-2 EUROSUR). The paradox this dual function entails has been resolved through an implicit re-conceptualization of what ‘saving’ and ‘life’ mean, via an approach that selects and reduces (migrants’) human rights.

Indeed, a ‘new’ humanitarianism (Chimni:2000) emerges from the EU’s ‘borderization’ of the Mediterranean (Cuttitta:2014a; van Houtum/van Naerssen:2002). One that objectifies migrants as threats (*‘a risk’*) to border security and as victims (*‘at risk’*) of smuggling/trafficking (Aradau:2004), (*de facto*) dispossessing them of the (legal) agency and (full) rights that come with the lives supposedly saved. Human rights obligations are largely disclaimed—through blame games and accountability gaps (Rijpma:2010; Pollak/Slominski:2009; Ripoll-Servent:this issue)—and access to protection ultimately denied.

While legal amendments have accompanied a change in official language, giving rise to an account where ‘saving lives’ features as top priority, this has not resulted in an equal transformation of practices on the ground. Neither policy goals, nor their underpinning rationale or the means to achieve them have been revised. The reduction of unauthorised arrivals remains the constant goal and interdiction the constant tool to attain it (Malta Declaration:2017; Niemann/Speyer:this issue). What has changed is the way in which ‘interdiction’ has been configured and portrayed, from the prime border/migration control mechanism into a ‘necessary’ life-saving device (Pallister-Wilkins:2017). In the background, a humanitarianized ‘rescue-without-protection’ model legitimizes action sparing migrants the instant dangers of irregular voyages, but without (real) opportunities to action their rights.

While ‘interdiction’ expands to encompass a continuum of exception and control that begins in countries of origin/transit and continues after retrieval at sea, ‘rescue’ is shrinking to its corporeal component (*cf.* Durieux:2016). Classic techniques of deflection or *non-entrée* (Hathaway:1992:40), “‘disrupting” journeys *en route*’ (Mountz:2010:136), align with ‘exclusion-upon-arrival’ measures, impeding access to asylum procedures (*M.S.S.*) or making them ineffective (Kernerman:2008:247-248). ‘Automatic removals’ upon landing without adequate opportunities to file for international protection—also called ‘immediate *refoulement*’ (Sharifi:219)—are characteristic of this trend. Their final ‘effect’ is to prevent ‘boat migrants’ from reaching safety (Hirsi:180), excluding them from territory, rights or both (Cuttitta:2017:2).

This article focuses on this development, spanning the start of EU-sponsored intervention at sea since the inception of Frontex up to the height of the ‘refugee crisis’ (Niemann/Zaun:this volume), tracing the evolution of the ‘rescue-through-interdiction’ paradigm crystallised over the past 10 years. It will reveal how the language of humanitarianism has been co-opted and de-naturalised to respond to the immediate necessities of migrants in distress, but neglecting the causes of crossings and the consequences of pre-emption, thereby disfiguring the substance of human rights. Adopting a normative/critical-legal approach, relying on the literature on ‘humanitarian borders’ (Walters:2011), the article will expose the ‘false dichotomy’ between securitization and humanitarianism (Perkowski:2016:334), unpacking their relationship to human rights. This third rationality at work in the EU-ropean ‘borderscape’ (Rajaram/Grundy-Warr:2007; Brambilla:2015) is under-researched and requires investigation (Neilson:2010:127-128). Although it may appear as counterbalance to securitization/humanitarianization dynamics—especially if the distinction between

humanitarianism as gift vs human rights as entitlement is emphasized (Pallister-Wilkins:2015:59; Calhoun:2010:37)—the following will show how human rights, too, have become an artefact of the ‘governmentality of unease’ (Bigo:2002), justifying restrictive policies of border/migration control. The problematization of the ensuing ‘securitization of human rights’ will be the main contribution to the ongoing debate.

Securitization and humanitarianization

The portrayal of (irregular) migration as a ‘security problem’ has been normalized in prevailing political discourse both at domestic and EU level (Huysmans:2000, 2006). Bigo has dissected the process by which the reality of cross-border movement has been ‘securitized’¹ to create a dominant ‘truth’ about the danger posed by unchecked arrivals that casts the unauthorized entrant as an ‘enemy’, menacing ‘the homogeneity of the State’ (Bigo:2002:67). Such characterization catalyses fears and justifies the adoption of (restrictive) measures to manage the ‘threat’ they represent—based on the myth that transboundary flows can, and should, be controlled to avoid ‘invasion’ (De Haas:2008). The securitization of migration engenders continuous anxiety, calling for continuous vigilance to anticipate and minimize risks, legitimizing policies of permanent exceptionality. Under this optic, EU border policing, as facilitated/coordinated by Frontex, has been framed as a set of ‘securitizing practices’ pertaining to this process (Léonard:2010; Perkowski:2012; Campesi:2014; Franko Aas/Gundhus:2015; *cf.* Neal:2009).

In the Mediterranean, against a backdrop of spiralling fatalities (IOM:2017), the narratives of ‘tragedy’, ‘emergency’, and ‘crisis’ intersect with the securitization discourse (van

¹ ‘securitization’ herein corresponds to the ‘set of interrelated practices, and the processes of their production, diffusion, and reception/translation that bring threats into being’ (Balzacq, 2011:xiii).

Reekum:2016), articulating demands for ‘urgent action’ that reinforce the security response (Jeandesboz/Pallister-Wilkins:2014, 2016)—helping also to re-frame it as merciful and key to guarantee migrant survival (Carling/Hernández-Carretero:2011). Security, in this context, is permeated by ‘humanitarianism’ construed as life-saving conduct predicated on principles of humanity (Barnett/Weiss:2008:11). By turning border crossing into a humanitarian issue, border interventions can be substantiated on compassionate grounds. However, as Pallister-Wilkins and others have demonstrated, instead of opposing the securitization logic, ‘humanitarianized’ controls intertwine with it, engendering a new form of ‘ethical policing’ that simultaneously ‘cares and controls’ (Pallister-Wilkins:2015, 2017; Ticktin:2011). Humanitarianism (re-)presents interdiction as benign and performed in the interest of migrants. Migrant safety and border security are thereby seemingly conciliated (Williams:2016). The depiction of the Mediterranean borderland as a space of crisis/tragedy/emergency serves to concentrate on the ‘here and now’ of shipwrecks, concealing underlying structural defects in EU border design (Pallister-Wilkins:2016), and to discard considerations of concomitant rights as less/non-urgent. Migrants, in this ‘crisified’ environment, are thus recognised a claim to be rescued, but little more.

Conversely, a rule-of-law-abiding understanding of human rights would embrace the whole substance of legal entitlements (Craig:1997), such as to leave any country (Article 2(2) Protocol 4 ECHR), to asylum (Article 18 CFR), or to *non-refoulement* (Articles 33 CSR51, 3 ECHR, 19 CFR), allowing access to the full protection they entail (Moreno-Lax:2017), without artificially severing them from mere physical survival. It would recognise the material and procedural facets thereof to facilitate, rather than frustrate, their exercise, in line with the principles of dignity (Article 1 CFR) and equality (Article 14 ECHR). And to that end, it would acknowledge their nature not as ‘theoretical and illusory’, but as ‘practical and

effective' safeguards (*Hirsi:175*), requiring concrete provision of the means necessary to enjoy them in practice—so that forced migrants are not forced back into misery.

Instead, the 'humanitarianization' of border-sea entrenches the management of pain and pity as part of the EU external frontiers architecture. And with Mediterranean crossings becoming a matter of life and death (*Albahari:2006, 2015*), irregular crossers are not only classed as threats, but also as victims to be 'saved'. The approach is (supposedly) 'migrant-centred' (*Vaughan-Williams:2014:2-3*). It (strategically) interweaves border security with human security vocabulary that helps enhance the legitimacy and reputation of securitizing forces. The resulting 'humanitarian government' cares-through-control/controls-through-care in the name of the preservation of life and the alleviation of suffering (*Fassin:2007:151*). Sympathy, *charitas*—rather than rights and legal agency—are the 'moral reason' of this modality of government (*Fassin:2012*). As the next section demonstrates, the ensuing humanitarian(-ized) border, premised on 'rescue' *qua* relief of pressing needs, neglects the breadth of formal obligations, centring on benevolent assistance to resolve the 'urgent', thereby consolidating the securitization rationale.

The 'rescue-through-interdiction' model

Although irregular migration by sea is not the principal source of irregular migration in Europe, with overstayers constituting the biggest group (*EUROSTAT:2016*), both media attention and EU operational efforts have disproportionately concentrated on maritime activities (*COWI:2009; Ramboll:2015; EPSC:2017*). Nevertheless, the overwhelming majority of border deaths does occur at sea (*IOM:2017*). Non-rescue episodes and *refoulement* incidents are mostly due to disagreement on the extent of legal responsibilities

accruing in the maritime context. Interdiction has been conflated with search and rescue (SAR), and SAR duties then ‘detached’ from human rights obligations (Moreno-Lax:2011).

The EU’s approach to the applicability of human rights at sea remains unclear. Common European Asylum System (CEAS) instruments, for example, have been designed to apply only within Member States’ territorial jurisdiction, excluding international waters (Articles 3(1) RCD, 3(1) APD, 3(1) DR). There is also no structural link made in Schengen and Frontex law to CEAS legislation, with both the Schengen Borders Code (SBC) and the European Border and Coast Guard Regulation (EBCGR) omitting any mention of the CEAS.

This ambiguity is also epitomized by Frontex’ equivocal relationship with human rights, notwithstanding formal submission of its founding Regulation (FR) to the Charter of Fundamental Rights (CFR) and the SBC (Recital 22 FR), which subjected, border interventions, from the start, to ‘the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’ (Article 3(b) SBC). Rather than considering respect and protection of the EU *acquis* as a legal precondition for engagement in operational action, the Agency initially took human rights as a ‘strategic choice’ (Frontex:2009b:4), on the understanding that legal responsibility rests ‘primarily’ with the Member States (FRS:13)—it lacking executive powers of its own and being merely a facilitator/coordinator of Member States’ cooperation.

This position has changed through subsequent reforms—co-existent with the securitizing/humanitarianizing process discussed above. However, continuous rule specification may have served to present EU/Frontex/Member State action as compliant with human rights, but it has not decidedly reinforced the rule of law in the Mediterranean (*cf.*

Slominski:2013). While the existence (and, somewhat, the content) of migrants' human rights has been acknowledged, their extraterritorial applicability has not been fully clarified, and neither have the powers and procedures required to realize them in practice.

The first phase of evolution goes from Frontex' inception up to the adoption of the 2010 Maritime Guidelines Decision (MGD)—subsequently replaced by the 2014 Maritime Surveillance Regulation (MSR). This period is characterised by a defensive stance by the EU/Frontex/Member States, disclaiming extraterritorial human rights duties and unlinking international protection from the 'fight against illegal immigration' on which border action was to concentrate. In turn, the second stage can be said to commence after the introduction of the MGD, purported to remedy the most appalling concerns—though only within Frontex-coordinated operations. Chronologically, this coincides with the Arab Spring and is marked by the gradual introduction of humanitarian language in public documentation, somehow mirroring the actual humanitarian crisis unfolding in Syria and North Africa. A third phase starts with the *Hirsi* judgment, condemning Italy's push-backs, and the MSR, bringing about adaptation strategies to the new legal landscape. Building on *Mare Nostrum*, *Triton* and *Triton+*, during the final phase, the EU comes up with a solution that transforms cross-border movement/international protection issues into matters of militarized law-enforcement. Operation *Sophia* (EUNAVFORMed Decision:2015) exemplifies this twist, shifting attention from the migrants themselves to the smugglers/traffickers that facilitate their transit. These new logics, as will be disclosed, have found corroboration in the latest Frontex reform (EBCGR) (*cf.* Niemann/Speyer:this volume).

(Phase 1) Testing the waters

Phase 1 in the development of the ‘rescue-without-protection’ paradigm is illustrated by operation *Hera*, launched in July 2006, to assist the Spanish authorities with irregular arrivals in the Canary Islands (Carrera:2007). The operation was deployed in several phases. During *Hera I*, a total of 6,076 were returned from Spanish territory until October 2006—with Frontex assisting with the identification of migrants, but for ‘intelligence purposes only’ (ILPA:2009)—and ‘close to 5,000...could be stopped from setting off’ (Frontex:2006:12) through collaboration with Senegal and Mauritania. *Hera II* overlapped with the first operation, prolonging it until December, with the goal of reinforcing maritime surveillance by dissuading migrant boats from leaving the African coast. According to the Spanish Commander-in-Chief, ‘boats containing a total of 1,243 people [were] intercepted and returned to shore’, adding that when located ‘within 24 miles off the coast they [were] *immediately returned*’ by Senegalese/Mauritanian authorities (*BBC News*:2006). From April to November 2007, *Hera III* fused the two dimensions of *Hera I* and *Hera II*, with the explicit aim ‘to stop migrants from leaving the shores on the long sea journey and *thus* reducing the danger of losses of human lives’ (Frontex:2007a). The outcome was ‘more than 1,000 migrants...*diverted back* to their points of departure’ (Frontex:2007b).

Despite the ‘respect’ owed to the EU Charter and ‘the principles recognised by Article 6(2) [TEU]’ that Frontex-coordinated action was supposed to ‘observe’ (Recital 22 FR), the human rights to *non-refoulement*, to seek asylum, and, crucially, to leave any country including one’s own were not considered to apply in this extraterritorial setting of diffuse collaboration with third countries. Yet, the implementation of the SBC did require the Agency and the Member States not only to ‘respect the rights [and] observe the principles’ enshrined in the Charter, but also to actively ‘promote the application thereof’ within the scope of their respective powers (Article 51(1) CFR).

Instead of raising concerns, *Hera*'s results were praised as a success. It was the 'diverting' of 'would-be immigrants' boats back to their points of departure' (Frontex:2009a) that produced 'a notable reduction in the number of migrants arrived to Canary Islands' (Frontex:2009b:43). Thus, during this period, a 'pure' securitization paradigm dominated EU border governance (and discourse); the objective of combating unwanted flows being all-pervading. But it is also in this phase when the equivalence of interdiction/prevention-of-departure to rescue/saving-of-lives started gaining terrain.

(Phase 2) Watered down humanitarianism

Phase 2 of this chronology is exemplified by *Hermes* and parallel Member State action in the Central Mediterranean, which represents a prolongation of the interdiction/rescue equation—though expanding the one while limiting the other. *Hermes* was first deployed in 2007 (Frontex:2007c:20), but it is as a consequence of the Arab Spring that it became most controversial. *Hermes 2011* was framed as a solidarity mechanism towards the Member States most affected by migratory flows, as part of a package intended to resolve the 'migration crisis' in the Mediterranean (Extraordinary EC:2011:10).

By April 2011, 430,000 persons had fled Libya. And, although a mere 20,000 arrived in Malta and Lampedusa (Malmström:2011), instead of enhancing reception capacities, the EU chose to reinforce border controls. *Hermes 2011*'s stated goal was '[t]o implement coordinated sea border activities to control illegal migration flows from Tunisia towards South of Italy' (Frontex:2011b). In such a climate, non-rescue incidents multiplied and 'more than 1,200 people...[went] unaccounted' in March-May 2011 (UNHCR:2011).

The 80 per cent decrease in arrivals witnessed that year in *Hera*'s operational area was matched by an 'almost nine-fold increase' of incoming migrants in *Hermes*' operational zone, suggesting a diversion effect. The two phenomena were, however, not connected. The Central Mediterranean inflow was entirely attributed to 'the civil war in Libya'. Yet, rather than considering fleers presumptive war refugees, they were portrayed as violators of Schengen rules, presented as 'apprehended migrants'—with a lateral mention of some amongst them being 'saved' (Frontex:2011a:49-50).

This timid inclusion of humanitarian language in Frontex' Annual Report clashes with the forceful terms of the MGD—binding since 2010—placing clear SAR and *non-refoulement* obligations on participating units. The Decision required conduct of Frontex-coordinated maritime operations 'in a way that does not put at risk the safety of the persons intercepted or rescued', explicitly demanding that 'no person shall be disembarked or otherwise handed over to the authorities of a country in contravention with the principle of *non-refoulement*', with the 'special needs of...persons in need of international protection...considered throughout all the operation' (paras. 1.1-3, Part I, Annex MGD).

Instead, next to *Hermes*, Italy persuaded Tunisian authorities to conclude an agreement to prevent departures and accept 'direct repatriation' with 'simplified procedures' (Italian Ministry of Interior:2011). Although several of the intercepted migrants 'indicated an intention to apply for international protection' (Frontex:2011c), according to direct eyewitnesses, 'people [were] removed...within one or two days of arrival' (Amnesty International:2011), making it implausible they were given 'a real and adequate opportunity' to request asylum and/or appeal expulsion decisions in line with fair processing standards

(*M.S.S.*:313). No ‘serious examination of the merits’ of their cases nor ‘access to an effective remedy’ with ‘automatic suspensive effect’ was granted (*M.S.S.*:321 and 293). So, despite the humanitarian nature of the crossings, originating from the Arab Spring, available data suggests that human rights were not effectively observed, notwithstanding the ‘saving lives’ rhetoric.

(Phase 3) Strasbourg coming to the rescue?

The ‘rescue-without-protection’ trend consolidated in the Italian/EU strategy, despite the *Hirsi* judgment. During the third phase of evolution, although it was known from the beginning that structural impediments prevented *Triton* from becoming a genuine SAR action, since ‘[SAR] at sea is a competence of the Member States [not Frontex]’ (JHA Council:2013), its ‘contribution to saving lives’ was highlighted as a major legitimizing factor (Frontex:2015b).

The background to *Triton* is provided by the Italian push-backs of 2009, where at least 900 migrants were returned to Libya ‘without proper assessment of their possible protection needs’ (UNHCR:2009). Regardless of its obvious human rights implications, the underpinning Italian-Libyan collaboration was portrayed as having ‘a positive impact’, because ‘on the humanitarian level, fewer lives ha[d] been put at risk, *due to fewer departures*’—clearly depicting interdiction as life-saving. Conversely, whether ‘the right to request asylum as well as other human rights [were] respected in Libya’ remained ‘unconfirmed’ (HRW:2009:37)—as if saving lives alone exhausted legal obligations.

The practice was condemned in *Hirsi*, which clarified the extraterritorial applicability of *non-refoulement*—at least under the ECHR—and the unsustainability of immediate hand-overs to third countries without prior verification of on-site conditions through proper procedures and appeals, regardless of presumptions of safety and on-paper commitments to respect human rights (Moreno-Lax:2012). Consequently, push-backs had to stop—their continuation had anyway become impracticable after Gaddafi’s ousting and the war in Libya.

The change of approach was also prompted by the mass drownings of October 2013 off Lampedusa (*BBC News*:2013a and 2013b). Italy then launched its hybrid (SAR/military) operation *Mare Nostrum* (Cuttitta:2014b, 2017), while the EU Council expressed ‘its deep sadness’ and asserted that ‘determined action should be taken...to prevent the loss of lives at sea and to avoid that such human tragedies happen again’ (EC:2013:46). The solution proposed, though, was not to open channels for legal transit and safe arrival—like humanitarian corridors or asylum visas (FRA:2015), but to reinforce ‘the fight against trafficking and smuggling’, ‘not only in the territory of the Member States but also in the countries of origin and transit’, calling for the enhancement of Frontex’ activities (EC:2013:47).

Mare Nostrum was terminated a year later because of excessive costs and a perceived ‘call effect’ attracting continuous arrivals. Frontex-led *Triton* took over, but with a much less ambitious remit (Carrera/den Hertog:2015). Pursuant to its mandate, ‘while saving lives [was] an absolute priority’, still the focus was ‘primarily border management’ (Frontex:2014a). Despite the grand language deployed by the European Council to justify the expansion of Frontex’ capacities, at the end of the day, ‘Frontex is [not] a search and rescue body’ (European Commission:2014) and its tasks were not extended to that effect.

Neither were enforcement or supervisory powers vis-à-vis the Member States granted. How the duty to ensure ‘compliance with...[EU] Charter...obligations regarding access to international protection...[and] the principle of *non-refoulement*’ (Article 1(2) FRR) was to be guaranteed remained hence unspecified. The 2011 Frontex Recast Regulation (FRR) had codified the MGD prohibition of disembarkation in contravention of *non-refoulement*, requiring that the ‘special needs’ of protection-seekers be not just considered, but ‘addressed’ as part of the binding obligation to ‘protect human rights’ (Article 1a FRR). Yet, no specific procedural steps, facilities, or legal safeguards were indicated to warrant such result.

The outcome of *Triton* totalled 14,500 recoveries during the first two months of patrols (before the mission’s upgrade in 2015), ‘including some 4,350 rescued with the direct participation of vessels and aircraft co-financed by Frontex’ (Frontex:2014b:18). But which follow up action was undertaken in these cases rests unreported. What is known is that many requested asylum on arrival (EUROSTAT:2014). Still, Frontex insisted in recording these crossings as ‘illegal’ (Frontex:2014b:44-5), portraying protection-seekers as ‘irregular entrants’ (*cf.* Article 31 CSR51). The Agency also avowed that, upon disembarkation, ‘most resources were devoted to their *immediate care*, and not towards screening’ (Frontex:2014b:44)—which is anomalous; Frontex’ explicit obligation was to develop identification/referral mechanisms, while provision for material needs fell on national authorities (as per the RCD). Procedural deficiencies at landing sites—in what became the ‘hotspots’ (ECRE:2016)—have subsequently been denounced as an extension of the registration/return logic of border controls, impeding access to adequate procedures (Red Cross:2016:11).

The MSR had entered into force in the intervening time, making abundantly clear that operational plans ‘should include [*dedicated*] *procedures* ensuring that persons with international protection needs...are identified and provided with appropriate assistance, including access to international protection’ (Recital 17 and Article 4(3) MSR). Defective/non-compliance with this crucial duty corroborates the ‘minimalist humanitarianism’ underpinning EU/Italian efforts, despite changes to the legal framework. The Code of Conduct (CC)—a soft-law instrument adopted to implement hard-law obligations stemming from the 2011 Recast Regulation—also required participants in Frontex-led missions to ‘*promote...that persons seeking international protection [be] recognised...informed...about their rights...and referred to the national authorities responsible for receiving their asylum requests*’ (Article 5 CC). But, as the Frontex’ Fundamental Rights Officer (FRO) has confirmed, the development of an ‘Access-to-Procedures’ tool only commenced in 2015 with dissemination foreseen from 2016 (FRO:2015:13), hence buttressing the finding that the ‘rescue-through-interdiction’/‘rescue-without-protection’ model (in its expanded form) largely continued in practice.

(Phase 4) From (pre-emptive) humanitarianism to (proactive) militarization

The paradigm has radicalized during the final phase of this timeline, taking a hyper-securitized/militarized turn, exemplified by the launch of EUNAVFORMed Operation *Sophia* (a CSDP inter-governmental action supporting *Triton*), the involvement of NATO in the Aegean, and the emergence of ‘shooting-to-kill’ policies at sea. The objective seems to be to ‘protect’ the ‘protectors’ of EU borders and support action against smugglers/traffickers, marking a move from ‘defensive’ to ‘offensive’ borders that proactively seek to destroy the

(only) means of mobility left to unauthorised crossers—even at the expense of the human rights (and life) of ‘boat migrants’.

Faced with a death toll of 1,500 fatalities within a few days in April 2015 (*The Guardian*:2015a, 2015b), a *Ten-Point Action Plan* was adopted, based on the reinforcement of Mediterranean operations, but ‘within the mandate of Frontex’ (EC:2015c), and concentrated on preventing departures (or accelerating removals). The main novelty was a proposal to deploy a EU-led naval force as part of ‘[a] systematic effort to capture and destroy vessels used by the smugglers’ (EC:2015a), so as ‘to *better contain* the growing flows of illegal migration’ (EC:2015b).

In response, *Triton*’s budget and geographical scope were expanded, to help Frontex ‘fulfil its dual role of coordinating operational border support...and helping to save the lives of migrants at sea’ (European Commission:2015:3). Yet, in keeping with the Agency’s competences, *Triton+* could not be turned into a ‘proactive’ SAR operation. According to its Executive Director, this could, moreover, create a ‘pull factor’ (*The Guardian*:2015c). No importance was given to ‘push factors’ in this framework (MPI:2015)—let alone to the entitlements of irregular crossers under international and EU law.

Simultaneously, plans to militarize the response to Mediterranean flows were set in motion. The ‘war on smugglers’ was submitted as the ultimate goal of the EUNAVFORMed, dismantling their business model by apprehending and destroying the means used for the smuggling traffic (Avramopoulos:2015). Three operational phases were distinguished for the rollout of the operation, including phases 2 and 3 to be carried out in international waters and

within Libyan domain—thus requiring concrete authorisation by either Libya or the UN Security Council (EEAS:2015).

In October 2015, a Security Council Resolution authorised Member States to intervene (only) on the high seas, using ‘all measures commensurate to the specific circumstances’ to ‘inspect’, ‘seize’, and ‘dispose of’ migrant vessels, so as to ‘disrupt the organised criminal enterprises engaged in migrant smuggling and human trafficking’ off the Libyan coast. Although the Security Council also urged for these activities to be performed ‘in full compliance with international human rights law’, it did not indicate how the disruption of smuggling/trafficking rings could be achieved without ‘undermin[ing] the human rights of individuals’ (UNSC:2015:5, 8, 10-12)—in fact, there have since been incidents of violence, death, and ‘pull backs’ in unclear circumstances (Sea-Watch:2016, 2017).

The first two six-monthly reports on *Sophia* confirm the diversion effect feared by EU Defence Chiefs advising on the operation (UKHL:2016). They had augured the mission would backfire, diverting migration to alternative routes, and (paradoxically) intensifying smuggling (Military Advice:2015:13, 37). While, ‘prior to the start of the operation there was an even split’ between the Central and the Eastern Mediterranean routes, intensified patrolling of the Libya-Italy strip initially shifted pressure to the Aegean (EEAS:2016a:3). The implementation of the EU-Turkey Statement (2016), requiring Turkey to impede irregular exit and readmit ‘[a]ll new irregular migrants crossing...into Greek islands’, lowered daily arrivals from over 1,700 to around 81 (Progress Report:2). The blockage of the Aegean route thus re-shifted flows to Libya (EEAS:2016b:3-4). But the deterrent effect ‘predicated on dissuading migrants from crossing the Mediterranean’ has not materialized (EEAS:2016a:17); ‘irregular migration across the Mediterranean [has] continued at around

the same levels’ (EEAS:2016b:9). By contrast, death tolls have increased, beating new records in 2015 and 2016 (IOM:2017). The likelihood of perishing at sea—despite enhanced surveillance and EUROSUR round-the-clock activity—has mounted from ‘one [in] 269 arrivals...[to] one for every 47’ in the Central Mediterranean (UNHCR:2016).

The initial diversion of smuggling traffic to the Eastern Mediterranean prompted the intervention of NATO—now consolidated in Operation *Sea Guardian* (NATO:2016b). The military alliance is, since February 2016, on a mission very similar to *Sophia*—but outside EU structures and beyond any accountability avenues—with the ambition to contribute to ‘the international efforts to stem the illegal trafficking and illegal migration in the Aegean’ (NATO:2016a). Although NATO units are only formally ‘tasked to conduct reconnaissance, monitoring and surveillance of illegal crossings’, when encountered with distress situations, they apparently rescue and return migrants *directly* to Turkey (*EU Observer*:2016a and 2016b)—disregarding their rights to leave and to *non-refoulement*. At the same time, it is expected the operation ‘could definitely help save lives...and...help break the criminal gangs that are trafficking migrants...into Europe’ (*The Guardian*:2016), which justifies its presence (while escaping democratic oversight).

A final move towards the militarization of controls is constituted by the ‘normalization’ of firearms use by Frontex-coordinated patrols. Several unredacted incident reports, leaked to the press, disclose routine recourse to weapons ‘as part of the “standard rules of engagement” for stopping boats at sea’ in the Aegean (*The Intercept*:2016). This has resulted in several—if rare—instances of migrants injured or even killed. Although the alleged purpose is ‘not to prevent boats from crossing the sea border, but to stop the smugglers’, nevertheless, ‘[t]he effect...appears to be the same’. Pursuant to the rules of engagement of the Greek Coast

Guard, ‘shooting to disable a vehicle is legal if done to prevent someone from illegally entering or exiting the country, *if they have a firearm*’ (*The Intercept*:2016). Yet, it has never been proven that ‘the driver of [any] refugee boat was armed’, as noted by the EU Ombudsman (O’Reilly:2016). Leggeri, in his reply as Executive Director of the Agency, has expounded that the use of weapons is (formally) in conformity with Frontex law—which indeed extends legal coverage to firearms recourse as part of the accepted/‘standardized’ range of practices of border control; hence providing (if not legitimizing) the conditions of possibility for similar accidents to recur (Article 40 EBCGR). Notwithstanding the danger (and patent lack of proportionality) this entails in situations involving overcrowded/unseaworthy vessels in distress, he also defended that ‘law enforcement officers are entitled to *the right of self-defence*’ (Leggeri:2016). Paradoxically, therefore, in a final twist of the ‘rescue-without-protection’ model, it may result that the life to be rescued is eventually that of the rescuers themselves.

The recent EBCG Regulation will not change this landscape—securitizing dynamics being harmonized as the norm. The new instrument contains an overabundance of human rights ‘endorsement clauses’, according to which human rights should define the mandate of the Agency (Articles 1, 6(3), 34 EBCGR), its tasks and responsibilities during maritime operations (Article 16(d) EBCGR), in relation to ‘referral’, ‘screening’, and ‘debriefing’ (Articles 16(3)(l) and 18(4)(a)-(b) EBCGR), and when cooperating with third countries (Article 54 EBCGR). But none develops the detail necessary for their prescriptions to materialize in practice. They limit themselves to proclaiming the need for EBCG teams to ‘comply with Union and international law’ and to ‘observe fundamental rights’ without elaboration (Article 40(2) EBCGR). And the thorny issue of apportionment of ‘shared responsibility’ for their correct implementation is conspicuously resolved with a clause that

reiterates the ‘primary’ responsibility of Member States ‘for the management of *their* sections of the external borders’ and the Agency’s duty to ‘support’ the application of EU measures (Article 5 EBCGR). Yet Frontex has not been vested with interdiction or SAR competence at all. It will not collect data on border-deaths, nor will it need to structure operations on that basis to *actually* ‘save lives’ (Franko Aas/Gundhus:2015:10-14; Rijpma/Vermeulen:2015); it will just be empowered to suspend/terminate them in cases of ‘serious’ or ‘persistent’ human rights violations (however defined), if it sees fit (Article 25 EBCGR).

It is expected that the operationalization of human rights provisions be developed in the (soft-law) Code of Conduct. Article 35 EBCGR expounds, in this connection, that the Code ‘shall lay down procedures intended to guarantee...respect for fundamental rights with particular focus on...persons seeking international protection’. If so, this will have no legally-binding force (FRS:32). In this situation, whether the new ‘complaints mechanism’ will palliate *ex post* any potential infringement is doubtful—especially considering that the FRO will have no decisional powers, there will be no appeals, and no remedies foreseen to that end (Article 72 EBCGR). At most, Frontex will be able to ‘request’ the Member State concerned to remove the officer found to have violated human rights from the mission in question or the common pool of border guards (Article 72(8) EBCGR). And this only within Frontex-coordinated initiatives—whether Member States have extraterritorial protection duties under EU law remains contested (*X and X*). Legal amendments seem thus cosmetic, reactive to mounting criticism, but devoid of effective substance that triggers real change on the ground (*cf.* Slominski:2013).

Problematizing the ‘rescue-without-protection’ paradigm

Under the ‘rescue-through-interdiction’ model—especially in its final phase—smugglers/traffickers have been reconfigured into the immediate causers of unauthorised migration and exploitation, with migrants victimized and ‘protected’ from abuse through their neutralization—regardless of other consequences on their legal agency and rights. The initial proposition, presenting ‘illegal immigration’ and ‘uncontrolled’ transit as a scourge to eradicate, has been nuanced and detailed. It is no longer just the irregular flow *per se* which arouses fear, but mostly its ‘uncontrollable’ movement, the focus of securitizing impetuses therefore now concentrating primarily on its facilitators. In the process, migrants are doubly victimized, as smugglers’ prey and as shipwrecked. This move allows, in turn, for the double reification pointed out above (as threats to border security and as subjects of smuggling/trafficking), which translates in the parallel transfiguration of human rights, which come to play a series of separate, complementary/contradictory roles.

Indeed, human rights justify maritime intervention; rescue/interdiction is undertaken in their name. But ‘human rights’ denote a multi-layer concept, encompassing the abstract value on which the EU project is founded (Article 2 TEU) that border policy shall preserve (Articles 67 and 77 TFEU), the human rights of the migrant-threats/victims (especially the right to life), and—the case arising—the human rights of the rescuers to self-defence. Correlations between these different levels of abstraction and immediacy allow for practical hierarchies to emerge. In the act of interception/rescue, faced with the imminent danger of the crime of smuggling/trafficking being perpetrated, the border guard may be confronted with a dilemmatic choice: either to protect the border or to protect the migrant (or even to protect himself), as there will be occasions in which all won’t possibly be reconciled (*cf.* Williams:2016). The protection of the abstract value of human rights that ‘border integrity’ represents may require concrete human rights sacrifices—so smuggling/trafficking is

prevented. This is the moment in which the right to life of ‘boat migrants’ may shrink to a mere right to survival (*if* the circumstances allow) and perceived threats to the physical soundness of the rescuer, the rescuees, or the border itself met with violence and armed force, *i.e.* with the conceivable (total or partial) destruction of the human rights of those eventually *refouled*, injured, or killed, who become victims of the protection of human rights.

This is how human rights become securitized. The process constitutes a securitization (that of human rights) within a larger (already ‘normalized’) securitization (that of migration). The triangulation between human rights *qua* fundamental value (that the border ‘protects’), the human rights of rescuees, and the human rights of rescuers allows for a complex constellation, including claims that measures ‘outside the normal bounds of political [and legal] procedure’ are required (Buzan:1998:25). The superimposition of the different kinds of ‘human rights’ within an already securitized field prompts moves, if not the invocation of ‘a special right’ of self-preservation on the part of the Sovereign, through its representatives, ‘to use whatever means are necessary to block [security threats]’ (Waever:1995:55). It is the defence of (a certain facet of) human rights that ‘border integrity’ symbolizes that justifies the attack on (one of the other dimensions of) human rights. Proximate and more distant notions of the same clash and discord, justifying the annihilation of (some) human rights so that (other) human rights can prevail. This omnifarious nature of human rights serves to downplay the real-world impact of maritime action on the concrete (human) rights of ‘boat migrants’. Human rights become both the means and the end of the securitizing process; hijacked as the tool and artefact of securitization (Balzacq:2008:79).

The conceptual separation between the smugglers/traffickers and the smuggled/trafficked provides abstract support to this re-presentation. The neutralization of smugglers/traffickers,

not directly through action focusing on them, but by targeting the means they employ to transport migrants, is key. The enemy is irregular movement *as such*. This objectivation of the threat makes a violent reaction ethically more palatable, ignoring that the split can hardly materialize in practice. Action targeting smuggling/migrant boats runs an immanent ‘high risk of collateral damage including the loss of life’, as recognised by the very planners of Operation *Sophia* (*EU Observer*:2015). It *de facto* equates to action being taken against the smuggled/trafficked themselves, behind a veil of a more neutral crime-prevention/victim-protection activity. The presentation of the operation as a kind of ‘humanitarian intervention’ (Kennedy:2004) from the ‘front line’ of EU’s war against smuggling/trafficking constitutes the last stage in the objectification of protection-seekers that the humanitarianization of borders entails. A theoretical rescue through the neutralization of their facilitators serves to divert attention from the migrants (and their rights) to the means of cross-border crime—as if there were alternatives to reach safety in Europe otherwise. Through the mobilization of ‘war-like’ images, the ‘minimalist humanitarianism’ infused in EU-ropean border work gives way to a new, militaristic type of intervention that discounts not only individual rights, but their very holders as well.

This transformation of action focusing on the war on smuggling, that is, on the destruction of the means for irregular transit, also affects the core substance of law. Human rights are dangerously transformed in this process, from the main limits to interdiction, subjecting Frontex/EU/Member State action to the rule of law, into the very justification for engagement in it. The ‘all-out war’ on smuggling/trafficking is substantiated in this transformation of the function of human rights, with interdiction portrayed as a *solution*, rather than as the *problem* and principal obstacle facing ‘boat people’ in their quest for protection (de Vries/Carrera/Guild:2016).

Throughout the evolution of EU-sponsored/Frontex-coordinated/Member State maritime intervention traced above, it is possible to discern not just the absence of meaningful engagement with human rights in practice, but also notice a proactive co-option of human rights into a border/migration control mechanism—as the justifiers of courses that actually undermine the position and legal protection of migrants. How is this achieved? The final step, alongside the objectification of the threat signalled already and the de-construction of human rights into different layers that can be hierarchized, is the re-conceptualizing of the ‘life’ that is rescued through interdiction into a ‘life-without-full-rights’; a (human) life that is severable from the (human) rights that should come with it. This is not exactly a ‘bare life’ (Agamben:1998)—Agamben’s dichotomous archetype requires either total exclusion from rights or complete legal plenitude (Neilson:2010:134; Lemberg-Pedersen:2017:51-52). The EU’s stance is not one of utter non-recognition, but rather of selective (non-)access to rights.

The ‘new’ humanitarianism that Chimni identified (referred to as ‘minimalistic’ or ‘pre-emptive’ here) contributes to this re-arrangement. There is no fixed or ‘objective’ definition of humanitarianism (Calhoun:2008:73); it can concentrate on the advancement of human rights or limit itself to ‘saving lives’ (Barnett/Weiss:2011). The fluidity of its conceptualization as anything/everything ‘concerned with or seeking to promote human welfare’ (Chimni:2000:244) allows it to modulate the boundaries between law and charity and adopt a selective approach to human rights. So understood, humanitarianism calls for a focus away from ‘humanness-according-to-law’ towards an all-encompassing, self-absolving ‘humanness-per-se’ (Cuttitta:2014b:214) within-and-beyond the law, blurring the distinction between compassion and entitlement. Humanitarianism, speaking in the name of mankind, blurs also the lines between means and ends, legitimizing recourse to any means necessary to

achieve the higher ends of humanity, including security and recourse to force. Humanitarian practices, thus classified, escape critique and opposition. This means that even war (on migrant smuggling or otherwise) can be portrayed as a humanitarian endeavour (Kennedy:2004). Humanitarian vocabulary can camouflage the naked exercise of power and justify a divestiture of rights provided that that (is perceived to) 'protect'. Human rights, filtered through humanitarianism, can be selected, abridged, or even put at the service of a policy of containment through interdiction. The absence of strict compliance with law is compensated by the ideal (or mirage) of humanitarianism.

The reduction of 'life' to a 'life-without-full-rights' and the transmutation of human rights as conceptually detachable from bodily subsistence is what allows interdiction to be revamped, from a potentially lethal interference with the rights of protection-seekers into a medium for their realization. This equally transforms, in the process, what should have been considered an international protection issue (that of 'boat people' risking their lives to reach safety in Europe and claim asylum under the CFR) into one regarding security and fight against crime, demanding policing responses, rather than action that addresses the deeper flaws of a border regime that leaves no alternatives but an illegal, perilous voyage across the Mediterranean.

Conclusions: Annulling (migrant) rights in the name of (human) rights?

The general human rights clauses progressively inserted in EU/Frontex law have not translated into actual compliance in practice. They only apply to Frontex-coordinated action, do not apportion responsibilities clearly, and fail to regulate sufficient procedural detail. They strike instead as formulaic assertions of *a priori* compatibility of maritime activities with the obligations they entail.

Non-refoulement, for example, is framed as an exception to the rule of disembarkation ‘in the third country from which the vessel is assumed to have departed’. Only ‘[i]f that is not possible’ (due to legal/factual impediments), will interdicted/rescued persons be brought to EU territory (Article 10(1) MSR). The bias is towards prevention of irregular movement. And this, as elaborated above, rather than taken as a ‘problem’ for access to protection (or at least an interference with human rights), is proposed as a ‘solution’ to avoid loss of life.

Instead of truly adjusting to human rights, the result of subsequent legal reforms has been for interdiction to be (re-)presented as a human rights-implementing tool with a multi-purpose function. It is now used as a risk-deterrent to counter (irregular migration) threats, as a humanitarian mechanism that recovers migrants in distress and rescues them from abuse by their facilitators, and as a weapon in the ‘war on smugglers’, while impact on actual (human/migrant) entitlements is silenced or discounted as a side effect (Williams:2016).

Remarkably, the ineffectiveness of interdiction to meet any of these goals is never questioned. Available data show that ‘more controls’ have not translated into ‘more deterrence’—with maritime flows exponentially increasing over the past twenty years (Fargues/Di Bartolomeo:2015). Nor has it meant lesser irregular entries through the Mediterranean route—with detections of clandestine arrivals also on the rise (EUROSTAT:2016). Not even has it reduced death rates overall—with fatalities peaking in the last period (IOM:2017). What available information suggests is primarily a diversion effect towards ever more dangerous routes (iMap:2016). Attachment to interdiction thus appears politically motivated, rather than empirically justified (Bratislava Roadmap:2016:3).

In parallel, the diminution, in (quality/quantity of) human rights, that this conception of ‘(semi-)life’ (that interdiction is supposed to spare) entails, is completely neglected.

The desperate situation of irregular Mediterranean crossers attests to the urgency of a change of paradigm. One that abolishes the ‘rescue-through-interdiction’/‘rescue-without-protection’ model and lives up to the full dignity of ‘boat migrants’, recognising that they may have good reasons (if not rights) that ‘lead them justifiably to seek access to our territory’ (Tampare Conclusions:1999:3). Such alternative model of ‘accessible-protection-in-practice’ needs investment in genuine SAR and the opening of channels for safe and legal arrival. It requires an inversion of priorities: a return to de-securitized borderlands and the integral re-subjectification of ‘boat migrants’—in line with rule of law standards (Article 2 TEU).

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