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# Preventing Rescue of Maritime Migrants

The fight against migrant smuggling and its effects on irregular migrants and search and rescue non-governmental organisations

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# Summary

Eighteen of twenty-five rescue-vessels operated by NGOs in the Mediterranean has been subjected to administrative or criminal sanctions. Whether rescue amounts to a crime is the basis for this thesis, which examines the intersection between prevention of the transnational crime of smuggling, and the rescues often necessary when smugglers facilitate journeys across the sea. Assistance at sea is revealed to be both an international duty of states and shipmasters and, in contemporary EU law, a criminal offence.

The EU law on migration, asylum and border control constructs a system which forces migrants to travel irregularly in order to enter the union, while at the same time employing increasingly strict border control measures to deter irregular arrivals and combat the crime of smuggling. The deterrence and securitisation of EU border policy has severe effects on NGOs who work proactively to save lives. They are policed and criminalised through a range of measures, all preventing them from conducting search and rescue (SAR). This thesis examines this development through a detailed examination of both the law on SAR, EU law against migrant smuggling, and the laws regulating entry into the union.

The thesis concludes that this system of deterrence of migrants and prevention of voluntary assistance derives from a lack of functioning responsibility-sharing in the EU, incentivising states to prevent arrival in all forms. This is further analysed through the theory of the ‘maritime legal black hole’, revealing how the systematic prevention of rescue keeps the maritime migrant in a state of rightlessness created by the international legal framework. The prevention of assistance does not aggravate the rightlessness but shifts the unintentional nature of the black hole to a, if not intentional, predictable one.

*Keywords:* migration, search and rescue, deterrence, irregularity, humanitarian assistance, securitisation, rightlessness, migrant smuggling.

# Sammanfattning

Arton av tjugofem räddningsfartyg som drivs av icke-statliga organisationer i Medelhavet har utsatts för administrativa eller straffrättsliga sanktioner. Grunden för den här uppsatsen är frågan om räddning kan utgöra ett brott, genom en undersökning av skärningspunkten mellan förebyggande av människosmuggling och de räddningar som ofta krävs när smugglare anordnar resor över havet. Assistans till sjöss visar sig vara både en internationell skyldighet för stater och sjökaptener och ett EU-rättsligt brott.

EU:s lagstiftning om migration, asyl och gränskontroll konstruerar ett system som tvingar migranter att resa irreguljärt för att ta sig in i unionen, samtidigt som allt striktare gränskontroller används för att avskräcka irreguljära ankomster och bekämpa smuggling. EU:s alltmer säkerhetsfokuserade gräns- och migrationslagstiftning har allvarliga konsekvenser för organisationer som arbetar proaktivt för att rädda liv. De kontrolleras och kriminaliseras genom en rad åtgärder, som alla hindrar dem från att bedriva sök och räddning (SAR). Detta examensarbete undersöker utvecklingen genom en detaljerad granskning av både internationell havsrätt, EU:s lagstiftning mot migrantsmuggling och de lagar som reglerar inträde i unionen.

Uppsatsen drar slutsatsen att det systematiska hindrandet av både migranter och frivillig hjälp härrör från en brist på fungerande ansvarsdelning i EU, vilket uppmuntrar stater att förhindra ankomst i alla former. Detta analyseras ytterligare genom teorin om det "sjörättsliga svarta hålet", som avslöjar hur det systematiska hindrandet av räddning håller migranter till sjöss i ett tillstånd av rättslöshet. Förebyggandet av assistans förvärrar inte rättslösheten utan förskjuter det svarta hålets oavsiktliga natur till en, om inte avsiktlig, förutsägbar sådan.

*Nyckelord:* migration, sök och räddning, irreguljär migration, humanitär hjälp, säkerhet, rättslöshet, människosmuggling.

# Preface

I want to send a great thank you to my supervisor, Eleni Karageorgiou, for invaluable help, support, intriguing questions and unlimited patience with my sometimes rambling chapters. Every time my confidence has faltered I have walked out of our sessions feeling both capable and well-prepared. Thank you!

Thank you Petronella, for never losing interest in my detailed accounts of the SAR-regime of the Mediterranean, and always being my very best friend and supporter. Almost nine years with you by my side and I could not be more grateful.

Thank you mom, partly for shaping me to the lawyer I have become, partly for everything else. Thanks dad for the confidence I receive from you and thank you Jon for the inspiration to be perpetually curious. Thank you Ellen for reminding me of the values of life, and Olle for making me appreciate law all over again through your eyes.

# Abbreviations

AFSJ	Area for Freedom, Security and Justice
CEAS	Common European Asylum System
CoE	Council of Europe
CSA	Civil Society Actor
ECHR	European Convention on Human Rights
ECRE	European Council for Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
FP	the Facilitators Package
FRA	European Union Agency for Fundamental Rights
IMO	International Maritime Organisation
MRCC	Maritime Rescue Cooperation Centre
NGO	Non-governmental Organisation
PICUM	Platform for International Cooperation on Undocumented Migrants
SAR	Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
SOM	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing UNTOC
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	UN Convention on the Law of the Sea
UNTOC	UN Convention against Transnational Organized Crime

# 1 Introduction

## 1.1 Background

In early 2023 a trial in a Greek court received international attention when charges of espionage were dropped against 24 humanitarians who formerly volunteered with search and rescue (SAR) in the Mediterranean. They have given their time and knowledge to rescue lives at sea but are prevented from continuing their work by ongoing investigations for money laundering, being members of a criminal organization, and facilitating unauthorized entry into the EU.<sup>1</sup> The latter of the crimes they are accused of committing is based on the EU law against migrant smuggling, the Facilitators Package (FP)<sup>2</sup> which in comparison to its UN counterpart<sup>3</sup> lacks important attributes and enables the criminalisation of SAR non-governmental organisations (NGOs).<sup>4</sup> The law of irregular migration is a complex and fragmented field in itself<sup>5</sup> which in combination with the current wave of policing against SAR NGOs<sup>6</sup> creates uncertainty regarding the rights of both migrants and rescuers.

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<sup>1</sup> Eva Cossé and Bill van Esveld, 'Sea Rescuers Still Waiting for Justice in Greece' Human Rights Watch, January 16, 2023  
<<https://www.hrw.org/news/2023/01/16/sea-rescuers-still-waiting-justice-greece>> accessed 23 May 2023.

<sup>2</sup> Council directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17; 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. OJ L 328/1.

<sup>3</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507 ('SOM').

<sup>4</sup> Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennifer Allsopp, Maria Giovanna Manieri and Michele Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament Study PE 536.490 (2016).

<sup>5</sup> Jaya Ramji-Nogales, 'Migration Emergencies' (2017) 68 *Hastings Law Journal*, p. 626  
<https://ssrn.com/abstract=2869230> accessed 23 May 2023.

<sup>6</sup> Sergio Carrera, Davide Colombi and Roberto Cortinovis, *Policing Search and Rescue NGOs in the Mediterranean. Does justice end at sea?* (2023) CEPS in-depth Analysis, February 2023-04 <https://www.ceps.eu/ceps-publications/policing-search-and-rescue-ngos-in-the-mediterranean/> accessed 23 May 2023, p. 1.



From the early days of the Common European Asylum System (CEAS) in the late 1990s, focus has been on restricting the opportunity to enter the union for third country nationals. Only those in ‘real need’ shall be allowed entrance, rather than ensuring safe arrival and prevent loss of life.<sup>7</sup> A majority of the people arriving irregularly to the EU do so via the Mediterranean, which in the 2010 and 20s has become the deadliest border worldwide.<sup>8</sup> The sea itself is not more dangerous than other large bodies of water, but journeys facilitated by smugglers are often conducted with unseaworthy, dangerous, and overloaded vessels.<sup>9</sup> The combination of unsafe boats with disorganised SAR efforts and fragmented migration policies makes the risk of death for higher than what is acceptable.<sup>10</sup>

In 2022, 176 579 persons were registered in the EU as having arrived irregularly. Compared to the record-breaking year of 2015, when over one million persons arrived irregularly, the numbers for 2022 are small.<sup>11</sup> Statistics from the UNHCR show that while the number of people arriving is decreasing, the number of migrants who die or go missing on their way across the Mediterranean is increasing, with 3 231 persons registered as dead or missing in 2021, the highest number in several years.<sup>12</sup> In 2022, the number of dead and missing persons was estimated to 2 406.<sup>13</sup>

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<sup>7</sup> Violeta Moreno-Lax, “Life after Lisbon: EU Asylum Policy as a Factor of Migration Control” in Diego Acosta Arcarazo and Cian C. Murphy (eds.) *Security and Justice Law: After Lisbon and Stockholm*. London: Hart Publishing Ltd, 2014. 149.

<sup>8</sup> Eugenio Cusumano and Matteo Villa, “Over troubled waters: maritime rescue operations in the Central Mediterranean Route” in Philippe Fargues and Marzia Rango (eds.), *Migration in West and North Africa and across the Mediterranean: trends, risks, development and governance* (2020) IOM, Geneva, p. 202.

<sup>9</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU action plan against migrant smuggling (2021-2025), COM(2021) 591 final, September 29, 2021, p. 3.

<sup>10</sup> Eugenio Cusumano, “The sea as humanitarian space: Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route” (2018) 23:3 *Mediterranean Politics*, p. 387.

<sup>11</sup> European Council, Infographic – Migration Flows: Eastern, Central, and Western Routes <https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/> accessed 23 May 2023

<sup>12</sup> UNHCR, data visualization on Mediterranean crossing charts rising death toll and tragedy at sea, 10 June 2022, <<https://tinyurl.com/yrvzbukn>> accessed 23 May 2023.

<sup>13</sup> Missing Migrants Project, IOM <<https://tinyurl.com/yktrwxy4>> accessed 23 May 2023.

Out of those who survive, thousands are rescued or intercepted and disembarked to Libya, often by the Libyan coast guard,<sup>14</sup> in line with the EU's close cooperation with Libya in combatting irregular migration and migrant smuggling.<sup>15</sup> Others manage to make the journey and arrive in the EU, many after having been rescued. Statistics are hard to come by from other sources than the Italian Coast Guard, but those numbers show that member states were the primary actor rescuing shipwrecked people in the Mediterranean from 2014-2016, saving at first around 120 000 persons (2014) and then around 80 000 persons a year (2015 and 2016). Most of these were performed by the Italian Coast Guard.<sup>16</sup> Meanwhile, EU-led operations have rescued over 600 000 thousand lives since 2015. Data from the EU does not separate rescues by year.<sup>17</sup>

Extensive SAR has repeatedly been suspected of attracting migrants and smugglers, increasing the 'flow' of people,<sup>18</sup> which has had consequences for both state-led and private SAR. NGOs are prominent actors in SAR, saving over 120 000 people between 2014 and 2018,<sup>19</sup> but as a result of increased border control the EU is experiencing a wave of policing of NGOs involved in SAR. Sixty legal procedures or more has been opened in Germany, Greece,

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<sup>14</sup> Sergio Carrera and Roberto Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?* (2019) 10 CEPS Paper in Liberty and Security in Europe No 2019-10, p. 6.

<sup>15</sup> Council, Press Release, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route', 3 February 2017 <<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>> accessed 23 May 2023

<sup>16</sup> Daniela Irrera, 'Non-Governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?' (2019) 24:3 *European Foreign Affairs Review*, p. 280.

<sup>17</sup> European Council, Infographic-Lives saved in EU Mediterranean operations (2015-2023) <https://www.consilium.europa.eu/en/infographics/saving-lives-sea/> accessed 23 May 2023

<sup>18</sup> Richard Kilpatrick Jr and Adam Smith, 'Balancing the SAR Responsibilities of States and Shipmasters' in Mitsilegas, Moreno-Lax and Vavoula (eds.), *Securitising Asylum Flows* (2020) Leiden: Koninklijke Brill NV, p. 99.

<sup>19</sup> Irrera (n 16) p. 280.

Italy, Malta, the Netherlands and Spain against SAR NGOs since 2016.<sup>20</sup> 18 of the 25 NGO-run vessels working with SAR in the Mediterranean has been investigated criminally or administratively. This development both risks the independence of human rights NGOs<sup>21</sup> and leads to individuals being criminally charged for non-profit acts performed out of compassion.<sup>22</sup>

This is where this thesis takes off; in the humanitarian space between migrants in distress on the Mediterranean and the attempts to disembark them safely in the EU, despite efforts to stop them. SAR of migrants is surrounded by problems and legal obstacles. As seen by the current Greek case<sup>23</sup> and the discussion within both the European Parliament<sup>24</sup> and separate international organisations,<sup>25</sup> the criminalisation of humanitarian assistance might have reached a precipice, one which this thesis aims to examine further.

## 1.2 Relevance and Research Questions

The EU legal framework against migrant smuggling, the FP, defines the crime of migrant smuggling and its punishments. While it aims to combat a

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<sup>20</sup> FRA, ‘June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights’ June 20, 2022 <<https://fra.europa.eu/de/publication/2022/june-2022-update-ngo-ships-sar-activities>> accessed 23 May 2023.

<sup>21</sup> Cusumano, ‘The sea as humanitarian space’ (n 10) p. 392.

<sup>22</sup> Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society* (2019) Oxford: Hart Publishing, p. 182.

<sup>23</sup> Eva Cossé and Bill van Esveld, “Sea Rescuers Still Waiting for Justice in Greece”, Human Rights Watch, January 16 2023, online: <https://www.hrw.org/news/2023/01/16/sea-rescuers-still-waiting-justice-greece> (accessed 2023-02-07).

<sup>24</sup> See for example the recent debate on solidarity with Italy, in which several MEP mentions the criminalisation of SAR NGOs: Debate on the need for European solidarity in saving lives in the Mediterranean region, particularly in Italy (2023/2656(RSP)) April 18, 2023. Minutes available online: [https://www.europarl.europa.eu/doceo/document/CRE-9-2023-04-18-ITM-015\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2023-04-18-ITM-015_EN.html) (accessed 2023-05-20). See also Violeta Moreno-Lax, Jennifer Allsopp, Evangelia Tsourdi and Philippe de Bruycker, *The EU Approach to Migration in the Mediterranean*, European Parliament Study PE 694.413 (2021) p. 113-115 with further examples of action from the EP in regard to criminalisation of SAR NGOs.

<sup>25</sup> Violeta Moreno-Lax, Jennifer Allsopp, Evangelia Tsourdi and Philippe de Bruycker, *The EU Approach to Migration in the Mediterranean*, European Parliament Study PE 694.413 (2021) p. 101.

transnational crime<sup>26</sup> and protect migrants from suffering at the hands of smugglers<sup>27</sup> it could also present an obstacle to voluntary SAR. Additionally, the FP is implemented in a context of securitisation of maritime border control in the EU<sup>28</sup>, and the fight against migrant smuggling is sometimes equated to a fight against irregular migration in general.<sup>29</sup>

The subject is one in between competing interests. The EU and its member states are exercising their sovereign right to control entry to their territories and enforcing their migration laws<sup>30</sup>, while migrants crossing the sea holds a right to seek asylum<sup>31</sup>, right to not be *refouled*<sup>32</sup> and their right to life.<sup>33</sup> This conflict of competing interests is further aggravated by the criminalisation of NGOs attempting to rescue migrants added to the equation. The aim of this thesis is to examine the intersection between humanitarian assistance to people in distress at sea and the prevention of the crime which put them there. The criminalisation of migrant smuggling seems to be catching the wrong end of the problem, preventing rescue instead of dangerous journeys across the Mediterranean, which is likely to have consequences for the human rights of migrants.

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<sup>26</sup> Council directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17 ('Facilitation Directive') preamble p. (2).

<sup>27</sup> European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, C(2020) 6470 323/01, Brussels, 1 October 2020, p 1.

<sup>28</sup> Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, "Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia" (2018) 67 *International and Comparative Law Quarterly*, p. 330.

<sup>29</sup> European Commission: on a New Pact on Migration and Asylum, Brussels, 23 September 2020, COM(2020) 609 Final, p. 15.

<sup>30</sup> Cathryn Costello, *The human rights of migrants and refugees in European law*, (2016) Oxford: Oxford University Press, p. 24.

<sup>31</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 18.

<sup>32</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention'); CFR (n 31) Article 19.

<sup>33</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) CETS 5 ('ECHR'), Article 2.

Consequently, this thesis aims to answer the following question:

*How does the legal framework concerning maritime migrant smuggling in the EU affect humanitarians conducting search and rescue of migrants, and what does this imply for the human rights of affected migrants?*

To answer the research question, the thesis will answer these sub questions in turn:

1. What is the legal framework in the EU concerning irregular migration and what challenges does it present in regard to entryways into the union?
2. What is the EU law against migrant smuggling and how is it enforced on the maritime border?
3. What is the international law on search and rescue and what kind of legal challenges does it give rise to?
4. How are humanitarians and other civil society actors working with SAR of migrants controlled and policed in the EU?

## **1.3 Methodology and Material**

This essay takes a traditional legal-doctrinal approach, surveying the research questions via primary legal sources such as international law and policy, on both a global and regional scale. Case law from the ECtHR is examined briefly when relevant. The primary legal sources include the TEU, TFEU, CFR and ECHR on the regional level. On the international level several conventions are examined, mainly the Refugee Convention and its Protocol but also three international treaties on the law of the sea: UNCLOS, SOLAS and the SAR Convention. Additional EU law used is mainly the Facilitators Package and regulations and directives related to migration to the EU. Several decisions and regulations relating to the EUs border and coast guard agency, Frontex, are also studied.

Due to a language barrier and the limited scope of the thesis the domestic law of the member states is not examined, and practices of member states are instead explored through summaries provided by other scholars. Secondary sources include academic literature and reports and other works from international organisations such as the International Organisation for Migration (IOM) and the International Maritime Organisation (IMO), and the European Union Agency for Fundamental Rights (FRA). The European Commission is an important source of information, and several policy document and guidelines are referenced and discussed. Statements from NGOs and reports made by other independent organisations such as the European Council for Refugees and Exiles (ECRE) and the Platform for International Cooperation on Undocumented Migrants (PICUM) are frequently used to build a factual foundation for an analysis of the effects of the legal sources mentioned above.

The approach is critical-legal, and the law examined is interpreted critically in light of its effects. This approach is supplemented by Itamar Mann's theory of the "legal black hole" or the "maritime legal black hole".<sup>34</sup> Mann constructs a theory that migrants on the Mediterranean exists in a legal black hole, without *de jure* rights, a situation fabricated legally through the division of responsibility where all relevant state actors can avoid extending a helping hand without violating any human rights norms. The legal black hole is helpful in clearing the fog on how international law sometimes raises obstacles for the promotion and development of human rights. This thesis intends to use this theory to examine whether the enforcement of the EU law against migrant smuggling affects these maritime legal black holes.

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<sup>34</sup> Mann I, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29:2 *European Journal of International Law* 347  
<<https://doi.org/10.1093/ejil/chy029>> accessed 23 May 2023

## 1.4 Literature Review and Contribution

The leading works on criminalisation of humanitarian assistance through the Facilitators Package are a couple of studies commissioned by the European Parliament. In 2016 Carrera, Guild, Aliverti, Allsopp, Manieri and Levoy published *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, a comprehensive study of the Facilitators Package and how its implementation results in the criminalisation of humanitarians working in solidarity, not for financial gain. The study finds the FP not fit for purpose and recommends several changes to primarily the definition of the crime of facilitating unauthorized entry to prevent the criminalisation of humanitarian assistance. When a follow-up study was published a couple of years later<sup>35</sup> it came to the same conclusion and delved deeper into new developments in member states' policing of humanitarian NGOs working with migrants. This thesis builds upon the critical approach to the FP of Carrera et al and discusses further the effects of the current legislation and of the suggested amendments.

In 2019 Moreno-Lax, Allsopp, Tsourdi and de Bruycker wrote *The EU Approach to Migration in the Mediterranean*, which includes a chapter on SAR and another on the criminalization of humanitarian assistance. Like the previous additions to the discussion, this study is quite clear on the negative consequences of the Facilitators Package and the deterring effect it has had on humanitarian assistance and SAR. It suggests a redress mechanism for SAR NGOs and argues that suggested improvements to the EU border control and SAR regimes will cement a standard of rescue as the exception to deterrence. These studies are complemented by *Policing Humanitarianism*, a book from 2019 by Carrera, Mitsilegas, Allsopp and Vosyliūtė, which argues

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<sup>35</sup> Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update*, European Parliament Study PE 608.838 (2018).

that the policing of CSAs, in a broad sense, have high stakes for democracy and the European community. It is based on interviews with people engaged in CSAs and representatives for EU agencies and national coast guards and discuss how policies against the crime of migrant smuggling have unintended, but not unpredicted, consequences for CSAs.

These consequences of policies against migrant smuggling are part of a securitisation of border control and migration, as argued by Moreno-Lax in several publications consulted in the development of this thesis. *Securitisating Asylum Flows* (2020) edited by Mitsilegas, Moreno-Lax and Vavoula, discussing the wide scope of actions contributing to the securitisation of entry into the EU. Furthermore, in an article from 2018 Moreno-Lax covers the development of EU border control operations in relation to how they legitimise impeding access to safety for migrants.<sup>36</sup> This body of work has been a guiding light in formulating the argument presented by this thesis, that the securitisation of the European borders creates obstacles for SAR NGOs, which in turn has effect on the human rights of both volunteers and migrants.

Policing of SAR NGOs is a comparatively new field of study for scholars of international human rights law, and the comprehensive studies mentioned above have a critical, approach to the FP and related legislation in common. This thesis is contributing to existing scholarly discussions by providing clarity to a fragmented legal field, spanning from specialised EU regulations to expansive international treaties. It builds on the connection between the increased border control of the EU and the securitisation of the duty to assist at sea to analyse the effects of this development on NGOs. It is however not enough to discuss the effects on the NGOs when the prevention of their work

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<sup>36</sup> Moreno-Lax V, 'The EU Humanitarian Border and the Securitization of Human Rights: the 'Rescue-Through-Interdiction/Rescue-Without- Protection' Paradigm' (2018) 56 *Journal of Common Market Studies* 119 <<https://doi.org/10.1111/jcms.12651>> accessed 23 May 2023.



could result in more deaths on the Mediterranean, which is why this thesis takes a clear focus on the human rights of the maritime migrants.

## 1.5 Delimitations

As all academic works this thesis has been subjected to certain limitations. First, as evident by the research question, it is only concerned with migration by sea, and primarily with smuggling of migrants by sea. Other forms of migration or smuggling is not examined. Furthermore, it is limited geographically to only the Mediterranean and mainly the central Mediterranean route. Examples from other routes are sometimes mentioned but are not the focus of the thesis. For similar reasons there are temporal limitations. The examination has a focus on current and recent developments, covering aspects of the legal history of maritime migration, SAR and migrant smuggling primarily from 2015 onwards.

Migrant smuggling is both conceptually and legally related to trafficking in human beings, which is a distinct criminal act with issues separate from those of migrant smuggling. Many migrants rescued on the Mediterranean are not solely victims of migrant smuggling but also of human trafficking. This dimension will not be explored further, and the law on trafficking in human beings is not covered in this thesis.

The list of human rights of migrants is extensive and far from all human rights of migrants are explored here. The thesis limits itself to the scope of European law through the EU Charter of Fundamental Rights and the European Convention of Human Rights. The right to life and the prohibition of torture are discussed. More prominently discussed is the right to seek asylum, the prohibition of *non-refoulement* and the right of refugees to use irregular pathways to escape persecution. Due to the references to the Refugee

Convention and its Protocol in EU law on migration and asylum,<sup>37</sup> the rights are also examined within these instruments.

Despite attempts to gather as much information as possible on the means of policing NGOs which conduct SAR of migrants it has not been feasible to compile an exhaustive list of every method of policing used against NGOs. The main form of policing discussed in this thesis is criminalisation for facilitation of unauthorised entry. In addition, policing in the form of harassment, impounding of vessels and invasive codes of conduct are discussed amongst other measures, albeit not in a comprehensive manner.

## 1.6 Definitions

In this thesis the people crossing the Mediterranean are referred to as ‘migrants’, to acknowledge the fact that movements across the sea are mixed, including both refugees or asylum seekers and migrants who do not qualify for such protection. When specific provisions apply only to one category of migrants that is clearly indicated in the text. The thesis builds on the fact that it is not possible to know whether someone qualifies for refugee status without an individual examination, and in situations of search and rescue at sea everyone is potential refugees. This is further discussed in chapter two.

Throughout the thesis the term ‘irregular’ is used to refer to both persons (irregular migrants) and the phenomena of irregular migration. Irregular in this context refers to travel without prior authorisation to cross borders, such as visas or valid passports. An irregular migrant is someone who crosses, or attempts to cross, into the EU without the necessary paperwork to make this a regular, ‘legal’ journey. The concept of legal irregular migration is further discussed in chapter two.

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<sup>37</sup> Treaty on the Functioning of the European Union [2007] OJ C 115/01 (‘TFEU’), Article 78.

Lastly, ‘humanitarian assistance’ is used throughout the thesis to refer to private or civil search and rescue at sea. It is intended to cover all forms of rescue performed at sea by a private unit, including NGOs, individual shipmasters and merchant vessels. Private actors who perform search and rescue in any capacity are performing ‘humanitarian assistance’ in the sense of it being done at least partly voluntary and with the intent to help others, without personal gain. The concept should not be confused with international humanitarian law, referring to situations of armed conflict or war, and do not refer to humanitarian aid in the meaning of support to combatants or civilians in conflicts.

## **1.7 Outline**

In the following chapter (chapter two) more context is provided in regard to migration over the Mediterranean and the law concerning irregular migration to the EU, discussing both the Common European Asylum System (CEAS) and the Area for Freedom, Security and Justice (AFSJ). This chapter argues that the flaws of certain aspects of the legal system creates incentives for states to avoid responsibility and deter arrivals.

In chapter three the development towards securitisation of the EUs border control is discussed. The chapter begins with an introduction to the law against migrant smuggling (the FP) and how this legislation is enforced on the maritime borders, through joint operations and interdiction. This chapter argues that the increased focus on security in EU policies prioritises the prevention of smuggling on behalf of SAR-obligations. The following chapter (four) examines further the duty to rescue vessels and people in distress in international law, with a focus on the definition of distress and the obligations of both states and private shipmasters.

In chapter five the adverse effect of the legislation against migrant smuggling on NGOs performing SAR is discussed. This chapter includes examples from member states on how humanitarians are being criminalised and deterred from performing SAR, but also covers other methods of policing NGOs. The securitisation and responsibility-avoidance discussed in previous chapters is here argued to be legitimising heavy policing against NGOs.

In the final analytical chapter (chapter six), the theory of the legal black hole is used as a measuring tape, to examine the lack of rights as an effect of the lack of obligations for state actors in regard to SAR. Other theoretical works are also examined, and the chapter argues that the prevention of humanitarian assistance perpetuates a situation of rightlessness for maritime migrants.

Chapter seven summarizes the thesis' findings and identifies areas that may warrant further research.

# 2 Irregular Maritime Migration to the European Union

This chapter covers the context of maritime migration to the EU, introducing the legal system for migration and asylum in the union with a focus on the provisions for entry. It discusses the rights of irregularly travelling migrants, the reasons for their irregularity, and the protection offered to them by the system. This will answer the sub-question of examining the legal framework in the EU concerning irregular migration and what challenges it presents in regard to entryways into the union.

## 2.1 Irregular Entry into the European Union

The number of people attempting to reach the EU via the Mediterranean has increased significantly since the so called Arab Spring of 2010, in part due to instability, conflict and violence in the region<sup>38</sup>, but persistent inequality can be just as powerful a generator of migration as conflict.<sup>39</sup> In the first four months of 2023 the number of people irregularly crossing the border into the EU via the central Mediterranean more than tripled compared to 2022.<sup>40</sup>

Many migrants attempt to reach irregularly the global north as a last attempt to improve their social and economic situation. The pull factor is often an underground labour market, but the push-factors are the more pressing

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<sup>38</sup> Jeanne Park, 'Europe's Migration Crisis' 23 September 2015, Council on Foreign Relations, <<https://www.cfr.org/backgrounder/europes-migration-crisis>> accessed 23 May 2023.

<sup>39</sup> Guy S. Goodwin-Gill, "Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea" in Violeta Moreno-Lax and Efthymios Papastavridis (eds.), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: integrating maritime security with human rights* (2016) Leiden: Koninklijke Brill NV, p. 20.

<sup>40</sup> Frontex, 'Detections in Central Mediterranean up three-fold in the first 3 months of 2023', April 12, 2023, available online: <https://frontex.europa.eu/media-centre/news/news-release/detections-in-central-mediterranean-up-three-fold-in-the-first-3-months-of-2023-fBX34V> accessed 23 May 2023.

reasons, forcing people to leave.<sup>41</sup> Why people migrate, and especially why they feel forced to do so, is a complex and multifaceted issue which includes a variety of push- and pull factors. The movement of people into a region, and especially to the EU in recent years, is therefore more often than not mixed, including both ‘economic’ migrants and refugees.<sup>42</sup> Some are entitled to international protection in the form of asylum, while others are not. Most are forced to turn to irregular means of travel, since the regular options are not available to them.

EU primary law distinguishes between migrants who are legally staying on union territory and the combat of illegal migration.<sup>43</sup> This binary distinction assumes a clearly defined and discernible status of every migrant, ‘legal’ or ‘illegal’, and allows for different treatment of the two groups. While one is to be treated fairly, the other is to be removed and ‘combated’.<sup>44</sup> The EU migration and asylum policies aims to create an Area of Freedom, Security, and Justice (AFSJ), to ensure the free movement of its citizens and “appropriate measures” in regard to immigration.<sup>45</sup> The AFSJ was established in the Treaty of Amsterdam 1997 as an overarching goal, under which EU competence for matters regarding asylum and immigration was placed.<sup>46</sup> Costello suggest that a transformative reading of the addition of ‘security’ in the AFSJ could “include a human security dimension, in particular security of residence for migrants and refugees.”<sup>47</sup> Another reading gives that the security referred to is security *of* EU-nationals *from* outsiders, such as migrants and refugees.<sup>48</sup> This interpretation could explain the construction of entryways for migrants into the union, or the lack of them.

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<sup>41</sup> UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants, 3 April 2014 (A/HRC/26/35) para. 16 <<https://digitallibrary.un.org/record/771920>> accessed 23 May 2023.

<sup>42</sup> Philippe Fargues, ‘2015 – the year we mistook refugees for invaders’ (2015) MPC Policy Brief, <<https://hdl.handle.net/1814/38307>> accessed 23 May 2023

<sup>43</sup> TFEU Article 78.

<sup>44</sup> Costello *Human Rights of Migrants* (n 30) p. 63.

<sup>45</sup> Treaty on the European Union [2012] OJ C 326/1 (‘TEU’) Article 3 (2).

<sup>46</sup> Costello *Human Rights of Migrants* (n 30) p. 17.

<sup>47</sup> *Ibid* p. 21.

<sup>48</sup> *Ibid*.

Asylum in the EU is regulated by the Common European Asylum System (CEAS), which was founded by the Tampere Conclusions in 1999 and aims to “develop a common policy on asylum, subsidiary protection and temporary protection...”.<sup>49</sup> As this aim clearly states, it is not a body of law on irregular migration or migration as such, but a system for common provisions on international protection. Within the CEAS the Union has developed a vast body of legislation concerning the determination of status of refugees<sup>50</sup>, the reception of applicants for international protection<sup>51</sup>, procedures for asylum applications<sup>52</sup>, and the determination of which member state is responsible for examining an application for protection.<sup>53</sup> What is absent in this body of legislation is provisions on the conditions of entry into the union for refugees and asylum seekers, which lies outside the scope of the CEAS as formulated in Article 78 TFEU.<sup>54</sup>

Conditions of entry are instead regulated by Article 79 TFEU, which founds the EU visa regime and is part of the broader AFSJ, with its ‘security’-dimension. It requires a valid visa for a majority of the countries in the global south<sup>55</sup>, something often impossible for a refugee or forced migrant to

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<sup>49</sup> TFEU Article 78.

<sup>50</sup> European Parliament and Council Directive 2011/95/EU of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (‘Qualification Directive’),

<sup>51</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96 (‘Reception Directive’).

<sup>52</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/61 (‘Procedures Directive’).

<sup>53</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). OJ L 180/31 (‘Dublin III’).

<sup>54</sup> TFEU Article 78.

<sup>55</sup> Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas

procure.<sup>56</sup> While the visa regulation categorises visa-requirements based on nationality, its effects are racialised. The system enforces the immobility of the global south, and the “hypermobility of the first world.”<sup>57</sup> Furthermore, regulations on airlines require them to submit data on all their passenger before take-off, including travel documents, effectively preventing anyone without a visa to enter the EU via an airplane.<sup>58</sup> These provisions build a system which requires of migrants to arrive in their country of destination before their application for international protection is examined, forcing them to irregularity.<sup>59</sup> International law acknowledges these issues and assumes that anyone applying for international protection will arrive irregularly. The Refugee Convention states clearly that a refugee cannot have their irregular entry into the territory held against them.<sup>60</sup>

Regardless of rights once a migrant or refugee has entered into the union, the CEAS and provisions within the AFSJ constructs the lack of safe and legal pathways into the EU. Costello calls this the “open secret at the heart of [...] CEAS”.<sup>61</sup> The system forces migrants to travel irregularly, often with the help of smugglers. Smuggled migrants have often paid large amounts for each segment of their journey, through several countries, before they embark on unseaworthy, dangerous vessels over the Mediterranean Sea. Some smugglers travel with the smuggled people on ‘mother ships’, big and safe vessels, until they are far enough from shore to instead relocate the smuggled people to the smaller, unsafe boats without flags. They then have to fend for themselves to travel across the ocean to Italy, Greece, or wherever the tides take them. Many die during the journey, due to either suffocation if travelling

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when crossing the external borders and those whose nationals are exempt from that requirement (codification), OJ L 303/39, annex I.

<sup>56</sup> James C Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ Thomas Gammeltoft-Hansen co-author (2015) 53:2 *Columbia Journal of Transnational Law* p. 245.

<sup>57</sup> E. Tendayi Achiume, ‘Racial Borders’ (2022) 110:445 *Georgetown Law Journal*, p. 475.

<sup>58</sup> Council directive 2004/82/EC of 29 April 2004, on the obligation of carriers to communicate passenger data, OJ L 261.

<sup>59</sup> Ramji-Nogales (n 5) p. 615.

<sup>60</sup> Refugee Convention (n 32) Article 31.

<sup>61</sup> Cathryn Costello, ‘Overcoming Refugee Containment and Crisis’ (2020) 21 *German Law Journal*, p. 17.



below deck, or lack of water, heat, and sickness.<sup>62</sup> Sometimes a smuggler captains the boat until they reach land or are rescued, where they abandon their post and ‘disappear’ in the crowd of migrants. Other times a migrant is the one driving the boat.<sup>63</sup>

## 2.2 Protection After Entry: Asylum

Once a migrant has overcome the difficulties of entering into the EU they are encompassed by the CEAS and its provisions. They are entitled to have their potential application for asylum examined individually<sup>64</sup> and with guarantees of access to procedures.<sup>65</sup> Only then can it be ascertained whether there is a right to protection.<sup>66</sup> Ramji-Nogales calls this reliance on the refugee definition a “narrow approach to protection of migrants”<sup>67</sup> and makes the point that someone fleeing not persecution, but extreme poverty, will not receive any guarantees of protection.<sup>68</sup> The refugee-definition derives from the Refugee Convention and its Protocol, which the CEAS is bound to respect.<sup>69</sup> The Refugee Convention does not contain the right to seek asylum, but merely the definition of refugee status and the right to protection inherent in article 33 (*non-refoulement*).<sup>70</sup> Asylum, it should be noted, is the institution of protection; refugee status is the content of the protection offered to those

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<sup>62</sup> Simona Ragazzi, ‘New Experiences in Investigating and Prosecuting Migrant Smuggling: From the Italian Approach to the European Dimension’ in Mitsilegas, Moreno-Lax and Vavoula (eds.), *Securitisating Asylum Flows* (2020) Leiden: Koninklijke Brill NV, p. 11.

<sup>63</sup> Zed Nelson, “Lampedusa boat tragedy: a survivor’s story” in *The Guardian*, 22 March 2014 <<https://www.theguardian.com/world/2014/mar/22/lampedusa-boat-tragedy-migrants-africa>> accessed 23 May 2023

<sup>64</sup> Qualification Directive (n 50) article 4 (3).

<sup>65</sup> Procedures Directive (n 52) article 6.

<sup>66</sup> Cathryn Costello & Minos Mouzouakis ‘The Common European Asylum System: where did it all go wrong?’ in Maria Fletcher, Ester Herlin-Karnell & Claudio Matera (eds.) *The European Union as an area of freedom, security and justice* (2017) New York: Routledge, p. 283.

<sup>67</sup> Ramji-Nogales (n 5) p. 632.

<sup>68</sup> *Ibid*, p 633.

<sup>69</sup> TFEU Article 78.

<sup>70</sup> María-Teresa Gil-Bazo & Elspeth Guild, ‘The Right to Asylum’ in Costello, Foster & McAdam (eds.) *The Oxford Handbook of International Refugee Law* (2021) Oxford, New York: Oxford University Press, p. 873.

granted asylum.<sup>71</sup> The right to *seek* asylum is not a right to be *granted* asylum, but merely a right to a certain procedure. There is no equivalent obligation on states to accept an application for asylum in international law.

On the regional level the EU omitted the delimitation of ‘seek’ in CFR.<sup>72</sup> This implies a right to be granted appropriate status as a refugee or beneficiary of subsidiary protection. While this broad right to not only seek but to be granted asylum is not clarified,<sup>73</sup> the aim of the CEAS according to the TFEU is partly to “[offer] appropriate status” in accordance with the Refugee Convention.<sup>74</sup> Whether article 18 CFR has this direct effect, giving third-country nationals (migrants) a right vis-a-via the member states to seek and be granted appropriate status is a matter of debate.<sup>75</sup> EU law also includes a subsidiary protection for people who do not qualify as refugees, but nonetheless need international protection.<sup>76</sup>

Mixed movements and the right to seek asylum complicate the ambition of the EU to prevent irregular arrivals,<sup>77</sup> since member states neither can refuse entry to people potentially entitled to international protection, nor return everyone to their country of departure if they risk death penalty, torture, or other inhuman or degrading treatment (*non-refoulement*).<sup>78</sup> *Non-refoulement* applies, as all rights within the EU, territorially within the region. To a certain extent it can also be applied extraterritorially, instead depending on the rights-holder being under the control of a state agent, for example the national

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<sup>71</sup> Ibid, p. 868.

<sup>72</sup> CFR article 18.

<sup>73</sup> Gil-Bazo & Guild (n 70) p. 880.

<sup>74</sup> TFEU Article 78.

<sup>75</sup> Samantha Velluti, *Reforming the Common European Asylum System -- Legislative Developments and Judicial Activism of the European Courts* (2013) Berlin/Heidelberg: Springer, p. 28-29.

<sup>76</sup> Qualification Directive, article 2.

<sup>77</sup> European Commission, ‘Irregular migration and return’, website. Online: [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return_en) (accessed 2023-05-11). “The Commission takes strong action to prevent irregular migration through ensuring that each EU country controls its own portion of EU's external borders.”

<sup>78</sup> Refugee Convention, Article 33; CFR, Article 19.

coast guard or navy. They cannot be disembarked in a state where their safety is at risk without violating *non-refoulement*. This was concluded in the ECtHR case of *Hirsi Jamaa*<sup>79</sup>, and applied to *refoulement* in the meaning of the ECHR.<sup>80</sup>

The extraterritorial application of *non-refoulement* requires a member state who performs a maritime rescue of a migrant to conduct an examination of the migrant's application for international protection, a sensitive process which is unsuitable to take place on a ship.<sup>81</sup> The rescued migrant must consequently be disembarked in EU territory for their first reception and examination of their application. Their irregular arrival cannot be held against them, in accordance with international refugee law.<sup>82</sup> This is relevant since many migrants' first contact with member state authorities is when they are rescued at sea from dangerous boats facilitated by smugglers, a means of travel used by a vast majority of people arriving to the southern EU via the Mediterranean.<sup>83</sup>

## 2.3 'Managed Migration' and Deterring Irregular Entry

The legality of irregular travel for refugees and the procedural guarantees attached to the right to (seek) asylum has not prevented the EU from spreading a narrative of the "fight against irregular migration"<sup>84</sup> in accordance with the distinction in Article 79 TFEU discussed above. The core values in regard to respect for fundamental rights in the CEAS were rapidly "totally

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<sup>79</sup> European Court of Human Rights [GC], *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09, Judgment of 23 February 2012).

<sup>80</sup> ECHR, Article 3.

<sup>81</sup> Carrera, Colombi and Cortinovis (n 6) p. 10.

<sup>82</sup> Refugee Convention, Article 31.

<sup>83</sup> Numbers from 2016 in: Europol and Interpol, 'Migrant Smuggling Networks – Joint Europol INTERPOL-report' Executive Summary, May 2016. Online: [https://www.europol.europa.eu/cms/sites/default/files/documents/ep-ip\\_report\\_executive\\_summary.pdf](https://www.europol.europa.eu/cms/sites/default/files/documents/ep-ip_report_executive_summary.pdf) accessed 23 May 2023.

<sup>84</sup> Commission, New Pact (n 29) p. 15.

undermined”<sup>85</sup> as noted by ECRE in 2004. Policies of ‘managed migration’, mainly driven by a perceived need to stem the flow of people into the region, has led to a regime of deterrence in the EU. The measures fail to address the reasons and causes of flight and did for a long time fail to reach its goals of stemming the flow.<sup>86</sup> As noted in relation to the visa regime, which primarily demands visas from people from the global south, the aims of the EU to limit the number of migrants arriving is also aimed at keeping out those from the global south, primarily nonwhite persons. This is argued by Achiume to maintain the racial border.<sup>87</sup>

The deterrence regime of the EU connects to deficiencies of the CEAS and a failure to achieve its goals of responsibility-sharing and solidarity between member states.<sup>88</sup> While the lack of safe and legal pathways into the EU prevents many arrivals, migrants still arrive irregularly in large numbers and are then entitled to the protective provisions described in the previous section. Solidarity is a guiding principle of all EU policies on asylum, border checks and immigration, and thereby of the CEAS.<sup>89</sup> It is a principle for responsibility-sharing between member states, relating to both financial and administrative duties and conceptually to the protection of migrants and refugees.<sup>90</sup> The CEAS regulates solidarity in relation to irregular arrivals with the Dublin Regulation, which is possibly the most criticised policy within the CEAS, in particular since the ‘crisis’ of 2015.

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<sup>85</sup> European Council of Refugees and Exiles (ECRE), ‘Broken Promises – Forgotten Principles’, June 2004 <<https://www.refworld.org/docid/4124b3cc4.html>> accessed 23 May 2023.

<sup>86</sup> Goodwin-Gill (n 39) p. 21.

<sup>87</sup> Achiume (n 57) p. 506.

<sup>88</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)), P8\_TA(2016)0102, p. 34.

<sup>89</sup> TFEU Article 80.

<sup>90</sup> Eleni Karageorgiou, ‘The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity’ (2019) 88 *Nordic Journal of International Law*, p. 333.

The regulation determines that the member state where someone first enters the EU irregularly is the one responsible for examining their application.<sup>91</sup> The Dublin system mentions solidarity several times in the preamble, setting a tone of “...[striking] a balance between responsibility criteria in a spirit of solidarity”<sup>92</sup> and “solidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust”<sup>93</sup>. Contrary to these introductory promises, the Dublin system entails a heavy burden for member states with a long external border if the system is applied accordingly. An evaluation of Dublin III found that it was neither “designed to deal with situations of mass influx” nor to “ensure fair sharing of responsibility”.<sup>94</sup>

The administrative and financial burden created by the Dublin-system and the absolute nature of *non-refoulement* has prompted member states to attempt avoiding responsibility. This is for example done by refusing rescue vessels port or resist engaging in SAR of migrants<sup>95</sup> since they are then obliged to examine their potential applications<sup>96</sup> and provide them with first reception in accordance with the EU standard.<sup>97</sup> Instead of ensuring responsibility-sharing, member states are incentivised to suspend the CEAS and ignore the Dublin-rules to alleviate the burden on coastal states.<sup>98</sup> As will be discussed in later chapters, they also forego their responsibilities under the international law of search and rescue.

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<sup>91</sup> Dublin III, art. 13.

<sup>92</sup> Dublin III, preamble, n 25.

<sup>93</sup> Dublin III, preamble, n 22.

<sup>94</sup> Sheila Maas, Elena Jurado, Mathieu Capdevila, Maylis Labayle, Laura Hayward (ICF International) Evaluation of the Dublin III Regulation for the European Commission, Final Report 4 December 2015, <[https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation_of_the_dublin_iii_regulation_en.pdf)> accessed 23 May 2023, p. 2.3.1.

<sup>95</sup> Carrera and Cortinovis (n 14) p. 3

<sup>96</sup> Dublin III, article 13 (1).

<sup>97</sup> Reception Directive.

<sup>98</sup> Maarten den Heijer, Jorrit Rijpma, and Thomas Spijkerboer, ‘Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System’, 53:3 *Common Market Law Review* (2016) p. 612.

These issues of the Dublin regulation, especially in relation to the so called refugee crisis of 2015, has led to increasing debates on changes to the asylum system. Since 2016 negotiations has been ongoing, and in 2020 the Commission presented a number of legislative proposals in the form of a New Pact on Migration and Asylum. It focuses partly on “reinforcing the fight against migrant smuggling”<sup>99</sup> including an improved system for search and rescue on the Mediterranean to prevent loss of life. Another aim is to rethink the Dublin-system and find better solutions for responsibility-sharing.<sup>100</sup>

The Pact has been criticised for building upon a flawed presumption of the possibility of finding a balance between rights, such as the right to seek asylum, and ‘flexibility’ or ‘security’.<sup>101</sup> Security in the new pact is the same ‘security’ from outsiders as discussed in relation to the AFSJ, relating to the ambition to limit irregular migration to the EU. This is primarily to be done through the prevention of human smuggling as a transnational crime, which is assumed to be a prerequisite for the creation of the AFSJ.<sup>102</sup> Another measure is the addition of a ‘pre-entry’ phase to the migration route, allowing for screening of migrants at the border.<sup>103</sup> This reveals a continued focus on security rather than the safety of irregularly arriving migrants, continually presenting the migrant as the threat to the “EU’s project on market integration”<sup>104</sup> and possibly a step towards cementing what Ramji-Nogales calls a “path-dependent approach”.<sup>105</sup> Instead of enabling safe and orderly migration to the EU, this system will continue to push migrants towards irregularity and smuggling.

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<sup>99</sup> Commission, New Pact (n 29), quote from headline at p. 15.

<sup>100</sup> Ibid. p. 3.

<sup>101</sup> Evelien Brouwer, Giuseppe Campesi, Sergio Carrera, Roberto Cortinovis, Eleni Karageorgiou, Jens Vedsted-Hansen, and Lina Vosyliūtė, *The European Commission’s legislative proposals in the New Pact on Migration and Asylum*, European Parliament Study PE 697.130 (2021) at p. 161.

<sup>102</sup> Facilitators Directive, preamble p. (1).

<sup>103</sup> European Commission, Amended Proposal for an Asylum Procedure Regulation, COM(2020) 611, p. 3.

<sup>104</sup> Eleni Karageorgiou, ‘The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity’ Guest Note for (2020) 2 *Nordic Journal of European Law*, p. V.

<sup>105</sup> Ramji-Nogales (n 5) p. 615.

## 2.4 Conclusions Chapter Two

This chapter have discussed the foundation of the EU asylum and immigration system, the AFSJ and the CEAS, and the clear focus on the distinction between legally entered migrants or refugees and the ‘illegal’ ones. The system does not entail provisions on regular entry for refugees, who are forced to irregular avenues into the union. It can be concluded that regardless of means of arrival there is a right to at least seek asylum and to not be *refouled*, but the security-focused approach of the EU and the flaws of the Dublin-system has incentivised states to deter arrivals and avoid responsibility. In the next chapter this security-approach will be further explored in the legislation against migrant smuggling and its enforcement.

# 3 Prohibiting and Preventing Migrant Smuggling in EU Law

This chapter will discuss the criminalisation of migrant smuggling as the main irregular means of travel for maritime migrants. The law against migrant smuggling is partly enforced through the lately enhanced border control of the EU, which will be discussed in relation to the protection of the victims of smuggling. The chapter will answer the sub question “what is the EU law against migrant smuggling and how is it enforced on the maritime border?” The chapter begins with the law on migrant smuggling (3.1) and then moves on to the enforcement of the FP through border control (3.2.).

## 3.1 The Facilitators’ Package

### 3.1.1 Introducing the legislation

In 2002 the EU implemented a directive focused on migrant smuggling as a transnational crime, the Facilitators Directive.<sup>106</sup> This directive creates the legal baseline for the criminalisation of human smuggling and is complemented by a framework decision.<sup>107</sup> The fight against migrant smuggling is highly relevant in contemporary EU migration policy. In 2021 the Commission published a renewed action plan against migrant smuggling which states that while smuggling puts the migrants at risk, it also “undermines the migration management objectives of the EU”,<sup>108</sup> pointing out the relationship between preventing the crime of smuggling and extensive

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<sup>106</sup> Council directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence. OJ L 328 (‘Facilitators Directive’)

<sup>107</sup> 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. OJ L 328 (‘Framework Decision’)

<sup>108</sup> Commission, renewed EU action plan against migrant smuggling (2021-2025) (n 9) p. 1.



border control. The action plan includes measures to reinforce the fight against migrant smuggling<sup>109</sup> which together with the fight against irregular migration is one of several focal points of the new pact for migration and asylum.<sup>110</sup> From 2022 the prevention of unauthorised entry and residence is prioritised as part of the European Multidisciplinary Platform Against Criminal Threats (EMPACT) 2022-2025, together with many other transnational and organised criminal activities.<sup>111</sup> Preventing migrant smuggling and irregular migration is clearly high on the EU's migration agenda.

While the facilitation directive provides the definition of the infringement and its exemptions, its accompanying framework decision sets minimum rules for penalties, jurisdiction and the liability of legal persons.<sup>112</sup> Together they constitute the Facilitators' Package (FP) which is intended to build towards the harmonisation of the combat of facilitation of illegal immigration in the region.<sup>113</sup> The FP is closely related to the UN convention against transnational organized crime (UNTOC)<sup>114</sup> and its protocol against smuggling of migrants (SOM).<sup>115</sup> There are however key differences between the UN and EU legislations. While SOM includes a requirement of financial gain for an act to be smuggling,<sup>116</sup> the FP do not require financial or other material motifs for facilitation of irregular entry.<sup>117</sup> The FP also has a weaker protection against criminalisation of smuggled migrants.

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<sup>109</sup> Commission, renewed EU action plan against migrant smuggling (2021-2025) (n 9) p. 11.

<sup>110</sup> Commission, New Pact (n 29), p. 15.

<sup>111</sup> EU Policy Cycle, EMPACT 2022-2025, online: <https://www.europol.europa.eu/crime-areas-and-trends/eu-policy-cycle-empact> (accessed 2023-03-27).

<sup>112</sup> Facilitators Directive, preamble, p. 4.

<sup>113</sup> Facilitators Directive, preamble, p. 3.

<sup>114</sup> UN Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 ('UNTOC').

<sup>115</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507 ('SOM').

<sup>116</sup> SOM, Article 3 (a).

<sup>117</sup> Facilitators Directive, article 1.

The FP criminalises intentionally assisting illegal immigration or illegal stay in the territory of a member state, including someone who instigates, is an accomplice, or attempts to perform such an action.<sup>118</sup> The crime is considered severe enough to merit a minimum sentence of eight years in prison under certain circumstances.<sup>119</sup> The criminal penalties can otherwise include extradition, confiscation of vehicles or vessels used to commit the offence or deportation.<sup>120</sup> The more administrative sanctions have been used against the non-typical offender, i.e., humanitarian volunteers and NGOs. Many humanitarian NGOs involved in SAR on the Mediterranean has, for example, seen their ships seized or held in port for long periods of time.<sup>121</sup>

### 3.1.2 Protection of Smuggled Migrants

Only once in the FP is the international law on refugees mentioned, and then only in the framework decision. The decision should be applied in accordance with international refugee law, especially articles 31 and 33 of the Refugee Convention and its Protocol.<sup>122</sup> The latter of these articles refer to the prohibition of *non-refoulement*<sup>123</sup> and the former to the right of refugees to not be criminalised for entering or residing in a state illegally.<sup>124</sup> The international law on migrant smuggling (SOM) is clearer, stating that migrants are not liable to criminal prosecution “for the fact of having been the object of [migrant smuggling].<sup>125</sup>

Despite these international assurances of protection, migrants are repeatedly criminalised. Situations in which a migrant is forced or lured to captain a boat over the sea are common, and under EU law this makes them the criminal

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<sup>118</sup> Facilitators Directive, article 1, 2.

<sup>119</sup> Framework Decision, article 1 (3).

<sup>120</sup> Framework Decision, article 1 (1-2).

<sup>121</sup> Moreno-Lax et al, *EU Approach to Migration* (n 25) p. 96.

<sup>122</sup> Framework Decision, article 6.

<sup>123</sup> Refugee Convention, Article 33.

<sup>124</sup> Refugee Convention, Article 31.

<sup>125</sup> SOM, Article 5.

rather than a participant.<sup>126</sup> For example, one Somali migrant was sentenced to 146 years in prison in Greece for migrant smuggling and responsibility for deaths that occurred during the journey he survived.<sup>127</sup> In 2023 the judgement was appealed, and the sentence reduced to eight years. This was further reduced by time already served and he was released.<sup>128</sup> This case is far from the only one. Thousands of ‘boat drivers’ or regular migrants have been criminalised in the EU for facilitating unauthorized entry.<sup>129</sup> The FP provides a scope of criminalisation constructed in such a way that it can be misused.<sup>130</sup>

Migrants travelling by unseaworthy vessels over the ocean present a safety concern for their own lives and well-being, as well as a security concern in regard to transnational crime.<sup>131</sup> The wide scope of potential criminalisation in the FP relates to the placement of the FP within the AFSJ, in which the criminalisation of migrant smuggling is of essence.<sup>132</sup> The priority of security *from* outsiders, and not security of residence *for* the ‘outsiders’<sup>133</sup>, enable sweeping definitions like those in the FP. The security concern has been allowed to take precedence over the safety concern, to the demise of the prevention of suffering at the hands of smugglers. This implies that a smuggled migrant is not a victim, but rather a participant in the crime of irregular entry into the union.<sup>134</sup> The FP builds on the lack of pathways discussed in chapter two and closes one of the few remaining entryways.

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<sup>126</sup> PICUM, ‘Migrant Smuggling: Why We need a Paradigm Shift’, Briefing paper, July 2022 <https://picum.org/wp-content/uploads/2022/07/Migrant-smuggling-why-we-need-a-paradigm-shift.pdf> accessed 23 May 2023.

<sup>127</sup> ECRE, “Greece: Survivor Sentenced to 146 Years Imprisonment Amid Deaths in Camps and at Borders” May 14, 2021, <<https://ecre.org/greece-survivor-sentenced-to-146-years-imprisonment-amid-deaths-in-camps-and-at-borders/>> accessed 23 May 2023.

<sup>128</sup> The Left in the EP, “Somali refugee sentenced to life in Greece to be released” <<https://left.eu/somali-refugee-sentenced-to-life-in-greece-to-be-released/>> ac23 May 2023.

<sup>129</sup> PICUM (n 126).

<sup>130</sup> Chiara Maria Ricci, ‘Criminalising Solidarity?’ in Mitsilegas, Moreno-Lax and Vavoula (eds.), *Securitising Asylum Flows* (2020) Leiden: Koninklijke Brill NV, p. 42.

<sup>131</sup> Aphrodite Papachristodoulou ‘Mediterranean Maritime Migration: The Legal Framework of Saving Lives at Sea’ (2020) 20 *University College Dublin Law Review* p. 87.

<sup>132</sup> Facilitators Directive, preamble p. (1).

<sup>133</sup> Costello *Human Rights of Migrants* (n 30) p. 21.

<sup>134</sup> Kinga Janik ‘A Human Rights Approach to Extremely Vulnerable People: Challenges and Feasibility in Assessing Smuggled Migrants’ Mitsilegas, Moreno-Lax and Vavoula (eds.) *Securitising Asylum Flows* (2020) Leiden: Koninklijke Brill NV, p. 64.

## 3.2 Enforcing the Facilitators' Package Through Border Control

### 3.2.1 Interplay between Protection and Control

Border control and SAR operations coincide in how the former combats migrant smuggling and the latter is necessary to save the lives of those smuggled in dangerous vessels. There are however distinct differences between border control and SAR operations. The EU's border control has become increasingly militarized and the use of firearms by EU-coordinated patrols is not uncommon,<sup>135</sup> as evidenced by one example where several smuggled migrants were shot.<sup>136</sup> Border control can be used to deter and return those attempting to cross, while SAR dispels a situation of emergency and then disembarks the rescued persons in a place of safety.

The European Border and Coast Guard Agency, Frontex, was established in 2004 to achieve a high level of surveillance and uniform handling of borders through joint operations. The agency also provides coordination and assistance to member states.<sup>137</sup> Frontex is a key part of reinforcing the EU's external maritime border, a choice based on the assumption that the removal of internal borders in the union necessitates a strengthening of the external border as compensation.<sup>138</sup> Frontex was not established with the explicit aim of combatting migrant smuggling, but to contribute to "control on persons

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<sup>135</sup> Moreno-Lax, 'Rescue-Through-Interdiction' (n 36), p. 129.

<sup>136</sup> Zach Campbell, 'SHOOT FIRST. Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept*, August 22, 2016. <https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/> accessed 23 May 2023.

<sup>137</sup> Regulation (EU) 2019/1896 Of The European Parliament And Of The Council of 13 November 2019: on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1.

<sup>138</sup> Moreno-Lax, *Life after Lisbon* (n 7) p. 154.

and surveillance of the external borders”.<sup>139</sup> One of the first Frontex-led operations was *Hera*, in several iterations, which aimed to assist Spain with irregular arrivals to the Canary Islands during 2006 and 2007. This was mainly done through diversion and comprehensive prevention of the arrival of migrants to EU-territory (Spain), regardless of potential refugee status.<sup>140</sup> *Hera* shows how in practice Frontex has had an equivocal relationship with human rights, ignoring the possibility for violations of *non-refoulement* and preventing applications for asylum in the return of migrants to their point of departure.<sup>141</sup>

This approach is widespread in the EUs border control policies. Despite being *de facto* closely related to irregular migration the border control has few connections to the CEAS.<sup>142</sup> The Tampere conclusions referred to border control, calling for close cooperation between member states “especially on maritime borders”,<sup>143</sup> but instruments regulating border control omits any mention of the CEAS.<sup>144</sup> The Schengen Borders Code (SBC) did however submit border control operations to the right of migrants to request international protection and *non-refoulement*,<sup>145</sup> and the founding regulation of Frontex referenced the SBC in this regard.<sup>146</sup> Frontex’ fundamental rights

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<sup>139</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2007] OJ L349/1, article 1 (2) (‘2004 Frontex Regulation’)

<sup>140</sup> Sergio Carrera, ‘The EU Border Management Strategy and the Challenges of Irregular Immigration in the Canary Islands’ (2007) CEPS Working Document, No. 261, p. 25

<sup>141</sup> Moreno-Lax, ‘Rescue-Through-Interdiction’ (n 36), p. 123.

<sup>142</sup> Moreno-Lax, ‘Rescue-Through-Interdiction’ (n 36), p. 122

<sup>143</sup> Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999 <<https://www.refworld.org/docid/3ef2d2264.html>> accessed 23 May 2023, p. 24.

<sup>144</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council, of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1 (‘SBC’); Regulation (EU) 2019/1896 of the European Parliament and of the Council, of 13 November 2019, on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1.

<sup>145</sup> SBC article 3 (b).

<sup>146</sup> 2004 Frontex Regulation, recital 22.

strategy is clear on Frontex' unconditional commitment to human rights<sup>147</sup> but the agency has previously claimed that the responsibility for human rights rests with member states.<sup>148</sup> These vague assurances of protection of human rights were, as noted with *Hera*, not enough. Additionally, the founding regulation of Frontex did not mention SAR or maritime safety,<sup>149</sup> despite being introduced the same year as IMO amended two conventions on maritime safety and published its guidelines on SAR.<sup>150</sup> Later Frontex has clarified that SAR is a responsibility of the member states and not within the agency's mandate.<sup>151</sup>

### 3.2.2 The 'War on Smugglers'

In 2013 several maritime incidents occurred where hundreds of migrants died due to a lack of well-coordinated SAR in the Mediterranean.<sup>152</sup> Since most irregular migrants arrived to Italy, and the most severe accidents happened in waters under Italy's responsibility, the state launched its own operation to save lives at sea and combat human smuggling, *Mare Nostrum*.<sup>153</sup> To be noted is that this was a shift in Italy's approach to maritime migration, which prior to *Mare Nostrum* mostly included pushbacks to Libya, famously judged as a violation of *non-refoulement* by the ECtHR.<sup>154</sup> The operation was highly

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<sup>147</sup> European Border and Coast Guard Agency (Frontex), Fundamental Rights Strategy, Warsaw February 14, 2021, preamble.  
[https://frontex.europa.eu/assets/Key\\_Documents/Fundamental\\_Rights\\_Strategy/Fundamental\\_Rights\\_Strategy.pdf](https://frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Fundamental_Rights_Strategy.pdf) accessed 23 May 2023.

<sup>148</sup> Moreno-Lax, 'Rescue-Through-Interdiction' (n 36), p. 123.

<sup>149</sup> 2004 Frontex Regulation, recital 22.

<sup>150</sup> IMO, Resolution MSC.153 (78) Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (adopted 20 May 2004, entered into force 1 July 2006); IMO, Resolution MSC.155 (78) amendments to the International Convention on Maritime Search and Rescue, 1979, as amended (adopted 20 May 2004, entered into force 1 July 2006); IMO, 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004) Res MSC.167 (78). Further discussed in section 4.2.

<sup>151</sup> European Commission, Memo: 'Frontex Joint Operation 'Triton' – Concerted Efforts for managing migrator flows in the Central Mediterranean' October 31, 2014, Brussels <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_609](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_609)> accessed 23 May 2023.

<sup>152</sup> Nelson (n 63).

<sup>153</sup> Ragazzi (n 62) p. 12.

<sup>154</sup> European Court of Human Rights [GC], *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09, Judgment of 23 February 2012).

successful, rescuing over 130 000 persons, but the cost of the operation led to its replacement with a joint operation led by Frontex, *Triton*. This operation was not intended to primarily perform rescue of irregular migrants, but to prevent transnational crime and protect the European borders.<sup>155</sup> Subsequent operations led by Frontex has had a similar mandate.<sup>156</sup> This marks the transition from the blanket diversion of irregular migrants presented by *Hera* to the prevention of arrival through interdiction of suspected smugglers.<sup>157</sup>

The mandate of *Triton* and *Poseidon*, both Frontex-run joint operations, was in 2015 defined to include “systematic efforts to identify, capture and destroy vessels used by smugglers”<sup>158</sup> which is intended to contain irregular (illegal) movement in the Mediterranean.<sup>159</sup> These provisions are clear examples of the employ of Frontex in enforcing the FP. This was done simultaneously as EUNAVFOR Med, a joint EU military operation in the Mediterranean, was established with the explicit aim to disrupt human smuggling networks. The casualties on the Mediterranean were described as directly caused by smuggling networks in the original Council decision.<sup>160</sup> This choice to combat smuggling rather than, for example, increase reception capacities in member states relates to the distinction between security *from* outside threats rather than safety *for* irregular migrants discussed in relation to the FP and the AFSJ.

The conclusion that the EU need security from outsiders corresponds to a narrative of SAR as a pull-factor for smuggling. This is the prime incentive

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<sup>155</sup> Ghezelbash et al (n 28) p. 326.

<sup>156</sup> Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), OJ L101/4.

<sup>157</sup> Moreno-Lax, ‘Rescue-Through-Interdiction’ (n 36), p. 128.

<sup>158</sup> European Council, press release, ‘Special meeting of the European Council, 23 April 2015 – statement’ <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/> accessed 23 May 2023.

<sup>159</sup> European Council, ‘Presidency Conclusions’, EUCO 22/15, June 26, 2015. <https://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf> accessed 23 May 2023.

<sup>160</sup> Council Decision 2015/778, 18 May 2015, on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) OJ L 122/31.

for deterrence and interdiction rather than rescue and reception of migrants.<sup>161</sup>

In Frontex' risk analysis of 2017 the following quote is included:

...both border surveillance and SAR missions close to, or within, the 12-mile territorial waters of Libya have unintended consequences. Namely, they influence smugglers' planning and act as a pull factor that compounds the difficulties inherent in border control and saving lives at sea. Dangerous crossings on unseaworthy and overloaded vessels were organised with the main purpose of being detected by EUNAVFOR Med/Frontex and NGO vessels.<sup>162</sup>

The report continues by concluding that SAR shall continue, but that coordination efforts must increase. The risk of SAR to become an incentive for even more dangerous endeavours by smugglers has also been used as an argument for heavy policing against NGOs.<sup>163</sup> A widespread belief in the narrative of SAR as a pull-factor for migration has securitised the EU's SAR regime, making it a means to prevent smuggling rather than an end in itself, damaging its humanitarian essence.<sup>164</sup>

The first EUNAVFOR Med operation, *Sophia*, was repealed in 2020<sup>165</sup> and replaced by Operation *Irini*, which has a very similar mandate.<sup>166</sup> EUNAVFOR Med also includes training of the Libyan Coast Guard,<sup>167</sup> as part of a broader collaboration with Libya to prevent migrant smuggling and human trafficking.<sup>168</sup> This collaboration is in line with a development towards externalisation of the EU's border control to avoid the responsibility for a

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<sup>161</sup> Kilpatrick & Smith (n 18) p. 99.

<sup>162</sup> European Border and Coast Guard Agency (Frontex), Annual Risk Analysis 2017, Warsaw February 2017, <https://doi.org/10.2819/94559> accessed 23 May 2023, p. 33

<sup>163</sup> Eugenio Cusumano and Matteo Villa, 'From 'Angels' to 'Vice Smugglers': the Criminalization of Sea Rescue NGOs in Italy' (2021) 27 *European Journal on Criminal Policy and Research* (2021) 23 <https://doi.org/10.1007/s10610-020-09464-1> accessed 22 May 2023, p. 29.

<sup>164</sup> Ghezelbash et al (n 28) p. 350.

<sup>165</sup> Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), OJ L162/18 ('Council Decision SOPHIA').

<sup>166</sup> Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), OJ L101/4.

<sup>167</sup> Council Decision SOPHIA, Article 2 a.

<sup>168</sup> Council, Press Release, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route', 3 February 2017 <<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>> accessed 23 May 2023.



migrant's application for protection and their reception,<sup>169</sup> and has resulted in thousands of migrants being returned to Libya upon interdiction.<sup>170</sup>

EUNAVFOR Med was noted by the UN Security Council in its resolution later in 2015, in which it authorized inspections and seizing of vessels on the high seas or outside of Libyan waters, if they were suspected to be used for migrant smuggling.<sup>171</sup> Interdiction of suspected vessels are allowed in situations of migrant smuggling according to SOM but requires the consent of the flag state.<sup>172</sup> The UNSC resolution was satisfied with good faith efforts to obtain the consent of the flag state.<sup>173</sup> NGOs report that since this UNSC resolution there has been an increase in violence and deaths on the high seas when suspected vessels are interdicted, regardless of level of distress.<sup>174</sup>

### 3.3 Conclusions Chapter Three

It can be concluded that the FP, as the EU law against migrant smuggling, includes a broad scope for criminalisation which can potentially criminalise the migrants themselves. The FP and the subsequent policies on border control all prioritise the security of the EU over the safety of the smuggled migrants, building on the narrative of SAR as a pull-factor for smuggling. Later joint operations led by Frontex, and EUNAVFOR Med are explicitly intended to contribute to the fight against migrant smuggling, and are thus means of enforcement of the FP. This has had adverse effects on SAR of migrants. The conclusion begs the question of what the duty to rescue entails in regard to migrants, which is the subject of the following chapter.

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<sup>169</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 46.

<sup>170</sup> Carrera & Cortinovis, (n 14) p. 6.

<sup>171</sup> UNSC Resolution 2240 (2015) preamble and p. 7.

<sup>172</sup> SOM Article 8 (2).

<sup>173</sup> UN Security Council Resolution 2240 (2015) on migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya / adopted by the Security Council at its 7531st meeting, on 9 October 2015 <https://digitallibrary.un.org/record/806095?ln=en> accessed 23 May 2023, p. 7.

<sup>174</sup> Sea-Watch, 'Libyan navy is risking lives of Sea-Watch crew and refugees during illegal return operation', 2017 <https://sea-watch.org/en/libyan-navy-is-putting-sea-watch-crew-and-refugees-into-danger-during-an-illegal-return-operation/> accessed 23 May 2023.

# 4 Search and Rescue in International Maritime Law

The EU law on irregular migration and migrant smuggling previously described works within an international regime of SAR and the law of the sea. Many migrants, travelling over the Mediterranean in unreliable vessels, must be rescued to survive the journey. Some rescues are performed by NGOs, other by state actors, and some by Frontex. Regardless of who performs the rescue there is a fundamental legal framework in the law of the sea, regulating SAR as a duty to assist (section 4.1) and where rescued persons are to be disembarked (section 4.2). This chapter will answer the sub question of what the international legal obligations concerning SAR of migrants are, and its legal challenges.

## 4.1 Duty to assist in international law

### 4.1.1 Introducing the legal framework

The legal framework for assistance or rescue at sea is found in several treaties, but it originates from customary international law and an ancient moral obligation.<sup>175</sup> In modern international law the duty to assist is not merely an obligation to respond to crisis but requires infrastructure and the allocation of resources to preparation which is regulated in several treaties. Most relevant here is UNCLOS, the SAR Convention, and the SOLAS convention.

The international law of the sea is organized around a system of maritime zones where different rules apply. Coastal states have different levels of power depending on in which zone something occurs. The sovereign territory

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<sup>175</sup> Kilpatrick & Smith (n 18), p. 82.

of a state extends beyond the coast<sup>176</sup> up to twelve nautical miles in what is called the territorial sea.<sup>177</sup> Within this zone ships have a right of innocent passage,<sup>178</sup> in opposition to the internal waters and its ports, where states control which ships are allowed to enter.<sup>179</sup> In addition to the territorial sea and the internal waters, all coastal states also have an exclusive economic zone, extending beyond the territorial sea for up to 188 nautical miles.<sup>180</sup> All parts of the ocean that is not part of any of these zones are instead part of the high seas (international water), where no state has a larger sovereign claim than another.<sup>181</sup>

Another maritime zone is the more informal SAR zone required by the SAR Convention, a treaty established to develop an international maritime SAR plan and coordinate SAR globally.<sup>182</sup> While other conventions include obligations for flag states, the SAR Convention focus on coastal states. It requires all coastal states to agree to SAR zones with their neighbours or other concerned states, which do not affect sovereign borders but were intended to be organized in such a way that SAR operations could be conducted as efficiently as possible.<sup>183</sup> The SAR Convention was amended in 1998 to emphasize regional collaboration and remove some of the considerable obligations it contained.<sup>184</sup> Also included in the convention is a requirement for parties to establish rescue co-operation centres, or MRCC's (maritime

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<sup>176</sup> "Coast" is here used synonymously with maritime baseline, which is a specific legal term of the law of the sea. *See* UNCLOS art. 5 and 7.

<sup>177</sup> United Nations (UN) Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 ('UNCLOS'), art. 3.

<sup>178</sup> UNCLOS art. 17.

<sup>179</sup> UNCLOS art. 25.

<sup>180</sup> UNCLOS art. 57.

<sup>181</sup> UNCLOS art. 86 and 87.

<sup>182</sup> International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) with annexes, as amended, 1405 UNTS ('SAR Convention'), preamble.

<sup>183</sup> SAR Convention, annex, article 2.1.4, 2.1.7 and 2.1.8.

<sup>184</sup> IMO, International Convention on Maritime Search and Rescue (SAR), Website: [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx) (accessed 2023-02-07)

rescue cooperation centres). These units receive distress calls, coordinate rescue missions, and act as communication centres for SAR in the region.<sup>185</sup>

SAR is a state obligation expected to be performed by private shipmasters, i.e., actors that traditionally are not subjects of international law, but must act in accordance with the law of the sea. We could thereby talk of the “duties” of shipmasters at sea.<sup>186</sup> SOLAS explicitly require shipmasters to perform rescue of persons in distress in their vicinity.<sup>187</sup> In UNCLOS all coastal states are given a duty to require of all shipmasters flying their flag to render assistance when needed. Shipmasters are not required to put their own vessel at risk or do more than what can be “reasonably expected”.<sup>188</sup> To be noted is that the duty to assist applies regardless of instructions from an MRCC; a ship on the high seas, outside of any SAR zone, is required by UNCLOS and SOLAS to provide assistance if they come across someone in distress.<sup>189</sup>

A ship that does not respond or goes against the instructions from an MRCC could violate the domestic laws of its flag state.<sup>190</sup> The obligation to abide by instructions from a MRCC is, however, primarily a state obligation. States must ensure that SAR is conducted swiftly and efficiently and if a private vessel fails to do so the flag state and the state of the MRCC are failing their obligations.<sup>191</sup> NGOs refusing to follow instructions from an MRCC could

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<sup>185</sup> SAR Convention, 2.3.

<sup>186</sup> Giorgia Bevilacqua, ‘Italy versus NGOs: the controversial interpretation and implementation of search and rescue obligations in the context of migration at sea’ (2019) 28:1 *Italian Yearbook of International Law Online*, p. 25 [https://doi.org/10.1163/22116133\\_02801003](https://doi.org/10.1163/22116133_02801003) accessed 22 May 2023.

<sup>187</sup> International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) as amended, 1184 UNTS 278 (‘SOLAS’), Chapter V, Regulation 33.1.

<sup>188</sup> UNCLOS art. 98 (1) (b).

<sup>189</sup> UNCLOS art. 98 (1) (a); SOLAS Chapter V, Regulation 33.1.

<sup>190</sup> Statewatch, “Maritime Rescue in the Mediterranean”, date unknown, <https://www.statewatch.org/media/documents/news/2018/feb/bundestag-Research-Services-Maritime-rescue-in-Med.pdf> accessed 23 May 2023. References a German primary source.

<sup>191</sup> UN Office of the High Commissioner for Human Rights, “‘Lethal Disregard’ Search and rescue and the protection of migrants in the central Mediterranean Sea”, May 2021, <https://www.ohchr.org/en/documents/reports/lethal-disregard-search-and-rescue-and-protection-migrants-central-mediterranean> accessed 23 May 2023.

thereby be liable to criminal charges, but the state hold the responsibility for the SAR itself. A failed rescue-operation is not the responsibility of the shipmaster who tried, but of the state coordinating the rescue.

### 4.1.2 Defining ‘distress’

The above mentioned instruments create a legal framework for coordination of search and rescue, consolidating the duty to assist at sea as a cornerstone of international maritime law.<sup>192</sup> The personal scope of the duty to assist is universal, clear in the wording of “any person found at sea” or “persons in distress”<sup>193</sup>. Regardless of citizenship or status people in distress are to be rescued, which is highly relevant when discussing rescue of irregular migrants.<sup>194</sup> The robustness is however compromised by the lack of a clear definition of ‘distress’. UNCLOS does not include a definition, and in SOLAS ‘distress’ is often discussed in terms of distress signals; anyone deeming their situation grave enough to emit a distress call is in distress.<sup>195</sup> The SAR Convention defines distress as a situation when “...a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”<sup>196</sup> which of course only reiterates that any person in need of assistance should receive it.

There are many examples of distress calls being ignored when the vessel emitting it is carrying migrants on their way to Europe. One of the darker stories is the ‘left-to-die-boat’ which in 2011 left Tripoli with 72 passengers, drifting ashore in Libya two weeks later with only nine survivors. The Italian MRCC received a distress call, a helicopter and several ships and vessels were observed from the boat, and yet no one intervened.<sup>197</sup> One of several reasons

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<sup>192</sup> Kilpatrick & Smith (n 18)p. 82.

<sup>193</sup> UNCLOS art. 98 (1) (a) and (b)

<sup>194</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 72.

<sup>195</sup> SOLAS Convention, Chapter V, Regulation 10 (a).

<sup>196</sup> SAR Convention (recast), Chapter I, p. 3.13.

<sup>197</sup> Council of Europe: Parliamentary Assembly, ‘Lives lost in the Mediterranean Sea: Who is Responsible?’ (2012) Doc. 12895, p. 1.

<<https://www.refworld.org/docid/4f7be86b2.html>> accessed 23 May 2023.

for this abandonment was the uncertainty around the distress call and whether the situation aboard the vessel amounted to distress, according to the Italian MRCC. Another was the interpretation of the SAR Convention as not clearly obliging anyone to act when the state responsible for the relevant SAR zone fails to do so.<sup>198</sup>

The SAR convention includes detailed definitions of different phases in a SAR operation. The MRCC is responsible for determining when a situation amounts to either of the phases. First, a person or vessel can be in the “uncertainty phase”, in that it is either reported as missing or fails to appear where it is expected to, either in a port or a position during a journey.<sup>199</sup> Vessels used to smuggle migrants are rarely formally expected anywhere, since their journeys are unplanned to their very nature, and the uncertainty phase should therefore not be applicable in most situations of SAR of migrants. The second phase is the alert phase, which applies either when a lost vessel is not located or contacted successfully in the uncertainty phase, or when the MRCC receives a signal that a ship is impaired “but not to the extent that a distress situation is likely”.<sup>200</sup> Inquiries are to be extended and, if the MRCC finds it necessary in relation to the circumstances, SAR action initiated.<sup>201</sup>

The last phase is the distress phase, which is when an MRCC receives information that a ship is in danger and in need of immediate assistance, or that a ship is impaired to a degree that a distress situation is likely. This phase can also be the result of failed locating and contacting efforts in the alert phase and circumstances point to the ship being in distress.<sup>202</sup> This phase requires immediate SAR action in accordance with the MRCC’s preparatory plans.<sup>203</sup>

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<sup>198</sup> Ibid, p. 74-75 and 80.

<sup>199</sup> SAR Convention, Chapter IV, p. 4.4.

<sup>200</sup> SAR Convention, Chapter I, p. 4.4.4.2.

<sup>201</sup> SAR Convention, Chapter I, p. 4.5.2.

<sup>202</sup> SAR Convention, Chapter I, p. 4.4.3.

<sup>203</sup> SAR Convention, Chapter I, p. 4.5.3.

These instructions to MRCC's gives clear guidance of how to categorize a situation but leaves room for interpretation of what measures are necessary. Only the last and most critical phase demands actual rescue attempts from the MRCC, and this phase is the only one completely dependent on being judged as a situation of immediate or possible distress. The power to define a situation as distress is placed partly with eyewitnesses, who must report a vessel as in immediate danger according to their judgement for a SAR operation to be conducted.

After the 'left-do-die-boat' in 2011, mentioned above, the Council of Europe published a report recommending member states to "avoid differing interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats..."<sup>204</sup>. The CoE defined the term 'distress' as including precarious and dangerous boats in themselves, regardless of when the danger arises. In this example the journey itself was life-threatening from departing from Tripoli.<sup>205</sup> If the (vague) definitions of distress are read in light of the purpose of conventions such as the SAR Convention, SOLAS and UNCLOS the aim must be to preserve life at sea. Any definition of distress should therefore account for the risk of loss of life, regardless of whether this is due to inherent qualities of the vessel or an accident.<sup>206</sup>

## **4.2 Disembark to a 'place of safety'**

### **4.2.1 Stand-offs over disembarkation**

Once a person or group of people are rescued, the issue of where to disembark arises. The EU has been harrowed by incidents of stand-offs in European

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<sup>204</sup> Council of Europe: Parliamentary Assembly, 'Lives lost in the Mediterranean Sea: Who is Responsible?' (2012) Doc. 12895, p. 13.3.

<https://www.refworld.org/docid/4f7be86b2.html> accessed 23 May 2023.

<sup>205</sup> Papachristodoulou (n 131) p. 97.

<sup>206</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 73.

ports during the last decades. During the Pinar incident in 2009 Italian and Maltese authorities could not agree on whom should be responsible for a vessel with over 140 rescued migrants, resulting in two deaths before Italy allowed the ship to port in Sicily.<sup>207</sup> The rescue occurred close to an Italian port but in the SAR-zone of Malta, and there was disagreement on which state was responsible under the international law on SAR. As in all such considerations there were also political undertones, affecting the willingness to receive the migrants.<sup>208</sup>

Similar situations have occurred countless times over the years. In 2021 over 37 incidents were recorded by the FRA, all concerning NGO-ships being held at sea without a safe port to disembark rescued people in for at least 24 hours, sometimes up to twelve days. In total almost 10 000 people were held at sea.<sup>209</sup> These incidents present potential violations of international maritime law and migration law since it effectively prevents any applications for asylum. Conditions on the rescue vessels themselves are often such that there is a high risk for violation of human rights.<sup>210</sup> When rescuing large groups from shipwrecks, shipmasters often have no other choice than to overload their own vessel, creating conditions of crowding, insufficient water and food supply, lack of medical care, and overheating.<sup>211</sup> Many survivors are already vulnerable, due to age, gender, previous illness or pregnancy to mention only a few reasons, and many more are weakened by their journey.<sup>212</sup> The conditions themselves can amount to torture or inhuman and degrading treatment, especially over a prolonged stand-off.<sup>213</sup>

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<sup>207</sup> Ghezelbash et al (n 28) p. 316.

<sup>208</sup> Nicholas De Blouw, 'Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean' (2010) 40 *California Western International Law Journal*. p. 353.

<sup>209</sup> FRA, 'Annex – Vessels kept at sea for more than 24 hours while waiting for a safe port, 2021' Fundamental Rights Report 2022, Annex. Online: <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-fr-2022-annex-vessels\\_en\\_0.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-fr-2022-annex-vessels_en_0.pdf)> accessed 23 May 2023.

<sup>210</sup> Carrera, Colombi & Cortinovis, *Policing Search and Rescue NGOs* (n 6) p. 17.

<sup>211</sup> See for example the Tampa-case, described below in section 4.2.2.

<sup>212</sup> Janik (n 134) p. 70.

<sup>213</sup> Papachristodoulou (n 131) p. 102.



There are examples of member states allowing selective disembarking in situations like these, only permitting the most vulnerable to leave the rescue vessel. In almost a third of the incidents referenced in the FRA-report selective disembarkation was employed.<sup>214</sup> Recently the question has been raised whether rescued migrants must endure this wait to ‘become’ vulnerable before they are allowed to disembark in the EU, and the legality of such practices.<sup>215</sup> The method also affects the rescuers and is primarily used when the rescuer is an NGO,<sup>216</sup> allegedly since NGOs are more likely than other private shipmasters to refuse disembarking in Libya, which is otherwise a common instruction from European MRCC’s. Disembarkation in Libya could violate the principle of *non-refoulement*, but there is discord among EU member states on this matter.<sup>217</sup> The result is that people could be denied assistance at sea if no reliable merchant vessel or state agent is available, or, if they are rescued by an NGO, refused to disembark.

## 4.2.2 The Shipmaster’s Discretion

The legal framework on SAR was partly amended by IMO in 2004 to avoid situations where rescue-ships are refused port and rescued people prevented from disembarking.<sup>218</sup> It was the *Tampa* which instigated these changes<sup>219</sup>, prompting IMO to clarify the right to port for a shipmaster performing the duty to assist. The *Tampa*-incident occurred in 2001 when a Norwegian tanker rescued 433 migrants who had attempted to travel to Australia from Indonesia but became shipwrecked. Australian authorities refused the ship

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<sup>214</sup> FRA, ‘Annex – Vessels kept at sea for more than 24 hours while waiting for a safe port, 2021’ Fundamental Rights Report 2022, Annex. Online: <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-fr-2022-annex-vessels\\_en\\_0.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-fr-2022-annex-vessels_en_0.pdf)> accessed 23 May 2023.

<sup>215</sup> Carrera, Colombi & Cortinovis, *Policing Search and Rescue NGOs* (n 6) p. 21.

<sup>216</sup> *Ibid.* p. 27.

<sup>217</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 104.

<sup>218</sup> IMO Resolutions MSC.155 (78) and MSC 153 (78), 20.05.2004.

<sup>219</sup> Ghezelbash et al (n 28) p. 316.

port and ordered them to instead set sails to Indonesia. This caused a riot onboard *Tampa*, and led the captain to travel towards Christmas Islands, but kept outside of Australian territorial waters. After several days and deteriorating conditions on the *Tampa*, Australian military boarded the ship, removed the migrants, and later disembarked them in New Zealand and Nauru. During the days of the stand-off claims were made that the ships flag state was now responsible for the migrants and that Norway had to receive them, despite the journey to Norway being incredibly long.<sup>220</sup>

The amendments affected SOLAS<sup>221</sup> and the SAR Convention.<sup>222</sup> The amendments does not clarify precisely where rescued people should disembark but rather imposes a state obligation to ensure disembarkation to a *place of safety*.<sup>223</sup> Both conventions gained a new regulation of the “shipmaster’s discretion” in decisions concerning safety of life at sea and a requirement of states to cooperate to allow shipmasters who have performed a rescue to be released of their duty as soon as possible.<sup>224</sup> In parallel with the amendments, IMO published a set of soft law, non-binding guidelines for SAR. Part of the guidelines are directed towards private actors as duty-bearers, requiring shipmasters to do everything they can to preserve lives, treat survivors as humanely as possible, and contact and follow instructions from MRCCs and state authorities.<sup>225</sup> State actors are however not only reminded that they need to do everything to preserve life and dignity, but also to relieve shipmasters of the rescued people as soon as possible to allow for merchant vessels to return to their original plan of journey.<sup>226</sup> This is a confirmation of the state’s final responsibility for the well-being of the rescued persons, regardless of their potential refugee status or citizenship.<sup>227</sup>

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<sup>220</sup> Papachristodoulou (n 131) p. 99.

<sup>221</sup> SOLAS, Chapter V, Regulation 34-1.

<sup>222</sup> SAR Convention (recast), article 3.1.9.

<sup>223</sup> Papachristodoulou (n 131) p. 105.

<sup>224</sup> IMO Resolutions MSC.155 (78) and MSC 153 (78), 20.05.2004.

<sup>225</sup> IMO, ‘Guidelines on the Treatment of Persons Rescued at Sea’ (20 May 2004) Res MSC.167 (78) Annex 34, p. 5.1.

<sup>226</sup> *Ibid.* p. 6.3.

<sup>227</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 72.

The New Pact for Migration and Asylum includes provisions on responsibility-sharing following SAR. These provisions would enable sustainable relocation arrangements following disembarkation, meaning that the member state that allows the disembarkation would be relieved of the responsibility to receive the rescued migrants.<sup>228</sup> Such arrangements are already in place today, but in an ad hoc manner which creates uncertainty. It is also reliant on the good will of other member states, as a voluntary mechanism for responsibility-sharing.<sup>229</sup>

The amendments and the guidelines are balancing between two fundamental legal phenomena: state sovereignty and *non-refoulement*. The sovereignty of states allows them to refuse anyone to cross their borders, including rescued migrants. To exclude non-citizens is only to exercise sovereignty, a “corollary of statehood.”<sup>230</sup> The state obligation concerning SAR does not entail an obligation to relinquish sovereignty regarding border control.<sup>231</sup> However, the absolute right of *non-refoulement* forbids states to force shipmasters to disembark migrants into situations of persecution or threats to their lives.<sup>232</sup> This is also included in the IMO Guidelines, as a duty of shipmasters to not allow disembarkation in situations where the safety of the survivors is further jeopardized.<sup>233</sup>

## 4.3 Conclusion Chapter Four

This chapter has examined the legal framework of SAR in detail and can conclude that there are considerable state-obligations in regard to the human

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<sup>228</sup> Commission, New Pact (n 29) p. 13.

<sup>229</sup> Carrera & Cortinovis, (n 14) p. 25.

<sup>230</sup> Costello *Human Rights of Migrants* (n 30) p. 24.

<sup>231</sup> Patricia Mallia, ‘The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal’ (2014) 18:11 *American Society of International Law*, p. 2.

<sup>232</sup> Refugee Convention, Article 33; CFR Articles 4 and 19; ECHR, Article 3.

<sup>233</sup> IMO, ‘Guidelines on the Treatment of Persons Rescued at Sea’ (20 May 2004) Res MSC.167 (78) Annex 34, p. 5.6.

rights and safety of those rescued, and for the coordination of SAR. A failed rescue-operation is the responsibility of a state, not of a private actor performing a rescue. The private shipmaster is only obliged to follow instructions from the national MRCC and to their best ability assist anyone in their vicinity. The issues revealed in regard to selective disembarkation, refusal to allow ships port, ignored vessels in distress and *non-refoulement* are primarily actualised when those in distress are migrants and the rescuer is an NGO.

This connects to the narrative of SAR as a pull-factor for smuggling as discussed in chapter three. The securitisation of the SAR-regime of EU has had consequences for the humanitarian essence of SAR as portrayed by the international legal framework. Another possible conclusion is that the legal system of SAR is not intended to work within a context of mass-movements of smuggled migrants, and thereby fails. These failures of the SAR-regime, in addition to the securitised enforcement of the FP, add up to a hostile treatment of SAR NGOs which will be discussed in the following chapter.

# 5 Criminalisation and Policing of Humanitarian Assistance

In this chapter different ways to prevent NGOs from working with SAR of migrants will be discussed, after a brief introduction to the extent of the SAR performed by NGOs. The policing of NGOs is directly related to the securitisation of SAR described in chapter three, as will be seen here, and the scope of the FP do not protect humanitarian actors from criminalisation. This will answer the sub question “how are humanitarians and other civil society actors working with SAR of migrants controlled and policed in the EU?”.

## 5.1 Search and Rescue by NGOs

Many rescuers are not state agents but rather private actors, either merchant ships being called to respond to distress calls, NGOs proactively working to save lives at sea, or other CSAs.<sup>234</sup> It is difficult to find specific statistics on whether they constitute a majority of SAR-actors in the Mediterranean but some sources suggest they were, at least in 2015 and 2016.<sup>235</sup> There was a clear surge in CSA-led activity in the Mediterranean when the Italian SAR-operation *Mare Nostrum* was discontinued in 2014, which left “an operational and a territorial gap in SAR”.<sup>236</sup> The EU-led joint operation which replaced *Mare Nostrum*, *Triton*, did not cover the same territory and did not have the same SAR mandate.<sup>237</sup> These decisions in combination with the sheer number of people traversing the Mediterranean in 2015 created a hole in SAR on the

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<sup>234</sup> Cusumano & Villa ‘Over troubled waters’ (n 8) p. 203.

<sup>235</sup> Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163) p. 28. The difficulty to find statistics relate to the conflation of SAR and interdiction, with for example Frontex’ joint operations not being classified as SAR-operations but nevertheless performing SAR in some capacity.

<sup>236</sup> Carrera et al, *2018 Update* (n 35) p. 69, added emphasis.

<sup>237</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 107–108.

Mediterranean, leading organizations and individuals to action.<sup>238</sup> During this period the response towards SAR NGOs in media and by politicians were overall positive, praising them as “angels”.<sup>239</sup>

Parts of this positive attitude to SAR NGOs remain. In the New Pact for Migration and Asylum the European Commission admits the need to partly rely on private, voluntary SAR to rescue more lives on the Mediterranean. It is discussed in relation to relocation arrangements after disembarkation and the issuing of two sets of guidelines<sup>240</sup>, both of which are now published: one guidance on the implementation of the FP to avoid criminalising humanitarian assistance<sup>241</sup> and one recommendation on the control of private SAR-actors to ensure maritime safety.<sup>242</sup>

Between 2014 and 2020 fourteen different NGOs were active in the Mediterranean. Their capacities have varied, and some has settled for providing aid at sea while awaiting larger rescue vessels, while others have been able to perform large-scale rescue missions by themselves. Some are political and with a clear agenda of whistleblowing and advocacy, while others are apolitical and focused entirely on saving lives.<sup>243</sup> They have rescued over 120 000 persons between 2014 and 2018.<sup>244</sup> Later statistics are unfortunately very difficult to find, maybe since state authorities do not want the impact of NGOs to be highlighted against their efforts to stem their efforts.

Suspicious of SAR NGOs cooperating with criminals began in earnest in 2016 when a leaked report from the EU’s border and coast guard agency,

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<sup>238</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 3

<sup>239</sup> Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163) p. 28.

<sup>240</sup> Commission, New Pact (n 29) p. 13.

<sup>241</sup> European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, C(2020) 6470 323/01, Brussels, 1 October 2020.

<sup>242</sup> European Commission, Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, C(2020) 6468 final, 23 September 2020.

<sup>243</sup> Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163) p. 27.

<sup>244</sup> Irrera (n 16) p. 280.

Frontex, “raised concerns”<sup>245</sup> that SAR NGOs and smugglers were communicating and planning rescue operations. One year later Frontex released a report showing that the number of rescues by NGOs exceeded the number of distress calls.<sup>246</sup> In one Italian case, *Juventa*, an NGO was indicted for facilitating illegal migration, since the group had gone above and beyond what is required to fulfil regular SAR. They had (allegedly) contacted the smuggling network beforehand, planned the rescue, failed to destroy the smugglers’ vessel in accordance with their instructions and aided the smugglers in avoiding the Italian law enforcement.<sup>247</sup> As of April 2023 the trial is yet to be concluded. The UN Special Rapporteur on the situation of human rights defenders has spoken on the matter and called it a “darkening stain on Italy’s and the EU’s commitment to human rights.”<sup>248</sup>

While the international law of the sea has historically developed towards more efficient and safer SAR, regardless of who is rescued or who is the rescuer<sup>249</sup>, the policies of the EU and its member states has developed towards more control, policing, and deterrence.<sup>250</sup> In June 2022 only seven NGO-ships were still actively performing SAR operations, four were locked in legal procedures, and seven vessels were docked for technical reasons. Since 2016 sixty procedures or more has been opened in Germany, Greece, Italy, Malta, the Netherlands and Spain against SAR NGOs.<sup>251</sup> Not all of these legal

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<sup>245</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 109.

<sup>246</sup> European Border and Coast Guard Agency (Frontex), Annual Risk Analysis 2017, Warsaw February 2017, <https://doi.org/10.2819/94559> accessed 23 May 2023, p. 32.

<sup>247</sup> Ragazzi (n 62) p. 27.

<sup>248</sup> OHCHR, Press Release, “Italy: Criminalisation of human rights defenders engaged in sea-rescue missions must end, says UN expert”, February 9 2023, Online: <https://www.ohchr.org/en/press-releases/2023/02/italy-criminalisation-human-rights-defenders-engaged-sea-rescue-missions> accessed 23 May 2023.

<sup>249</sup> Moreno-Lax et al *Approach to Migration* (n 25), p. 72, see also chapter 4.2.2 on the *Tampa*-case.

<sup>250</sup> Forensic Oceanography (Heller C and Pezzani L), *Blaming the Rescuers* (2017) Goldsmiths, University of London <[https://content.forensic-architecture.org/wp-content/uploads/2023/04/2017\\_Report\\_Blaming-The-Rescuers.pdf](https://content.forensic-architecture.org/wp-content/uploads/2023/04/2017_Report_Blaming-The-Rescuers.pdf)> accessed 23 May 2023, p. 5.

<sup>251</sup> FRA (n 20).

procedures relate to the law against migrant smuggling, but many do and that is what the next section will cover.

## 5.2 Criminalising Humanitarian Assistance

### 5.2.1 Prosecution as Deterrence

During 2022, over one hundred individuals working or volunteering with NGOs to aid migrants faced criminalisation or legal action in some form. In total, nine people were acquitted in 2022 but *none* of the over one hundred individuals were found guilty, even if procedures are still ongoing in many cases.<sup>252</sup> These statistics are not only related to SAR or maritime migration, but to a wider range of actions relating to unauthorised entry or residence. According to PICUM the number “demonstrates how these trials are politically motivated, but judicially unfounded”.<sup>253</sup> In Greece, there are several examples which raises suspicions on law enforcements’ independence, such as refusing to translate declarations of arrest, unfounded charges on carrying weapons (fishing knives necessary when performing SAR) and persistent harassment even after the individual’s acquittal.<sup>254</sup>

In addition to these worrying circumstances during arrests and investigations, the procedures themselves are more often than not drawn-out. Out of the nine acquitted people referenced in PICUM’s report cited above, six received their acquittals after more than five years of proceedings.<sup>255</sup> Sean Binder and Sarah Mardini, high-profile volunteers in the NGO ERCI, was arrested in 2018 and their trial are yet to be concluded. In January 2023 a Greek court found some of the charges against them and their 22 colleagues inadmissible due to a

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<sup>252</sup> PICUM, ‘More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022’ Briefing paper, 2023, [https://picum.org/wp-content/uploads/2023/03/More-than-100-people-criminalised-for-acting-in-solidarity-with-migrants-in-the-EU-in-2022\\_EN.pdf](https://picum.org/wp-content/uploads/2023/03/More-than-100-people-criminalised-for-acting-in-solidarity-with-migrants-in-the-EU-in-2022_EN.pdf)> accessed 23 May 2023, p. 4-5.

<sup>253</sup> Ibid, p. 5.

<sup>254</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 110.

<sup>255</sup> PICUM (n 252) p. 4.



refusal of the prosecutors to translate documents or present clear indictments, but in May the case was appealed to the Supreme Court and after five years of legal procedures they might face several more.<sup>256</sup>

Studies have shown that while few humanitarians get convicted of human smuggling or other criminal charges, their detention, investigation, and seizure of their vessels prevent their work and deter others from attempting to help.<sup>257</sup> Over 300 individuals who have volunteered with SAR or working in a SAR NGO has been charged with migrant smuggling since 2015.<sup>258</sup> Applying laws against the facilitation of unauthorized entry to someone not involved in organized crime goes back to years before the crisis of 2015. In 2002 a crew of fishermen in the boat *Chico* were investigated for facilitating illegal entry after they rescued 150 migrants. Only a few days later another crew, on *Bon Orient*, was in a similar situation but hesitated to perform a rescue of a group of migrants to avoid the charges faced by the crew of *Chico*.<sup>259</sup> The criminalisation of *Chico* had a ‘chilling effect’, making private shipmasters immediately hesitant to fulfil their duty to assist at sea.<sup>260</sup> The deterring effect of criminalisation is the major issue, even if actual imprisonment is a larger problem for the convicted individual.

## 5.2.2 Scope of Criminalisation in the Facilitators’

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<sup>256</sup> This information was shared by the organisation raising awareness of Binder and Mardini’s trial, FreeHumanitarians, through an open-access document published on Google Drive, available online: <https://docs.google.com/document/d/10vwH2otpb0zs17bQf3fRDhd621wr6EZLCSJPsXAmeyo/edit> (accessed 2023-05-12).

<sup>257</sup> See Carrera et al, *Fit for purpose?* (n 4); Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163).

<sup>258</sup> ReSOMA, *The Criminalisation of Solidarity in Europe*, 2020, online: <https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf> accessed 23 May 2023 Gionco M, and Kanics J, *Resilience and Resistance in Defiance of the Criminalisation of Solidarity across Europe*, Greens/EFA report (2022), <http://extranet.greens-efa.eu/public/media/file/1/7751> accessed 23 May 2023.

<sup>259</sup> PICUM, ‘Book of Solidarity: Providing Assistance to Undocumented Migrants in France, Spain, and Italy – Volume II’ (2003), [https://picum.org/wp-content/uploads/2021/11/Book-of-Solidarity-VOL-2\\_Coloured-cover.pdf](https://picum.org/wp-content/uploads/2021/11/Book-of-Solidarity-VOL-2_Coloured-cover.pdf) accessed 23 May 2023.

<sup>260</sup> Ricci (n 130) p. 51.

## Package

The criminalisation of private actors is directly related to the broad scope of criminalisation in the FP and not only stemming from “bad implementation”.<sup>261</sup> There is nothing in the definition of facilitating unauthorised entry that distinguishes criminal smuggling from rescue missions when they entail disembarkation in the EU, due to the lack of a requirement of financial motifs in the FP.<sup>262</sup> The equivalent provision of the 1990 Schengen Convention, which the FP replaced, included financial gain as a requisite for assisting illegal entry or residence.<sup>263</sup>

On the UN level the requisite of financial objective was imperative to avoid criminalisation of family members or support groups and resulted in a limited personal scope of the criminalisation, only including actors enabling illegal entry for their own financial or material benefit.<sup>264</sup> The requirement of material benefit is similar to the definition of criminal organisations used in the EU today<sup>265</sup> and when the FP was published,<sup>266</sup> but was not extended to the FP. Indeed, concerns were raised during negotiations of the FP that the absence of a financial gain-objective could lead to criminalisation of humanitarian assistance, and the response was to include a humanitarian exception.<sup>267</sup> This provision gives member states the opportunity to not impose sanctions on actions otherwise considered facilitating illegal entry when “the aim of the behaviour is to provide humanitarian assistance”.<sup>268</sup>

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<sup>261</sup> Ricci (n 130) p. 52.

<sup>262</sup> Facilitators Directive, article 1.

<sup>263</sup> The Schengen Acquis – Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239, article 27 (1).

<sup>264</sup> Carrera et al, *Fit for purpose?* (n 4) p. 26.

<sup>265</sup> Council Framework Decision 2008/841/JHA of 24 October 2008, on the fight against organised crime [2008] OJ L 300/42, article 1 (1),

<sup>266</sup> Council Framework Decision 98/733/JHA, Joint action of 21 December 1998 adopted by the Council, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [1998] OJ L 351/1, article 1.

<sup>267</sup> Carrera et al, *Fit for purpose?* (n 4) p. 26.

<sup>268</sup> Facilitators Directive, article 1 (2).

This humanitarian exception<sup>269</sup> is not used to its fullest capacity, with only a few member states having implemented it in domestic legislation. One state who has implemented it is Greece, a country that nevertheless criminalise SAR NGOs continually.<sup>270</sup> Suggestions to make the exception mandatory, to protect private actors involved in SAR and prevent their criminalisation,<sup>271</sup> has been criticised for not being a strong enough measure. A mandatory exception of humanitarian assistance would arguably not prevent investigations and could shift the burden of proof onto the prosecuted, having to prove their own status as a humanitarian rather than a criminal.<sup>272</sup> With the current climate regarding SAR NGOs it is also entirely possible that their suspected role as accomplices to smugglers<sup>273</sup> would prevent a mandatory exception to have effect.

The European Parliament has been aware of the risk of the FP enabling criminalisation of humanitarian assistance for many years and has commissioned several studies into the subject.<sup>274</sup> In 2018 the EP adopted guidelines to prevent the criminalisation of humanitarian assistance, and it was acknowledged that this is an undesirable consequence of the wide personal scope of the facilitators' directive.<sup>275</sup> The Commission has also noted the potential for criminalisation of humanitarian assistance within the FP and states that all criminalisation of humanitarian actors are unintended consequences of the legislation.<sup>276</sup> A regulatory fitness and performance (REFIT) assessment was done by the Commission, but it concluded that the

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<sup>269</sup> Facilitators Directive, article 1 (2).

<sup>270</sup> Carrera et. al. *Fit for purpose?* (n 4), p. 31.

<sup>271</sup> Ibid p. 64.

<sup>272</sup> Ricci (n 130) p. 53.

<sup>273</sup> Carrera et al *2018 update* (n 35), p. 72.

<sup>274</sup> Moreno-Lax et al *Approach to Migration* (n 25); Carrera et al, *Fit for purpose?* (n 4); Carrera et al *2018 update* (n 35).

<sup>275</sup> European Parliament, Motion for resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised, B8-0314/2018, 28 June 2018, p. 2-3.

<sup>276</sup> Commission, *New Pact* (n 29) p. 16.

FP was not in need of amendment.<sup>277</sup> This was criticised for failing to taking preceding studies, coming to the opposite conclusion, into account.<sup>278</sup>

The Commission guidance on the implementation of the FP includes the vague wording “humanitarian assistance that is mandated by law cannot and must not be criminalised”<sup>279</sup> which limits the scope of their guidance significantly. The SAR performed by NGOs that is mandated by law is those actions which take place after instructions from an MRCC or if the NGO comes across a ship in distress on the high seas, as discussed in section 4.1 on the duty to assist.<sup>280</sup> NGOs are often patrolling the sea, watching out for overcrowded vessels carrying migrants.<sup>281</sup> This form of proactive rescue is not clearly mandated by law, and according to the Commission’s guidance it can be criminalised regardless of humanitarian intent.

### 5.3 Other Forms of Policing

Formal criminalisation is too narrow a concept to capture in what ways member states of the EU prevents humanitarian assistance. There are examples of a wide range of administrative sanctions and other preventative or punitive measures being used to prevent NGOs from working in the Mediterranean,<sup>282</sup> often legitimised by its deterrent effect on irregular migration itself. The opportunity to be rescued is suspected to be a pull-factor for migration, migrant smuggling, and an incentive for smugglers to make the crossing more dangerous to encourage rescue.<sup>283</sup> The activities of SAR NGOs is thereby considered to aggravate the problem with migrant smuggling, rather than alleviate the problem of migrants dying at sea. Regardless of

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<sup>277</sup> Commission, Refit Evaluation of the EU legal framework against facilitation of unauthorized entry, transit and residence: the Facilitators Package (Directive 2022/90/EC and Framework Decision 2002/946/JHA), SWD(2017) 117, 22 March 2017, p. 35.

<sup>278</sup> Carrera et al *2018 update* (n 35), p. 9.

<sup>279</sup> Commission Guidance (n 250) para 4 (i).

<sup>280</sup> See text to n 188.

<sup>281</sup> Cusumano & Villa ‘Over troubled waters’ (n 8) p. 203.

<sup>282</sup> Carrera, Colombi & Cortinovis, *Policing Search and Rescue NGOs* (n 6) p. 4.

<sup>283</sup> Carrera et al *2018 update* (n 35), p. 71.

potential “pull-factor” the presence of SAR NGOs close to Libyan waters has been instrumental in reducing deaths in the Mediterranean.<sup>284</sup> Statistical analyses have shown that there is no clear correlation between increased SAR and migrant smuggling.<sup>285</sup>

Closely related to the criminalisation of SAR NGOs are the strict codes of conduct required of them. Again, these are mostly employed by Italy, but Greece has also used strict codes of conduct for SAR NGOs to allow them to continue with their activities. The Italian code was a direct result of the 2017 Frontex-suspensions<sup>286</sup> that rescue NGOs were colluding with smugglers. It was supported by the EU and intended to ensure that rescuers were not in fact smugglers.<sup>287</sup> Disobeying this code of conduct has led to criminal investigations of the members of the NGOs, but also to withdrawal of their permission to disembark in Italy.<sup>288</sup> The contents of the Italian code of conduct are not public but rather negotiated between the authorities and every specific organisation or individual, but has been called “nonsensical, dishonest and illegal” by the SAR NGO SeaWatch.<sup>289</sup>

The provisions in the codes of conduct relate to registration and certification of vessels and crew, restrict the use of light signals to prevent communication with smugglers, and regulate where NGOs are allowed to patrol.<sup>290</sup> They can also include binding obligations to follow any instructions from an MRCC, regardless of the orders received. In 2018 the NGO Proactiva Open Arms had their ship seized and their crew facing legal consequences for refusing to obey orders from the Italian MRCC to relocate rescued migrants to the Libyan

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<sup>284</sup> Ibid p. 67.

<sup>285</sup> Cusumano & Villa ‘Over troubled waters’ (n 8). 209.

<sup>286</sup> Frontex Annual Risk Analysis 2017 (n 162).

<sup>287</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 109.

<sup>288</sup> Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163).p. 30.

<sup>289</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 109.

<sup>290</sup> Cusumano & Villa, ‘From ‘Angels’ to ‘Vice Smugglers’ (n 163).p. 30.

Coast Guard.<sup>291</sup> The captain of the Proactiva-ship considered this a violation of *non-refoulement* due to the conditions for migrants in Libya.<sup>292</sup>

Many EU member states use administrative measures to prevent NGOs from setting out to sea. Malta and Germany, amongst others, has systematically impounded vessels used for SAR to investigate their registration and certificates, often fining captains and NGOs heavily due to minor errors in registration.<sup>293</sup> This range of legal action towards SAR NGOs could violate the right to a fair trial and access to justice, but even when authorities fulfil these requirements the proceedings themselves have heavy impact on the work of NGOs, effectively deterring them from continuing their work. It should also be noted that the seizure of vessels has been used by prosecutors to end stand-offs over disembarkation, effectively forcing disembarkation when other authorities refuse NGOs access to the port.<sup>294</sup>

The policing of SAR NGOs is, in many examples, performed by local police officers or other state authorities.<sup>295</sup> As recently as May 2023 one NGO working primarily with human rights observations in the Mediterranean decided to dissolve its organization due to harassment and obstruction from police authorities.<sup>296</sup> It had by then not conducted any monitoring operations in the Aegean Sea since February 2022 due to increased policing from Greek authorities.<sup>297</sup> Harassment can also come from media, social or traditional, and plays an important role in how NGOs are portrayed.<sup>298</sup> Some people involved in SAR has reported that they have been publicly defamed by prosecutors, lost funding and donations, and been exposed to threats on social

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<sup>291</sup> Statewatch, 'The seizure of the Open Arms boat as a paradigm of the European Union's war against human rights', April 2018 <http://www.statewatch.org/analyses/no-327-open-arms-seizure.pdf> accessed 23 May 2023, p. 2.

<sup>292</sup> Carrera et al *2018 update* (n 35), p. 76.

<sup>293</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 112.

<sup>294</sup> Cusumano & Villa, 'From 'Angels' to 'Vice Smugglers' (n 163) p. 32.

<sup>295</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 110.

<sup>296</sup> Mare Liberum, 'It cannot go on like this! Statement on the dissolution of Mare Liberum' May 1, 2023 <https://mare-liberum.org/en/dissolution/> accessed 23 May 2023.

<sup>297</sup> FRA (n 20).

<sup>298</sup> Carrera et al *2018 update* (n 35) p. 125.

media.<sup>299</sup> In interviews people involved in CSAs has pressed on their need to stay neutral, to avoid being targeted by the police as smugglers and simultaneously keep the trust of the migrants and not be seen as police.<sup>300</sup>

While all of the above mentioned examples show clear deterrence of SAR NGOs, on the EU level the relationship to SAR NGOs is more complicated. The Commission's SAR Recommendation concerning private (NGO-led) SAR is both embracing the idea of the 'pull-factor' and relying on a continued presence of NGOs in the Mediterranean.<sup>301</sup> The recommendation lists several suggestions for a higher level of control of SAR NGOs, to "meet the relevant safety and health requirements associated with this activity, so as not to pose a danger to the crew or the persons rescued"<sup>302</sup> presenting a paradox of suspicion of and trust in SAR NGOs.<sup>303</sup>

## 5.4 Conclusion Chapter Five

EU Member states are turning on SAR NGOs. They are criminalised for smuggling or colluding with smugglers despite their humanitarian motifs, have their vessels seized or impounded, and are constricted by codes of conduct and administrative regulations. Some also experience harassment by police or the media. After years of litigation very few are actually convicted of smuggling, while errors in registration or conduct are punished with heavy fines. All of these actions result in NGOs being prevented or deterred from performing SAR, which correlates to the avoidance of the potential pull-factor of SAR and the 'war on smuggling'. These conclusions will be further analysed in the final chapter.

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<sup>299</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 110.

<sup>300</sup> Ibid, p. 108.

<sup>301</sup> Commission, Recommendation (EU) 2020/1365 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, 23 September 2020, Rec. 9.

<sup>302</sup> Ibid. Rec. 12.

<sup>303</sup> Moreno-Lax et al *Approach to Migration* (n 25) p. 82.

# 6 Prevention of Assistance in Relation to Rightlessness

In this last chapter a theoretical approach will be taken to the issues previously described to address the implications for migrant's rights. The guiding work is Mann's *Maritime Legal Black Holes*, but other theoretical writings on rightlessness of migrants and criminalisation of humanitarian actors are also employed, primarily *Migration Emergencies* (Ramji-Nogales) and *Interdiction-Through-Rescue* (Moreno-Lax). The chapter begins with summarising some conclusions from the previous sections, laying the legal playing field and discussing it as a securitised migration crisis, constructed by law. The second part applies Mann's theory to the material, uncovering what happens to the black hole in relation to the policing of SAR NGOs.

## 6.1 A Securitised Crisis

The present thesis commenced with explaining the flaws of the CEAS and its mechanism for allocating responsibility between member states. The lack of functioning responsibility-sharing has led to responsibility-avoidance, which takes many forms but most relevant for the scope of this work is the avoidance of conducting SAR and disembarkation of irregular migrants. Despite the theoretical solidity of the international SAR-regime it has failed to account for the massive flows of maritime migrants who has crossed the Mediterranean in recent years. A system that neither on the side of reception (CEAS, Dublin) nor the side of SAR can accommodate large numbers of arrivals is, with Ramji-Nogales words, "the legal construction of migration emergencies"<sup>304</sup>.

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<sup>304</sup> Ramji-Nogales (n 5) p. 646.



The inadequacies of the SAR-regime and CEAS in relation to irregular maritime movements has created a situation in which migrant smuggling is categorised as a threat not to the migrants but to the citizens of the EU. The FP assumes that the AFSJ necessitates criminalisation of migrant smuggling, which is problematic. It ignores whom the crime of smuggling is materially directed against, the migrant, and instead focuses on the EU as the victim of migrant smuggling. The migrant is an accomplice to the smuggler, not in how they are criminally charged but in how they are treated and deterred.

This is not unique to the FP but a common thread in EU migration law, especially in the New Pact on migration and asylum, which equates the “fight against irregular migration” with the “fight against migrant smuggling.”<sup>305</sup> The FP and the subsequent joint operations described in section 3.2.2 all prioritise the security of the EU over the safety of the smuggled migrants. Both *Triton* and its successor *Poseidon* are used for SAR operations, but also holds a clear mandate to disrupt criminal smuggling networks and prevent the transit of smugglers. Justifying extensive border control and use of force and at the same time decreasing or preventing humanitarian assistance can only be comprehended by agreeing with the narrative of SAR as a pull-factor for smuggling, as understood by Frontex in its risk analysis from 2017.<sup>306</sup>

If the victim of the crime of migrant smuggling is the state it becomes counterproductive to conduct extensive SAR. While the securitized border control must save lives (to comply with international law on SAR) this is a secondary objective to that of preventing the transit of smugglers. Moreno-Lax’ theory on ‘rescue-through-interdiction’ builds on the conflation of interdiction and rescue, or the framing of interdiction and criminal prevention as humanitarian rescues.<sup>307</sup> This is closely related to the dual understanding of the smuggled migrant as both a victim and a threat to the security of the

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<sup>305</sup> Commission, New Pact (n 29) quotes from p. 16.

<sup>306</sup> Quoted above at note 162.

<sup>307</sup> Moreno-Lax, ‘Rescue-Through-Interdiction’ (n 36), p. 122.

EU<sup>308</sup>, as an accomplice to the smugglers. Interdiction of a suspected smuggling-vessel can use considerable amounts of force, and even armed violence as mentioned in section 3.2.1. If framed as humanitarianism the use of force can be justified as a rescue operation that prevents loss of life due to unseaworthy vessels. This is what is done through the EUNAVFOR Med operations described in section 3.2.2, *Sophia* and *Irini*, and the cooperation with the Libyan coast guard which has resulted in thousands of migrants being returned to their point of departure in Libya. It offers the migrant survival, but not the entire package of (enforceable) human rights.<sup>309</sup>

The war on smuggling is also used to legitimise the policing of SAR NGOs, going back to the responsibility-avoidance and the fear of inciting more smuggling. The legal construction of a migration emergency has been securitised to a degree where attempting to voluntarily mitigate the crisis is criminalised or deterred.

## 6.2 The Maritime Legal Black Hole

### 6.2.1 Rightlessness of Migrants

SAR could be a pull-factor for smuggling, but it is also the decisive point motivating a migrant to put themselves in a situation of rightlessness at sea according to Mann's *Maritime Legal Black Hole*. The prospects of possibly being saved and brought to safety in the EU is deemed preferable to the situation migrants experience before departing, and thus the rescue is the pull-factor. The key point of Mann's theory is that these chances for rescue are associated with a situation of complete rightlessness. In another situation the conditions aboard these vessels could amount to violations of the prohibition of torture or in cases of death a violation of the right to life. More in line with

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<sup>308</sup> Ibid. p. 119.

<sup>309</sup> Ibid. p. 121.

the scope of this thesis is the right to seek asylum and the prohibition of *non-refoulement*, both of which are actualised when a migrant (potential refugee) is either in the territory or under the control of a state, as discussed in relation to *Hirsi Jamaa* above in section 2.2. Human rights require a state agent responsible for their enforcement. At sea, outside of SAR zones, no state agent is in control, and hence no state agent is to be held responsible. The rights are neither enforceable in practice nor existing *de jure*.<sup>310</sup> Regardless of conditions during the journey, or even if they were to die because of them, the maritime irregular migrants are not experiencing any violation of their *de jure* rights.<sup>311</sup>

The rightlessness is directly related to the law of the sea, not the law of human rights. The duty to assist at sea is saturated in delimitations of responsibility, creating spaces where no one can be held responsible for the failure to rescue someone who drowns. As shown by the discussion in relation to the definition of ‘distress’ in section 4.1.2, to claim a universal application of this duty is to construct a definition too broad. Mann argues that the deaths on the Mediterranean due to failures to rescue them is “a form of killing by omission”.<sup>312</sup> The problem is not necessarily in the definition of distress but in the legal system which delineates areas where no jurisdiction over human rights exists.<sup>313</sup> Someone who drowns in the non-existent SAR-zone of Libya, where no state agent is responsible for coordinating rescue, dies without having their rights violated.<sup>314</sup> On the high seas the result will be similar. The duty to assist on the high seas is limited to ships coming across anyone in distress, and if no one does, no one is obligated to perform rescue.<sup>315</sup>

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<sup>310</sup> Mann (n 34), p. 356.

<sup>311</sup> Mann (n 34), p. 367.

<sup>312</sup> Mann (n 34), p. 365.

<sup>313</sup> Ibid.

<sup>314</sup> Mann (n 34) p. 367.

<sup>315</sup> See section 4.2 on the duty to assist, UNCLOS article 98 (1) (a).

A leading work on lack of rights on which Mann's broader work builds is Arendt's theory on statelessness and how this leaves a person not only with a lack of rights, but with a complete lack of the right to have rights. She compares the situation of a stateless person with that of a criminal, who is guaranteed fair and effective procedures, concluding that committing a crime might be the best way to become a respectable person before the law for someone without rights.<sup>316</sup> The rightless person are not only deprived of equality before the law, but of law completely.<sup>317</sup> The maritime legal black hole expands the idea. People traversing the Mediterranean are not only rightless, but their suffering and even their deaths can be ignored by states without legal consequences.<sup>318</sup>

Mann argues that smuggled migrants give up their *de jure* rights when they elect to leave a state where they are *de facto* rightless. The lack of opportunity or possibility to enforce their rights in their country of departure is enough to make them embark on journeys where they lose all claim to having their rights violated.<sup>319</sup> Anything that happens to them on the high seas is impossible to challenge in any legal avenue.<sup>320</sup> As discussed in chapter two, this irregularity is not a choice since no preferable options are available, and the system of migration law in the EU lacks provisions for entry for migrants. In Ramji-Nogales' words, the "autonomy of many migrants is severely constrained by circumstance."<sup>321</sup> The illusion of choice is a diversion from the complicated causes of international migration, often aided by the narrative of irregular movements as a crisis for the global north to handle.<sup>322</sup>

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<sup>316</sup> Hannah Arendt, *The Origins of Totalitarianism* (1951), Cleveland: Meridian Books, the World Publishing Company, 7th printing, 1962, p. 288.

<sup>317</sup> *Ibid* p. 296.

<sup>318</sup> Mann (n 34), p. 368.

<sup>319</sup> Mann (n 34), p. 370.

<sup>320</sup> Mann (n 34), p. 351.

<sup>321</sup> Ramji-Nogales (n 5) p. 624.

<sup>322</sup> Ramji-Nogales (n 5), p. 624.

Mann does not claim that all migrants move towards the EU by choice but rather that their circumstances are so dire that the rightlessness of maritime smuggling becomes preferable. They trade their rights for a “promise of charity”.<sup>323</sup> This charity is not the opportunity for asylum in the EU, despite it being the endgame, but the rescue at sea. Some complete the journey without rescue, of course, and many are rescued within the SAR zones of the EU and by state agents obliged to do so by law. Many others are rescued on the high seas by SAR NGOs, present on the scene only because they are there voluntarily, without legal obligation to patrol the high seas. This is the charity traded for rights.

This thesis has drawn a picture of the state of play in regard to rescue at sea, both from a legal perspective and on the ground. It described the actors at work and the issues of the system by examples of incidents where the authorities failed to enable efficient rescue with disembarkations in a place of safety, such as the *Pinar* incident or the Left-to-die-boat. What is clear is that there is no law requiring NGOs to set out to sea to fill a gap left by the state authorities, and there are no consequences for a state failing to save a boat full of irregular migrants. Rescue by an NGO is thereby a charity very far removed from a right with a corresponding duty. What then happens when the charity itself is accompanied not by rights but by the risk of criminalisation?

## **6.2.2 What Happens to the Black Hole when Voluntary SAR is Prevented?**

If there is a maritime legal black hole in which migrants are *de jure* rightless, it is defined by how it is made by legal provisions. The hole is created when a system of international law casts a net of protection but ignores the holes where no protection is granted.<sup>324</sup> The rightless migrant is left to hope for

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<sup>323</sup> Mann (n 34), p. 370.

<sup>324</sup> Mann (n 34), p. 348.

charity-rescue, since the legal web of protection neglects to embrace them. Responsibility-avoidance and increased border control has intertwined humanitarian and policing assistance.<sup>325</sup> The conflation of interdiction and rescue described above creates a situation in which SAR operations are simultaneously deterrence-operations. Keady-Tabbal and Mann describe this as a “confusion between border enforcement, maritime safety, and humanitarian relief.”<sup>326</sup> Within this system SAR NGOs are in a precarious position, acting against the security-focused deterrence-approach.

Mann claims that the maritime legal black holes are “unintended consequences of a certain division of labour that international law defines between states and individual actors.”<sup>327</sup> This claim must be deconstructed to be understood in the context of NGO-policing. The division of labour relates to the understanding within international law of the state as the only one responsible for rescue, or for the enforcement of human rights, leaving the individual without responsibility for her neighbours. At sea this is partly distorted by the limited duty to assist, which as we know from chapter 4.1 applies to shipmasters flying a state’s flag. The duty to assist does however have clear boundaries, such as only applying to ships in the vicinity of the distressed, or its dependence on someone other than those on the vessel recognizing the situation as distress. This “allows some to drown legally”<sup>328</sup>.

This division of labour allows for states and other actors to manipulate the level of risk at sea. By employing rescue operations, such as *Mare Nostrum*, the number of deaths can be decreased, and by removing those operations it can be increased.<sup>329</sup> Rescue of migrants outside of a SAR zone is only an obligation of the shipmaster coming across them, but to be discovered at sea

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<sup>325</sup> Niamh Keady-Tabbal and Itamar Mann, ‘Weaponizing Rescue: law and the Materiality of migration Management in the Aegean’ (2023) 36 *Leiden Journal of International Law* 61 <https://doi.org/10.1017/S0922156522000528> accessed 23 May 2023, p. 74.

<sup>326</sup> *Ibid*, p. 79.

<sup>327</sup> Mann (n 34), p. 369.

<sup>328</sup> Mann (n 34), p. 367.

<sup>329</sup> Mann (n 34), p. 367.

can be difficult. To be discovered by a patrolling NGO is not to be encompassed by legal protection, but to be the object of charity-rescue. The patrolling NGO is not present due to legal obligation, and only after coming across the vessel in distress will the rescue become mandatory. This is why policing takes place before the NGO embarks on its patrol; to ensure control over those who could come across an obligation to rescue, and where they later disembark the rescued people.

The removal of a SAR operation beyond the mandated zone is not a violation of the state's duty to rescue as long as they keep doing it in their SAR zone and territorial waters. When Italy cancelled *Mare Nostrum* it was not a violation of any legal obligation, despite it being directly related to increased number of deaths at sea. It can even be argued that the policing of SAR NGOs, through detailed codes of conduct as described in section 5.3, are part of the state's responsibility to ensure safe and efficient SAR. If they do not control the quality of the (voluntary) SAR, they do not abide by the international obligations on coastal states as described in chapter four. This view is shared by the Commission, in its guidelines on private SAR.<sup>330</sup>

So far the theory of the maritime legal black hole is applicable and gives clear answers as to where the systemic errors occur. In relation to the policing and criminalisation of SAR NGOs that this thesis has described the problem becomes a different one. A legal system this intricate that also does its utmost to prevent the only reason for leaving, the charity rescue, does not only maintain a legal black hole but encourages it. The *unintended* consequences of the international legal division of labour between states and individuals is that a state, as the ultimately responsible party, can ignore people who drown outside of their SAR zone. The consequences of the EU and its member states preventing NGOs from rescuing the otherwise ignored people are not

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<sup>330</sup> Commission, Recommendation (EU) 2020/1365 (n 301), Rec. 9.

‘unintended’. While NGO SAR is charity rescue, its prevention becomes a hindrance of assistance which could at the very least be morally questioned.

The division of labour in international law attributes responsibility to states and releases the individual from risking liability if they fail to rescue anyone. In the perplexing legal system of the EU, however, someone who despite their lack of obligation attempts to perform SAR risks criminal liability. If their rescue mission fails they are normally released from responsibility, since it is a state obligation to ensure well-functioning SAR, but if it succeeds they are facilitating unauthorised entry. As discussed previously the FP lacks a requirement of ‘financial gain’ in the definition of facilitating illegal entry, and the humanitarian exception clause in article 1 (2) is rarely used and applied haphazardly. The rescuer is a smuggler in the eye of the law. Even if the criminalisation and policing of SAR NGOS has increased recently, as described in chapter five, the cases of *Chico* and *Bon Orient* exemplifies that private SAR has been viewed as assistance to smugglers for far longer.

The distrust and policing of SAR NGOs has been argued to be part of the classic foreigner-citizen divide, which in a modern EU-context had added a third category of untrustworthy citizens. These are the ‘insiders’ who assist the ‘outsiders’, or SAR NGOs persistent on aiding migrants. They are casualties of the fight against smuggling and transnational crime, criminalised by association with the outsiders.<sup>331</sup> The loss of some citizens to the prevention of unauthorized entry is closely related to the similar differentiation of the ‘worthy’ migrants; those who achieve status as refugees, and are afforded protection, and those who do not and are returned to situations they risked their lives to leave.<sup>332</sup>

As discussed above in chapter 2.1 the AFSJ equates ‘security’ with security for those within the borders *from* those outside. In this context the

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<sup>331</sup> Carrera et al, *Policing Humanitarianism* (n 22) p. 178.

<sup>332</sup> Ramji-Nogales (n 5) p. 647.



criminalisation of the ‘untrustworthy’ for associating with outsiders is a logical conclusion. The crew of *Proactiva* were criminalised for failure to play along with the deterrence of migrants by refusing to hand them over to the Libyan Coast Guard, despite their aim to uphold *non-refoulement*. Other examples include clear collaboration with smugglers, such as the Italian case *Juventa*, also described in section 5.2. The collaboration was intended to save more lives, but the prevention of death is viewed as a side-effect of the more pressing matter of deterring unauthorised entry into the EU.

The ‘charity rescue’ becomes a criminal endeavour despite assurances from the Commission that it *is* an unintended consequence of the legislation. The SAR NGOs are deviations from the system which allows states to control the level of risk migrants face. When rescue or interdiction is not dependent on the operations performed by state agents but rather carried out independently a form of ‘true rescue’ arises. The maritime legal black hole is, however, unchanged. The migrants lost or dead at sea are just as rightless as they would be without the prevention of their rescue. Their claim does not change when their charity rescue, a voluntary act, is thwarted. This is the cornerstone of the theory of the legal black hole, the lack of the right to claim a violation of one’s rights, and the prevention of voluntary act does not reconstruct the act as a duty corresponding to a right to be rescued.

## **6.3 Conclusions Chapter Six**

This analysis has concluded that the maritime legal black holes are reinforced by the prevention of ‘charity rescue’ or voluntary SAR. The lack of a duty of NGOs to perform rescue solidifies the non-existence of a right for the irregular migrant to be rescued, and the removal of ‘charity rescue’ only increases the risk of drowning at sea. It does not, however, change the rightlessness of the migrants. While the prevention of assistance can be questioned on a moral level, to ensure ‘security’ by policing non-state actors is encompassed in the state-obligation of SAR.

# 7 Summary of Thesis Findings

This thesis aimed to examine the intersection between humanitarian assistance to people in distress at sea and the prevention of the crime which put them there, migrant smuggling. It has presented the argument that increased border control and focus on security *from* outside threats rather than safety *of* migrants has allowed the fight against migrant smuggling to expand beyond its original scope. It has resulted in outright criminalisation of SAR NGOs, despite their primary goals being to fill a gap left in the EU's SAR regime, and in strict policing of their work to deter those already active and prevent new actors from stepping onto the scene. The stricter border control and securitisation of migratory movement can be derived from the failures of the CEAS and the Dublin-system, which encourages member states to avoid their responsibilities. This has effects in the form of refusals to assist or allow rescued migrants port in the EU and in a complicated deterrence-regime. Irregular arrivals are prevented or intercepted, and many are returned to their point of departure.

The thesis set out to answer *how does the legal framework concerning maritime migrant smuggling in the EU affect humanitarians conducting search and rescue of migrants, and what does this imply for the human rights of affected migrants?* It can be concluded that the research question has been answered, through five chapters each providing one piece of the response.

**Chapter two** discussed the first sub question, concerning the legal framework in the EU of irregular migration and what challenges it presents in regard to entryways into the union. It concluded that the lack of safe and legal pathways to the EU forces migrants to travel irregularly to reach the EU. This irregularity of many migrants travelling towards the EU is reliant on the definition of refugee-status, granting only those qualifying for asylum the protection of certain rights. The chapter discussed legal provisions relevant to

migrants irregularly entering the EU, such as the right to seek asylum, not be *refouled* and to use irregular means to escape persecution. EU policies often overlook the mixed nature of movements, assuming people who travel irregularly are not refugees and not entitled to protection. All of these rights, however, depend on the individual application for protection. There are safeguards within the CEAS to ensure the reception and procedures all irregular migrants are entitled to, until it can be ascertained whether they qualify for refugee status. These state obligations in addition to the burden placed on coastal states by the Dublin-system were concluded to aggravate a tendency to deter irregular migrants rather than receive them.

**Chapter three** combined the ambition to deter irregular maritime migration with the increased border control and securitisation of migratory movements connected to the ‘war on smuggling’ to answer the sub question “what is the EU law against migrant smuggling and how is it enforced on the maritime border?”. The chapter examined the FP, especially in regard to how it protects migrants from criminalisation in accordance with SOM and concluded that the protection is weaker in EU law, to the detriment of the migrants who in a smuggling context are often forced to captain the vessels used to smuggle them. It could also be concluded that the FP is enforced through a vast system of border control, coordinated by Frontex and EUNAVFOR Med. This system is used to protect the EU’s external border from migrant smuggling, and by extension from irregular migrants. This was argued to impair the SAR-regime by building a narrative of SAR as an incentive for smuggling and irregular migration, motivating the conduction of interdiction rather than rescue.

These deficiencies of the SAR-regime were further discussed in **chapter four** which covered sub question three, the international legal obligations concerning SAR of migrants. The international SAR-regime and the universal scope of the duty to assist was grounded in international treaty law such as UNCLOS, the SAR Convention and SOLAS. The universality of this duty

was further discussed in relation to the deterrence of irregular migrants, with examples of distress calls being ignored and the definition of distress being used to avoid assisting. The chapter examined stand-offs over disembarkation which are common when the rescued persons are irregular migrants, as a way to avoid jurisdiction over their potential applications for protection. The chapter concluded that while issues are more persistent when those rescued are migrants, the legal system makes them even more apparent when the rescuer is an NGO.

These negative connotations surrounding SAR were in **chapter five** argued to be causing most of the policing of SAR NGOs. The chapter used several examples to illustrate how SAR NGOs are policed, to answer sub question number four, how are humanitarians and other civil society actors working with SAR of migrants controlled and policed in the EU? It is clear that they are criminalised for facilitating illegal entry, due to the broad scope of criminalisation in the FP, but also that they are controlled and policed in many other ways to deter them from setting out to sea. Most prominent is the use of strict codes of conduct and the impounding of vessels. If they refuse to abide by these codes their permits for disembarking rescued migrants are withdrawn.

These first four substantive chapters answers the first part of this thesis' research question, and it can be concluded that the law on smuggling only affects NGOs in that they are forced to attempt to not be criminalised, since the legislation itself do not provide sufficient safeguards against criminalisation of humanitarian assistance. The thesis could further conclude that the policing and criminalisation of NGOs is closely related to the responsibility-avoidance, deterrence and security-focus of EU migration policies in the broader sense. The enforcement of the FP in the form of border control has resulted in a severe securitisation of the SAR regime, which is used to legitimise the policing of NGOs.

The second part of the research question was responded to by a theoretical analysis of the rightlessness of maritime migrants in **chapter six**, although the rights of migrants was discussed throughout all chapters as revealed by the summary of findings above. First, it can be concluded that the policing of NGOs in itself has severe consequences for the rights of irregular maritime migrants, who are exposed to risky stand-offs over disembarkation or returned to their point of departure without examination of their potential applications. Second, the rightlessness experienced by maritime migrants on the high seas as explained in the relevant chapter is reinforced through the prevention of voluntary SAR. They have no right to be rescued, and the prevention of an act that was never an obligation does perpetuate, if not aggravate, the rightlessness of the shipwrecked migrants.

Future studies into this subject could extend the analysis to a moral-philosophical examination of the non-duty to rescue in relation to deliberate prevention of assistance. Possible solutions to the issues described in this thesis all relate to the creation of legal pathways into the EU. To allow migrants safe and legal entry to the EU without first requiring them to overcome perilous journeys could only result in more lives saved. This would require reconsiderations of the purposes of the CEAS, and a shift towards policies on protection rather than deterrence and criminalisation, which at the moment could be a daunting task for the EU. A first step, however, could be to stop the prevention of voluntary SAR and allow NGOs to continue their rescues, to stop the loss of life on the Mediterranean.

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