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**MIGRANT DEATHS IN THE MEDITERRANEAN  
SEA**

**IS THE EUROPEAN UNION DOING ITS BEST TO PREVENT  
THEM?**

Dissertation to obtain a Master's  
Degree in Law, in the speciality of  
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## **Anti-plagiarism statement**

I hereby declare that this dissertation is my own work. All materials and sources used in its elaboration have been acknowledged and all citations have been properly identified.

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## **List of abbreviations**

CFR - Charter of Fundamental Rights of the European Union

CoE - Council of Europe

ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR - European Court of Human Rights

EU - European Union

FRA - European Union Agency for Fundamental Rights

HRC - United Nations Human Rights Committee

ICCPR - International Covenant on Civil and Political Rights

IMO - International Maritime Organization

MOAS - Migrant Offshore Aid Station

MSF - Médecins Sans Frontières

NGOs - Non-Governmental Organisations

SAR - Search and Rescue

SAR Convention - International Convention on Maritime Search and Rescue

SOLAS Convention - International Convention for the Safety of Life At Sea

UN - United Nations

UNCLAWS - United Nations Convention on the Law of the Sea

UNHCR - United Nations High Commissioner for Refugees

## Abstract

Several international law of the sea instruments impose on the European Union and on its Member States the obligation to ensure efficient maritime search and rescue services. In spite of this, since 2013, a total of 19.956 people attempting to cross the Mediterranean Sea have either died or gone missing. This is the result of an unfortunate combination of European laws, policies and practices. Policies aimed at combating migrant smuggling which may inadvertently be making the Mediterranean Sea even deadlier. Practices which prioritise border control operations over maritime search and rescue. And laws that allow for States to prosecute non-governmental organisations which volunteer to fill in the resultant operational gap. Due to insufficient legal pathways for migration, migrants will keep on trying to reach Europe irregularly and thus lives will continue to be lost at sea. For this reason, it remains urgent and necessary to do more to rescue them. In line with the international legal framework of maritime search and rescue and with the principle of solidarity and fair sharing of responsibilities, the European Union must promote the development of a regional agreement through which responsibility for search and rescue in the Mediterranean can be shared. These services need to be separate from border control and from anti migrant's smuggling operations, both in law and in practice, due to the conflicting nature of their respective goals. Additionally, the involvement of non-governmental organisations in these operations must be valued, not criminalised. As such, the European Union's laws on facilitation of unauthorised entry, transit and residence must be revised. Finally, policies aimed at directly or indirectly preventing irregular arrivals which do not comply with international human rights law must be immediately abandoned.

**Keywords:** search and rescue; irregular migration; non-governmental organisations; human rights

## Resumo

Diversos instrumentos de direito internacional do mar impõe aos Estados-Membros da União Europeia a obrigação de assegurar serviços de busca e salvamento eficientes. Porém, desde 2013, 19.956 pessoas morreram ou desapareceram ao tentar atravessar o Mar Mediterrâneo. Isto é o resultado de uma infeliz combinação de políticas de combate ao tráfico de migrantes, que poderão estar inadvertidamente a tornar a travessia do Mediterrâneo ainda mais perigosa; de práticas que privilegiam o controlo fronteiriço em detrimento de operações de busca e salvamento; e de leis que permitem que os Estados punam organizações não governamentais que, de forma voluntária, tentam preencher a existente lacuna operacional de salvamento. Devido à insuficiência de vias que permitam aos migrantes chegar à Europa de modo regular, estes vão continuar a tentar fazê-lo irregularmente, e continuarão a perder-se vidas. Por isso, é urgente e necessário fazer mais para os resgatar. Atendendo ao regime jurídico internacional de busca e salvamento marítimo e ao princípio da solidariedade e da partilha equitativa de responsabilidades, a União Europeia deve promover um acordo regional através do qual a responsabilidade pelas operações de busca e salvamento no Mediterrâneo possa ser redistribuída entre os Estados-Membros. Estas deverão distinguir-se das competências de controlo fronteiriço e das de combate ao tráfico de migrantes, tanto na lei, como na prática, atendendo à natureza diversa dos objetivos em causa. Mormente, o envolvimento de organizações não governamentais nestas operações deve ser valorizado e não criminalizado, pelo que as leis europeias em matéria de auxílio à entrada e ao trânsito irregulares devem ser revistas. Finalmente, devem ser imediatamente abandonadas quaisquer políticas que visem impedir entradas irregulares e que sejam incompatíveis com o direito internacional dos direitos humanos.

**Palavras-chave:** busca e salvamento; imigração irregular; organizações não governamentais; direitos humanos

## **Statement regarding length of dissertation**

The body of this dissertation, including spaces and notes, occupies a total of 116.946 characters.

# 1. Introduction

## 1.1. Background and scope

In recent years, the topic of migration has made it to the centre of mainstream political debates around the world. This could be owed, among other things, to the increasingly more detailed coverage by media outlets of armed conflicts, extreme poverty and climate change, which are some of its root causes. It can also be seen as a result of the growth of civil society's involvement in humanitarian activities. Whatever the reasons may be, migration ended up becoming one of the most pressing matters of our times. Because of this, many governments placed it at the top of their political agendas and found their own ways of approaching the increase in migratory flows. This would, in turn, originate - or expose - troublesome phenomena, such as the discrepancy between the level of human rights protection afforded to regular migrants and the one irregular migrants benefit from<sup>1</sup>.

The death of migrants attempting to flee their countries of origin by sea is a pertinent example of the aforementioned phenomenon. For geographical reasons, it assumes particular relevance in southern Europe, thus presenting European Union (EU) Member States with demanding challenges. In fact, the deadliness of the Mediterranean Sea has been well documented and reported upon over the years. In spite of this, it is not possible to claim that this problem has appropriately been dealt with, nor that we are currently on the right path to doing so<sup>2</sup>.

There are certain international law of the sea instruments of which all EU Member States are signatories and which prescribe the obligation for coastal States to provide efficient maritime search and rescue (SAR) services, which have the aim of preventing the loss of life at sea. But what exactly does this obligation consist of? And is it being fulfilled by the EU and its Member States? And what role do non-governmental organisations (NGOs) play in the central Mediterranean Sea? And what about the people

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<sup>1</sup> SPIJKERBOER, Thomas - *Wasted Lives: Borders and the Right to Life of People Crossing Them*. 2017, p. 26-27.

<sup>2</sup> To clarify, the problem to which we are referring to is the number of migrant deaths occurring in the Mediterranean Sea, specifically in the central Mediterranean. We do not believe migration to be a problem which needs solving and, even if we did, it would never be possible to cover all its root causes in a single study.



who have died at sea, did they have a right to be rescued? And what can be done for those who did not die, but whose rescue did not meet basic human rights standards?

In order to answer all of these questions we must first recognise that the policy options which can aggravate or combat the problem of deaths at sea result from tensions between various types of discourses, each emphasising the need for certain measures to be adopted in prejudice of others and sometimes creating a false dilemma. Ensuring an area of security while guaranteeing a space for humanitarianism and upholding human rights can be a tricky balance to obtain, especially if any of these elements is neglected in favour of another<sup>3</sup>. However, it is through properly addressing each of these dimensions that we can begin to comprehend how the desirable balance can be reached.

It is undeniable that, at least in theory, there is a vast array of measures which can be undertaken by the EU to prevent the loss of migrant lives at sea<sup>4</sup>. Surely, some are more efficient than others. The placement of maritime rescue in the first of those categories is not consensual, as it is possible to argue that there are better long-term solutions to reduce the number of deaths in the Mediterranean. Nevertheless, none provide a more immediate response to the problem and thus none are more urgent. Regardless of the need to search for more durable and sustainable solutions, it is not reasonable that people keep dying at sea while waiting for these solutions to be adopted.

## **1.2. Aim and objectives**

With this study we aim to understand if the number of migrant deaths in the central Mediterranean Sea in recent years is so high *despite* EU's laws and practices or *because of them*. In other words, we want to find out if the legislative and operational measures in place are adequate to tackle this problem or if they could be improved upon and, if so, how should we improve them. To reach this goal, we have set six objectives.

- First, we must understand what Search and Rescue (SAR) is and what are States required to do to ensure it.

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<sup>3</sup> PERKOWSKIA, Nina - Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean 'Migration Crisis'. 2016, p. 331-335.

<sup>4</sup> GIL, Ana Rita - What E.U. could and should do to stop the Mediterranean crisis. 2015.

- Second, we must analyse how and by whom is SAR being provided in the Mediterranean Sea.
- Third, we must evaluate the impact of EU law instruments on the work of SAR NGOs.
- Fourth, we must consider proposals to revise the above-mentioned instruments.
- Fifth, we must contemplate the viability of recognising a right to be rescued at sea.
- Sixth, we must address the compatibility of certain migration control measures with human rights law.

By attempting to achieve these objectives, we aim to conduct a study which allows for a broad understanding of the laws and practices surrounding SAR operations in the central Mediterranean Sea. Likewise, while putting into evidence their deficiencies, we seek to defend many of the policy changes that have been presented over the last few years and which are yet to be adopted.

### **1.3. Structure, methodology and literature review**

Throughout this study we address the high number of deaths in the Mediterranean Sea from different perspectives. Each perspective is developed in a dedicated chapter. Although any of them could have been researched separately, we believe that each one gives a valuable contribution to the overall understanding of the issue at hand. At any rate, in spite of the complementarity between the four perspectives, and hence between the next four chapters, we follow a specific approach for each one. Consequently, it is more appropriate to discuss the methodology and state of the art on a chapter by chapter basis and, while doing so, to lay down this study's structure.

- Chapter 2 focuses on the international law of the sea. In it, we identify the three conventions which prescribe the obligation of States to ensure SAR at sea. We analyse the relevant provisions enshrined in the International Convention for the Safety of Life at Sea (SOLAS Convention), the International Convention on Maritime Search and Rescue (SAR Convention) and the United Nations Convention on the Law of the Sea (UNCLAWS).

Afterwards, we proceed to interpret these instruments. To this end, we mainly rely on the work of Efthymios Papastavridis, Irini Papanicolopulu, Killian S. O'Brien, Rick Button, Stuart Kaye and Tulio Treves. Additionally, we take into consideration guidelines from the International Maritime Organization's (IMO) Maritime Safety Committee.

There is a general consensus regarding the identification of the various duties which the obligation to ensure SAR comprises. The different inputs of these authors help to clarify key aspects concerning SAR, thus allowing us to better comprehend the following chapters.

- Chapter 3 covers SAR practices in the central Mediterranean Sea from 2013 onwards. We examine the Italian operation Mare Nostrum and EU's operations Triton, Sophia and Themis. In addition, we discuss the involvement of SAR NGOs in rescue operations, as well as a few criticisms targeting their work. To achieve this, we rely firstly on documents made available by the Italian Ministry of Defence, the European Commission, the Council of the EU, the European External Action Service and Frontex. Secondly, we turned to the contributions of Charles Heller, Emily Koller and Lorenzo Pezzani. Lastly, we also resort to news provided by NGOs or by other reliable media outlets.
- Chapter 4 contains an analysis of two instruments of EU law aimed at defining and punishing the facilitation of unauthorised entry, transit and residence of migrants in EU Member-States. In it, we discuss how they are impacting the work of SAR NGOs in the central Mediterranean and why is there a need for them to be revised. We start by examining Council Directive 2002/90/EC of 28 November 2002 and Council framework Decision 2002/946/JHA of 28 November 2002. Despite the European Commission stating that these instruments do not need to be reviewed, as they allegedly do not affect SAR NGOs' work, other EU institutions and bodies, such as the European Parliament and the European Union Agency for Fundamental Rights (FRA) claim the opposite.

These beliefs seem to be shared by the majority of authors who wrote on this topic. While Sergio Carrera refers to this as policing humanitarianism, Carmine Conte and Lina Vosyliute call it a crackdown on NGO's assisting migrants. Charles Heller and Lorenzo Pezzani use the expression blaming the rescuers, whilst authors like Elspeth

Guild and Mark Provera prefer to talk about criminalisation of irregular migration. Yasha Maccanico labels the phenomenon as the shrinking space for solidarity and Rachel Landry speaks of a need to decriminalise humanitarian smuggling. The expression “”crimes of solidarity has, on its turn, been used by Gabriella Sanchez, Luigi Achilli and Sheldon X. Zhang. We take into account the various contributions of these authors when analyzing the aforementioned instruments.

- In Chapter 5 we approach the main question from an international human rights law perspective.

The jurisprudence of the European Court of Human Rights (ECtHR) assumes exceptional relevance in this realm, for it allows us to interpret the right to life as it is prescribed by the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Charter of Fundamental Rights of the European Union (CFR) and the International Covenant on Civil and Political Rights (ICCPR) will likewise be mentioned. This will allow for a broader depiction of the protection of the right to life, encompassing Council of Europe (CoE), EU and UN (United Nations) systems, respectively.

Our attempt to understand if the application of this right at sea grants people in distress an individual right to be rescued draws on the constructive views of Seline Trevisanut and on the skeptical views of Efthymios Papastavridis. The latter portion of this chapter focuses on so-called push-backs and pull-backs. These are practices aimed at preventing irregular arrivals by sea, which raise serious human rights concerns. We seek to expose the problematic nature of these practices by resorting once more to the ECtHR’s case law, but also to reports from Amnesty International and Human Rights Watch, as well as to the contributions of Ana Rita Gil, Andrew Brouwer, Annick Pijnenburg, Meena Fernandes and Judith Kumin.

- The conclusions of our study are presented in chapter 6. In it we assess the fulfilment of the objectives set out in section 1.2. We likewise formulate recommendations which are directly related to the topics addressed in each chapter. Finally, we point out that further research is necessary on migration policies that can reduce the need for migrants to attempt such dangerous sea crossings.

Our study is conducted through desk research on EU laws, policies and practices that can reflect, either positively or negatively, on the number of deaths in the

Mediterranean Sea. Additionally, we resort to international law instruments and to the relevant jurisprudence to better understand and interpret them.

To reach our conclusions, we build on the contributions of scholars whose publications - articles, journals and monographs - prove pertinent to our study. When applicable, we confront the perspectives of the authors which we support with dissenting opinions from other authors, in an attempt to make available to the reader the necessary information to comprehend the different spectrums of the issue under analysis.

## **2. States' obligation to ensure maritime search and rescue**

### **2.1. Introductory remarks**

We cannot hope to fully grasp all the legal questions that are raised by the rescue of people in distress at sea by analysing it from the perspective of a single branch of international law, as such a specific and isolated approach would leave many of those questions unanswered. Therefore, in order to get a holistic view on this matter, one would most likely have to take into consideration provisions from the international law of the sea, attending to the location where the facts take place; from international human rights law, in relation to the way people are treated upon being rescued at sea; from international refugee law, since some of those people may wish to seek asylum; from international criminal law, as the situation in which they find themselves in may be owed to the actions of smugglers; and also EU law, since certain non-governmental rescue operations can fit EU's qualification of assistance of unauthorised entry.

However, recognising that avoiding the loss of human life at sea is the main reason behind the existence of SAR, and since many of the other questions only arise after the rescue is initiated or concluded, it is chronologically more reasonable to begin our study by looking into the provisions of the international law of the sea which are behind the obligation of States to conduct such operations. The international legal framework of SAR is essentially composed of a single article in a UN convention and several others scattered throughout IMO conventions. Sticking to the chronological reasoning, we will be analyzing these instruments by the order of their entry into force, notwithstanding our exclusive focus on their most recent amended versions, as those are the ones which are currently in force in the majority of States.

### **2.2. International Convention for the Safety of Life at Sea**

Adopted in 1974 and having entered into force in 1980, the SOLAS Convention currently binds 165 States and covers many different aspects regarding maritime safety, such as requirements related to the construction of ships, their equipment, the carriage of dangerous goods and overall seaworthiness.

Chapter V of the SOLAS Convention addresses safety of navigation, and its regulation 15 deals with the matter of SAR operations. Under paragraph (a), “each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts”. This includes, for instance, making available adequate means through which people in distress can be located and subsequently rescued, keeping in mind the specific demands and dangers of each area. Paragraph (b) addresses the need for contracting parties to share information concerning their SAR facilities and any proposal for changes of said facilities.

### **2.3. International Convention on Maritime Search and Rescue**

The SAR Convention was adopted in 1979 and entered into force in 1985, creating the first international system covering SAR operations. Currently, 113 States are bound by it. As the name implies, it is here where we will find the main principles that inform the manner in which SAR must be conducted, as well as important definitions clarifying relevant terms and expressions we will be using throughout our study.

As stated in sub-paragraphs 1.3.1. and 1.3.2. respectively, search is “an operation, normally coordinated by a rescue coordination centre<sup>5</sup> [...] using available personnel and facilities to locate persons in distress”, and rescue is an operation to retrieve them, attend to their basic needs and deliver them to a place of safety.

As implied by the definition set forth in sub-paragraph 1.3.3., SAR services are not just the combination of both a search operation and a rescue operation. It is likewise necessary to actively monitor and coordinate the available resources, whether public or private, to allow for a quick response to situations of distress, especially in what regards the provision of medical assistance. A rescue coordination centre is responsible for ensuring that these services are being adequately provided within a defined area assigned to it, which goes by the name of SAR region.

In addition, it is crucial to understand who can be considered as being in distress for the purposes of SAR. This question is indirectly answered by the definition of distress

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<sup>5</sup> "A unit responsible for promoting efficient organization of search and rescue services and for coordinating the conduct of search and rescue operations within a search and rescue region", SAR Convention, sub-para. 1.3.5.

provided by sub-paragraph 1.3.13., where it is described as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”. To further consolidate this notion, we must stress that assistance must be provided to any person that is or seems to be in a situation as the one previously described, regardless of their nationality, their status or the circumstances in which they are found, as stated in sub-paragraphs 2.1.9. and 2.1.10..

The SAR Convention dedicates the entirety of chapter 2 to the organisation and coordination of SAR operations. Sub-paragraph 2.1.1. prescribes that States parties must develop their SAR services so that they can ensure that, as soon as their authorities become aware of a potential situation of distress at sea, assistance is immediately provided. Furthermore, they should, in accordance with sub-paragraph 2.1.2, establish a legal framework, assign a responsible authority, organise available resources, establish communication facilities and coordination and operational functions, as well as put in place processes to improve the service. These are deemed to be the basic elements needed to provide SAR at sea, and States can ensure them individually or in cooperation with other States, when this proves appropriate.

## **2.4. United Nations Convention on the Law of the Sea**

The UNCLAWS was concluded in 1982, entered into force in 1994, and currently binds 167 States and the EU. It is arguably the most significant treaty on international law of the sea and, in what regards to SAR, contains important provisions relating to the duties of masters of ships, as well as flag and coastal States.

The basic principles related to the duty to render assistance are laid out in article 98. In its paragraphs 1(a) and 1(b), it is prescribed that all masters of ships should be required by flag States to render assistance to anyone in distress at sea, or to proceed to the distress situation in a speedily manner upon being alerted to it, in order to conduct a rescue operation. Of course, such assistance is only reasonable if, by providing it, the master of the ship does not place her own ship and crew in danger as well. Additionally, paragraph 2 affirms that coastal States should establish and maintain SAR services which effectively ensure maritime safety and, “where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose”.



The provisions above belong to Part VII of the UNCLAWS, which regards the high seas, but also apply to the exclusive economic zone due to the reference made by paragraph 2 of article 58. In what concerns the duty to render assistance, said provisions are also relevant in the territorial sea, as stated in paragraph 2 of article 18, which makes this rule applicable in all maritime zones.

## **2.5. Interpreting the international legal framework of maritime SAR**

Although it was lacking until the entry into force of the above-mentioned conventions, nowadays it is hard to argue against the existence of a robust international legal system concerning search and rescue at sea<sup>6</sup>.

The UNCLAWS lays out the foundations of SAR, but still receives some slight criticism due to the residual number of its provisions addressing the preservation of human life<sup>7</sup>. Nonetheless, those foundations are built upon by the SAR Convention, which aims to establish the framework on how to deal with situations of distress at sea, and by the SOLAS Convention, which focuses on ways to ensure that those situations do not happen, thus having a more preventive nature, instead of a reactive one. This legal framework has been understood as comprising three duties. These are the duty to provide assistance to people in distress, the duty to bring any rescued person to a place of safety and the duty to provide for their disembarkation<sup>8</sup>.

Being codified in the UNCLAWS and generally believed to be a fundamental principle of international law<sup>9</sup>, the first one of these duties is clear and does not raise many issues, the same cannot be said for the latter two. Without delving too deep into this matter, as such is not possible to accomplish due to the scope of this study, a few notes about each of these duties must be highlighted.

The duty to bring any rescued person to a place of safety can sometimes be problematic. It has been defined as a place where the rescue operation can be concluded,

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<sup>6</sup> BUTTON, Rick - International Law and Search and Rescue, p. 12-13.

<sup>7</sup> PAPANICOLOPULU, Irini - The Law of the Sea Convention: No Place for Persons?, p. 874.

<sup>8</sup> O'BRIEN, Killian S. - Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem, p. 720.

<sup>9</sup> PAPANICOLOPULU, Irini - The duty to rescue at sea, in peacetime and in war: A general overview, p. 501.

where the lives of the rescued are no longer threatened, where their basic needs can be met and from where they can reach their destination<sup>10</sup>. This definition is not particularly helpful, as problems subsist regarding the determination, in certain cases, of which places are safe and which are not. Yet, as we will be able to see in chapter 5, the difficulties raised by this individual assessment are not insurmountable.

As for the duty to provide for disembarkation, it is perhaps the most controversial, as it can interfere with State sovereignty and it is not generally accepted that a State has the duty to allow for the disembarkation into its ports of any rescued person, which in turn means that despite a flag State's obligation to disembark the rescued people at a place of safety, there is no corresponding obligation for coastal States to allow them to be disembarked on their territory<sup>11</sup>. Again, chapter 5 will provide us with an opportunity to share a few considerations regarding this topic.

The questions about how these duties should be fulfilled are strongly intertwined with international human rights law, hence their complexity. As some authors have pointed out, there are certain circumstances where the international law of the sea and international human rights law overlap<sup>12</sup>. With that being said, the existence of the obligation to ensure SAR and the fact that coastal States must fulfil said obligation is not, at any rate, affected by such complexity. Regardless of the debate surrounding each of the specific duties that make up the obligation to provide SAR, and in spite of the practical and academic relevance of thoroughly understanding these duties, the point of this chapter is simply to get across the idea that States parties to the relevant IMO conventions are obliged to put in place and make available efficient SAR services.

On a final note, throughout this study we will be using the expressions obligation to ensure SAR services or obligation to provide SAR interchangeably. This obligation refers to SAR services as they are prescribed by the instruments mentioned in sections 2.2., 2.3. and 2.4., which in turn should be understood as comprising all duties analysed in this section.

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<sup>10</sup> Maritime Safety Committee - Guidelines on the Treatment of Persons Rescued at Sea, p. 8.

<sup>11</sup> PAPANASTASIOU, Efthymios - Rescuing Migrants at Sea: The Responsibility of States Under International Law, p. 14.

<sup>12</sup> TREVES, Tulio - Human Rights and the Law of the Sea, p. 1-15.

## 2.6. Concluding remarks

As we have already seen, the international law of the sea prescribes various SAR obligations. However, it is important to note that not all of them fall on States. In fact, some of them can potentially fall on anyone navigating at sea<sup>13</sup>. For instance, there is an obligation to render assistance that falls on masters of ships, being the flag States required to ensure that they do so. Although we should not ignore this obligation, for the purposes of this study we will focus on coastal States' obligations to provide efficient SAR services, as this approach will prove more relevant when, in the following chapter, we address the issues related to the provision of SAR services in the Mediterranean Sea in recent years.

If there is a conclusion to be drawn from our analysis of the international legal framework of maritime SAR, and which is not impaired by the controversies regarding some of its specific aspects, it is that coastal States are under the obligation to ensure SAR services and may cooperate amongst each other in order to do so. Elaborating further on this idea, questions such as what is the status of people rescued or where to disembark them should not mean that SAR services are not in place to ensure their rescue and instead must be addressed after such operation occurs. Any different approach is, in light of what we have seen, contrary to the international law of the sea.

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<sup>13</sup> KAYE, Stuart - Commentary: Maritime search and rescue as everyone's responsibility, p. 136-137.

## **3. The provision of search and rescue in the Mediterranean Sea**

### **3.1. Introductory remarks**

At the time of writing, since 2013 a total of 19956 people have either died or gone missing in the Mediterranean Sea<sup>14</sup>. These numbers are also a consequence of the global trend of increasing irregular migration<sup>15</sup> and refer to the eastern, western and central Mediterranean routes. The latter, being by comparison the most deadly, is mostly resorted to by people fleeing Libya, as a consequence of major human rights violations taking place there<sup>16</sup>. However, depending on the measures that were being put in place to prevent the sea crossings in a given period through a certain route, the number of deaths has been known to increase in other routes<sup>17</sup>. This means that, in order to fully understand this issue, one must take into consideration not only the central route from Libya to Italy, but also the western route from Morocco to Spain and the eastern one from Turkey to Greece.

However, it is not under the scope of this chapter to thoroughly discuss the specific context of each route, nor to address every aspect that influences the dynamics of the attempts to cross the Mediterranean Sea, but rather to allow for a basic understanding of the state of SAR provision in the area. To achieve this, and for the sake of being concise, we will be focusing on the events taking place in the deadliest of the three routes.

It is also worth noting that the countries of origin and destination mentioned above serve merely a purpose of geographical contextualisation, because the specified routes are also used by people leaving and trying to reach neighbouring countries to those previously identified<sup>18</sup>.

As we have alluded to earlier, the reasons behind the decision to cross the Mediterranean may be pertinent to determine the legal status of a person and, after their rescue, one must address the question of where to disembark this person, but the

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<sup>14</sup> UNHCR - Europe: Dead and Missing at Sea. Available at <https://data2.unhcr.org/en/dataviz/95>, accessed on 18 October 2019.

<sup>15</sup> TJADEN, Jasper Dag; VIDAL, Elisa Mosler - GLOBAL MIGRATION INDICATORS 2018, p. 30.

<sup>16</sup> UN Support Mission in Libya - Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya. 2018.

<sup>17</sup> MACGREGOR, Marion - Changing journeys: Migrant routes to Europe. 2019.

<sup>18</sup> CRÉPEAU, François - Report of the Special Rapporteur on the human rights of migrants, p. 7-8.

uncertainty as to the answers to give to these questions should never compromise the rescue itself and, therefore, should be addressed separately after it takes place.

Although the EU itself is not a member to the SOLAS Convention nor to the SAR Convention analysed, respectively, in sections 2.2. and 2.3. of the previous chapter, it is party to the UNCLAWS, as mentioned in section 2.4. of the same chapter, as are all EU Member States. So, even if it is not yet clear how it can manage its SAR obligations, it is at least safe to assume that the EU should play some sort of role in ensuring SAR is taking place in the Mediterranean Sea. Recognising the difficulties associated with implementing SAR services fully coordinated by the EU<sup>19</sup>, it seems reasonable that the responsibility of carrying out these services should not fall exclusively on one or a few EU coastal States, but must instead be shared amongst all Member States, in accordance with article 80 of the Treaty on the Functioning of the EU, which establishes the principle of solidarity and fair sharing of responsibilities<sup>20</sup>.

The provision of SAR services in the central Mediterranean in recent years will be briefly described below, from the actors involved, to the shifts in approach by the EU and its Member States, so we can better understand what has and has not been done to tackle the loss of life at sea in this region.

### **3.2. Actors involved and characteristics of the operations**

It is possible to argue that the SAR services provided by the EU and its Member States in the Mediterranean Sea before 2013 were not plentiful. Likewise, apart from a few isolated incidents, the provision of SAR by NGOs in the same region before 2014 was pretty much non-existent. One of the most notable incidents involved the German vessel *Cap Anamur*, which in June 2004 rescued 37 migrants in distress and brought them to Italy for disembarkation<sup>21</sup>.

Nevertheless, in order to address the increasing number of people attempting to cross the Mediterranean Sea, and especially as a direct response to a ship that capsized

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<sup>19</sup> TREVISANUT, Seline - Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?, p. 536.

<sup>20</sup> METSOLA, Roberta; KYENGE, Kashetu - WORKING DOCUMENT on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations, p. 14-15.

<sup>21</sup> Italy lets refugee ship dock. The Guardian. 12 July 2004.

near Lampedusa resulting in the deaths of around 350 people<sup>22</sup>, in October of 2013 the Italian government launched a humanitarian and military operation known as Mare Nostrum. Despite being coordinated by the Italian navy, this operation received financial support from the EU and technical support from Frontex, the European Border and Coast Guard Agency. It had a dual purpose of protecting human life at sea and tackling human trafficking and migrant smuggling<sup>23</sup>. Although it was extremely effective in the pursuit of its humanitarian goal of saving lives at sea<sup>24</sup>, this operation proved to be too costly for the Italian government to maintain. Lacking a stronger support from the EU and its Member States, along with growing political opposition, this operation would eventually meet its end in December of 2014.

In any case, the phasing out of operation Mare Nostrum coincided with the launching of Frontex's operation Triton, which began in January 2015<sup>25</sup> but was never intended to be a replacement for the former, being considerably different in its mandate, resources and eventual outcomes. This operation was primarily focused on border control and surveillance and, in comparison with Mare Nostrum, had at its disposal a reduced number of vessels, a smaller operational area, a considerably smaller budget and no specific SAR nor humanitarian mandate<sup>26</sup>.

All of these circumstances contributed to the appearance, in 2015, of NGOs such as Médecins Sans Frontières (MSF)<sup>27</sup> and Sea-Watch<sup>28</sup>, which started to conduct SAR operations in the Mediterranean Sea, joining Migrant Offshore Aid Station (MOAS), which was already operating there since the previous year, thus having been the first NGO on the scene<sup>29</sup>.

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<sup>22</sup> POVOLEDO, Elisabetta; YARDLEY, Jim - Migrants Die as Burning Boat Capsizes Off Italy. The New York Times. 3 October 2013.

<sup>23</sup> Italian Ministry of Defence - Operation Mare Nostrum. Available at <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>.

<sup>24</sup> TAYLOR, Adam - Italy ran an operation that saved thousands of migrants from drowning in the Mediterranean. Why did it stop?. Washington Post. 20 April 2015.

<sup>25</sup> European Commission - Memo: Frontex Joint Operation 'Triton' – Concerted Efforts for managing migrator flows in the Central Mediterranean. 31 October 2014.

<sup>26</sup> KOLLER, Emily - Mare Nostrum vs. Triton. 2017, p. 1-12.

<sup>27</sup> MSF - Migrants: MSF and MOAS to launch Mediterranean search, rescue and medical aid operation. Press Release. 9 April 2015.

<sup>28</sup> Sea-Watch - Blog of Sea-Watch Migrant rescue operations in the Mediterranean Sea. 28 April 2015. Available at <https://sea-watch.org/en/news/>.

<sup>29</sup> MOAS - MOAS IN CENTRAL MEDITERRANEAN. Available at <https://www.moas.eu/central-mediterranean/>, accessed on 22 November 2019.

In April of 2015, around 800 people died after a failed rescue attempt carried out by a commercial ship<sup>30</sup>. Reacting to this disaster, the EU decided to triple the budget of operation Triton and to extend its operational area<sup>31</sup>. Additionally, it launched operation EUNAVFOR MED, also referred to as operation Sophia, which was of a military nature, having the main goal of disrupting smuggling networks in order to prevent people from leaving Libya. This would be done through surveillance and information gathering, apprehension of migrant smugglers and disposal of their vessels<sup>32</sup>. In February of 2018, operation Triton was replaced by operation Themis, which is in place at the time of writing and remains focused on law enforcement and security<sup>33</sup>. Operation Sophia would end up seeing its mandate extended until 2020<sup>34</sup>.

With the exception of Mare Nostrum, none of the operations described above were primarily dedicated to SAR. In spite of this, all of them claim to have a SAR component and, in fact, have indeed been involved in rescue operations, sometimes even in coordination with or at the request of SAR NGOs. The latter can however be regarded as the only actors primarily concerned with preventing the loss of life in the region, filling in for the lack of an effective SAR service provided by the EU or by its Member States.

Also of note is the timing of EU's measures analysed in this section, which seemed to always be preceded by a major disaster, thus strengthening the argument that there were no such thing as effective SAR services in place in the Mediterranean Sea and further justifying the practical need for NGOs to intervene.

Given the recent rejection of the European Parliament's motion for a resolution calling for the enhancement of SAR in the Mediterranean, this scenario is likely to remain unaltered in the near future<sup>35</sup>.

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<sup>30</sup> BONOMOLO, Alessandra; KIRCHGAESSNER, Stephanie - 800 migrants dead in boat disaster as Italy launches rescue of two more vessel. 20 April 2015.

<sup>31</sup> Frontex - Frontex welcomes pledges to boost operations Triton and Poseidon. News Release. 23 April 2015.

<sup>32</sup> Council of the EU - Council Decision (CFSP) 2015/778 of 18 May 2015.

<sup>33</sup> Frontex - Frontex launching new operation in Central Med. News Release. 1 February 2018.

<sup>34</sup> Council of the EU - EUNAVFOR MED Operation Sophia: mandate extended until 31 March 2020. Press Release 609/19. 26 September 2019.

<sup>35</sup> European Parliament - Motion for a resolution on search and rescue in the Mediterranean (2019/2755(RSP)).

### 3.3. Criticism of SAR NGOs' work

Despite what has been said above regarding the cooperation between SAR NGOs and Frontex, as the involvement of the former in SAR activities grew, the criticism of their actions kept growing as well.

If, in the beginning, these criticisms could be traced back to certain individuals or groups expressing their opinion on this matter<sup>36</sup>, rapidly State authorities<sup>37</sup> and EU agencies<sup>38</sup> started to adopt very similar arguments in their public discourse.

Although we will address many of the arguments used to criticise the work of NGOs in the Mediterranean Sea, it is not our intention to reproduce here all the debate that has been generated around this issue, but rather to present a few ideas that were behind the ever-increasing climate of mistrust and hostility affecting the mentioned NGOs. It is worth noting that some of the critical opinions we will be looking into below are very similar to the ones directed towards Operation Mare Nostrum at the time when it was still running<sup>39</sup>.

Some arguments focus on an alleged collusion between NGOs and migrant smugglers. Others claim that the former are financed by the latter, or that they have intentions to sabotage the Italian economy<sup>40</sup>. Yet, of all the allegations made about the work of SAR NGOs, three of them stand out – either because they are more articulate and coherent or because they are more widely spread.

First, because many of them operate near the Libyan coast, they are accused of luring people to try to attempt the dangerous sea crossing. They are, in addition, blamed for inadvertently contributing to the worsening of the quality of the boats and the increasingly dangerous tactics used by smugglers. Moreover, their presence is believed to make the Mediterranean crossings even deadlier.

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<sup>36</sup> GEFIRA - Caught in the act: NGOs deal in migrant smuggling. 15 November 2016. Available at <https://gefira.org/en/2016/11/15/caught-in-the-act-ngos-deal-in-migrant-smuggling/>.

<sup>37</sup> DAMBACH, Kai - Italy prosecutor claims NGOs working with human smugglers. Deutsche Welle. 24 April 2017. Available at <https://www.dw.com/en/italy-prosecutor-claims-ngos-working-with-human-smugglers/a-38554753>.

<sup>38</sup> Frontex - Risk Analysis for 2017, p. 32.

<sup>39</sup> HELLER, Charles; PEZZANI, Lorenzo - Death by Rescue: The Lethal Effects of the EU's Policies of Non-Assistance. Section 2: Mare Nostrum's Demise. 2016. Available at <https://deathbyrescue.org>.

<sup>40</sup> Amnesty International - Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean. 2018, p. 14.



Let us address each of these Statements individually.

Firstly, the claim that SAR NGOs operating close to Libyan territorial waters is responsible for an increase in the number of people attempting to cross the central Mediterranean, otherwise referred to as the pull-factor argument, seems to be difficult to articulate with the constant growth of migration from Africa towards Europe. This trend has been registered since 2014 and at that time NGOs did not assume such a prominent role in the area. In other words, it is debatable that the number of people crossing the Central Mediterranean would have decreased if SAR NGOs were to cease their operations in that region. This is further put into perspective if we consider the sharp escalation of crossings through the Western Mediterranean route in periods when no NGO activity is found<sup>41</sup>.

Secondly, the argument that the actions of NGOs are also responsible for the deterioration of vessels 'quality and for the adoption of more dangerous strategies by smugglers is also dubious. These circumstances could also be attributed to the deterioration of the situation in Libya, as well as to some EU measures such as the destruction of smuggler's 'vessels<sup>42</sup>, which was one of the goals of Operation EUNAVFOR MED, as mentioned in the previous section<sup>43</sup>.

Thirdly, and in line with both of the assumptions presented previously, some believe that the presence of NGOs in the Central Mediterranean is actually contributing to make the crossing even more dangerous. There is, however, available data showing that the mortality rate is lower in the periods of the year when the deployment of NGO vessels increases, which in itself may lead us to doubt the accuracy of such claims<sup>44</sup>.

It lies beyond the scope of this study to defend one line of argument and refute the other in order to find out which criticisms hold true and which do not. Even though we believe that there is existing vast empirical evidence to allow for such an approach, our goal in this section is to paint the background against which the events we will be

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<sup>41</sup> HELLER, Charles; PEZZANI, Lorenzo - BLAMING THE RESCUERS. Section 1: Pull-Factor?. 2017. Available at <https://blamingtherescuers.org/report/>.

<sup>42</sup> European External Action Service - EUNAVFOR MED: Operation Sophia Six Monthly Report (June, 22nd to December, 31st 2015). 29 January 2016, p. 5.

<sup>43</sup> HELLER, Charles; PEZZANI, Lorenzo - BLAMING THE RESCUERS. Section 2: Worsening smugglers tactics?.

<sup>44</sup> Ibid., Section 3: Increasing the Danger of Crossing?.

analysing in the next chapter will unfold, so we can understand the context that built up to them.

### **3.4. Concluding remarks**

Despite establishing in the previous chapter that EU Member States - and the EU itself - as parties to the relevant conventions must ensure efficient SAR services, we have just identified that there is no EU agency primarily responsible for ensuring them in the deadly Mediterranean Sea, nor is there any operation resultant from the cooperation of Member States that resembles the Italian Mare Nostrum Operation in terms of prioritising the safety of life at sea.

While the operations carried out by Frontex have a focus on border control, the EUNAVFOR MED operation is mainly concerned with combating the crime of smuggling. None of these constitute SAR services as defined by the SAR Convention. In short, SAR NGOs are the only actors in the Mediterranean Sea who have the goal of rescuing people in distress at the top of their priorities and have proven to be extremely effective in fulfilling their life-saving mission.

At any rate, as some authors have pointed out, the provision of SAR by NGOs should be seen as extraordinary, thus being desirable that the need for their presence be reduced<sup>45</sup> which, in turn, would mean that States would be acting in accordance with their obligations under the international law of the sea.

For this reason, it is even more puzzling not only the nature of the allegations made against SAR NGOs described in section 3.3., but also the criminal prosecutions targeting them and their members and which we will be analysing in the next chapter.

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<sup>45</sup> CUSUMANO, Eugenio; PATTISON, James - The non-governmental provision of search and rescue in the Mediterranean and the abdication of State responsibility. 2018, p. 70-71.

## **4. Impact of the EU's Facilitators Package on non-governmental search and rescue**

### **4.1. Introductory remarks**

It is important to stress that SAR NGOs, much like other types of NGOs, are faced with numerous challenges that can impair their ability to operate normally in the EU<sup>46</sup>. These challenges are not limited to the negative discourse aimed at delegitimising and stigmatising them and which we have looked into in section 3.3. of the previous chapter, and often include legal restrictions, limitations in obtaining funding and administrative penalties<sup>47</sup>.

Albeit significant, each of these aspects would require a case by case analysis which would take into consideration, among other things, certain national political trends which could prove to be particular in a given EU Member State, thus making it hard for us to discern a pattern that could be traced back to EU law or to concrete EU actions or omissions.

In this chapter, we will start by focusing mainly on criminal prosecutions targeting SAR NGOs and their members, as we believe these to be a consequence of the interpretation and transposition to the national level of Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence, hereon referred to as Facilitation Directive or simply as Directive. For this reason, we will only be referring to cases of formal investigation or prosecution carried out by national judicial authorities that fall under the scope of the Directive, regardless of the final outcomes of the proceedings.

According to its recitals 4 and 5, the Directive is meant to enhance other instruments aimed at combating illegal immigration and trafficking in human beings. At the same time, it provides a definition of the facilitation of illegal immigration, thus rendering more effective Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, hereon referred to as Framework Decision. Together, the two

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<sup>46</sup> FRA - Challenges facing civil society organisations working on human rights in the EU. 2018.

<sup>47</sup> SZULEKA, Małgorzata - First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland. 2018, p. 10.

aforementioned instruments constitute what has been referred to as the European Union's Facilitators Package.

We will start by pointing out the provisions of the Facilitators Package which prove relevant to our study, as they enable the criminal prosecution of SAR NGOs and their members. Afterwards, we will give an account of cases where this has indeed happened, followed by a few notes on problematic aspects relating to the use of certain terminology. We will conclude this chapter with a proposal to revise the Facilitation Directive in a way that can help to prevent such cases from occurring in the future.

## **4.2. Adoption process and main provisions of the Facilitators Package**

According to paragraph 1(a) of article 1 of the Facilitation Directive, States are required to adopt laws which impose sanctions on anyone who intentionally assists a non-EU national "to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens". It is likewise subject to sanctions, according to paragraph 1(b), "any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens".

Of note is the fact that paragraph 1(b) requires the existence of financial gain for the act to be qualified as facilitation of unauthorised residence, whereas paragraph 1(a) contains no such reference to the need for financial gain in what regards the facilitation of unauthorised entry or transit. In light of what we have been discussing until this point, it becomes apparent that the actions of members of SAR NGOs that take part in rescuing operations at sea may not be safe from falling under the scope of this provision, in spite of the non-profit nature of their activities.

Furthermore, paragraph 2 of the same article provides that Member States can decide not to impose sanctions on the facilitation of unauthorised entry or transit when "the aim of the behaviour is to provide humanitarian assistance to the person concerned". In this case, the national legislator is left to decide whether or not people providing humanitarian assistance will be exempt from prosecution. So, depending on the Member State where the fact takes place, members of SAR NGOs can be prosecuted for providing humanitarian assistance.

The wording of the Directive and the considerable room for interpretation that it left Member States with ended up being reflected in the way that it was transposed to the national level. Most States do not explicitly exempt humanitarian assistance from being punished, nor do they require the financial gain criteria to be met in order for court proceedings to be initiated<sup>48</sup>.

What is more, a definition of humanitarian assistance is completely absent from the Directive<sup>49</sup>, further contributing to the already existing legal uncertainty.

In relation to the Framework Decision, by reading recital 4 and article 2, it becomes clear that not only natural persons can be liable for the facilitation of unauthorised entry, transit or residence, but that legal persons can be held liable for such actions as well. This means that their members can be prosecuted, but that NGOs themselves can likewise be targeted by these criminal proceedings.

Lastly, article 6 states that this Framework Decision does not affect the rights recognised to individuals under international refugee law which, as we will be able to see in section 4.4., is a rather weak and insufficient reference to Member States' international law obligations.

When the EU began to address matters related to migration which were previously under the exclusive competence of Member States, it soon became apparent that combating irregular migration was one of its main priorities. Indeed, the Facilitators Package builds on these previous demonstrations of EU's intention to harmonise Member States' legislation on the means of combating irregular migration and irregular work<sup>50</sup>.

The legislative processes which eventually culminated in the adoption of the Directive and the Framework Decision were set in motion by two French initiatives. The wording in both proposals was considerably stronger and more punishing than the one we have just analysed<sup>51</sup>.

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<sup>48</sup> FRA - Criminalisation of migrants in an irregular situation and of persons engaging with them. 2014, p. 9-13.

<sup>49</sup> European Commission - REFIT Evaluation Of The Eu Legal Framework Against Facilitation Of Unauthorised Entry, Transit And Residence: The Facilitators Package. 2017, p. 8.

<sup>50</sup> Gil, Ana Rita - Direito e Política Europeia em matéria de luta contra a imigração ilegal. 2013, p. 18-19.

<sup>51</sup> Official Journal of the European Communities, C 253. Vol. 43 (2000), p. 1-6.

For instance, article 1 of the Directive simply stated that the “act of facilitating intentionally, by aiding directly or indirectly, the unauthorised entry, movement or residence” in EU territory of non-EU nationals should be regarded as an offence. The optional exemption clause was already there, but instead of referring to humanitarian assistance it only allowed for the exemption of a few close family members listed in article 4. Additionally, the penalties prescribed by the Framework Decision were subject to aggravation if any of the conditions in article 2 was met. One of these aggravating circumstances was the facilitation of entry, movement or residence of people who sought to work irregularly in the EU.

After being consulted by the Council of the EU regarding these proposals, the European Parliament issued two opinions rejecting each of France's initiatives<sup>52</sup>. In spite of this, the Council moved forward with the adoption of these instruments.

Reading France's proposals following the analysis of the Facilitators Package, we can understand that the original texts were considerably improved upon. A distinction between facilitation of unauthorised entry and transit and facilitation of unauthorised residence was included in the Directive. The article regarding aggravating circumstances was excluded from the Framework Decision. Nonetheless, the spirit of the initiatives remained intact in the approved versions, albeit watered down by careful writing and a slightly narrower scope.

### **4.3. Cases of criminal prosecution of SAR NGOs**

If we bear in mind the legal framework analysed in the previous section, it is readily perceivable that SAR NGOs are not the only organisations the activities of which can fall under the scope of the Facilitators Package. NGOs who engage with migrants on land in order to provide them with humanitarian assistance can be prosecuted on grounds similar to SAR NGOs. This can be the case of migrants who already find themselves inside the EU and are assisted in trying to reach a certain Member State. For example, if they are brought by an NGO to another country's hospital or shelter, this can be regarded as facilitation of unauthorised transit.

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<sup>52</sup> Official Journal of the European Communities, C 276. Vol. 44 (2001), p. 244.

This information, along with the events described in the previous chapter, makes it easier to grasp why there were 8 cases of NGOs being prosecuted in 2015 and why, from that year onwards, the number kept increasing, having reached its peak in 2018, a year when 24 cases were registered<sup>53</sup>.

Researchers identified a total of 49 cases of formal investigation or prosecution, of which 37 were based on the facilitation of unauthorised entry or transit of migrants. These cases have involved 158 individuals, 83 of them having been exclusively investigated or prosecuted on the grounds of facilitation of unauthorised entry or transit of migrants. At least 16 NGOs and associations are estimated to have been affected by these proceedings, which have taken place across 11 Member-States<sup>54</sup> and each had an average duration of around 2 years<sup>55</sup>.

Association nationale d'assistance aux frontières pour les étrangers, Are you Syrious, Calais Action, Calais Solidarité, Habitat et Citoyenneté, MSF, Mediterranean Saving Humans, Plateforme pour le Service Citoyen, Emergency Response Centre International's, Roya Citoyenne, Sea Watch and Walking and Borders NGO were all involved in the kind of proceedings described in the previous paragraph. In terms of SAR NGOs, the most well-known cases of prosecution are those of Team Humanity and Professional Emergency Aid (PROEM-AID) in Greece, Proactiva Open Arms and Jugend Rettet in Italy and Sea-Eye in Malta<sup>56</sup>.

For instance, in August 2017 Jugend Rettet's *Iuventa* was ordered to the port of Lampedusa. A preventive seizure was confirmed by the Tribunal of Trapani and again by the Supreme Court of Cassation in April 2018. As for the crew, 10 volunteers were initially charged with facilitation of unauthorised entry, but in July 2018 the investigation was extended to former crew members. If convicted, the volunteers could face up to 20 years in prison and have to pay fines of 15000 euros per rescued person. Jugend Rettet's case is a perfect example of the kind of proceedings that some SAR NGOs have to endure.

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<sup>53</sup> CONTE, Carmine; VOSYLIUTE, Lina - Crackdown on NGOs assisting refugees and other migrants. 2018, p. 23.

<sup>54</sup> Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden and the United Kingdom.

<sup>55</sup> CONTE, Carmine; VOSYLIUTE, Lina - Crackdown on NGOs assisting refugees and other migrants. 2018, p. 19.

<sup>56</sup> CARRERA, Sergio (et al.) - Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update. 2018, p. 72.

Of course, not all cases play out in the same exact way. Still, a certain pattern can be observed.

Criminal proceedings typically begin when, after having been involved in a rescue operation, SAR NGOs attempt to disembark the rescued people in EU ports. Besides the formal accusation of facilitating unauthorised entry, some members of SAR NGOs are held in preventive custody, while others have to pay fees of thousands of euros to be released on a bail<sup>57</sup>. As for the vessels used during the rescue operations, it is common for them to be seized by the national authorities<sup>58</sup>.

Although these proceedings eventually end in acquittals, the impact that they have on the accused are considerable. They include, of course, the time and money that these non-profit actors must spend to defend themselves in court, but also the damage to their reputation. Furthermore, these circumstances contribute not only to their reluctance to resume rescue operations, but also have a dissuasive effect on other NGOs. An unfortunate but predictable consequence of these proceedings is ultimately the increase in the number of deaths at sea<sup>59</sup>.

#### **4.4. The need of a revision of the Facilitators Package**

If we compare the definition of smuggling of migrants adopted by the UN Protocol against the Smuggling of Migrants by Land, Sea and Air with the definition of facilitation of unauthorised entry and transit used in the Facilitation Directive, we find a substantial difference regarding the inclusion of an element of financial gain.

The Protocol, which supplements the UN Convention Against Transnational Organized Crime and to which the EU is a signatory, defines the smuggling of migrants in its article 3(a) as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. No requirement related to a financial

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<sup>57</sup> Ibid., p. 72-79.

<sup>58</sup> FRA - Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations. 2018. Available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-ngos-sar-mediterranean\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf).

<sup>59</sup> MACCANICO, Yasha (et al.) - The shrinking space for solidarity with migrants and refugees: how the European Union and Member States target and criminalize defenders of the rights of people on the move. 2018, p. 6.



benefit is found in the Facilitation Directive, making its scope considerably broader, as we have seen above.

However, as some authors have expressed, aligning the definition of the Facilitation Directive with the one from the UN Protocol is not enough to prevent humanitarian assistance from being considered a crime<sup>60</sup>. This is the case because the humanitarian assistance clause from the Facilitation Directive is optional, rather than mandatory<sup>61</sup>, which means that by default the provision of humanitarian assistance is not exempt from punishment<sup>62</sup>. This presents us, on the one hand, the need to establish a definition of what should be considered as humanitarian assistance and, on the other hand, to establish a clause that explicitly exempts acts of such nature from falling under the scope of the Directive.

According to an in depth analysis of the costs and benefits of the different policy options that could inform a revision of the Facilitators Package, the need to define and exempt humanitarian assistance from sanctions has been regarded as contributing to its overall advancement, whilst also being believed not to have any negative effects in what concerns the pursuit of the objectives of the EU legal framework on the facilitation of unauthorised entry, transit and residence<sup>63</sup>.

Finally, the Directive only contains a reference to international refugee law, failing to state the terms under which it is meant to articulate with relevant regional and international human rights instruments, as well as with the various international law of the sea conventions. On this matter, a revision of the Directive could also draw inspiration from article 19 of the above-mentioned UN Protocol establishing that none of its provisions should “affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law”. Albeit pertinent, this aspect is notably less impactful when compared to the discussion surrounding the financial gain criteria and the humanitarian assistance exemption clause. In fact, it has been argued that the recognition

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<sup>60</sup> LANDRY, Rachel - Decriminalising "Humanitarian Smuggling". 2017.

<sup>61</sup> PROVERA, Mark - The Criminalisation of Irregular Migration in the European Union. 2015, p. 11.

<sup>62</sup> CARRERA, Sergio; GUILD, Elspeth - Irregular Migration, Trafficking and smuggling of human beings: Policy Dilemmas in the EU. 2015, p. 84.

<sup>63</sup> BOZEAT, Nick (et al.) - Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling). 2017, p. 73-74.

of international law and human rights commitments do not appear to have a great influence in States' practice in this field<sup>64</sup>.

#### **4.5. Notes on possible misuse of terminology**

At this point, it is worth clarifying that migrant smuggling and the facilitation of unauthorised entry and transit are expressions that can be taken as having the same meaning. According to the EU Action Plan against migrant smuggling, the Facilitators Package was intended to directly crack down on migrant smuggling<sup>65</sup>, hence strengthening the argument that the definition set in the Facilitation Directive should be harmonised with the one from the UN Protocol.

Be that as it may, according to recital 5 of the Facilitation Directive, this piece of legislation is meant to supplement “other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children”. This identical treatment of - or apparent confusion between - smuggling and trafficking is detrimental<sup>66</sup>, as they are two different crimes, each of them extremely complex in their own way and demanding specific and differentiated actions<sup>67</sup>.

The European Parliament has already called for a clear distinction between migrant smuggling and human trafficking, stating that, “in general terms, the criminal smuggling of migrants involves facilitating the irregular entry of a person to a Member State, whereas human trafficking involves the recruitment, transportation or reception of a person through the use of violent, deceptive or abusive means, for the purpose of exploitation”<sup>68</sup>.

Although it is out of the scope of this study to thoroughly compare the two crimes, as well as to point out which policy options are better suited to tackle each one of them,

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<sup>64</sup> GUILD, Elspeth - Issue Paper: Criminalisation of Migration in Europe: Human Rights Implications. 2010, p. 17.

<sup>65</sup> EUROPEAN COMMISSION - EU Action Plan against migrant smuggling (2015 - 2020). 2015, p. 3.

<sup>66</sup> GKLIATI, Mariana - Proud to Aid and Abet Refugees: The Criminalization of ‘Flight Helpers’ in Greece. 2016.

<sup>67</sup> SANCHEZ, Gabriella; ACHILLI, Luigi - Critical insights on irregular migration facilitation: global perspectives. 2019, p. 6-8.

<sup>68</sup> European Parliament - Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration [2015/2095(INI)].

we can question if perhaps this confusion is responsible for a number of phenomena which we have alluded to in section 3.2. of the previous chapter.

Let us take as an example the unrealistic belief that stopping the migrant smugglers will automatically save lives. This argument could be more reasonable if we were talking about trafficking, because stopping a trafficker will likely stop the exploitation and the violence towards a certain group of people. As for the migrants who resort to smugglers, even if the smugglers are arrested, migrants will still be in need of an alternative way to escape their current predicaments, which usually results in them choosing to attempt even more dangerous journeys<sup>69</sup>.

Following this rationale, one is left wondering if measures that simply focus on disrupting migrant smuggling operations are actually resulting in further loss of life at sea, as no other real alternatives are made available to the migrants.

#### **4.6. Synthesis of opinions on a revision of the Facilitators Package**

Throughout the years, and ever since its entry into force, there have been numerous calls for a revision of the Facilitators Package. There are various academic studies suggesting that revision is needed, most of which have already been referenced in this chapter. Discontent relating to the Package and its negative effects has however been manifested in other forms, such as the European Citizens' Initiative “We are a welcoming Europe, let us help!”, registered by the European Commission<sup>70</sup>, or a petition asking that no person be prosecuted for providing humanitarian assistance, which reached the European Parliament<sup>71</sup>.

From the beginning, the European Parliament itself has had its concerns about the Facilitators Package, later affirming that “anyone who provides different forms of

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<sup>69</sup> SANCHEZ, Gabriella - Five Misconceptions Concerning Smuggling. 2018, p. 3.

<sup>70</sup> European Commission - European Citizens' Initiative: Commission registers "We are a welcoming Europe, let us help!" initiative. 14 February 2018.

<sup>71</sup> European Parliament - Petition No. 1247/2016 by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea. 2016.

humanitarian assistance to those in need should not be criminalised and that Union law should reflect that principle”<sup>72</sup>.

Unfortunately, the European Commission has been dismissive of these criticisms, stating that it does not find a significant link between this legal framework and the criminalisation of SAR NGOs and adding that no act of rescue at sea can be criminalised according to EU Law<sup>73</sup>. The Commission is of the opinion that, despite their differences, the Facilitators Package is coherent with the UN Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>74</sup> and has concluded that the Package should stay as it is<sup>75</sup>.

The conclusions of the European Commission are strongly contradicted by the majority of the academic research conducted on this matter, as well as by civil society in general, either members of NGOs or other EU citizens and, most notably, by the European Parliament. This has led some authors to qualify the Facilitators Package as “a bad law” which “is not fit for purpose”<sup>76</sup>.

#### **4.7. Concluding remarks**

Despite the important role played by SAR NGOs in the Mediterranean Sea<sup>77</sup>, the previous analysis sheds light on the severe consequences that EU legislation may impact in their work and their staff<sup>78</sup>.

Additionally, the fact that a significant number of EU citizens is willing to either openly engage in a behaviour which is currently qualified as a crime under EU law or to publicly protest against it<sup>79</sup>, should be seen as an indicator that These citizens do not identify themselves with these legal instruments. Likewise, the fact that there was ever a

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<sup>72</sup> European Parliament - Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration [2015/2095(INI)].

<sup>73</sup> European Commission - REFIT Evaluation Of The Eu Legal Framework Against Facilitation Of Unauthorised Entry, Transit And Residence: The Facilitators Package. 2017, p. 22.

<sup>74</sup> Ibid., p. 31.

<sup>75</sup> Ibid., p. 37.

<sup>76</sup> CARRERA, Sergio (et al.) - Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update. 2018, p. 106.

<sup>77</sup> FRA - Fundamental Rights Report 2018, p. 143.

<sup>78</sup> Red Cross EU Office - Humanitarian space for migration work must be protected. 18 December 2017. Available at <https://redcross.eu/latest-news/humanitarian-space-for-migration-work-must-be-protected>.

<sup>79</sup> PESKINSKI, Janina - Humanitarian citizens: breaking the law to protect human rights. OpenDemocracy. 28 August 2017. Available at [https://www.opendemocracy.net/en/mediterranean-journeys-in-hope/humanitarian-citizens-breaking-law-to-protect-human-/-](https://www.opendemocracy.net/en/mediterranean-journeys-in-hope/humanitarian-citizens-breaking-law-to-protect-human/).

need for NGOs to assume such a prominent role in SAR to begin with, can be regarded as a symptom of EU's deficient provision of SAR services<sup>80</sup>.

In this respect, even though the absolute number of deaths at sea has been dropping, the rate of deaths at sea has gone up drastically. This has led some authors to question if the EU still sees the saving of lives as a priority and to argue that the focus should not be on the reduction of sea crossings and instead on decreasing the likelihood of people dying at sea<sup>81</sup>.

Comprehensively, the legal framework which we have analysed in this chapter, together with the increase in the militarisation of border control<sup>82</sup> which we have discussed in the previous one, should lead us to doubt their efficiency as measures to prevent the loss of lives at sea, especially when EU Member State's SAR obligations are not being adequately fulfilled.

Although certain authors prefer to address this issue from a solidarity perspective<sup>83</sup>, there are practical and legal problems which are not related to this concept and which are no longer limited to a lack of compliance with international law of the sea principles, but may also amount to human rights violations. This will be our focus throughout the next chapter.

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<sup>80</sup> Cusumano, Eugenio - How NGOs Took over Migrant Rescues in the Mediterranean. Euroobserver. 1 September 2016. Available at <https://euobserver.com/opinion/134803>.

<sup>81</sup> VOSYLIUTE, Lina - Is saving lives still a priority for the EU?., Reconnecting Europe Blog. 19 April 2018. Available at <https://eu.boell.org/en/2018/04/19/saving-lives-sea-still-priority-eu>.

<sup>82</sup> ZHANG, Sheldon X.; SANCHEZ, Gabriella; ACHILLI, Luigi - Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling. 2018, p. 10.

<sup>83</sup> RYNGBECK, Annica - Criminalisation of Humanitarian Assistance to Undocumented Migrants in the EU: A Study of the Concept of Solidarity. 2015, p. 37-38.

## **5. Human rights implications of non-rescue at sea**

### **5.1. Introductory remarks**

In this study, we began by identifying coastal States' SAR obligations. Afterwards, we proceeded to put into evidence the EU's shortcomings in what concerns SAR in the Mediterranean Sea. Those shortcomings were predominantly owed to the insufficient and inadequate nature of the operational measures adopted, which failed to directly tackle the loss of life at sea. Additionally, we noted that the existence of EU law instruments which allow for the prosecution of SAR NGOs that try to fill in this gap further aggravate an already dire situation.

Simply put, if the EU and its Member States do not provide efficient SAR services and if NGOs have a hard time filling in that gap, there is an increased risk of people dying while attempting to cross the Mediterranean. If we choose to see this increased risk as a consequence of EU's actions and omissions, it is possible to argue that some of the deaths resulting therefrom could be prevented.

Our line of reasoning brings us to a place where, in order to move forward, we must resort to international human rights law, because the combination of factors illustrated above ultimately results in loss of human lives. As such, we must ask ourselves if, either through actions or omissions, the EU and its Member States are violating the right to life of people who, despite finding themselves in distress at sea, are not rescued. To answer this question, we first need to analyse the nature and scope of the right to life. After doing so, we will try to understand under which circumstances can States be held responsible for violating the right to life in the context of SAR. In other words, we will try to figure out if there is such a thing as a right to be rescued at sea.

The latter portion of this chapter is dedicated to identifying and providing examples of border control policies, such as push-backs and pull-backs, which raise serious human rights concerns, namely in respect of the prohibition of torture and the prohibition of collective expulsions. These are pertinent as they often involve inadequate performance of rescue operations, which may indirectly hinder their life-saving goal.

## 5.2. Overview of the protection of the right to life

For this initial contextualisation, we will focus on the CoE and rely heavily on the ECtHR's work. Though its robust and extensive case law would provide enough subject matter to allow us to move forward, it will still be useful to take a brief look at other human rights law instruments and, when pertinent, at official documents from the bodies responsible for their monitoring. After analysing the ECHR, we will be mentioning the scope of the right to life under the CFR and under the ICCPR. In doing so, we will be covering the scope of the right to life under the main human rights instruments of the CoE, the EU and the UN, respectively. This is especially relevant for our study, as all EU Member States are also members of these organisations and have ratified the above-mentioned instruments.

The ECHR dates back to 1950 and, since then, it has been amended and supplemented by various protocols. All individuals, being subjects of international law, are entitled to every right featured in this instrument. States are responsible to ensure that each and every person can benefit from these rights. To this end, the ECtHR was established, so that it could supervise whether the Convention and its Protocols are being upheld by the contracting States.

Of relevance to our study is article 2 of the ECHR, concerning the right to life.

In paragraph 1 of the article, it can be read that “everyone’s right to life shall be protected by law” and that “no one shall be deprived of his life intentionally”. The rest of the article establishes the exceptional situations under which a State is exempt from responsibility following a violation of this right. In peace time, no derogation of this article is admitted, as it enshrines one of the most fundamental values shared by all 47 Member States of the CoE<sup>84</sup>.

The right to life, consisting in a right not to be killed or, perhaps more appropriately, in a right to not be deprived of life, generates a number of obligations which States must fulfil. These obligations can be broken down into positive or negative obligations. In general terms, positive obligations can be understood as those which require States to perform certain actions in order to ensure the protection of the right to life, being negative

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<sup>84</sup> ECtHR - *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, para. 147.

obligations those according to which States must refrain from acting in a way that would result in a violation of this right.

In article 2 we find the obligation to protect life through the law, the prohibition of intentional deprivation of life, save for the exceptions listed in paragraph 2(2)<sup>85</sup> and the obligation to investigate possible breaches in the fulfilment of the previous two obligations<sup>86</sup>.

As it may be apparent at this point, the second obligation mentioned above is a negative one and implies that States must refrain from unlawfully and arbitrarily interfering with the right to life or, in other words, abstain from causing death.

As for the positive obligations, they are twofold. On the one hand, States must investigate and punish those who perpetrate against the right to life of others. On the other hand, they are obliged to take steps to protect the life of all individuals, either from other individuals or, in certain cases, from themselves. This obligation also arises when States know or ought to know that one or more individuals face a real and imminent risk to their lives. However, a State will not be responsible for a death if its authorities have done everything that could reasonably be expected of them to impede the materialisation of that risk<sup>87</sup>. Furthermore, there are various factors that must be taken into account when assessing the relevance of said risk<sup>88</sup>.

At any rate, the preventive nature of the latter positive obligation means that States must “adopt operational measures to safeguard the lives of those who fall under its jurisdiction”<sup>89</sup>. These obligations have arisen in the contexts of, for instance, health care, dangerous activities, incidents on board ships, just to name a few<sup>90</sup>.

If it is true that this article cannot be understood as guaranteeing an absolute level of security in every situation where the right to life may be at risk<sup>91</sup>, it is not less true that the list of preventive measures which States must put in place to protect that right is

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<sup>85</sup> ECtHR - *Boso v. Italy* (dec.), no. 50490/99, 5 September 2002.

<sup>86</sup> ECtHR - *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, 30 March 2016, para 229.

<sup>87</sup> BARRETO, Ireneu Cabral - *A Convenção Europeia dos Direitos do Homem* : anotada. 2015.

<sup>88</sup> ECtHR - *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019, paras. 142-145.

<sup>89</sup> ECtHR - *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014, para. 130.

<sup>90</sup> ECtHR - *Guide on Article 2 of the European Convention on Human Rights: Right to life*. 2019, p. 6-8.

<sup>91</sup> ECtHR - *Molie v. Romania* (dec.), no. 13754/02, 1 September 2009, para. 44.



expected to expand as the years go by. This is likely to happen, not only because the list is set by the ECtHR at the same rate as cases are brought before it, but also because the standards for the protection of human rights need to be progressively set higher<sup>92</sup>.

As we have pointed out in the beginning of this section, all EU Member States are signatories of the ECHR and are therefore bound by its provisions. In any case, the responsibilities of the institutions and bodies of the EU regarding human rights became even clearer after 2009. With the entry into force of the Treaty of Lisbon, the CFR acquired a binding status, thus having the same legal value as any of EU's Treaties<sup>93</sup>.

It is stated in article 2(1) of the CFR that "everyone has the right to life". This provision is based on the first sentence of article 2(1) of the ECHR and has the same meaning and scope, despite its slightly different wording. Of note is the fact that, apart from applying to EU's institutions and bodies, it also applies to Member States when implementing EU Law.

Last but not least, article 6(1) of the ICCPR reads that "every human being has the inherent right to life". According to the same article, "this right shall be protected by law" and "no one shall be arbitrarily deprived of his life". The implementation of the ICCPR by the 172 States that have ratified it is monitored by the UN Human Rights Committee (HRC).

In 2018, the HRC issued a General Comment on the above-mentioned article 6. It offers a comprehensive analysis of the protection of the right to life under the ICCPR, which is mostly in line with the ECtHR's case law. According to the Committee, States' obligations must contemplate "reasonably foreseeable threats and life-threatening situations". Even if these do not ultimately result in death, a violation of the right to life can still be found. The document also features a reference to the need to avoid narrow interpretations of this right<sup>94</sup>.

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<sup>92</sup> MORAWSKA, Elzbieta Hanna - The Preventive Dimension of the Protection of the Right to Life Under the European Convention on Human Rights. 2019, p. 2.

<sup>93</sup> SILVEIRA, Alessandra; CANOTILHO, Mariana - Carta dos Direitos Fundamentais da União Europeia Comentada. 2013.

<sup>94</sup> HRC - General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life. 2018, p. 1-2.

### **5.3. A right to be rescued at sea and the concept of jurisdiction**

It is possible to argue that the obligations of States concerning SAR are not merely obligations of means, but also entail the need to achieve certain results. In other words, other than deploying means which can be used to rescue people in distress at sea, the fulfilment of States' obligations regarding SAR can likewise be assessed through an evaluation of the effectiveness of those means<sup>95</sup>.

With that being said, a different question arises. As we have seen in section 2.5. of this study, the various international law of the sea instruments often establish duties but then fail to ensure that, in practice, those duties are implemented. This is the case, as we already know, with the duty to disembark rescued people at a place of safety, which does not entail a corresponding duty for any State to allow for the disembarkation in their territory. So, knowing about the obligation of States to ensure SAR at sea, and in spite of their obligations to protect the right to life which we have addressed in the previous section, do people in distress at sea have a right to be rescued? The answer to this question can determine whether or not it is viable to attempt to bring before the ECtHR questions regarding potential violations of the right to life resultant from the provision of SAR services or lack thereof.

To this end, some authors have tried to understand if such right exists within or if it can be extrapolated from the international law of the sea. This does not seem to be the case. Although it has been suggested that there are human rights obligations contained in international law of the sea instruments<sup>96</sup>, the fact is that they are two distinct branches of law, each with its specific scope and imposing on States very different kinds of obligations. Moreover, The nature of these instruments, which merely distribute responsibilities among States and call on them to cooperate in order to provide SAR without ever referring to an individual right to be rescued at sea seems to suggest that, even if existent, such right cannot find its basis on the international law of the sea<sup>97</sup>.

This does not mean, however, that such right cannot be supported by international human rights law. For this reason, we must try to understand under which conditions the right to life can be applied at sea.

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<sup>95</sup> MOEN, Amy - For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention. 2010, p. 386-389.

<sup>96</sup> OXMAN, Bernard H. - Human Rights and the United Nations Convention on the Law of the Sea. 1997.

<sup>97</sup> PAPASTAVRIDIS, Efthymios - Is there a right to be rescued at sea? A skeptical view. 2014, p. 20-24.

Indeed, the ECtHR has, on various occasions, ruled on cases where some of the facts took place at sea. Such was the case, for instance, in *Vassis and others v. France*, where the applicants were deprived of liberty for 18 days, following an interception and subsequent arrest of their vessel on the high seas by the French authorities, on suspicion of transporting drugs<sup>98</sup>.

We believe that the positive obligations referred to in the previous section can extend to the performance of emergency services<sup>99</sup> and, by analogy, to SAR services, provided that State authorities are aware that the lives of individuals are at risk and that they are subject to the jurisdiction of that State. However, the notion of jurisdiction is essentially a territorial one and the application of the ECHR to events which take place outside of a State party's territory is therefore regarded as exceptional. By default, vessels that enter States' SAR regions are not immediately under their jurisdiction<sup>100</sup>.

This view was held by the ECtHR in the case of *Medvedyev and Others v. France*, in which the crew of a Cambodian ship suspect of carrying drugs was intercepted by French authorities on the high seas, after the flag State gave its agreement via a diplomatic note, resulting in the escort of the ship and its crew to the French port of Brest. In the same case, the ECtHR affirmed that, despite the “special nature of the maritime environment”, it is not reasonable to assume that people on board vessels are covered by no legal system capable of ensuring the protection of their most fundamental rights<sup>101</sup>.

Nevertheless, the aforementioned presumption of lack of jurisdiction whenever a vessel finds itself outside of a State's territory can be rebutted.

This can happen, for example, after a distress call is launched, either by the people in distress themselves or by a third party. After the call is acknowledged, a jurisdictional link between the people in distress and the State authorities emerges and the latter are obliged to directly or indirectly provide emergency services<sup>102</sup> or, in the case of SAR, conduct a rescue operation. Jurisdiction is also established if, on the basis of an

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<sup>98</sup> ECtHR - *Vassis and others v. France*, no. 62736/09, 27 September 2013.

<sup>99</sup> UUSITALO, Jenna - *Protecting the Right to Emergency Medical Service in the European Court of Human Rights and Collective Complaint Procedure*. 2018, p. 51.

<sup>100</sup> ECtHR - *Medvedyev and others v. France [GC]*, no. 3394/03, 29 March 2010, para. 64.

<sup>101</sup> *Ibid.*, para. 81.

<sup>102</sup> TREVISANUT, Seline - *Is there a right to be rescued at sea? A constructive view*. 2014, p. 9.

international agreement - such as an IMO convention - State authorities exercise effective control over a vessel or the people who are on board.

The latter scenario happened to be brought before the ECtHR in *Hirsi Jamaa and Others v. Italy*. In this case, a group of around 200 migrants who set sail in an attempt to reach Italy were intercepted and taken on board Italian vessels, before being promptly returned to Libya. The ships belonged to the Italian armed forces and their crew was entirely made up of Italian military personnel. For this reason, the ECtHR determined that, upon boarding the military ships, the migrants came under the "exclusive de jure and de facto control of the Italian authorities"<sup>103</sup>.

The HRC's General Comment analysed in the previous section helps further the argument of an extraterritorial application of the duty to protect the right to life, this time under the ICCPR. It achieves this by mentioning that the exercise of effective control over a person in a way which directly impacts her right to life places her under the jurisdiction of the responsible State party, even if the events take place outside its territory. What is more, the HRC expressly refers to the need to protect the life of any individual who is found to be in a situation of distress at sea<sup>104</sup>.

Unfortunately, there are circumstances where the jurisdictional link may prove to be difficult to establish. This is the case, for example, when a distress call is not launched or when SAR services are not provided.

As for the first case, in light of everything we know so far, it is possible to claim that States are aware of the particularly dangerous nature of the Mediterranean Sea. Such awareness would lead them, ideally, to assume a more proactive stance towards the rescue of people in distress<sup>105</sup>.

As for the second case, and in the absence of clear human rights solutions, there may be another way through which it could still be possible to find States responsible for failing to uphold their SAR obligations. The UN International Law Commission Articles

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<sup>103</sup> ECtHR - *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012, paras. 81-82.

<sup>104</sup> HRC - General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life. 2018, p. 15.

<sup>105</sup> TREVISANUT, Seline - *Is there a right to be rescued at sea? A constructive view*. 2014, p. 14.

on Responsibility of States for Internationally Wrongful Acts can help to shed some light on this issue.

In order for a State to be internationally responsible, the act or omission needs to be, on the one hand, “attributable to the State under international law” and, on the other hand, constitute “a breach of an international obligation of the State”<sup>106</sup>.

The first element means that the act must be traceable back to a State, a legal person who is a subject of international law and who possesses full authority to act under it, albeit through its agents and representatives<sup>107</sup>. The second element refers to the breach of the obligations of a State in force at the time of the act and that includes treaty and non-treaty obligations, such as customary international law and general principles of international law<sup>108</sup>.

Because of this, in our opinion, it is possible to claim that a State that is a party to the SOLAS Convention, the SAR Convention and the UNCLAWS and that does not provide SAR services is, according to the ILC Articles, committing an internationally wrongful act.

The issue discussed in the previous three paragraphs falls outside the scope of this chapter, as it does not directly contend with Human Rights. At any rate, we felt it would be important to address every possible scenario, even one where protection under the ECHR cannot be afforded. Besides, it is important to stress that jurisdiction not being established does not mean that lives are not being lost in the Mediterranean Sea and that no one should be held accountable<sup>109</sup>.

To sum up, States' obligations under international human rights law cannot be ignored, even in what regards the provision of SAR services. Consequently, a right to be rescued at sea can result from the application of the right to life in a SAR context, but only in cases where a jurisdictional link between the events and a State's actions or omissions is found. In this respect, and in accordance with the ECtHR's relevant case law,

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<sup>106</sup> UN International Law Commission - Responsibility of States for Internationally Wrongful Acts, article 2(a) and (b).

<sup>107</sup> UN International Law Commission - Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, article 2, paras. 5 and 6.

<sup>108</sup> *Ibid.*, article 2, para. 7).

<sup>109</sup> Parliamentary Assembly of the Council of Europe - Lives lost in the Mediterranean Sea: Who is responsible?. 2012.

certain acts of States which occur or produce effects outside their territories can exceptionally result in jurisdiction being established<sup>110</sup>.

#### **5.4. Human rights violations resultant from push-backs at sea**

Perhaps as an attempt to avoid upholding the above-mentioned positive human rights obligations, or merely as yet another way to prevent irregular arrivals, some EU Member States have developed policies which allowed them to externally manage attempts to reach their territories<sup>111</sup>. One of those policies would become known as push-backs at sea. These consist of returning intercepted or rescued migrants back to their countries of origin. Italy's cooperation with the Libyan coast guard to this end is a remarkable example of this kind of policy<sup>112</sup>.

The most relevant case regarding these practices was that of *Hirsi Jamaa and others v. Italy*, which we have already cited above when approaching the concept of jurisdiction. In that case, the applicants were a group of eleven Somali nationals and thirteen Eritrean nationals, whose return to Libya upon interception at sea by the Italian navy breached the ECHR.

Italy argued that the event was a rescue operation. However, the applicants, who were part of a group of roughly 200 migrants, were never informed of their destination after being taken on board Italian military ships. Plus, all of their documents and belongings were confiscated before they were eventually handed over to the Libyan authorities.

In this particular case, different questions emerge. Not all of them, however, fall under the scope of our study, hence will only be succinctly touched upon for the sake of a complete depiction of the legal ramifications of the events previously described.

We will begin by referencing each of the three violations found by the ECtHR.

First, the Court found a violation of article 3 of the ECHR, which prescribes that “no one shall be subjected to torture or to inhuman or degrading treatment or

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<sup>110</sup> GUILFOYLE, Douglas - *Medvedyev and Others v France*, European Court of Human Rights. 2010, p. 437-442.

<sup>111</sup> Amnesty International - *The Human Rights Risks of External Migration Policies*. 2017.

<sup>112</sup> Human Rights Watch - *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*. 2009, p. 1-27.

punishment”. The violation concerns two distinct risks to which the migrants were exposed. On the one hand, the risk of suffering from torture or inhuman or degrading treatment or punishment in Libya. On the other hand, the risk of being arbitrarily returned from Libya to Somalia and Eritrea.

The judges claimed that article 3 imposes on States an obligation not to expel individuals to another State where they run a real risk of being subjected to the treatment prohibited by its provisions<sup>113</sup>. In addition, they were of the understanding that, in light of the available reports on the situation in Libya<sup>114</sup>, Italy knew or ought to have known that these migrants would be subject to such risk upon disembarkation. As for the possibility of their subsequent return to Somalia and Eritrea, it fell on Italy the responsibility to ensure that this would not happen without an individual risk-assessment previously being conducted<sup>115</sup>.

To disregard these provisions would be to violate the principle of non-refoulement, which is understood as an inherent element of the prohibition of torture or inhuman or degrading treatment or punishment<sup>116</sup>. Despite having its roots in international refugee law, refoulements are nowadays regarded as serious international human rights violations irrespective of victims’ legal status, and even if carried out in an indirect fashion, like in the scenario described in the end of the previous paragraph.

Second, Italy was found to have breached Article 4 of Protocol no. 4. of the Convention. This article sets forth the prohibition of collective expulsion of aliens, which has been defined as “any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”<sup>117</sup>.

The purpose of this article is twofold. It forbids the expulsion of a group of individuals just because they happen to share similar characteristics, such as religion, nationality or ethnic origin, thereby preventing members of the group from being

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<sup>113</sup> ECtHR - Hirsi Jamaa and Others v. Italy, paras. 123-131.

<sup>114</sup> Human Rights Watch - Libya: Rights at Risk. 2008.

<sup>115</sup> ECtHR - Hirsi Jamaa and Others v. Italy, para. 147.

<sup>116</sup> ECtHR - Handbook on European law relating to asylum, borders and immigration. 2014, p. 61-67.

<sup>117</sup> European Commission on Human Rights - Becker v. Denmark, no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 4, p. 236.

discriminated against on those grounds<sup>118</sup>. Additionally, an examination of each individual's personal situation shall be conducted, in order to prevent them from being removed without getting an opportunity to bring up their arguments against State authorities' expulsion measures<sup>119</sup>.

The scope of application of the Protocol is coherent with that of the Convention, hence the reason why this right also extends to removals which take place on the high seas, as long as they fall under States' jurisdiction<sup>120</sup>.

Third, the Court found That there had been a violation of the applicants' right to an effective remedy, as they were not given an opportunity to challenge the expulsion measure nor to submit applications for international protection before being expelled. This behaviour amounted to a violation of article 13 of the ECHR, when taken in conjunction with the two aforementioned articles, and is the reason why there was no need to exhaust domestic remedies before submitting an application to the Court. The Italian authorities essentially made it impossible for this to happen by returning the migrants to Libya, where they would be unable to seek any kind of domestic remedy.

This case clearly illustrates the dangers associated with these types of practices. Push-backs not only undermine the right to asylum and the principle of non-refoulement<sup>121</sup>, but also collide with human rights, as do many interception-based migration control policies<sup>122</sup>. In the same vein, judge Pinto de Albuquerque accurately notes in his concurring opinion that the *Hirsi Jamaa* case “is about the international protection of refugees, on the one hand, and the compatibility of immigration and border-control policies with international law, on the other hand”.

Although we recognise the usefulness of a more thorough approach which would take into consideration different aspects related to international refugee law, such approach falls outside the scope of our study.

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<sup>118</sup> GIL, Ana Rita - Collective expulsions in times of migratory crisis: Comments on the *Khlaifia* case of the ECHR. 2016.

<sup>119</sup> ECtHR - Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsions of aliens. 2020, p. 5.

<sup>120</sup> ECtHR - *Hirsi Jamaa and Others v. Italy*, paras. 177-178.

<sup>121</sup> FERNANDES, Meena (et al.) - The Cost of Non- Europe in Asylum Policy. 2018, p. 45-100.

<sup>122</sup> BROUWER, Andrew; KUMIN, Judith - Interception and Asylum: When Migration Control and Human Rights Collide. 2003.



Be that as it may, at this time it is convenient to recall the contents of chapter 2 of this study. In its section 2.5., we saw that, in order for a rescue operation to be complete, the rescued persons had to be disembarked at a place of safety. Allowing people to die at sea or rescuing them just so they can be returned to a country where their lives are in danger both constitute human rights violations, whether the victims are refugees or not. If States breach their human rights obligations while conducting border control operations, it is undoubtable that they incur in liability for such breaches, as mentioned in section 5.3.. This is further corroborated by the ECtHR's statement that countries are free to establish their immigration policies, in so far as these comply with their international human rights obligations<sup>123</sup>.

Finally, it is worth pointing out that the prohibition of torture we have alluded to is also present in article 4 of the CFR and in article 7 of the ICCPR. As for the prohibition of collective expulsions, it can be found in article 19(1) of the CFR. It stands to reason that push-backs are not just problematic in a CoE context, being likewise unacceptable by both EU and UN standards.

### **5.5. Transitioning from push-backs to pull-backs**

The incident which gave rise to the case we have analysed in the previous section seemed to be justified by a bilateral cooperation agreement that had been signed between Italy and Libya back in 2007. The agreement stated that Italian vessels and personnel would be deployed so that, together with Libya's coast guard, mixed maritime patrols could be established. In 2009, an additional protocol was signed, which allowed for maritime patrols with joint crews to be conducted in Libyan and international waters, as well as in Italian waters, under the supervision of Italian personnel<sup>124</sup>.

Libya's poor treatment of migrants, asylum seekers and refugees has been very well-documented over the years. In spite of this, the EU is seemingly willing to keep on regarding its authorities as partners for the purpose of SAR and migration control, as we already had the chance to point out in section 3.2. of this study. However, following the *Hirsi Jamaa* case, the cooperation between Italy and Libya had to take on a form which

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<sup>123</sup> ECtHR - *Hirsi Jamaa and Others v. Italy*, para. 179.

<sup>124</sup> ECtHR - *Hirsi Jamaa and Others v. Italy*, para. 19.

was not so blatantly incompatible with the ECHR. Therefore, in 2017, the two countries signed a memorandum of understanding<sup>125</sup> and thus push-back practices gave way to pull-back practices.

In this context, pull-backs are the practices which aim to prevent migrants from taking to the sea or from reaching Italian waters. EU and Italy play an important role in increasing Libya's effectiveness in conducting pull-backs. This is done mainly through funding and through the provision of technical assistance with the aim of improving their capacity to intercept migrants and to bring them back to Libyan territory. The outcomes of this type of cooperation have been labelled by some authors as unlawful<sup>126</sup>, while others hypothesised that the ECtHR could find them to be violating human rights<sup>127</sup>. Others, still, claimed Libya to be totally incapable of safely managing its SAR region<sup>128</sup>.

Italian jurisdiction over these operations is hard to establish, since they are mostly carried out by the Libyan coast guard. But, by building Libya's capacity to pull-back migrants, Italy and the EU are effectively assisting its authorities in sending migrants and potentially people in need of international protection back to Libya. In our view, this is ultimately what Italy has already been condemned for doing in the case of Hirsi Jamaa.

In other words, Libya is being assisted in doing through pull-backs what Italy cannot do through push-backs. One is left to wonder for how long can this type of behaviour be regarded as acceptable according to ECHR, CFR and UN human rights standards.

## **5.6. Concluding remarks**

Usually, the concerns regarding SAR service's 'compliance with international human rights law have to do with the disembarkation of the rescued and especially with

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<sup>125</sup> Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. 2017.

<sup>126</sup> CARRERA, Sergio; CORTINOVIS, Roberto - Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?. 2019, p. 31-34.

<sup>127</sup> PIJNENBURG, Annick - From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?. 2018, p. 402-426.

<sup>128</sup> MACCANICO, Yasha - Mediterranean: As the fiction of a Libyan search and rescue zone begins to crumble, EU states use the coronavirus pandemic to declare themselves unsafe. 2020.

their treatment upon being disembarked<sup>129</sup>. This means that it is more frequent for human rights questions to emerge after the rescue operation is concluded. The role of human rights in a phase previous to the disembarkation is not so well established. Although we believe that it raises its own set of challenges, an exclusive focus on the disembarkation portion of the process may eventually prove irrelevant if people in distress do not get the chance to be taken on board a rescue unit to begin with.

Besides, often the subject of SAR is discussed in a very one-sided fashion. It is common for the focus to be on the obligations of States and not on the rights of people in distress. Regardless, it is imperative to keep in mind that SAR exists to protect human life at sea. For this reason, supporting the existence of a right to be rescued at sea would perhaps indirectly contribute to improve overall SAR services in Europe by allowing for a higher degree of State accountability.

In this chapter we sought to point out that States' inability or unwillingness to provide efficient SAR services should not be seen merely as an operational failure, but rather as a potential violation of the human rights of people in distress at sea, specifically of their right to life.

We end by stating that both the right to life and the prohibition of torture have to be interpreted in accordance with the principle of universality. The universal nature of these human rights is such that they are afforded to all individuals. The individuals' nationality, residence or legal status are irrelevant in what regards their right to benefit from human rights protection.

But if this protection is to be effective, States' sovereign right to determine who is allowed to enter and stay in their territory cannot remain untouched. In fact, it can suffer a few limitations in so far as strictly necessary to ensure the adequate protection of an individual's human rights. In certain cases, this can mean that States have to refrain from engaging in controversial border control policies with the aim of preventing irregular arrivals by sea. In other cases, it could even mean making it possible for irregular migrants to enter and stay, albeit temporarily, in the territory of a State of which they are not a national<sup>130</sup>.

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<sup>129</sup> CoE Commissioner for Human Rights - Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranean. 2019, p. 34.

<sup>130</sup> GIL, Ana Rita - Imigração e Direitos Humanos. 2017, p. 255-293.

## **6. Conclusion**

### **6.1. Assessment of the objectives' achievement**

The first objective of this thesis was to understand what exactly is SAR and what are States required to do to ensure it.

We understood that SAR operations comprise a preventive dimension. Coastal States are required to establish, operate and maintain maritime safety facilities to allow for coast-watching and for locating people in distress at sea. We also identified a reactive dimension of SAR obligations. Once located, people in distress must be retrieved, medically attended and delivered to a place of safety. These obligations require States to deploy available personnel, vessels, aircrafts and other resources, either public or private. In order to fulfil these obligations, coastal States should cooperate amongst each other. Yet, since this duty is not well-defined, there seems to be no obvious consequence for not doing so<sup>131</sup>. In the specific context of the EU, under the principle of solidarity and fair sharing of responsibilities, this duty to cooperate assumes even more relevance. In any case, persons found in a situation of distress at sea must be rescued, regardless of their legal status, nationality or the circumstances in which they find themselves in.

Our second objective required us to analyse how and by whom is SAR being provided in the central Mediterranean Sea.

We realised that the Italian operation Mare Nostrum set a high standard in terms of SAR provision in the central Mediterranean. Unfortunately, after its end, no other operation appeared to have SAR as its main objective. The focus of Frontex's operations Triton and Themis is essentially on border control and operation Sophia was put in place to combat migrant smuggling. This gap in SAR provision in the Mediterranean was eventually filled by NGOs, who took on a prominent role in saving lives at sea. We noted that the launching or reinforcement of the above-mentioned operations was almost always preceded by major disasters and that SAR NGOs proved to be the only actors primarily concerned with avoiding further loss of life at sea. In theory, despite their different goals, border control operations could potentially

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<sup>131</sup> COPPENS, J. - The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea?. 2013, p. 593.

enhance the quality of SAR services<sup>132</sup>. However, this is not currently happening and instead the conflicting nature of SAR and border control<sup>133</sup> is becoming increasingly more evident. Because of this, we argued that EU's SAR obligations were not being adequately fulfilled in the central Mediterranean.

Our third objective demanded that we evaluated the impact of the Facilitators Package on the work of SAR NGOs.

We identified cases of SAR NGOs and their members being prosecuted on account of their work and argued that such prosecutions were a consequence of deficiencies of the Facilitation Directive. Namely, of the lack of a financial gain criteria and of a mandatory and well-defined humanitarian assistance exemption clause.

On top of all the criticism SAR NGOs already have to endure, these prosecutions have a damaging effect on their reputation. Adding to this, they have a deterrent effect on the accused, as they must spend time and money to defend themselves in court. At the same time, these proceedings manage to have a dissuasive effect on other NGOs that may be pondering to attempt to save migrants in the future.

If we keep in mind the current lack of efficient SAR services in the Mediterranean, the idea of reducing civil society's involvement in the area almost certainly means that there will be even more migrant deaths.

Our fourth objective had us considering proposals to revise the Facilitation Directive.

The majority of research on this topic suggests that a revision of the Facilitation Directive is necessary in order to allow SAR NGOs to carry out their activities without fear of prosecution.

The three key aspects of the Directive which we have identified as justifying its revision are the broad definition of facilitation of unauthorised entry and transit, the lack of a definition of humanitarian assistance and the optional nature of the existing humanitarian assistance exemption clause. These elements need to be revised so that the Facilitators Package stops negatively impacting the work of SAR NGOs.

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<sup>132</sup> JUMBERT, Maria Gabrielsen - Control or rescue at sea? Aims and limits of border surveillance technologies in the Mediterranean Sea. 2018, p. 674-696.

<sup>133</sup> BASARAN, Tugba - Saving Lives at Sea: Security, Law and Adverse Effects. 2014, p. 386.

Our fifth objective consisted in contemplating the viability of recognizing a right to be rescued at sea.

By analysing the ECtHR's case law we were able to understand the scope of application of the right to life, in which a right to be rescued at sea could find its grounds. We concluded that States' inability or unwillingness to provide SAR services could potentially consist in a violation of the right to life in its positive dimension, and suggested that the recognition of a right to be rescued at sea could contribute to increase their degree of accountability for deaths in the Mediterranean Sea. However, the recognition of this right depends on a judgement of the ECtHR on a question regarding the existence of such right, which is yet to occur. Hence, claims for the existence of an individual right to be rescued at sea still stand on tenuous grounds.

Notwithstanding, States exercising jurisdiction over their SAR regions and failing to rescue people in distress at sea would have an additional incentive to uphold their duty to rescue if a corresponding right to be rescued were to be recognised.

Our sixth objective had us addressing human rights violations resultant from push-backs and pull-backs at seas.

Whilst using the cooperation between Italy and Libya as an example, we were able to identify three rights that are usually breached by push-back practices. These are the prohibition of torture or inhuman or degrading treatment or punishment, the prohibition of collective expulsions and the right to an effective remedy. By intercepting migrants at sea and returning them to a place where they may be subject to torture without conducting an individual assessment of each of their particular circumstances and allowing them to apply for international protection, States that engage in push-backs are effectively incurring in violations of these rights.

As for pull-backs, it is not easy to establish a direct jurisdictional link between States that finance and support the operations and the actions of the States that actually carry them out. Albeit logical that assisting Libya in conducting operations which violate international human rights law is in itself unacceptable under EU standards, no organisation or body has adopted a strong enough stance on this matter yet.

## 6.2. Recommendations

In this study we have covered the most relevant provisions of the international legal framework of SAR and conducted an analysis of SAR practices in the central Mediterranean Sea. By doing so, we hope to have shed light on some of the aspects which we believe to be directly or indirectly contributing to the increase in deadliness in this region.

On a general assessment, and in line with everything we said so far, we believe that the number of deaths in the central Mediterranean Sea in recent years could have been considerably lower had the EU acted differently. This means that the answer to be given to this study's main question must be negative. In other words, we are not convinced, at the time of writing, that the EU is doing its best to prevent deaths in the Mediterranean Sea.

Not ensuring efficient SAR services, making it legally impractical for NGOs to provide them or disembarking rescued people at unsafe locations for the sake of combating irregular migration all contribute, in one way or another, to more migrant deaths.

For this reason, below we will elaborate a few recommendations which we believe that, if adopted, can help to make the Mediterranean less deadly in the future. We are of the opinion that the adoption of these recommendations would result in an overall improvement of SAR in that region, thus allowing for more people in distress to be rescued and preventing further human rights violations from taking place.

- Member States at EU's southern sea borders are faced with considerable challenges that need a collective and coordinated response in order to be overcome. In line with the international legal framework of maritime SAR and with the principle of solidarity and fair sharing of responsibilities, the EU must promote the development of a regional agreement through which responsibility for SAR in the Mediterranean can be shared equally between all its Member States. This agreement must ensure that the resources allocated are suitable to address the Mediterranean Sea's specific SAR needs, keeping in mind its vast history of situations of distress.
- SAR services need to be separated from border control and from anti migrant smuggling operations, both in law and in practice. Whilst the objective of border

control is to prevent unauthorised entries into the EU, anti migrant smuggling operations' goal is to combat the crime of migrant smuggling. Let us recall that SAR's goal is to rescue everyone in distress at sea, regardless of their legal status or of the situation in which they are found. For this reason, it would be preferable that an independent body be responsible for ensuring it. In this way, the competent body could focus on reducing the number of deaths at sea, instead of on reducing the number of irregular arrivals.

- The work of SAR NGOs is extremely valuable, especially at a time when State-operated SAR services are insufficient. It is desirable that these organisations play a secondary role in SAR in the Mediterranean, assisting States in the fulfilment of their obligations. However, currently their work is conditioned by the Facilitation Directive. This instrument must be revised so that the definition of facilitation of unauthorised entry and transit includes a financial gain requirement. In addition, the concept of humanitarian assistance must be clearly defined. Also, the optional humanitarian assistance exemption clause should be made into a mandatory one, as this would help to prevent SAR NGOs from being criminally prosecuted for rescuing people in distress.
- Finally, EU and Member States' practices which directly or indirectly lead to violations of international human rights law must cease immediately. These include not only push-back measures, but also any kind of cooperation with third countries with the aim of circumventing human rights obligations. Any operation which seeks to prevent irregular migration through unlawful means cannot be tolerated in the context of the EU, of the CoE or of the UN and thus needs to be stopped. Even though States have a sovereign right to control access to their territory, this right cannot be exercised in a way which affects migrants' right to life, or that subjects them to the risk of suffering from torture or any other inhuman or degrading treatment or punishment.



### 6.3. Further research

As pointed out in the beginning of this study, the deficiencies in SAR services in the Mediterranean Sea were exposed due to the increase in migration flows towards Europe. The prospect of dying at sea cannot be used as a deterrent to migration. However, we must also recognise that SAR does not completely solve the problem of migrant deaths at sea. Addressing the reasons which lead migrants to attempt to cross the Mediterranean Sea in unseaworthy vessels is as important as providing efficient SAR services.

Likewise, it is imperative to understand that irregular migration by sea is part of a wider phenomenon of irregular migration, the patterns of which must be thoroughly researched upon so that States' policies can be fact-based. Key aspects such as geography, means of transportation, civil society's role, smuggling networks' involvement, international obligations, State sovereignty and migrants' motivations must be taken into consideration<sup>134</sup>.

Accordingly, we believe that it is necessary to conduct further research on EU migration law, namely on the possibility of opening new channels for regular migration. It is possible to argue that the creation of additional legal pathways for migration would drastically reduce the need for migrants to embark on such dangerous sea journeys, thus decreasing the number of deaths in the Mediterranean Sea.

Policy developments of this nature do not need to be regarded solely as acts of solidarity, though, as evidence seems to suggest that the EU is already in need of such developments and would thus benefit widely from them<sup>135</sup>.

Surely, it is not feasible to have a comprehensive debate around migration without bringing up the way in which it relates to other concepts. By addressing the relationship between migration and the economic development of receiving States, or by assessing the dimension of the security risks posed by irregular migrants, or by grasping the consequences of the way in which they are portrayed by the media, one can truly perceive the extent to which this discussion is dynamic and complex. This further emphasises the

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<sup>134</sup> MCAULIFFE, Marie; KOSER, Khalid - A Long Way To Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making. 2017, p. 13-38.

<sup>135</sup> HOLTSLAG, Jan Willem; KREMER, Monique; SCHRIJVERS, Erik - Making Migration Work: The future of labour migration in the European Union. 2013, p. 38-50.

necessity of migration law to be informed by research and data, rather than by political narratives which may, in some instances, stand on weak factual grounds<sup>136</sup>.

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<sup>136</sup> JONES, Hannah (et al.) - Go Home? The politics of immigration controversies. 2017, p. 148-163.

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