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# MONITORING MIGRATION IN THE CENTRAL MEDITERRANEAN

A matter of Border Controlling or Rescuing Lives?

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## ABSTRACT

Over the past decades, the number of migrants trying to reach Europe have increased dramatically. With the establishment of European Union and a policy of strengthening border surveillance, paths taken by migrants have changed. The dangerous journey through the Mediterranean Sea became an opportunity for many people to arrive in Italy and culminates in the deadliest migration route in the world. Considering the protection of irregular migrants and the challenge of monitoring Italian frontiers, the author hopes to contribute to the debate on whereas this migration dilemma has being dealt as a humanitarian crisis or as purely matter of border control. Through a comparative study, it will be analyzed the current policies, the actors involved and the legal framework applied both to a Border-Control and to operations of Search and Rescue on the National, EU and International levels. By the end, the necessity of more interaction between these elements will be evaluated and further discussions on their alignment with human rights ideas will be carried. Recommendations will be also proposed in order to introduce more thoughts on this yet, unsolved issue.

**Key words:** irregular migration; Central Mediterranean route; border control; rescue operations in the sea; human rights principles; balanced approach.

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## LIST OF ABBREVIATIONS

<b>CoE</b>	Council of Europe
<b>EC</b>	European Commission
<b>ECJ</b>	European Court of Justice
<b>EEC</b>	European Economic Community
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court to Human Rights
<b>EU</b>	European Union
<b>EUNAVFOR</b>	European Union Naval Force
<b>Frontex</b>	European Border and Coast Guard Agency
<b>HRW</b>	Human Rights Watch
<b>IOM</b>	International Organization for Migration
<b>IMO</b>	International Maritime Organization
<b>MOAS</b>	Migrant Offshore Aid Station Foundation
<b>MOU</b>	Memorandum of Understanding
<b>MSF</b>	Médecins Sans Frontières
<b>NATO</b>	North Atlantic Treaty Organization
<b>NGO</b>	Non-Governmental Organization
<b>RABIT</b>	Rapid Intervention Border Team
<b>RCC</b>	Rescue Coordination Center
<b>SAR</b>	Search and Rescue
<b>SARcon</b>	Search and Rescue Convention
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>TEU</b>	Treaty of European Union
<b>TFEU</b>	Traty on the Functioning of European Union
<b>TU</b>	Testo Unico sull'Immigrazione (Text on Italian Immigration Law)
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UN or ONU</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## GENERAL INTRODUCTION

Migration is a fluid phenomenon. It doesn't matter how tall are the walls or how dangerous could be the journey, people always find a way to overcome these barriers. Migration is also, not a new event. People have from thousands of centuries moved from one place to the other looking for food, water or shelter. In the new globalized era, the term *economic migrant* appeared but, in fact, it is still related to the one's search for a better life or even for its own survival. The word *economic* was attached to *migrant* when the humanitarian side of migration started to fade, not to think why people leave everything they have but to rather think the financial aspects this move signifies. In reality, the meaning of migration started to be subdivided into different categories at the same time as the definition of frontiers became more important.

A citizen is, in simple terms, someone that belongs to a country. Immigrant is someone that is residing inside the borders of a country where he is not a citizen. To understand who is an immigrant it is than, necessary to understand what are borders. The definition of borders, however, is a fictitious human invention<sup>1</sup> and susceptible to changes. As the time pass, more and more countries tried to improve the quality of this definition in order to render easier and peaceful, the exercise of sovereignty powers. It is true to affirm that in the past decades migration and the concept of borders started to change. Differently than what was a few decades ago, in what is relation to people's movement, were an instrument to keep a State aware of the entrance of people but now it only seems to be a way that authorities found to justify the refusal on admitting people into a certain territory. This idea have increased in parallel to the rise of the migration influx, until the point that people from third countries on the move to Europe started to be seen as a burden to be dealt by sovereign States and sometimes, not eve as human beings. Notably, the number of fatalities have also risen as more border control measures were <sup>2</sup>enforced.

Articles published by important channels of communication with titles such as “Thousands of migrants rescued in the Mediterranean”<sup>3</sup> or “700 migrants feared dead in Mediterranean shipwreck”<sup>4</sup> became routine in Europe and are the realization that irregular migration has not being handled

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<sup>1</sup> Federico Ferretti, ‘As origens da noção de fronteiras móveis: limites políticos e migrações nas geografias de Friedrich Ratzel e Élisée Reclus’ (2014).

<sup>2</sup> Thomas Spijkerboer, 'The Human Costs of Border Control', *European Journal of Migration Law* vol 9.1 (2007). p. 127

<sup>3</sup> Hilary Clarke and Lorenzo D'Agostino, ‘Thousands of Migrants Rescued from Mediterranean in Three Days’ (*CNN International*, 17 April 2017) <<http://edition.cnn.com/2017/04/17/europe/mediterranean-migrants-rescue/index.html>> accessed 7 May 2017.

<sup>4</sup> Patrick Kingsley, Alessandra Bonomolo and Stephanie Kirchgaessner, ‘700 Migrants Feared Dead in Mediterranean Shipwreck’ (*The Guardian*, 19 April 2015) <<https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>> accessed 7 May 2017.

correctly so far. It will be not ignored the fact that many things have changed with the establishment of the European Union and the Schengen Area, the rise of push factors in some African and Middle-Eastern countries, the problematic situation in Libya with the rule of two different governments, but this is only part of the cause of why there are still so many fatalities involving migrants in the Central Mediterranean Sea. The problem, that initially looks only a matter of engaging in a better border controlling, has a more complex face than this.

The present work will be analyzing through the realization of a multi-level study, how migration by the sea and its peculiarities in the Central Mediterranean have being observed. It will be divided in the different institutional degrees of relevance to migration in this area, which are the Italian Government, the European Union and the International Community. Thus, their methods will be crossed over with the two main approaches used to manage the issue of irregular migrants<sup>5</sup>, whereas a Security-based or Humanitarian-based, putting in contrast and evaluated by its legal framework, the actors involved and the policies put in practice. As a Security-based approach it will be considered the Border Control measures taken place and as the Humanitarian-based focus, it will discussed obligations arising from Search and Rescue operations, developed in a structure of mirror chapters.

This interdisciplinary and comparative work will try to englobe considerations on the current paths followed and if they have a too 'one sided' focus or have being trying to adapt a balanced approach, discussing cases where only either Humanitarian or Security ideas were adopted and how it can be prejudicial to resolve the situation. By the end, it will be put in question what are the actual problems that were found in the many different levels and frameworks considered by this research and, weigh the insertion of human rights principles in policy making, in the operational context and in the normative basis to understand if the monitoring migration in the Central Mediterranean have being considered a matter of Border Control or Rescuing Lives. In conclusion, a few recommendations will be formulated in regard to the gaps found by the author, in the hope to contribute to a better understanding of the migration crisis in its complexity and to lead towards a solid and efficient solution to be applied in this geographical area.

Much have being said about migration by the sea in the Mediterranean and how there are so many people still dying. Yet, little is clear. What this study proposes is to give a background on what each

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<sup>5</sup> For the purpose of this work, the term 'irregular migrant' will be used as a larger category, englobing all undocumented people as proposed by John Salt and Jeremy Stein in "Migration as a business: the case of trafficking." *International Migration* (1997), regardless if they are on the move or were found trespassing irregularly the Italian borders or inside Italian Territory, once the concept of maritime borders is still difficult to define, especially in relation to migration . It will also not be considered the status of the migrant, whereas even briefly mentioned in parts of the research, classifying or studying them in separated categories of economic migrant, asylum seeker or refugee will not be relevant.

entity responsible is doing in order to remedy the absurd situation and explain how human rights can be the one of the most important tools for the resolution, personifying the victims of this crisis and passing a message of empathy.

## CHAPTER 1

### **Identifying the issue: The large number of migrants crossing the Mediterranean Sea in route to Italy**

The European Continent have faced in the past centuries a shift in the migratory movements. Instead an origin region, it started to receive an intense flow of arrivals. Despite all the efforts cross-bordering control still imply difficult tasks for all the actors involved. The Schengen Agreement<sup>6</sup> rendered moving from one EU Member State to the other easier not only for citizens but also for foreigners, when border checks were abolished. This means that a third country national will only be controlled when present at an external border, in the imminence to enter the Schengen Area. Because of this, many irregular migrants reach Italian territory first in order to arrive in Germany or Sweden, making Italy, mainly, an arrival country. The Dublin Regulation<sup>7</sup> represents an attempt to minimize the effects caused by the Schengen Agreement in arrival countries, but remain limited to asylum seekers. However, migration by the sea has this peculiarity: their legal status before reaching land is still of an irregular migrant.

The current scenario is that the land routes to Europe have being more controlled and the alternative is to depart from Libya in a precarious boat in direction to Lampedusa<sup>8</sup>. This chapter will try to illustrate the migration journey itself in Central Mediterranean in three ways: exhibit data on the issue to analyze how big can be this issue; understanding the reasons behind this influx and how dangerous

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<sup>6</sup> The Schengen Agreement (signed in 14 June 1985, implemented by the Schengen Convention on 19 June 1990). It started as a multilateral agreement between five States belonging to the European Economic Community, the primitive format of the European Union. The Schengen was incorporated into the European Union in 1995 as the *Schengen Acquis*. Its main function was to install a common visa policy and abolish border checks inside the Schengen Area, formed currently by European Union Member States plus Switzerland, Norway and Iceland.

<sup>7</sup> ‘Dublin Regulation’ or EU Regulation n. 604/2013 as amended (signed in 15 June 1990, implemented in 1 September 1997). The Regulation, in a few words, concerns the establishment of a set of procedural rules in relation to asylum claims processed in the European Union.

<sup>8</sup> International Organization for Migration, ‘Missing Migrants Project’ (2017)



can be the journey until Italy; what States have done before that led the situation in the Mediterranean to what it is today.

### **1.1 A quantitative and geographic overview**

The “Missing Migrants Project”<sup>9</sup> was launched by IOM in 2013 with the purpose of collecting data about migrant’s disappearance worldwide. The information is essentially gathered from NGO’s, Media reports based on survivor’s interviews and Coast Guard’s statistics. In the Mediterranean Sea particularly, the material comes from IOM’s field operations and partner organizations working on the reception of survivors at landing points. These types of initiatives are an important tool to ensure effectiveness of action plans in times of crisis, once it gives the actors an idea of which contours their responses should have. The data quality however, is still a problem when it comes to evaluating the situation in the Mediterranean, since numbers come from many different sources and can be only estimated. Subsist, so, an uncertainty on the actual percentages<sup>10</sup> and it happens because it is still very challenging to convince governments to commit on producing accurate data on irregular migration, which shows that there isn’t enough attention paid on the protection of migrants that decided to board inflatable boats and start their journey in direction to Europe.

The main areas covered by the IOM’s Missing Migrants are related to the number of arrivals, number of fatalities and countries of origin. In 2016, it is shown in the project’s website that under the count of 46,856 arrivals in the south of Italy, around 2,061 deaths were reported. It is very alarming that a journey that is supposed to take 8 hours by boat from Tripoli to Lampedusa in normal conditions, turns out to have a fatality rate of 4,4%, being the highest in the World. By gathering also nationality’s statistics and not only numbers related to the size of immigration flows, IOM’s project appointed the need to understand if these influxes are motivated by certain country’s push factors. Alongside with Missing Migrants, it was also published by IOM a full report on the matter, called “*Fatal Journeys: tracking Lives lost during Migration*”, where different regions in the World that were dealing with intense migration in 2014 were analyzed. Their main focus was to give more than graphics on migrant’s death by painting a historical and geographical background, the risks caused by illegal crossing and further problems with documenting people’s disappearances when they are on the move.

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<sup>9</sup> International Organization for Migration, ‘Missing Migrants Project’ (2017) <<http://missingmigrants.iom.int>>. accessed 29 May 2017.

<sup>10</sup> International Organization for Migration, ‘Fatal Journeys: Tracking Loves Lost During Migration’ (2014).

As in relation to the Mediterranean region, it is indicated that the area holds 75% of all migrant's deaths occurred in 2014. The situation in the whole area didn't improve substantially from this date until today, but in the maritime route that leads to Italy specifically, it could be said that it has rather deteriorated.

In comparison to the numbers presented by IOM, the operational portal of UNHCR can also be placed as a second source of information<sup>11</sup>. Even though UNHCR's main focus is on refugees, the website provides weekly updates on migrants crossing the sea in the Central Mediterranean area. Out of a total of 72,368 arrivals, 63,810 people disembarked only in Italy in 2017<sup>12</sup>. In addition, it is also provided some content referring to cases of migrant's disappearances, which by June were already more than a thousand. The interesting feature of UNHCR's work is the examination of migration's numbers divided into nationalities and sex. According to their data, on top of the list of countries of origin is Nigeria with 11.7%, followed by Bangladesh 10.3%, Guinea 9.3%, Côte d'Ivoire 8.7%, Syria 7.7% and Gambia 6.3% and among these numbers children are 15.1%, women 9.6% and men are 75.3%.

The problem of UNHCR's collection is that it doesn't mention which nationalities are more likely to take the Central Mediterranean route. However, the IOM's Missing Migrants Project may be filling this gap. In line with their findings from January to April in the years of 2015 and 2016, the three main migrant's countries of origin coming to Italy are Eritreans, Nigerians and Somalians. It is important to remember that both agencies already mentioned belong to the United Nations and are not under the administration of any government. As it was specified before, it is very uncommon that a State would provide a complete database on irregular migration and less probable it would be open to public consultation. Although, limited statistics produced by Italian and European Union institutions were found, concerning mainly rescued people or intervention operations. Figuring as one of these sources is the Frontex's annual risk analysis. The 2017 risk analysis<sup>13</sup> manages to show quite similar percentages to the ones presented by IOM and UNHCR when the whole Mediterranean Sea is out in question. It happens because even if migration in total numbers have gone lower in Europe after the EU-Turkey, such numbers did not decrease in what concerns Italy. For instance, the analysis

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<sup>11</sup> UNHCR, 'Operational Portal on Refugees Situation: Mediterranean Situation'.  
<<http://data2.unhcr.org/en/situations/mediterranean>> accessed 6 April 2017.

<sup>12</sup> The total in this case is taking into consideration whole Mediterranean from January 1st to June 9th, 2017. The main migration routes by the sea are divided in: Eastern Mediterranean Route that leads to Spain, Central Mediterranean Route, that leads to Italy, and Western Mediterranean Route, that leads to Greece.

<sup>13</sup> According to Frontex, 'Risk Analysis for 2017' (2017).

makes reference to the reduction of Syrians in -85%, Afghani -80%, Iraqi -69%, which in reality, had largely used the route through Greece whereas main nationalities arriving in Italy have increased, such as Nigeria with 67%, Guinea 236%, Côte d'Ivoire 206%, Gambia 48% and Senegal 73%. The only nationality reported as having a decreasing number are Eritreans.

Given the above data presented, a couple of observations can be made out of it. Firstly, it is to be noticed that deaths in the Mediterranean are not isolated cases and numbers have remained alarming regarding the Central Mediterranean Route, which means that the crisis has not being addressed properly by the involved actors. Secondly, the same countries of origin have occupied the top spots on the ranking through the years, leading to conclude that push factors are also not diminishing in the Sub-Saharan region. Bearing this in mind, it is true to affirm that the journey to Italy by the sea despite its risks, remain as a considerable channel to arrive in Europe.

## **1.2 How migrating to Europe through the Mediterranean is an option?**

Migration can be defined as a “permanent or semipermanent change of residence”<sup>14</sup>. The word itself has no relation to the distance or the reasons why this change it occurs but contains four elements in its act: an origin, a destination, the intervening obstacles and personal factors, according to Lee. He sets that existing push and pull factors are the simple cause why people migrate, and combined to the obstacles and personal factors, migration can be understandable from different points of view. For instance, when taking into analysis the discourse made from right wing political parties, a lot about the pull factors are emphasized, whereas for example, Eritreans come to Italy because they know they will find a better living standard and economic opportunities, better medical care, security. In opposition to this idea, many people believe that migrants come to steal jobs. What has been forgotten is to evaluate the extremely high push factors in the countries of origin of migrants arriving in Europe. Someone who decided to cross the Mediterranean by boat is a person that is willing to leave his home, that ignores the abnormal intervening obstacles to be faced on the way and put his life in danger all the way up to another continent in an inflatable boat. Their count does not start from a simple push factor, but a completely inadequacy on the way of living in their countries.

To give a better picture of the situation, the focus will be drawn in on one of the countries that has a high number of arrivals by sea in Italy, like Eritrea. Among the poorest countries in Africa, it has one of 10 worst GDP's in the world according to the International Monetary Fund Index. As reported by

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<sup>14</sup> Everett S Lee, *A Theory of Migration* (1966), p. 49.

the Human Rights Watch<sup>15</sup>, the country has also one of the most repressive governments and worst Human rights situations in the globe. The Eritreans have been ruled for the past 25 years by a non-elected government leaded by the president Isaias Afwerki, which have been accused by the United Nations Commission of Inquiry of crimes against humanity and completely disrespect for the rule of law<sup>16</sup>. The biggest tensions in Eritrea are related to freedom of press, ranking the last position in the world<sup>17</sup>, freedom of religion, indefinite mandatory military service and forced labor. People flee from the country in large numbers according to UNHCR, stating that approximately 12% of the population of Eritrea are refugees or asylum seekers in another country<sup>18</sup>. The most popular destinations are Sudan, Israel, Egypt, and Europe as whole.

Italy for some of the migrants attempting to cross the Mediterranean is not only an arrival country but also a destination country. For Eritreans and Somalians for example, Italy presents itself as an opportunity to establish and make residence, due to do the historical connection between the countries. The area where Eritrea is right now was a former Italian Colony until 1947<sup>19</sup>, which may be one of the factors that attracts this specific group of people to establish in Italy. As highlighted at an article in Al Jazeera, 90% of Eritreans that applied for refugee status were granted in the first half of 2015<sup>20</sup>. The journey, however, is not simple. Many migrants and refugees coming from Eritrea still need to cross Sudan and Libya in order to embark in a boat to Europe. Sudan has a large history of repatriating Eritreans refugees and asylum seekers back to Eritrea, where they suffer retaliation, torture and imprisonment. Also, when passing through Sudan they risk being kidnapped by Sudanese traffickers and sold to “...to Egyptian traffickers in Sinai who have subjected at least hundreds to horrific violence in order to extort large sums of money from the victims’ relatives”, says the Human Rights Watch. One interview with a survivor published in their website<sup>21</sup> shows the reality of torture the migrants face in the Sinai:

*“(...)They beat me with a metal rod. They dripped molten plastic onto my back. They beat the soles of my feet and then they forced me to stand for long periods of time, sometimes for days. Sometimes they threatened to kill me and put a gun to my head.*

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<sup>15</sup> Human Rights Watch, ‘World Report 2017: Events of 2016’ (2017).

<sup>16</sup> Human Rights Council, ‘Detailed Findings of the Commission of Inquiry on Human Rights on Eritrea’ (2016) 32nd Session, A/HRC/32/CRP.1.

<sup>17</sup> According to Reporters without Borders, ‘2017 World Press Freedom Index’ (2017).

<sup>18</sup> Ibid. 12.

<sup>19</sup> Even if they got independent in 1936, the official year is 1947.

<sup>20</sup> Interview given by Prof. Fulvio Vassallo Paleologo to Al Jazeera on the asylum applications Italy. Kavitha Surana, ‘Italy Quietly Rejects Asylum Seekers by Country’ (2015). Situation also confirmed previously by UNHCR: Adrian Edwards and Leo Dobbs, ‘Global Trends Report: 800,000 New Refugees in 2011, Highest This Century’ (2011).

<sup>21</sup> Human Rights Watch, “‘I Want to Lie Down and Die’”: Trafficking and Torture of Eritreans in Sudan and Egypt’ (2014).

*They hung me from the ceiling so my legs couldn't reach the floor and they gave me electric shocks. One person died after they hung him from the ceiling for 24 hours. We watched him die. Whenever I called my relatives to ask them to pay, they burnt me with a hot iron rod so I would scream on the phone. We could not protect the women in our room: they just took them out, raped them, and brought them back. They hardly let us sleep and I thought I was going to die but in the end a group of us managed to escape."*

Besides the danger of being sold as slaves, many others have also reported sexual abuse, famine, dehydration, imprisonment, threats to their families. The Frontex risk analysis of 2017 shows that many of the migrants caught trying to arrive Europe were aware of the dangers of their journey, however, it should be even more spread in their countries of origins to raise awareness about the issue. According to an article published by IOM Italia<sup>22</sup>, the situation in Libya gets more and more out of hands and the slave market grows each day. The daily life of a person captured by slave traders is marked by threats, torture and malnutrition. One of the tactics of IOM in this sense is to spot people in Libya who have suffered from the confinement, help them with medicine and treatments and offer a voluntary repatriation to their countries, which they not only will have a resettlement sponsored by the Organization but also will be the voice of what the journey entails, reporting what they suffered in the attempt of dissuading other people.

Even with all the intervening obstacles, many people still come in large numbers to Europe. The terrible human rights conditions in many of their countries of origins and the dangerous journey shows the extreme situation they are found in. Eritreans, for instance are a good example of a nation where they are usually granted refugee status. According to Professor Fulvio Vassallo Paleologo, there is a selective way on granting refugee status, where Eritreans are easily given and some other countries like Nigeria, may be submitted to expulsion when arriving in Europe<sup>23</sup>. It is important to note that the route out of Nigeria can be as dangerous as for Eritreans and remain there is not an option for some people. Even though Nigerians are not easily granted refugee status, they still come, they still risk their lives up to Libya, and once again, up to Italy. This are the utmost conditions people puts themselves in on the reach for a sort of salvation.

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<sup>22</sup> International Organization for Migration, 'Migranti Venduti Come Schiavi in Libia. Le Drammatiche Storie Raccolte dall'OIM' (2017).

<sup>23</sup> Kavitha Surana, 'Italy Quietly Rejects Asylum Seekers by Country' (2015) Al Jazeera.

### **1.3 Relevant Past Operations and Policies adopted through the last decade to monitor the Mediterranean Sea**

The migration flows from Africa to Italy are not a recent event, even though they have clearly intensified in the past decade. In addition, the importance of Human Rights has also grown in the policy making and political discourse, which have been leading to a more empathetic way to deal with migration in the Mediterranean. It is a way to go, even if there is still a lot to do on ensuring the application of human rights principles on the matter.

According to the IOM Report<sup>24</sup>, the influx of migrants to Italy was not so large before the 90's and this change is related to the legal channels to enter in Europe before and after creation of European Union in 1993. It is a matter of fact that at that time were established a number of new obligations in order to have a better control of border inside the EU. It led, for example, to the creation of a European Citizenship, where any person that belongs to one of the Member States would have the right to reside and to move inside the EU. The European States slowly abolish the *jus soli* criteria or implemented it with a series of restrictive conditions to it, trying to harmonize the law on citizenship of European States. Because there were already larger flows of movement inside the EU already and the criteria for accepting third country migrants depended on conceding a visa or residence permit to one of the State members, the more legal conditions were imposed for these migrants to enter or to remain in the Schengen area. In this sense, the European Union, even though installing a human rights talk, was a starting point for a more restrictive immigration policy within European States-Members.

Having a more restrictive policy consequently increases the attempts of illegal crossings, which leads to an expanded border control in order to stop this phenomenon. In this regard, the IOM report give some examples:

“This has taken various forms, such as Italy’s naval blockade in the Adriatic in the late 1990’s; Spain’s high-tech surveillance system called System de Vigilancia Exterior (SIVE) and its cooperation with West African countries in the late 2000s; Italy’s controversial pushback of migrants to Libya in 2009; the razor-wire fences in Ceuta and Melilla; and the defining of the Evros region, followed by the construction of a high-tech fence in 2013.”

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<sup>24</sup> International Organization for Migration, ‘Fatal Journeys: Tracking Loves Lost During Migration’ (2014).

Many individual measures were taken by states in their national levels to secure frontiers and, between wrongs and rights, culminated with the creation of Frontex in 2013. Even though a new agency at a European level was established to perform border control, the prerogative of acting in this field still remains with the countries and national legislation. Even if the Frontex was legally able to take full action on the matter, it would not be sufficient in arrival points. As more patrolled are some routes, other optional ones start to pop. One of the facts that made the Central Mediterranean Route was the patrolling of the maritime route between Albania and Italy, combined of course, with the lack of state control in Libya. So far, the Central Mediterranean Route has been outing numbers years after year since the creation of European Union.

To arrive at the situation that is today, years of different actions and tactics were applied and some important ones tackled specifically the boat crossing from Africa to Europe. The most relevant Italian initiative in this regard is the Operation Mare Nostrum. It was an Italian's Government operation that started in 2013 and lasted one year, working under the control of Italian Navy but receiving also small funds<sup>25</sup> from the European Commission and some support of other operations led by Frontex. It was a response to the increased flow of migrants arriving in Lampedusa<sup>26</sup> and was considered an evolution of the operation Constant Vigilance that had operated from 2004 to 2013 by Italy. The Operation Mare Nostrum had very ambitious naval units and advanced technology, prioritizing search and rescue for migrants in boats along the Mediterranean and stop human trafficking. The staff on board was also composed by doctors and officials from the immigration office in order to spot refugees<sup>27</sup>. It is shown in the "Statista"<sup>28</sup> that more than 156,362 migrants were rescued after the beginning of Operation Mare Nostrum in 2014, which can relate to the efficiency of the operation if compared to the Constant Vigilance, that saved from 2005 to 2013 only 33,379 people. The Operation had a overall positive opinion, where around 70% of the experts interviewed by the EUROMED Survey of 2017<sup>29</sup> considered that it had a Good or Very Good performance. Mare Nostrum was, however, not free from criticism. Most of bad opinions were related to failure on saving 3,343 people, inconsistency on

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<sup>25</sup> Whenever Italian Government has invested around \$114 million, European Commission contributed with \$1,8 million, which represents 1,5% of the total funds only. More information available in: [http://europa.eu/rapid/press-release\\_MEMO-14-566\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-566_en.htm)

<sup>26</sup> Ministero della Difesa Marina Militare, 'Operation Mare Nostrum' (2014) <<http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>> accessed 29 April 2017.

<sup>27</sup> Agostina Latino, 'Le Operazioni Navali Nel Mediterraneo Fra Rispetto Della Dignità Umana e Difesa Delle Frontiere' (2015) vol. 1. p 4.

<sup>28</sup> Statista is a website which provide a full data analysis in different matter by comparing different sources available. Statista, 'Number of Rescued Migrants with the Operation Mare Nostrum from 2005-2014 in Italy' (2014) <<https://www.statista.com/statistics/579418/number-of-rescued-migrants-operation-mare-nostrum-italy/>> accessed 6 April 2017.

<sup>29</sup> European Institute of the Mediterranean, Management of Human Movements and Migrations in the Euro-Mediterranean Region (2017). p. 28.

collecting personal data on board, cases of disrespect of the principle of non-refoulement and problems concerning collective expulsion<sup>30</sup>.

#### **1.4 Monitoring the Central Mediterranean Route: A matter of Border Control or Rescuing lives?**

Taking a closer look at the policies implemented in the past decades to monitor the Mediterranean Sea, it is possible to say that many strategies and different approaches were put in practice. The Central Mediterranean Route became one of the most dangerous paths to enter in Europe and different actors have been trying to make the situation better. As for the Italian Government, European Union, NGO's and other institutions acting in the area, there has been distinct ways of dealing with the problem. Very often, they are considered contradictory. Earlier in 2017, the executive director of Frontex, Fabrice Leggeri, declared that almost half of the rescue operations at the Central Mediterranean Route have been performed by NGO's, which makes more difficult to check the nationalities of the migrants and these Organizations were not fully cooperating with to stop smuggling routes, affirming also in a more indirect way they may be even supporting criminal business when they get close to Libya in order to rescue people. His interview opened the debate on how NGO's are too focused in search and rescue of migrants, on minimizing the number of deaths in the Mediterranean Sea and not concerned if they may be helping smugglers and traffickers indirectly, or if the Frontex is an agency that has been only concerned on impeding migration than touching the question of the high number of death of migrants in the Central Mediterranean Route.

According to the EUROMED Survey 2017<sup>31</sup>, when experts were asked about in what extent they consider that the following options should be pursued by the EU and its member states, most of them considered very important to focus less on a reactive and security-based approach. In fact, many authors have been mentioning this issue of a crescent securitization of borders and, as explained before, this may also have relation to the effect of European Union acting as bloc. Latino mentions in her article how the approaches have been changing from operation to operation until now, even though when these operations began, they had the intent to deal with migration using a humanitarian scope:

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<sup>30</sup> Sabine Llewellyn, 'Search and Rescue in Central Mediterranean Sea' (2015). p. 7.

<sup>31</sup> European Institute of the Mediterranean (2017). p. 21.



*“Come si è cercato di evidenziare, i precedenti stadi del processo di europeizzazione delle politiche migratorie – quanto alle operazioni navali nel Mediterraneo - hanno preso le mosse da un’operazione unilaterale, caratterizzata da una connotazione prevalentemente umanitaria - Mare Nostrum -, per evolvere in una missione dedita, soprattutto, al controllo delle frontiere marittime europee - Triton. L’attuale operazione appena varata, EuNavfor Med, sembra rappresentare un irrigidimento degli aspetti difensivi di Triton. Il focus sembra spostarsi inesorabilmente verso la tutela delle frontiere, con margini sempre più esigui per quel che concerne il profilo di tutela dei diritti dei profughi.”<sup>32 33</sup>*

The situation however, has been treated as something that should be either pending for a humanitarian approach or either to security actions, instead of being evaluated under the possibility of a balanced approach, like these fields could only be understood as contrasting ways of dealing with the problem rather than complementary. In the following chapters, it will be discussed how different are Border Control and Rescue Operations are, evaluating if there is a tendency on following either a security or humanitarian based ideas, hoping to give clarification on what are the problems found in the law, in the operational methods and diplomatic strategies.

## CHAPTER 2

### **Security Approach: Maritime Border Control and Surveillance in the Italian Coast and Vicinities**

The definition of border control is linked to all the actions of monitoring the entrance of people, animals and goods inside a country’s territory and are usually performed by special national agencies. The mandate of those agencies may englobe diverse functions in order to monitor the cross of frontiers, such as customs, security, sanitary and immigration checks. To understand where these agencies have jurisdiction, is important to limit their area of work. For the purpose of this research,

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<sup>32</sup> Latino (2015). p. 30.

<sup>33</sup> ‘How it was highlighted before, the previous stages in the process of ‘europeization’ of migratory politics – in relation to the naval operations in the Mediterranean – have used the move of a unilateral operation, characterized by a prevailing humanitarian connotation – *Mare Nostrum* -, to develop into an operation dedicated, mainly, to the control of maritime European borders – *Triton*. The current operation just launched, *EuNavfor Med*, seems to represent a stiffening on defensive aspects of *Triton*. The focus seems to inexorably move towards the protection of frontiers, with its margins always more small in what concerns the profile of protection of refugee’s rights.’ (free translation by the author).

however, it only will be focused on the Territorial Waters concept, rather than list all the territorial areas in the Italian jurisdiction.

The United Nations Convention on the Law of the Sea<sup>34</sup> defines Territorial Waters as the “breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines”. Extending the area considered as a territorial water, there is also what is called Contiguous Zone, which is an area measured from the baselines until 24 nautical miles where a State may “exercise the necessary control to: prevent of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; punish infringement of the above laws and regulations committed within its territory or territorial sea”. The Italian territorial waters and consequently, the contiguous area, have different measures than the normal in certain areas. In a bilateral agreement with Tunisia, in order also to set up a parameter for the areas Lampedusa, Linosa and Pantelleria, it was established the breadth of 13 nautical miles<sup>35</sup>.

Taking into consideration that the limit of jurisdiction for the Italians would be, in theory, until 24 nautical miles approximately, it leaves the question if they should perform border control also until this limit, once the Contiguous Zone belongs to International waters and is subjected to a partial control of the nearest coastal state, and even if they are able to perform any act after the 24 miles of partial jurisdiction. The Case n. 32960/10 brought to the *Corte di Appello di Reggio Calabria* decided in this matter. The *Guardia di Finanza*<sup>36</sup>, one of the Italian authorities acting on monitoring the Mediterranean Sea, identified an intercepted a boat with a Turkish flag distant 23 miles from the Coast. In the case of a boat not showing any flag, the UNCLOS have already previewed the legality of stopping boats in limited circumstances even after the Contiguous zone in article 110, paragraph 1, complemented by the Smuggling Protocol<sup>37</sup> in article 8, paragraph 7. However, in this case, there was three differentials: a competing jurisdiction since the boat had the Turkish flag, and in principle, could not have intercepted the boat at International Waters; the fact that Turkey have never ratified the UNCLOS; the Italian State never established the breadth of its contiguous zone in national law. The court, basing its decision on article 33 and 111 of the UNCLOS combined with art. 12 of the

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<sup>34</sup> United Nations Convention on the Law of the Sea (signed in 10 December 1982, entered into force in 16 November 1994)

<sup>35</sup> Italian Law n. 347 of 3 June 1978, art. 2.

<sup>36</sup> The *Guardia Di Finanza* in literal translation is Financial Guard. They a police force under the Ministry of Economy and Finance and their main jurisdictional power is to handle cases related to financial and other crimes committed for economic purposes, including smuggling and trafficking. It was established by the Italian Law n. 189 in 23 April 1959, reformed in 2001. The Italian name will not be translated into English during this work. More information about their mission and tasks on <<http://www.gdf.gov.it>>.

<sup>37</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.(signed in 12 December 2000, entered into force in 28 January 2004).

Italian Legislative Decree n. 286/98 the made clear the legality of intercepting boats until 24 miles when they are violating the Coastal State Law, since it was proved that also the Turkish boat had the intention of disembarking foreign citizens illegally in Italian territory.

When it comes to the performance of border control in the Sea there are many factors to observe, as demonstrated by the case. It is important to mention that this type of monitoring is always based on the premise of Security of a State<sup>38</sup>. In this sense, it is important to individualized which institutions have being acting on border control and security in the Italian territory, to which law framework these acts relate to and the current policies, operations and strategies adopted since the end of operation *Mare Nostrum*<sup>39</sup>.

## 2.1 The legal Framework

The Border Control and Security measures emanate from diverse institutions and their derivative agencies mandate must be prescribed in a legal document in order to confer legitimacy in their acts and attain responsibility. The legal framework where border control and security in the sea in the Italian coast is inserted is very important and should be analyzed in three different levels: National, referring to the power of the Italian State; Regional, through the European Union legislation; International, based on Conventions and Treaties where Italy is a party.

### 2.1.1 National

The control of the southern maritime border in Italy, performed by the Italian State is regulated by the Decree n. 286 of 1998, called “*Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*” (T.U.) and the Inter-Ministerial Decree number of 14 July 2003, published with the number 220 on 22 September 2003<sup>40</sup>. The T.U. had its focus in the beginning, regarding migration by the sea, in a series of sanctions and return policies and with the modification in 2002, instead of going on the direction of a more humanitarian approach to the topic, reinforced security measures, bilateral agreements and cooperation with third countries to

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<sup>38</sup> This may be understood as a security act since, for instance, since 2002, the institution responsible for managing borders in Italy is on the hands of Department for Public Security, under the Ministry of Interior. Further information on: Polizia di Stato, ‘Direzioni Centrali Del Dipartimento Della Pubblica Sicurezza’ (2017) <<http://www.poliziadistato.it/articolo/view/32950/>> accessed 24 May 2017.

<sup>39</sup> The operation *Mare Nostrum* is considered by Llewellyn a humanitarian-militarized operation, and by its mandate it should be mentioned as a reference on both Security Measures as the Humanitarian Actions performed in the Mediterranean in order to monitor migration to Europe.

<sup>40</sup> Luca Salamone, ‘Polizia Marittima ed Antimmigrazione alla luce della recente normativa’ (2004) p.4.

combat illegal migration<sup>41</sup>. The text has suffered many different changes from 2002 until 2016, some of them coming from the different powers of the Italian Republic, others incorporated directives originated from European Union and even others, were merely consequences of the signature and ratification of International instruments. The T.U. current format exhibits a list of 49 articles, applicable to non-European citizens<sup>42</sup> in regard to their status inside Italian territory, regulating from their entrance, exit and stay, to measures of border and sanitary control to the topics of labor, family, child, refugee, study, social security, social integration and human rights law that may be applicable to them taking into consideration the norms contained in communitarian law and international law.

Besides presenting a very broad and interdisciplinary approach to migration, the modifications of 2002 until 2016 showed a clear shift in the path that migration law in Italy was taking. Among the dozens of modifications in 14 years, around a third of the amendments were related to security, being the most relevant and recent ones in this field about migrant's detention<sup>43</sup> and the combat of terrorism<sup>44</sup>. The modifications of the Single Text also had some influence on the Italian Maritime Law<sup>45</sup>, defining new operational limits to police and military forces, conferring more power to intercept smuggling ships in the Italian maritime territory and even, enlarging the possibilities of an extraterritorial control in the sea, specifically with the insertion of article 12, comma 9-bis<sup>46</sup>.

The Interministerial Decree of 14 July 2003<sup>47</sup> was a joint effort from the Ministry of Interior, Ministry of Defense, Ministry of Economy and Finance and the Ministry of Infrastructure and Transport, elaborated exactly to fulfill some gaps that the T.U. have left in regard irregular migration control and surveillance in the sea and how it should be operated<sup>48</sup>. It is a list of 10 articles that regulates and set prerogatives to the action of police and military forces in the coastal area of the country. The article 2 of the Decree for instance, mentions three main areas of operation, starting at the diplomatic field and the importance on acting *alla fonte* with third countries to prevent migration, passing to the

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<sup>41</sup> Alessia di Pascale, 'Migration Control at Sea: The Italian Case', *Extraterritorial Immigration Control* (2010). p. 284.

<sup>42</sup> Excepted in certain occasions, expressly preview by the legislation, as mentioned in articles 1 and 2 of the T.U. "1. Il presente testo unico, in attuazione dell'articolo 10, secondo comma, della Costituzione, si applica, salvo che sia diversamente disposto, ai cittadini di Stati non appartenenti all'Unione europea e agli apolidi, di seguito indicati come stranieri. 2. Il presente testo unico non si applica ai cittadini degli Stati membri dell'Unione europea, salvo quanto previsto dalle norme di attuazione dell'ordinamento comunitario."

<sup>43</sup> Italian Law n.10 from 21 February 2014.

<sup>44</sup> Italian Law n. 43 from 17 April 2015.

<sup>45</sup> Di Pascale (2010). p. 285.

<sup>46</sup> Article 12, comma 9-bis was added to the T.U. with official publication in the *Gazzetta Ufficiale* on 18 August of 1998 under the number 191 and says: "La nave italiana in servizio di polizia, chi incontri nel mare territoriale o nella zona contigua, una nave, di cui si ha fondato motivo di ritenere che sia adibita o coinvolta nel trasporto illecito di migranti, puo' fermarla, sottoporla ad ispezione e, se vengono rinvenuti elementi che confermino il coinvolgimento della nave in un traffico di migranti, sequestrarla conducendo la stessa in un porto dello Stato."

<sup>47</sup> Interministerial Decree from 14 July 2003, published in the *Gazzetta Ufficiale* on 22 September 2003 under the number 220 with the name *Disposizioni in materia di contrasto all'immigrazione clandestina*.

<sup>48</sup> Salamone (2004) p. 5.

necessity of monitoring international waters to finish enumerating the characteristics of territorial waters interventions. Along the other articles, it is specified the competences of each actor involved on performing monitoring in a specific coastal zone, behavior norms and ethics, the access to information and the formation of capable personnel.

### **2.1.2 European Union**

Entering in the matters of communitarian law on safeguarding borders, there are some difficulties on setting up a legal framework. The Frontex, which works as the European agency responsible for border control and coast guard was established by the Council of European Union Regulation 2007/2004<sup>49</sup>. As an operational agency formed by the EU member states, there is no specific binding document that they respond to, but it can serve as a legal basis for their actions, articles from the TEU and the Schengen Border Code<sup>50</sup>. The Schengen Agreement was signed in 1985 and in its origin, was not an instrument apart from to EEC or to the European Union to abolish internal borders the so called among the contracting parties<sup>51</sup>. It was only in 1999 with the Amsterdam Treaty that the Schengen rules were integrated to the legal framework of the European Union. With the enlargement of the borders, two outcomes could have been expected: a greater integration between member states on discussing border control and immigration issues; and second, a larger pressure on borders, since it was now, englobing an area of 4,312,099 square km.

Before Frontex, in 2002, the Commission Communication called Towards integrated management of the external border of the Member States of European Union set a plan to launch a European Corp of Border Guards, and due its institutional and legal nature, amendments in the Amsterdam Treaty would need to be done<sup>52</sup>. However, the creation of such agency would imply that national states would lose some of its sovereign power towards a unified EU activity, for example, it would give authority to guards who did not belong to the country they worked on, which of course did not please many of the State-parties. In the absence of a common understanding, a Community operational system rather than a legislative started to be developed, leading to the establishment of Frontex years later. The agency was born as a quick answer to the need of cooperation between EU member states on the issue of border surveillance and besides the fact that it represents a supranational structure that “respects” the sovereign power of states, the lack of binding document also makes accountability an actual

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<sup>49</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004.

<sup>50</sup> Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’, *Extraterritorial Immigration Control* (2010). p. 229

<sup>51</sup> Schengen Agreement (1985) article 2, 1. “Internal borders may be crossed at any point without any checks on persons being carried out.”

<sup>52</sup> Baldaccini (2010). p. 230.

serious problem. The problems to held Frontex accountable for its wrong doings, nevertheless, will be discussed further in this work such as their scope.

Despite the fact that the main Agency responsible for European border controlling is not bind by a specific document, it is important to remember that in 2007, the Regulation 2007/2004 was amended and under is change, it was added that officers engaged in the Frontex's activities, being member state's nationals, were obliged to respect communitarian law and the host state law, but being bind by their national law. In this regard, the European Court of Justice exercise jurisdictional power to ensure that Community law is respected.

Since the main codification in regard to border control is the Schengen Border Code, it is essential to underline some aspects of it. The codification is mainly divided in two parts, separating external borders from internal borders. In relation to the migration flow into Europe through the Central Mediterranean Route, only the external borders fragment should be taking into consideration. According to article 2 (2), external borders means "the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders". However, this definition has been used sometimes as a way of validating actions outside of the geographical scope of border control<sup>53</sup>. In fact, the concept can be applicable to justify pre-border control measures, looking up to the article 9, whereas border control is defined as "the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance". This article introduces the idea of the "intention to cross", which in some cases may be used to justify border control and border surveillance in vicinity areas. As Den Heijer correctly highlights:

"Putting emphasis on a functional rather than a geographical definition of border controls to delimit the scope of the Code brings a number of advantages. It does away with a territorial bias which is incongruent with current practices of border controls; it provides a workable alternative for not overstretching the scope of Code; and it succeeds in the creation of a common corpus applicable to all border controls - thus preventing the emergence of a lacuna in Community Law. It replaces the question 'where do border guards operate?' with the question whether activities can be labeled as border control activities defined in the Borders Code. Since border controls are

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<sup>53</sup> Maarten den Heijer, 'Europe beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', *Extraterritorial Immigration Control* (2010). p. 178.

defined as exclusively relating to actual or intended crossings of the external border, policies relating to persons who are not yet on the move- such as procedures on the issue of visa - could be construed as not falling under the scope of the Code.”<sup>54</sup>

As the same can occur to consider the opposite: people already on the move but not yet inside of Schengen borders may be controlled, based on the Code. The codification in this sense is also very precise on defining actions. Article 2 and its 19 paragraphs are dedicated exclusively on defining terms such as border control, border surveillance, border check and border guards that will be frequently used along the Code. It shows also that the main focus is to establish a very clear structure border surveillance within the EU. In article 12 it is explained that border surveillance procedures have the intention of “prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally”. The interesting part of this article however, is the second line of second paragraph, which states that “surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.” This has a clear relation to the shift of illegal migration routes, which have now took forced to a more dangerous path as surveillance have increased in certain areas, not only on the spare of the human cost<sup>55</sup>. For example, after the Italian blockade in the Adriatic in 1999 to impede sea migration from Albania, people have been trying to reach it through Libya, which puts people in a more life risky journey than they were before. As well mentioned by Baldaccini, “nowhere in the evaluation exercises carried out so far is there appreciation about the higher risks to migrant’s lives involved in disrupting and displacing migration routes”<sup>56</sup>. The question in this case would be if a higher control on border is the correct answer for illegal migration.

### **2.1.3 International**

When making a parallel between surveillance of borders and international law, is important to mention law of the sea. The main legal framework in that conceptualizes this field is the United Nations Convention on the Law of the Sea, concluded in 1982 and becoming effective in 1994 after the 60th ratification from Guyana. Even if he initial level of ratification was low, nowadays, 167 countries have already joined its terms, including all member states of the European Union. It is important to mention that Libya have signed the UNCLOS, though, have not yet ratified it. By not

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<sup>54</sup> *ibid.*

<sup>55</sup> Spijkerboer (2007). p. 127

<sup>56</sup> Baldaccini (2010) p. 242.

ratifying it, Libya is not bound by it and so, cannot be addressed under the rules of the Convention, which implicates in a great difficulty to Italy on taking actions against boats coming from Libya.

The UNCLOS was written in a time that irregular migration by sea was not yet a major concern and it doesn't devote efforts on the topic itself. Its main focus has origins in a time where the most important thing was to define authority of a coastal state, listing its rights and duties over a delimited maritime area<sup>57</sup>. The Convention itself is built in a way that renders very difficult to amend, as it can be inferred from articles 313 and 314. Due to this difficulty and growth of need on establishing norms that could address irregular migration by sea, agreements and other conventions, such as the Smuggling Protocol, the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue were adopted and will be discussed in the next chapter.

In relation to surveillance concepts exhibited in the Convention, it is mentioned the sovereign right of the coastal state to prevent the infringement of customs, fiscal, immigration or sanitary laws of its own national law, contained in article 21, h. There is at the repeatedly confirmation that the coastal state has authority to regulate the passage over boats carrying illegal immigrants in its maritime territory<sup>58</sup>. The criminal jurisdiction, however, should be exercised under the scope of article 27, 1, a, where the consequences of the criminal activity must extend to the Coastal State in question, which very often happens in case of smugglers or traffickers. Regarding territorial waters, the UNCLOS is quite clear on conceding regulating powers over the activities of foreign vessels within the coastal state's limits. Another article in the Convention which is important to look at is art. 19. In its first part, it addresses the right to innocent passage, which means that a ship, has the right to pass on territorial waters as long it is not promoting or engaging in any activity that is prejudicial to the peace, order or security of the coastal state and it is in conformity with the Convention and rules of international Law. The right to innocent passage, however, render an important debate, whether it boats carrying illegal migrants cannot argue their right to enter in the maritime territory based on right to innocent passage, boats carrying refugees are in a different situation. The biggest problem with granting or not the innocent passage in these cases is based on the status of the people in the boat, which is very difficult to determine instantly.

Relating a bit more specifically to the entrance of aliens in a State's territory and security is the second part of article 19, whereas the "Passage of a foreign ship shall be considered to be prejudicial

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<sup>57</sup> Richard Barnes, 'The International Law of the Sea and Migration Control', *Extraterritorial Immigration Control* (2010). p. 106.

<sup>58</sup> *ibid.* p. 120.



to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State”. This article however, in the author’s opinion, fails to address the entrance of migrant’s boat in maritime territory, whereas it only mentions the embark and disembark, actions that engage a set of other obligations, including ones that are not specifically connected to the simple entrance into territorial waters, such as to process asylum applications.

Still in the question of innocent passage, article 25 provide steps that could be followed by a Coastal State when it considers that the ship entering in their territorial waters is violating article 19. The first part of the article mentions that the State in question should be able to adopt measures to prevent a non-innocent passage in its territorial water and further temporarily suspension, but not specifically regulates which measures are these, leaving it to a subjective interpretation on what is necessary to prevent non-innocent passage or not. There are gaps in the UNCLOS to relate irregular entrance of migrants into territorial waters, leaving conflicting norms with humanitarian provisions, for example, when a vessel is not on innocent passage, the State in question has the right to remove or to prevent it from its territorial sea. This, for instance, does not consider the consequences for migrant’s lives safeguard in overcrowded boats.

At an International Level, apart from the UNCLOS which is focused in the law of the sea, there is also more specific regulations on the issue of irregular migration developed by United Nations. Among the three protocols that supplement the Convention Against Transnational Organized Crime (also known as the Palermo Protocols) there is the Protocol against the Smuggling of Migrants by Land, Sea and Air. At this point, talking about this protocol is more relevant than the one about human trafficking because the very nature of them: while the protocol addressing trafficking focus on the protection of human rights, the smuggling protocol promoted the criminalization of smuggling and prosecution of smugglers<sup>59</sup>.

The Protocol emerged from a constant debate that started in the end of the 90’s, subsequent to the presentation of a draft by the Italian government focused on preventing irregular migration by the sea at a session of the International Maritime Organization. The idea took form in broader way and a Protocol was posed to signature in 2000, coming into force in 2004 after 40 ratifications. The proposal

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<sup>59</sup> Tom Obokata, ‘The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air’, *Extraterritorial Immigration Control* (2010). p. 153.

was not related to a solo State concern, once other countries like Austria and Argentina were looking ways to address smuggling of people<sup>60</sup>. Considering that the UNCLOS was not a sufficient framework to relate to the issue, the Smuggling Protocol stated diverse obligations and steps to be followed by State parties in order to increase prevention methods and fundament the act of smuggling as an international and criminal offense. It is worth mentioning, at last, that both Italy and Libya have signed and ratified it.

In regard to the protocol provisions, there are some articles that can represent both its preventive nature as its punishment intent. Some preventive measures can be found in article 10 , which proposes that States should exchange information, especially those who are close to each other on, for example, embarkation and disembarkation points, routes, transportation methods, identity of suspects or organized criminal groups, the format of travel documents of its nationals and how to identify a falsification, legislative experiences and further actions they may use to prevent irregular migration, and other scientific and technological knowledge that could be put in practice in a State. An extended recognition to peculiarity of migration by the sea and the importance of the cooperation between States in order to prevent it is present on article 7. The Protocol a way to add prevention methods in many of the security acts proposed. For example, in relation to border security, article 11 in its first part states that border control may be strengthened to prevent and detect smuggling of migrants, such as paragraph 2 specifies that legislative measures must be adopted in order to inhibit as much as possible, commercial carries from participating on smuggling actions. This last provision can be also tricky, once it suggests that commercial boats having on board migrants without or with illegal documentation may be penalized<sup>61</sup>. A case will be further discussed in this chapter involving this provision and the criminalization of rescuing of undocumented migrants by commercial vessels and its problematics.

One interesting aspect of the Protocol is that it is consistent on providing guidance on how to proceed when irregular migrants are found in High Seas and relates itself directly to the United Nations Convention on the Law of the Sea. The second chapter tries to address to acts of smuggling that take place in high sea because it is already stated in national laws what happens when it is in the territorial sea<sup>62</sup>. For example, Article 7, which was already mentioned, refers to the UNCLOS when mentioning international law of the sea and tries to reaffirm the existing provisions present on it, being followed

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<sup>60</sup> *ibid.* p. 153.

<sup>61</sup> *ibid.* p. 155.

<sup>62</sup> *ibid.* p. 157.

by article 8 which gives further guidance on how States should proceed and steps that must be taken if their encounter with a smuggling boat was in the High Seas.

## 2.2 The Main actors and their competences

To understand better how Border control in the Italian coast works, it is fundamental to specify not legal framework gives base to these security actions but who is in charge of it. Following the past polemics between Frontex and NGO's, it seems that there is not only a problem with the number of different agencies, but overlapping and even contrast in their competences. The information is spread in confusing ways, and even for any citizen interested in the topic and wanting to know more, it is not easily explained in any information source who is responsible for what when it comes to the border control in the Central Mediterranean. Surveillance in this context is performed by different actors originated from different levels, sometimes with the same task, some others with a broader jurisdiction. In this chapter, however, it only will be focusing in the ones who operated with a focus in security, even though some of them may be performing in exceptional circumstances, search and rescue operations as well. In order to clarify these actors, it will be divided in the same categories at it was to explain the legal framework: agencies related to the Italian State, to the European Union and to the International Community as a whole.

### 2.2.1 National

Starting from the perspective of the Italian State, having their prerogatives based mainly in the Single Text (T.U) and the Interministerial Decree of 2003, performing surveillance operations are the *Marina Militare* and the *Guardia di Finanza*. They have different competences, defined by the area of action: whereas the *Marina Militare* operates in International waters, the *Guardia di Finanza* is responsible for coordinating the actions of police in territorial waters, including the contiguous zone<sup>63</sup>. The *Capitanerie di Porto* (or Coast Guards) is also listed in article 1 as one of the forces that are responsible on combating and preventing irregular migration in the sea, however, their actions are mainly search and rescue focused and for this reason, will be detailed in next chapter.

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<sup>63</sup> In this sense, according to the interpretation of art. 12, paragraph 7 of the T.U., the coordination of the operations in territorial water and the contiguous zone are controlled by the *Guardia di Finanza*, however, it may also be performed by different police forces, observed some requisites to be fulfilled, as underlined by Salamone, p. 4: “*secondo cui le direttive sono adottate dal Ministro dell'interno, i prefetti delle province di confine terrestre ed i prefetti dei capoluoghi delle regioni interessate alla frontiera marittima promuovono le misure occorrenti per il coordinamento dei controlli di frontiera e della vigilanza marittima e terrestre, d'intesa con i prefetti delle altre province interessate, sentiti i questori e i dirigenti delle zone di polizia di frontiera, nonché le autorità marittime e militari ed i responsabili degli organi di polizia, di livello non inferiore a quello provinciale, eventualmente interessati, e sovrintendendo all'attuazione delle direttive emanate in materia*”

Even though there is a differentiation between the *Marina Militare* and *Guardia di Finanza*, they may be able to perform in a broader jurisdiction in certain situations. The *Marina Militare* is able to take part in operations at territorial waters whenever there is a need for assuring effectiveness of the procedure, they have to act before the *Guardia di Finanza*, which will finalize the intervention, according to article 6. On the other hand, the *Guardia di Finanza* does not have jurisdiction to intercept any boats further than the 24 miles that limits the contiguous zone, but they can monitor and communicate the *Marina Militare* whenever spotting any situation outside of their action zone, according to article 5. Remembering the case mentioned in the beginning of the chapter, it is now clear why the debate about the location of the boats, if the *Guardia di Finanza* was or not in the contiguous zone when intercepted the Turkish boat was important.

### **2.2.2 European Union**

The European Union Agency on the matter of border and coast guard is the Frontex. It was established by the Council Regulation (EC) 2007/2004, amended in 2007 and again by the recently adopted EU Regulation 2016/399. The Frontex mission, according to their website “is to promote, coordinate and develop European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management” through a set of tasks which include, for example, border management, migration control, fighting organized crime, assist in search and rescue operations, develop risk analysis and border surveillance and promote surveillance policies in coordination with member states<sup>64</sup>. It works as a way of promoting “integrated border management”, since border control in its legal faculties, remain a national prerogative. In this sense, to integrate the Agency, member states are obliged to provide in balanced way, resources and staff. Frontex has a role of technical coordination between Schengen countries on ensuring a fair and integrated border surveillance. It means that, for example, the responsibility of controlling the Mediterranean Sea should not rely, in theory, only in Coastal States when people are using its territory only as an entrance in Europe to after, migrate to countries like Germany or Sweden. The non-checking principle inside Schengen borders are compensate when other countries deploys experts, officials, technology and funding to work in Mediterranean countries, it is a way of “sharing the burden” for the pressure countries like Italy and Greece suffer, to not be alone on trying to contain a problem that involves the Europe as whole and not only arrival countries.

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<sup>64</sup> The tasks of Frontex according to their website include in its totality include many others not listed in this paragraph. For more information in this regard: <http://frontex.europa.eu/about-frontex/mission-and-tasks/>.

Taking into account the difficulty of understanding the work of Frontex without a legal basis, taking a look through its organizational structure can give some clarification. The Agency is divided in three main areas: Operations division, Capacity Building and Corporate Governance<sup>65</sup>. The operations division would be the one in charge of Fronted Situation Centre, the launch of risk analysis, the promotion of joint operations and return support; the Capacity building division focus more on research and development, pooled resources, training of officials and cooperation within the EU and with third countries; finally, the corporate governance section is destined to take over financial and corporate services, legal affairs, human resources and security, and information and communication technology. Responsible for these areas is the Management Board and the Consultative Forum, which also has an independent office working for Fundamental Rights.

So far, the Frontex have being intensely involved in operations carried out in the Mediterranean Sea and addressing illegal cross bordering into Italy. In the 2017 risk analysis produced by them, around 551,1371 people were identified illegally passing between BCP's (border crossing passing). The current Frontex Operation on this specific area is the Operation Triton. It was launched in 2014 and substitute the previous Italian initiative Operation Mare Nostrum. The Triton operation has been strongly criticized because it was seeing was a way of lowering the importance of the topic, since Triton in comparison to Mare Nostrum has a much smaller contingent of staff, technology and funds. In its release memorandum, it is justified as a EU support mission to help the Italian efforts on border surveillance<sup>66</sup>, however it was not seen like that. The operation Triton will be discussed in a broader way in next topic.

Another operation that is also subordinated by the EU and it's worth mentioning is the EUNAVFOR Med Sophia, launched in 2015 and is supposed to terminate in July 2017. The operation belongs to the European External Action Services, which deals directly with EU policies in relation to third countries, especially in the topic of foreign affairs and security policy. Their mandate in this operation is to "undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used of suspected of being used by migrant smugglers or traffickers". Their main focus is to work on the issue of use the Central Mediterranean Route for criminal actions connected to illegal crossing of people into Italy. From last year, their mandate was also enlarged, including not only the monitoring of the Mediterranean but also training of Libyan Coastguards and Navy and support the UN embargo

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<sup>65</sup> Frontex, 'Frontex Institutional Organization Schemat' (2017) <[http://frontex.europa.eu/assets/Frontex\\_Schemat.png](http://frontex.europa.eu/assets/Frontex_Schemat.png)> accessed 6 June 2017.

<sup>66</sup> European Commission, 'Frontex Joint Operation Triton - Concerted Efforts to Manage Migration in the Central Mediterranean' (2014) <[http://europa.eu/rapid/press-release\\_MEMO-14-566\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-566_en.htm)>. accessed 6 June 2017.

on arms in Libya. The command of the operation is from an Italian Navy Rear Amiral and French Navy Rear Amiral. It has contribution from 25 States<sup>67</sup> and units deployed by the Italian, Spanish, French, Dutch, German, British and Belgian States.

### 2.2.3 International

Taking as a referent point, the United Nations Convention on the Law of the Sea, besides establishing an International Tribunal to solve disputes in regard to the norms applied in the convention, does not have independent operational actors with police power. The border control and surveillance over maritime borders, aside from being mentioned at a limited extension in the UNCLOS still needs to rely in the State Parties to the convention for developing field actions. In this sense, it was already analyzed how the Italian State and the European Union acting as a block under the Schengen agreement have been acting, but there is still another one who also has been giving support to managing the migration crisis under a security approach: the NATO.

The North Atlantic Treaty Organization is an inter-governmental military institution founded in 1949 which Italy is part of. The organization have coordinated a number of different interventions and crisis management so far, including an operation in Libya from March to October in 2011 against the massive violations occurring during Colonel Mummer Qadhafi's regime. In 2016, during the Warsaw Summit the operation Sea Guardian was created to execute a sequence of maritime security actions in the Mediterranean Sea. Their mandate relies on main seven tasks: raising awareness about the situation in the area, assuring the freedom of navigation, performing maritime interdiction, impeding the proliferation of weapons, protecting structures in difficult conditions, enforcing counter-terrorism and developing maritime capacity-building<sup>68</sup>. There is a very limited amount of information available and so far, no mention to actively contributing to surveillance in the Mediterranean in the issue of migration, however, in an interview in 2016 given by NATO's Secretary General Jens Stoltenberg, he affirms that that the operation Sea Guardian I can provide support to the Operation Sophia conducted by the EUNAVFOR in International waters. In the same interview, was present the Italian Minister of Foreign Affairs, Paolo Gentiloni, that added more on this affirmation:

*“(...)So, there is at the time being no direct relationship between the Sophia operation and the likely support that Sea Guardian will give to Sophia and this is going to be*

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<sup>67</sup> European Union, ‘Operation Sophia - Eunavfor Med Mission Update’ (19 June 2017)

<[https://eeas.europa.eu/sites/eeas/files/eunavfor\\_med\\_-\\_mission\\_19\\_june\\_2017\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/eunavfor_med_-_mission_19_june_2017_en.pdf)> accessed 7 July 2017.

<sup>68</sup> NATO, ‘Operation Sea Guardian’ (27 October 2016) <[http://www.nato.int/cps/en/natohq/topics\\_136233.htm?](http://www.nato.int/cps/en/natohq/topics_136233.htm?)> accessed 20 June 2017.

*something very important and the Libyan situation in a very directive way. Everything takes place in international waters aimed at achieving some specific goals and objectives: that is fighting human trafficking, training Coast Guards and controlling and surveying - and surveillance of the arms embargo.”<sup>69</sup>*

It's very clear with this affirmations that there is a carefully drawn line between the different scopes of both operations and where they take place, not denying that NATO may support Operation Sophia. There was a polemic episode involving a NATO unit in 2011 near Lampedusa. Apparently, officials denied help to a boat carrying 72 people, including refugees, leading to the survival of only 11 people whereas the others have died from hunger and dehydration<sup>70</sup>. There is, however, a slight change in how NATO has been dealing with the situation and an increasing role on migration surveillance is expected, due to the recent operations in the Aegean Sea to monitor crossings from Turkey to Greece in cooperation with Frontex<sup>71</sup>. There is also, a tendency in the growth of cooperation between NATO and the EU in the topic of illegal migration by the sea, due to the start of the debates on migration and refugees in February 2016 with different entities linked to the European Union.

### **2.3 Current Policies and Strategies**

Apart from the reinforcement of legislation focused on security and border surveillance carried out in the Italian, European Union and International frameworks in order to address the increased influx of irregular migrants on the Central Mediterranean Route, other actions must be taking into consideration. Behind the application of regulations, there is a huge diplomatic and political effort by the responsible authorities on trying to solve the problem in different fronts. In what concerns this multi-level approach the Italian government has its strategy focused on two main areas of interest: involving more the EU on the issue, based on fairer “burden-share” and less pressure on arrival States that the Schengen Agreement brought; and in the bilateral cooperation with third states, including both origin states and transit ones, to try to remedy the situation in its roots.

Starting at the European level, Italy has been active on voicing that there is a need of cooperation between EU member States, both by putting in practice joint surveillance operations and on financial

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<sup>69</sup> NATO, ‘Joint Press Conference by NATO Secretary General Jens Stoltenberg and Paolo Gentiloni, Foreign Affairs Minister of Italy at the NATO Defense College - Secretary General’s Opening Remarks’ (14 October 2016) <[http://www.nato.int/cps/en/natohq/opinions\\_135908.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/opinions_135908.htm?selectedLocale=en)> accessed 20 June 2017.

<sup>70</sup> Jack Shenker, ‘NATO Units Left 61 African Migrants to Die of Hunger and Thirst’ (*Common Dreams*, 5 September 2011) <<https://www.commondreams.org/news/2011/05/09/nato-units-left-61-african-migrants-die-hunger-and-thirst#>> accessed 13 June 2017.

<sup>71</sup> NATO, ‘Assistance for the Refugee and Migrant Crisis in the Aegean Sea’ (27 June 2016) <[http://www.nato.int/cps/en/natohq/topics\\_128746.htm?](http://www.nato.int/cps/en/natohq/topics_128746.htm?)> accessed 20 June 2017.

support. A better responsibility-share on the issue of migration control among the States have being in debate since the Thessaloniki Summit in 2003, and unfortunately, has not being solved yet. Italy, such as Greece and other countries that have being suffering from its geographical position are considered arrival countries by who intends to migrate by the sea, and as much as other European States have being trying to accommodate the situation, there is a higher border pressure on those countries and its being left for than to handle, instead of a full solidarity and compromising between all the Schengen area. Only by comparing the dimensions of Operation Mare Nostrum, coordinated by Italian State and the Triton, coordinated by Frontex, as in theory, the operation, the second one should have substituted the Mare Nostrum, it can be seen that Italian efforts have being so far bigger than the ones by the EU agency. Another Italian initiative worth mentioning in the creation of the “Quadro Group”, where Italy, Malta, Cyprus and Greece united forces to deal with the illegal migration in the Mediterranean Sea and to reach for the European Union to debate some internal action with the other member states and for diplomatic agreements with third countries<sup>72</sup>.

“Italy warns migrants crisis is at the limit”, an article published by New Europe on June 2017, alerts that Italian Government is formally calling the European Commission to take urgent measures in regard to large numbers of arrivals in Italy, or Italy would be forced to stop boats from disembarking migrants in its ports<sup>73</sup>. According to the article, even the commissioner for European Migration and Home Affairs, Dimitri Avramopoulos admitted that the situation is unsustainable. After the EU-Turkey deal signed in the beginning of 2016, which impede migrants on crossing from Turkey in direction to Greece, could have some influence on the increased influx to Italy. It is also very debatable the legality of the Italian measure, as Mattia Toaldo, an expert on Libya at the European Council on Foreign Relations affirms to New Europe:

*“This is a panic measure and I would very much be surprised if it is legal. The law requires the rescue of people in distress on the high seas, and this self-blockade of Italian port would leave migrants floating in the Mediterranean, including those in most NGO rescue ships. It is most likely designed to force Europe to take some kind of other action. It also shows that the ideas so far have failed. It was first proposed that the Libyan coastguard take more action to push the boats back. It was then suggested the tribes in southern Libya act as detention guards and then it was proposed to take action in Niger. Nothing has worked.”*

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<sup>72</sup> di Pascale (2010). p. 291.

<sup>73</sup> Beata Stur, ‘Italy Warns Migrant Crisis “at the Limit”’ (*New Europe*, 29 June 2017) <<https://www.neweurope.eu/article/italy-warns-migrant-crisis-limit/>> accessed 7 July 2017.



In fact, the second tactic adopted by the Italian Government has been trying to make agreements with third countries, specially Libya. In 2008, they have signed in Benghazi the Friendship, Partnership and Cooperation Treaty, giving Libya a \$5 billion compensation for the colonial times, and in return, Libya would collaborate on fighting irregular migration<sup>74</sup>. This same Treaty was also including a permission Italy to repatriate hundreds of migrants and was extremely condemned in 2009<sup>75</sup>. Not to mention that similar readmission agreements were already signed with Algeria, Morocco, Nigeria, Tunisia and Egypt by that time. Another effort to strengthen Libyan-Italian cooperation was the Tripoli Declaration of the 21 January 2012. The Declaration's aim was on "strengthening the privileged relationship in countering illegal immigration" and to highlight the "found a new State based on democracy and on universally recognized human rights principles, as well as respecting the 12 December 2000 Palermo Convention against transnational organized crime and its additional protocols against the trafficking of persons and smuggling of migrants". The text of the declaration also proposed measures to be adopted as for example, the training of officials, creation and improvement of reception and aid centers, the establishment of a joint program on border surveillance and voluntary returns and repatriation.

Libyan cooperation has been difficult since the embargo imposed on the country. Italy has, apart from the Convention, tried other times to efficiently introduce joint patrols, training for Coast and border guards in Libya, provide technology for monitoring the Libyan coast, cooperation between experts, exchange of missions, but so far, the numbers of irregular migrants that have been arriving in Italy and claiming that have passed through Libya only goes higher.

There is also a shady aspect of some of the agreements, as mentioned by Di Pascale<sup>76</sup>. Many of the acts of cooperation are not public or not even have a very formal or legit characteristic. There are no publications in the *Gazzetta Ufficiale*, there is no complete information to be accessed through a website open to the public, rendering all the diplomacy that is taking place unknown and with a secret nature. Recently on the Italian media has been on debate a Memorandum of Understanding between Italy and Libya proposed on the beginning of 2017 and that deserve some attention and analysis.

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<sup>74</sup> di Pascale (2010). p. 298.

<sup>75</sup> Baldaccini (2010). p. 253.

<sup>76</sup> di Pascale (2010). p. 300.

### 2.3.1 Memorandum of Understanding Italy - Libya

The Memorandum of Understanding between the Italian State and Libya's National Reconciliation Government<sup>77</sup> signed in Rome on 2 February 2017, has the scope of combating illegal migration, human trafficking and fortify border security, especially in what regards migration by the sea over the Mediterranean. It is supposed to last three years from its signature and it can be prolonged if it interests both parties. The Memorandum in its initial paragraphs reinforces what is regulated already in the Treaty of Friendship, Partnership and Cooperation and the Tripoli Declaration. Besides its reaffirmation, there was already a lot of debate whether those agreements were effective and in respect for human rights, and reassuring it in a new Memorandum sets up a bad start for the negotiations.

The Memorandum itself contains a set of other interesting statements before it even starts the articles. In its introduction, it mentions the "Fund for Africa" program, and its focus on countries connected to the countries of origin of migrants and countries which serve as a route for them. The project was initially launched in 2015 by the European Union and aimed to support countries in Africa by acting specifically in root causes of why people migrate to Europe, on trying to diminish the push factors and promoting stability on those regions<sup>78</sup>. Italy was in charge of the SINCE project<sup>79</sup>, which is an acronym for Stemming irregular migration in Northern and Central Ethiopia, but also presented projects for Sudan, Senegal, Burkina Faso and Niger. The Trust Fund divide its allocations of resources in three main areas of Africa: The Sahel and Lake Chad, the North of Africa and the Horn of Africa. Among countries involved receiving benefits from the EU Emergency Trust Fund for Africa, is also Libya, which is part of the North of Africa region. Even if is beneficial, the total allocated for them is seven times less than the Sahel and six times less than the Horn of Africa. This paragraph states, in reality, that Italy will be committed on opening a dialogue with EU to give priority to the countries like Libya.

Right after there is one of the most problematic parts of the MOU, which says that "to individuate urgent solutions to the irregular migrants which cross Libya to go to Europe by sea, through the provision of temporary hosting camps in Libya, under the exclusive control of the Libya Interior Ministry, in anticipation of repatriation or voluntary return to the countries of origin, working at the

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<sup>77</sup>More information on the Libyan Government on: Rebecca Murray, 'Libya: A Tale of Two Governments' (*Al Jazeera*, 4 April 2015) <<http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html>>

<sup>78</sup>International Cooperation and Development European Commission, 'The EU Emergency Trust Fund for Africa' <[http://ec.europa.eu/europeaid/regions/africa/eu-emergency-trust-fund-africa\\_en](http://ec.europa.eu/europeaid/regions/africa/eu-emergency-trust-fund-africa_en)> accessed 29 April 2017.

<sup>79</sup>ONU Italia, 'Italy and EU Start Trust Fund for Africa: First Project in Ethiopia' (18 December 2015) <<http://www.onuitalia.com/eng/2015/12/18/italy-european-commission-start-trust-fund-africas-first-project/>>.

same time so that countries of origin accept their own citizens, that is signing agreements with countries in regards to.”<sup>80</sup> The problem with this is that Libya has being several times accused of violating human rights of migrants, considered by the United Nations even as a “pattern of torture”<sup>81</sup>. According to a Human Rights Watch article<sup>82</sup>, only in 2016 the IOM was able to identify that an approximately 770,000 migrants and asylum seekers were in Libya and among of those, 4,000 to 7,000 were held in 24 detention facilities controlled by the Department for Combatting Illegal Migration, section subordinated to the Tripoli-based Interior Ministry.<sup>83</sup> It is worth mentioning that by the time both the Treaty of Friendship and the Tripoli Declaration were signed, Libya still had a unified government<sup>84</sup>. Either way, if the control remains with one of the governments or the other, in a country in conflict, the lowest priority is given to refugees or migrants, and it can be even more dangerous to trust them in a detention center or any kind of “camp”.

Another particular aspect of the MOU is that among the immigration issues, it is always a reference to fuel contraband, which as matter of fact, does not relate to the migration issue directly. This inception in the text is related to Italy making a point in the Libya conflict. Turns out the militia’s fighting priority in the country is not only taking control of institutions but also to oil refineries and pipelines over the country. In this MOU is indirectly included that Italy would fight against contraband of oil, or in other words, would consider contraband the selling of oil of any group besides the ones connected to the National Reconciliation Government of Libya State, and more important, fight them. The text of the MOU can shape a very risky position that Italy is putting itself in order to make Libya cooperating with the migration issue.

In regard to the articles contained in the MOU, it can be said that they are succinct and objective, but also leaves space for different interpretations, as stated in its article 6. The most important articles at the Memorandum are the first and the second. Article 1 states that the parties will be committed on developing programs that would involve both countries security and military institutions in order to

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<sup>80</sup> The text of the Memorandum is officially available only in Italian and Arabic. The text present in this work referring to the MOU comes from a translation available in the ASGI website. <<http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>> accessed in 29 May 2017.

<sup>81</sup> Human Rights Watch, ‘Libya: End “Horrorific” Abuse of Detained Migrants - UN Report Details Widespread Torture, Forced Labor, Sexual Violence’ (14 December 2016) <<https://www.hrw.org/news/2016/12/14/libya-end-horrific-abuse-detained-migrants>> accessed 5 May 2017.

<sup>82</sup> Ibid.

<sup>83</sup> Libya until the moment of the writing is under a conflict. The territory had been divided between almost a dozen of different groups, where some also detain control of petrol stations. The two main claimed governments are The National Reconciliation Government of Libya and the National Liberation Government in Tripoli, having also two different governments. More on the conflict in Libya on: <http://www.aljazeera.com/news/2016/04/libya-story-conflict-explained-160426105007488.html>

<sup>84</sup> More on the different governments ruling Libya on: <http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html>

control migration. Not only, it is asked that Italy supports financially regions in Libya that have been affected by migration influx and that would contribute technologically and technically to the Defense Ministry and the Interior Ministry. The second article, differently than article 1, tries to set specific tasks that both parties would have to commit to. This includes: reinstating land borders control in south to Libya; financial contribution by the Italian Government and European Union to the “hosting centers” and with medicines, medical equipment and further transfer when in the occasion of a serious chronic disease; training of the Libyan personnel working in host centers; the commitment to the parties on elaborating a wider Euro-African cooperation on the topic of irregular migration by improving the quality of life in origin countries; to support international organizations in Libya that are currently working on migration, especially the ones that are have been focusing on the return of migrants to their country of origin; and at last, create space for jobs in Libyan regions affected by illegal migration, as an “income replacement”.

The MOU is clearly focused on the financial maintenance by Italian Government of host centers for migrants in Libya. It is a clear strategy to impede them to embark in direction to Europe, however, the well know consequences for human rights of these migrants have not been addressed properly, with no more than one sentence in article 5 of the Memorandum. The agreement is dangerous and doesn't present any kind of effective action to the control of the migration crisis. It has been recently blocked by a Libyan Court on March 2017, one month after its signature, with an alleged effect of form, questioning the authority of the Mr. Fayeza Mustafa Serraj on representing the Libyan State, since its being under conflict and control by more than one government. Until the time of the writing, there were no further comments by the signatory parties on the current validity of the MOU.

#### **2.4 The difficulty of a pure Border Control approach on tackling the migrant's flows in the Central Mediterranean**

By analyzing the legal framework, the actors and the current policies on dealing with the large influx of migrants in route to Europe, embarking from Libya and trying to cross the Mediterranean in order to reach Italy, it can be seen that the maritime border surveillance has played a big part of the strategy, as such extraterritorial interventions based in multilateral cooperation. The State, in order to exercise its sovereignty in its own territory have increased operations of border control. It is normal that a State needs to have control of who comes in, of who is staying in its territory, but in the case of people who are willing to board on overcrowded vessels, risking their life to reach Europe, there are some considerations to be made.

Security measures in any level can be observed alone. There is a tendency in the study of law on the compartmentalization and specialization in topics, which many times is a good way of understanding it, since this approach may provide a higher level of expertise when concentrated in one field of knowledge<sup>85</sup>. In another hand, some situations cannot be examined isolated. It is true that the migration flow into Italy relates directly with maritime border control, but before knowing that laws have being broken when someone enters in a territory irregularly, there are four questions to ask: *where*, in relation to the State's territory; *in which conditions*, to understand the methods that the person used; *who*, in relation to the migrant's identity and status; and *why*, to understand the reasons behind the "illegal" act.

The four questions mentioned should walk together and it will be explained why. The first two relate directly to border control and the law of the sea whereas the two lasts look at the humanitarian aspect of migration. Looking over a concrete case, those questions will be asked again. Getting back to the case where the Tunisian fishermen were arrested in Lampedusa in 2007 accused of facilitating illegal entrance in Italy. To the question *where*, it will be considered the Italian territory, and for this reason on it will be applicable Italian border control procedures and immigration laws. Analyzing the case from this perspective, it is clear that the fishermen have entered unlawfully in Italy and not only, have disembarked 44 other people coming mainly from Sudan and Eritrea, and for this reason, should have being prosecuted. In regard to the question of *in which conditions*, the answer would be that they have entered Italy and disembarked other migrants using a boat, and so the law of the sea would be applicable to the situation in conjunct with Italian border control regulations, to give guidance on how to proceed lawfully with interventions in a boat. From this perspective, it is clear the criminal offense: a boat of Tunisian was intercepted in Italian territory, carrying other than the crew, 44 irregular migrants trying to smuggle into Italy. The fishermen were in fact, arrested and later, prosecuted by facilitating irregular migration. This case is a clear example of the application of border control focused approach. Imagine however if the situation was slightly different. Imagine if the boat was intercepted in the border and blocked from disembarking in Italy. This is the actual case of the Cap Anamur<sup>86</sup>, already mentioned in the beginning of the chapter. The case has raised the questions *where* and *in which conditions* to keep the ship from docking in Sicily for sixteen days, without considering the *who* and *why*. This raises the situation where a border control approach was analyzed initially, apart from the humanitarian situation the people were involved.

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<sup>85</sup> Barnes (2010). p. 104.

<sup>86</sup> Italian Tribunal of Agrigento – Italy v Bierdel, Dachkevitch and Schmidt, No. 954/09.

Not only in those cases it can be seen the consequences of a single-sided approach to the migration problem in the Central Mediterranean Route. Other consequences such as the circumvention of responsibility to rescue, collective expulsion of migrants, disrespect to the principle of non-refoulement, the existence of overcrowded detention centers, the disrespect for human rights when adopting extraterritorial prevention methods such as the “host centers” in Libya, the condition of “migrants in orbit”<sup>87</sup> are only few examples of problems that can arise when only security and border control are in the table to be discussed.

## CHAPTER 3

### **Humanitarian approach: Search and Rescue in the Central Mediterranean**

In 2012, an emblematic case was brought to the Council of Europe in the form of a report, with the title “*Lives Lost in the Mediterranean Sea: who is responsible?*”<sup>88</sup>. The report was based in the failure of saving 72 migrants that were in a boat within the Italian SAR zone. Even with the presence of many different actors who could have helped the people in distress, the boat remained adrift for two weeks, until it reached back Libya with only nine survivors. This situation showed how difficult it is in certain terms on setting responsibilities for search and rescue, even with the delimitation of the SAR zone, even with the explicit mentions in UNCLOS to the principle of always going for the aid whenever a boat is in distress.

This third chapter will be presented with a mirror structure with the previous one in order to show how the same situation can have different legislation, different actors, different approaches and how they are so far, working with them in a descriptive contrast. Before navigating into the legislation concerning search and rescue it is important now to mention that the next points will not take into consideration asylum seekers but migrants as a whole group. It is clear that asylum seekers in the majority of the time would be protected under the Refugee Convention, but the scope of this present work is not to address this particular group but all the people that have been seen at the Central Mediterranean Route, a way of reaching Europe, since it has been also detailed cases of expulsion, detention centers, extraterritorial measures and situations where a person is not holding a *quasi*

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<sup>87</sup> den Heijer (2010). p. 189.

<sup>88</sup> Council of Europe, ‘Lives Lost in the Mediterranean: Who Is Responsible?’ (2012).

automatic refugee status. For this very reason, the analysis of search and rescue to follow will take in consideration migrants as a group and not a focus in asylum seekers.

### **3.1 The Legal Framework**

The legal framework to be considered are integrated partially in the immigration law and border control and in some institutional levels, have a completely different focus. Whereas border control mainly seemed to be an independent approach that did not considered in a great extension, rescue operations, the Search and Rescue coordination is established by a conjunction of different provisions coming from different levels.

#### **3.1.1. National**

In relation to how the Italian perceives the obligation of Search and Rescue in the Sea, a few legal frameworks can be contextualized. The “*Testo Unico sull’Immigrazione*” and the Interministerial Decree of 2003 already mentioned in the previous chapter, besides being a text with the intention to regulate the status of migrants in Italy and state action in regard to border control, have both some provisions related to the general obligation of respecting human life. The T.U. in its article 12 for example, that specifies penalizations connected to irregular entrance in Italy, in its second paragraph, highlights that any act committed with the purpose of helping or providing humanitarian assistance to foreigners in need can be considered a criminal offense. In addition to that, the Decree have specified how that provision applies to the maritime borders. The article 2 of the Decree stands for the importance of preserving human life in the sea, specifying that one of three main activities that the State should perform in the sea includes rescue of people, nominating the Coast Guards as the main actor to operate in this issue and finally, stating that surveillance and rescue can be concomitant activities. This article is very much focused in delimiting responsibilities and setting operational plans when a salvage effort must be put in practice. Article 7, also from the Decree is under the chapter of Norms of Conduct for the authorities and in its first paragraph says that “*Nell’assolvimento del compito assegnato l’azione di contrasto è sempre improntata alla salvaguardia della vita umana ed al rispetto della dignità della persona*”. This is the only article in the Italian legislation that relates directly with the respect for human dignity in the sea. It is worth mentioning that the Italian

Navigation Code, in the end of its 543 articles<sup>89</sup> does not have a single mention to rescue operations, to respect for human life or human dignity in the sea.

At this point it can be noticed that little is regulated in the national law and this may have some consequences. As it was shown in the last chapter, the internal law on migration and border control such as the actors under the responsibility of the Italian State play the biggest role on maritime border surveillance but little is regulated in relation to the obligation of rescuing, leaving it to be guided almost entirely by international law. Not only the obligation on coming for the aid of people in distress in the sea, but also setting up the respect for human life by authorities when migrants are on board. The case brought to the CoE served as a clear example of how it can be dangerous not having provisions specifying exactly the consequences on not rescuing someone.

### **3.1.2 European Union**

Considering the EU legal framework, there is no specific instrument in regard to search and rescue in the sea. However, violations on law that may imply disrespect for the European Convention of Human Rights and may be prosecuted at the European Court of Human Rights. Many of the cases that involves incident with migrants on boats and State authority's failure to rescue are initially prosecuted by the Italian State, applying directly the rights established by the convention and its protocols, Schengen regulations if applicable, and further international legislation, and still have the possibility to proceed to the European Court of Human Rights.

A number of emblematic cases have been decided under the observation of the ECHR, such as the *Hirsi Jamaa v. Italy* and the *Sharifi v. Italy and Greece* brought to the ECtHR. The most relevant article in this regard are article 2, that states about the right to life; article 3, which sets the prohibition against torture and inhuman or degrading treatment or punishment; and article 6, that enumerated rights attached to the obligation of conceding a fair trial. In this sense, it is important to notice that these observations are applied in an indirect way and could be applicable to many different situations, not only involving migrants crossing the borders by the sea. The obligation to rescue comes from the obligation to respect human life. Related to that is the Regulation (EU) 2016/1624, which established the European Border and Coast Guard Agency. The regulation in question does not mention a restrictive norm for those who fails to protect human life in the Sea, but states in article 49:

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<sup>89</sup> Repubblica Italiana, 'Regolamento per l'esecuzione del codice della navigazione (navigazione marittima)' approvato con DPR 15 Febbraio 1952 n. 328. (Italian Navigation Code, 1952)



“This Regulation respects fundamental rights and observes the principles recognized by Articles 2 and 6 of the Treaty on European Union (TEU) and reflected in the Charter. In particular, this Regulation seeks to ensure full respect for human dignity, the right to life, the right to liberty and security, the right to the protection of personal data, the right to asylum, the right to effective remedy, the rights of the child, the prohibition of torture and of inhuman or degrading treatment or punishment and the prohibition of trafficking in human beings. It also seeks to promote the application of the principles of non-discrimination and non-refoulement.”

The regulation exhibited a set of principles contained initially in the European Convention of Human Rights and tries to connect it with the mandate of Frontex, as a way of ensuring compliance of the authorities acting under the Fronted Agency with the Convention. However, yet, there is no legal framework at European level that addresses or penalizes directly the rescue in the sea of people in distress in the actual context of increased influx of migrants using the Central Mediterranean Route.

### **3.1.3 International**

Finally, at the International legal framework it is possible to find a number regulations that are directly applicable to the issue of search and rescue in the sea. The main conventions in this regard, besides the International Convention on the Law of the Sea, are the International Convention on Search and Rescue (SARcon) that entered into force in 1985 and the International Convention for the Safety of Life at Sea (SOLAS), of 1980. Once both Conventions have been written in a time where neither safety or rescue in the sea were regulated taking into consideration migration by the sea in high scales and difficult conditions as today, their provisions are very much focused in incidents related to commercial or military vessels. In 2004, however, seeing the need of update of the text, the SAR and SOLAS Convention were amended, giving more attention to the aid of persons found in distress in the sea.

Starting with the UNCLOS it is true to affirm that is built over a text with a vary number of principles in different topics such as environmental responsibilities to safety on board. In relation specifically to search and rescue, there is the article 98(1) that states over the obligation to the master of the ship, without risking the safety of his own boat, help any person that is found in distress in the sea or he

has the information of its location<sup>90</sup>. The second part of the same article refers then, to the creation of rescue coordination centers (RCC's), able to provide assistance to people in distress in the sea, working under the responsibility of a government or established by a mutual cooperation agreement with neighbour States<sup>91</sup>. The UNCLOS, as it is noted has a very broad character and leave for the States the recognition of its own concrete obligations<sup>92</sup>. It poorly considers search and rescue and fails to take into consideration migration in its framework. As well highlighted by Barnes, migration by the sea acquired more importance recently and the UNCLOS *“is not susceptible to revision and so the inclusion of other provisions dealing with rescue and migration control at sea must be dealt with through other instruments such as the SOLAS and the SARcon.”*

Because of the difficulty to address migration by the sea, the UNCLOS does not play the most important part in the matter of search and rescue of migrants, leaving for the SOLAS and the SARcon. The SOLAS Convention, in reality has its primarily focus on merchant ships. It displays a list of precautions and safety operational instructions for boats, from situations of fire on board, technical problems to norms of design of the ship. However, it establishes some regulations related do search and rescue and the further treatment of them after 2004<sup>93</sup>. Another resolution in the SOLAS that could be mentioned is the regulation 7 saying that:

“Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.”<sup>94</sup>

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<sup>90</sup> “Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.”

<sup>91</sup> “Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”

<sup>92</sup> Barnes (2010). p. 137

<sup>93</sup> The SOLAS Convention was amendment in its Chapter V, especially in what concerns rescue operations.

<sup>94</sup> International Convention for the Safety of Life at Sea (SOLAS) 1978. Art. 7.

This article in reality is, equally as it was observed in other legal frameworks, mentions only the obligation of a State to proceed with the rescue, adding also the necessity of having appropriate structures that should be available for whenever it is needed. It is in fact a way of introducing measures and operational centers that would serve as a precaution for incidents that were already established by the UNCLOS. It does not, however, hold a State responsible for not acting.

The first one to note is Regulation 33 in the Chapter V of the Convention Annex, which sets the obligation to assist anyone in distress in the sea and further guidance in the case that the boat which is receiving the information or seeing a person in need in the sea to notify the search and rescue center of the area. After the Resolution MSC 153(78), which modified the Regulation 33, it was added another paragraph conceding more protection to the master of a ship that decides to proceed with the embarkation of people in distress in their own boat, gives protection to people that embarked, stating that the boat must disembark them in a safe place with full cooperation of the State responsible. This new modification shows that not only rescuing is an obligation but also both the ship master and to the rescued people will be welcomed to act so<sup>95</sup>. There is a debate around this new modification, which will be addressed in the next chapter.

Even though at the SOLAS there was already a recognition of the importance of creating Rescuing centers coordinated by National Governments, there was not yet a concrete idea of how that could be transform into reality because until the adoption of the SAR Convention there was not a proper system that would organize an action plan for governments to perform search and rescue. The main task of the SAR convention was to build a system that would attend any boat in distress anywhere in the world. For this reason, the SARcon established the SAR zone system, where maritime regions of the World would be divided between coastal States and for that area, they would be responsible for providing assistance to people that could be in need in the sea. The division of this maritime regions is not only a matter of the Convention but could be also handled between two different States signing a bilateral agreement. As a matter of fact, Italy and Malta have signed and ratified the Convention, having also between them, overlapping areas where the responsibility may rely on the Maltese search and rescue center or the Italian, and also based on this, there have being recurrent cases of disagreement between both states about who should be responsible for attending a boat in distress in certain areas. In addition, because the Central Mediterranean Route involves boats that may cross not only the Italian or Maltese SAR zones, is important to highlight that Libya has signed the SAR Convention but has not yet ratified it, which leaves a vacuum in the international law on who should

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<sup>95</sup> Barnes (2010). p. 139

act if Libya is not willing to provide any assistance. No information on the current operation of a Maritime Rescue Coordination Centre under the responsibility of Libya could be found on the time of the writing<sup>96</sup>.

As in regard to the SAR Convention itself, it can be said that it works as the most direct international legal framework to address the issue of rescuing of people in distress in the sea. It provides more than the UNCLOS and the SOLAS, actual operational methods and procedures for governments to ensure protection of people in the sea as for ships in the encountering other boats in distress. After the Resolution MSC 155 (78) adopted in 2004, provisions were extended to strengthen its relation to the migration by the sea. For instance, article 2.2.1 was modified, having added a second part which mentions assistance to people not only found in distress in the sea but also, to help people who have already found “refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility...”. As well referred by Barnes on page 140 this modification “indicates a move away from a purely territorial view of responsibility, towards one based upon collective responsibility and capacity to engage in rescue operations”.

### **3.2 The Main Actors and their Competences**

As much as the legal framework the actors have always changed. When it comes to the coordination of Search and Rescue Operations, it should not involve police power, however, it is possible to see the incidental characteristic that is also bending over military boats. Under the general obligation to rescue stated in the UNCLOS, no boat should deny help for those found in distress in the sea and in this way, different actors with a Security mandate have been acting in Rescue performances. For the purpose of this chapters, it will be mainly considered those agencies and institutions that act primarily with a Search and Rescue function, but others that have exception clauses or see themselves in situations of incidental rescue will be also briefly dealt.

#### **3.2.1 National**

Within the National scope on operating Search and Rescue in the Central Mediterranean Route, there are a few different actors. Taking into consideration the article 2 of 2003’s Decree<sup>97</sup>, the main

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<sup>96</sup> As it can be seen in the Map in the Canadian Coast Guard, that provide contacts for Rescue Centers over the world, no spot is signed in the Libyan territory: <<https://sarcontacts.info/contacts/mrcc-rome-5809/>> accessed 12 June 2017.

<sup>97</sup> “(...)2. Restano immutate le competenze del Corpo delle capitanerie di porto per quanto riguarda la salvaguardia della vita umana in mare. Nell’espletamento di tali attività le situazioni che dovessero presentare aspetti connessi con l’immigrazione clandestina, ferma restando la pronta adozione degli interventi di soccorso, devono essere

authority to perform rescue in the sea is the *Capitanerie di Porto*. The *Capitanerie* is under the functional administration of the Ministry of Environment, Territory and the Sea and the Ministry of Agriculture, Food and Forestry Policies<sup>98</sup>, which is very much justified by their mandate. They are, in fact, a specialized sector of the Italian Navy to act whenever a civil activity is taking place in the sea, and among those, search and rescue operations. Their jurisdiction englobes territorial and international waters, this second only concerning to the Italian SAR zone and their mandate relates do civilian activity in the sea and do not implies police force, which means that they are able to perform monitoring and rescue of migrants but are not able to deal with the further consequences of it, and when needed, maintain contact with the *Marina Militare* or *Guardia di Finanza*, depending also on their area or operation. In order to maintain the coordination between these actors and other ones that may be involved, it was installed the Italian Maritime Rescue Coordination Centre (IMRCC) based in Rome but divided in fifteen directorates working as sub stations for rescue operations. In the case of Sicily, the directorate is located in Catania, but besides that, they also have three naval bases, in the cities of Catania, Pescara and Sarzana. There is also the presence of specialized squadron located in Lampedusa, as joint operation with the European Union, which despite the failures<sup>99</sup>, were a good initiative<sup>100</sup>.

Besides the *Capitanerie di Porto*, the *Marina Militare* have performed also a large number of rescue operations, even though this is not the first prerogative. In fact, according to the report made by the *Capitanerie di Porto* on 2016, the *Marina Militare* was responsible for the second largest number of rescues performed in Italian SAR zone, staying behind only the *Capitanerie* itself<sup>101</sup>. Their main function, however, is monitoring and intercepting boats in extraterritorial waters for security purposes, observing some conditions stated in the UNCLOS, but should also, taking into account the articles 489 and 490 of the Italian Navigation Code and the principle of rescuing human lives, proceed with the rescue. In this regard, Salamone states:

*“In tale situazione l’interesse alla salvaguardia della vita umana, risulta in sostanza prevalente rispetto a qualsiasi altro interesse operativo o di polizia. A questo fine non*

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*immediatamente portate a conoscenza della Direzione centrale e dei comandi responsabili del coordinamento dell’attività di contrasto all’immigrazione clandestina indicati agli articoli 4 e 5. 3. Le attività in mare possono assumere il carattere di: a) sorveglianza; b) intervento di soccorso, il cui coordinamento e’ di competenza del Corpo delle capitanerie di porto; (...)”*

<sup>98</sup> Llewellyn (2011). p. 4.

<sup>99</sup> In February, 2015, 22 people died on board of the boats belonging to the special squadron in Lampedusa, that could guarantee the safety of the passengers in adverse weather conditions.

<sup>100</sup> Llewellyn (2011). p. 4

<sup>101</sup> The report does not consider rescues performed by non-state actors.

*deve essere esclusa la possibilità di ospitare a bordo i clandestini, tenendo conto che le imbarcazioni di cui è dotata l'Unità non possono considerarsi un luogo sicuro a meno che, in situazioni meteo-marine buone, non sia vicina la terraferma o sia presente in zona un'altra nave che sia in grado di prenderli a bordo”<sup>102</sup>*

The problem in this kind of operations, on the other hand, is that the *Marina Militare* not always have the appropriate equipment to perform a rescue. Whenever spotting a boat in distress, it needs to take into account that the people are already in a fragile situation, many times dehydrated and in debilitated physical condition. The *Marina Militare*, as the name itself says, is a military force, focus in military purposes and their ships are structured with military technology, which means that, they are built to be safe and to not make easy in case of someone wants to attack or go up on board. It is the same problem when cargo ships have to perform rescue on the sea: there is a great difficult to board people, considering also their physical health, and to give an urgent treatment to them when they are not prepared for it. It is true, however, that even if there isn't the specific task of search and rescue, the *Marina Militare* has being providing units and training in this area since rise of migrants trying to reach the Italian Coast<sup>103</sup>, and for instance, certain operations like the Operation Mare Nostrum, with a more specific task of balancing migration control and search and rescue over the Mediterranean Sea have being coordinated successfully by them.

### **3.2.1.2 Other actors - Commercial Vessels and Civil Population<sup>104</sup>**

Other actors that may figure in rescue operations are merchant vessels and civilians ships, including fishery ones. In 2014, according to WorkBoat, merchant ships have rescued around 40,000 migrants in the Mediterranean Sea<sup>105</sup>. The article also mentions that in respect to the SARcon and UNCLOS they have the obligation to help, however, this can be a dangerous activity and should not become a solution for the problem. Merchant vessels are not prepared to perform rescue, are not safe to house a large number of people on board or to attend further necessities such as medical care. Some incidents have occurred in this regard in 2015, when a Portuguese freighter called King Jacob tried to help a

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<sup>102</sup> Salamone (2004). p. 7.

<sup>103</sup> Ministero della Difesa Marina Militare, 'Dual Use (Nonmilitary Activities Performed by the Italian Navy)' <[http://www.marina.difesa.it/EN/facts/dual\\_use/Pagine/default.aspx](http://www.marina.difesa.it/EN/facts/dual_use/Pagine/default.aspx)> accessed 7 May 2017.

<sup>104</sup> For the objective of this research the classification "commercial vessels" will be considered any type of embarkation that is engaged with any economic activity regardless its size, design or commercial purpose. It may include from cargo ships to fishermen boats. As for civil population, it will be considered any boat used for personal or recreational reasons, sports practice or any other non-commercial, governmental or military activity.

<sup>105</sup> Pamela Glass, 'Migrants Vessels on Front Lines of Migrant Crisis' (*WorkBoat*, 28 April 2015) <<https://www.workboat.com/blogs/washington-watch/merchant-vessels-in-mediterranean-on-front-lines-of-migrant-crisis/>> accessed 7 April 2017.

boat of migrants in distress near Lampedusa. As the 500 feet long ship approached the migrant boat, in a wrong maneuver of the second one, they collided. Among the total of approximately 850 people that were on board of the crowded migrant ship, only 28 survived<sup>106</sup>. Big merchant ships even in a complicated rescue situation have one less thing to worry than smaller fishery ones: the problematic of besides not being able to perform rescues in a safe way, being accused of smuggling.

The Italian movie “*Terraferma*”, directed by Emanuele Crialese, shows in a very sensible way, the perspective of civilians when confronted with the necessity of saving migrants in distress in the sea and what they are risking. The case in which the movie was based occurred near Lampedusa in 2007 and came to conclusion in the end of 2009, after a decision from the Tribunal of Agrigento. Two Tunisian captains of a fishing boat and other members of the crew were prosecuted after saving 44 people from drowning and brought them to Italy, since the nearest port was Lampedusa. They were warned not to enter in Italian territorial waters by authorities but the critical situation on board led them to move in direction to the Italian port. After disembarking migrants in urgent medical situation and potential refugees, they had the boat confiscated by Italian authorities and were arrested for illegally entering in Italian territory with the aggravate and facilitating smuggling into Italy. The case became internationally famous and set fired to the debate of criminalizing rescue activities, of the importance of a moral action of helping over a security one<sup>107</sup>.

### 3.2.2 European Union

In regard to the European Union action on Search and Rescue, there is no specific Agency with the mandate for the realization of such, however, it is to note that according to the Italian Coast Guard Report of 2016, units belonging to the Frontex, excluded Italian ones, were responsible for rescuing 13.616 people in the Italian SAR zone. This number seems rather high, nonetheless it is not within their scope to perform search and rescue operations but it becomes necessary many times when border surveillance is being put in practice. As it is stated at Frontex website, their role is only to support these operations and nor coordinate or participate actively on it. The human rights obligations are merely incidental<sup>108</sup>. Having that in mind, is important not to mistake that the main focus of Operation

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<sup>106</sup> Jim Yardley and Dan Bilefsky, ‘Migrant Boat Captain Steered Toward Tragedy in Mediterranean, Authorities Say’ (*The New York Times*, 21 April 2015) <<https://www.nytimes.com/2015/04/22/world/europe/italy-libya-migrant-boat-capsize.html>> accessed 7 February 2017.

<sup>107</sup> Antonello Mangano, ‘I Pescatori Tunisini Salvano 44 Naufraghi, l’Italia Li Processa’ (*Linkiesta*, 27 September 2011) <<http://www.linkiesta.it/article/2011/09/27/i-pescatori-tunisini-salvano-44-naufraghi-litalia-li-processa/6134/>> accessed 23 June 2017.

<sup>108</sup> Baldaccini (2010). p. 243.

Triton launched by Frontex to “substitute” Operation Mare Nostrum, even if their action englobes european SAR zones, is not a rescue operation but rather a patrol and border surveillance.

As for the EUNAVFOR MED Sophia mission, the search and rescue operations of migrants are also incidental, once their focus is on the identification and capture of vessels used by smugglers or traffickers. Their operations have the clear scope of stopping criminal networks and the salvage of life are only a consequence of their actions, like the Frontex. The only difference in their actions is that they have being put in practice partnerships with NGO’s and International Agencies that work with the migration and human rights, establishing the so called “Shared Awareness and De-Confliction in the Mediterranean”<sup>109</sup> seminar, where talks have been provided by both military and humanitarian actors.

### 3.2.3 International

There is not yet any international and governmental coalition acting in the Mediterranean, despite the work that NATO has being doing in the Aegean Sea. However, it doesn’t mean that anyone is doing anything. One of the most active actors in the Central Mediterranean Route are the Non-Governmental Organizations. They have been responsible for almost 40% of rescues performed in the maritime area north of the African Continent. As noted, the action of specific NGO’s can be mentioned. The Migrant’s Offshore Aid Station (MOAS) is one of the organizations that are active on the issue. They started in 2013 and created a model to be followed by other NGO’s that were determined to provide help to migrants attempting to cross the Mediterranean. Only in the Mediterranean, they have rescued more than 30,000 people since 2014<sup>110</sup>. Following the MOAS model, other NGO’s such as the Doctors without Borders and the SOS Mediterranee put on work large vessels with a trained team and capacity to perform full search and rescue operations. Other smaller NGO’s such as Sea-Watch and Pro-Activa focus their tasks on providing urgent medicine or giving life-jackets until bigger and equipped vessels come to the rescue and embarkation of the people found in distress<sup>111</sup>.

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<sup>109</sup> European Union, ‘Operation Sophia - Eunavfor Med Mission Update’ (19 June 2017)

<[https://eeas.europa.eu/sites/eeas/files/eunavfor\\_med\\_-\\_mission\\_19\\_june\\_2017\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/eunavfor_med_-_mission_19_june_2017_en.pdf)> accessed 7 July 2017.

<sup>110</sup> Migrant Offshore Aid Station, ‘Current Mission - Central Mediterranean’ (2015) <<https://www.moas.eu/central-mediterranean/>> accessed 27 June 2017.

<sup>111</sup> Eugenio Cusumano, ‘How NGOs Took over Migrant Rescues in the Mediterranean’ (*EU Observer*, 9 January 2016) <<https://euobserver.com/opinion/134803/>> accessed 28 June 2017.



The NGO's in comparison to the Italian Coast Guard and the incidental activity of Frontex have one characteristic that differentiates their attitude towards the problem. Taking into consideration that they are not connected to a State and so, they can be considered a more impartial actor, whereas its necessary not to judge the person drowning on proceed with security controls, but focus in saving its life. States, for more concerned they are with rescuing people, have certain limitations to their jurisdiction, to the scope of their work and to understand their responsibility sometimes. In this matter for example, while the Frontex's mandate is to work around 30 miles from the Italian coast, the NGO's are able to cover larger areas because they are not necessarily bound to the same legislation as Frontex. As a matter of their performing their tasks, the Italian Coast Guard, even having the mandate for search and rescue operations, are still a military force working for a government and it can reflect in its ideas. But also, because of this "impartiality" aspect, they have been criticized and sometimes even accused of favoring illegal migration and smugglers. This problem will have some consideration by the end of the chapter.

Another actor that could also be mentioned briefly is the United Nations. Like the NGO's, they don't have police power to proceed with border control but their scope is to cooperate in the technical and operational area. They are able to work in conjunction with the Italian authorities or the Frontex. It was installed a main office in Rome and other centers in Sicily - Lampedusa, Trapani, Caltanissetta and Siracusa - under the responsibility of the IOM along with UNHCR, Save the Children and the Italian Red Cross.<sup>112</sup> Their main task has been to assist in the reception of migrants, promote dialogue, provide research and statistics, offer human rights and migration training for officials, present draft projects and other act in other issues connected to migration and asylum<sup>113</sup>. Their work is mainly focused on inland activities and besides its great importance, it is not relevant to rescue operations carried on the sea as analyzed in this research.

### **3.3 Current Policies and Strategies**

As it was seen so far, not so much have been done in relation to increase the numbers of search and rescue operations as their efficiency in the Central Mediterranean Route. Italy as a front State finds itself with a limited funding and capacity to deal alone with the influx of people trying to reach its land and had in the past tried to prevent more people from dying in the sea with the Operation Mare

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<sup>112</sup> International Organization for Migration, 'International Organization for Migration Work in Italy' (2014) <http://www.iom.int/countries/italy>> accessed 28 June 2017.

<sup>113</sup> Further information in all the activities developed by IOM in Italy are available in the website: <http://www.italy.iom.int/it/aree-di-attivita>

Nostrum. When the EU was called for help and started to play some part of the game, Frontex launched the Operation Triton, and with a budget three times lower, was supposed to slowly compensate for the end of Mare Nostrum<sup>114</sup>. Clearly, not only their level of action was different but also its focus, once Triton initially had no intention to coordinate search and rescue missions, but only to give support.

Taking into account that there is at International level, only NGO's working currently on search and rescue and Italy, after the end of Mare Nostrum have been calling for more solidarity between the European Union Member States, it is crucial to understand which paths the EU is taking recently. Bearing that in mind, one document that comes to the light is the European Agenda on Migration, and where it is possible to see the EU actions on improving rescue operations.

### **3.3.1 European Agenda on Migration**

In the beginning of 2015, the European Commission has published the European Agenda on Migration<sup>115</sup>, where action plans were discussed in regard to both border control and humanitarian aid in relation to migration. One of the priorities of it, as stated right in beginning under the topic *Saving Lives*, tries to propose a more effective solution by increasing the budget of the Frontex's Triton Operation and financial support to Front States, like Italy. Accordingly, by having higher funds, they will be able to enlarge the geographical area of action and help saving lives of migrants as stated in the text. This does not mean that Frontex will start acting directly on rescuing operations, but as the footnote 4, at page 3 of the Agenda reminds, this help is given "in addition to the substantial assistance available to these Member States from Home Affairs funds of which Italy is the major beneficiary in absolute terms and Malta in per capita terms."

There is a debate on the weather stipulated funds will concretely solve the problem or not. It moves in a way that EU is working on close the gaps that remains in search and rescue operations, according to Amnesty International, once "in practice, this means more assets at sea, closer to where most refugees and migrants, travelling on overcrowded and unseaworthy boats, get into trouble and risk drowning. And ultimately more lives will be saved."<sup>116</sup> Enlarging the area for the actuation of Frontex

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<sup>114</sup> Llewellyn (2011). p. 9.

<sup>115</sup> European Parliament and Council, 'European Agenda on Migration' (2015).

<sup>116</sup> Amnesty International, 'EU Moves towards Closing Search and Rescue Gap in the Mediterranean' (27 May 2015) <<https://www.amnesty.org/en/latest/news/2015/05/european-union-moves-towards-closing-search-and-rescue-gap-in-the-mediterranean/>> accessed 29 June 2017.

will permit them to rescue people in more critical points and closer to Northern Africa, but reminding again, it is an incidental action derived from their border surveillance missions.

The Agenda is divided in four pillars, which are: “Reducing incentives for irregular migration”, “Border Management - saving lives and securing external borders”, “Europe’s duty to protect: a strong common asylum policy” and “A new policy on legal migration”. Observing from the thematic approached in the text, it seems that its going on the right direction. In a more specific connection to search and rescue and who should be responsible on preventing people from drowning in the Mediterranean Sea, the Agenda on page 11, under the “Border Management” pillar mentions that “Coastguards have a crucial role both for saving lives and securing maritime borders. Their effectiveness would be improved through greater cooperation. The Commission, together with relevant agencies, will support such cooperation and, where appropriate, the further pooling of certain coast guard functions at the EU level.” This is the only part of the whole project that questions if the Frontex, in the capacity of a European Border and Coast Guard Agency, should shift from a incidental finding to start performing direct rescue operations, including it among its own mandate and not only act as a support actor. Yet, little have been discussed on the topic.

### **3.4 The difficulty of a pure Search and Rescue approach on tackling the migrant’s flows in the Central Mediterranean**

Since Fabrice Leggeri’s declarations to the media about the difficult cooperation between NGO’s working on search and rescue and the Frontex, the question whether or not NGO’s were collaborating with criminal organizations popped up everywhere. A quick search in Google for the three words NGOs, migrants and Mediterranean shows only articles related to the accusation that NGO’s collude with smugglers. It is not a question if this affirmation is actually portraying the truth but of why some people believe in it.

There are some facts that must be mentioned. The first is the larger geographical area that NGO’s are acting in comparison to the Frontex. On the map available at MOAS website showing where their rescue operations have taken place in the Mediterranean Sea in 2015<sup>117</sup>, it can be seen that almost all of them have happened very near the Libya coast. It also shows where did the migrants embarked and to which port they were brought in Italy. The problem with this is that many NGO’s have being called as “Migrant’s Taxi”, picking them up in the North of Africa and bringing them to Europe. As

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<sup>117</sup> Migrant’s Offshore Aid Station (2015).

completely inappropriate the expression is, it reinforces the rightwing discourses along with the failure of handling the large number of people arriving in Italy and motivating more and more intolerance against migrants. The problem grows where NGO's try to save as many lives and they can, but for this, go against some of the security policies of the EU.

“In December, the EU accused various migrant rescue NGOs like Médecins Sans Frontières (Doctors Without Borders – MSF) of actively working with people smugglers to further an agenda of mass migration and open borders activism in a leaked confidential report. Frontex claimed that migrants were given directions of where to find NGOs ships which hinted at collusion between the groups. MSF hit back at Frontex and accused the EU of making ‘the lives of refugees and migrants miserable’”<sup>118</sup>

The actual problem is not only the reinforce of right wings related to a search and rescue approach but three others: The jurisdictional area to perform salvage is different them to perform border control; The mandate of NGO's does not allow them to take preventive measures against smugglers or traffickers actions; As close as they go to Libya, more people are put together in a boat, worse conditions has the transportation, because smugglers may rely on the fact that NGO's were able to rescue them right after they set sail.

As mentioned before, the NGO's area of action larger than the one of a State Agency. Those agencies are only able to perform border control whenever the boat is inside the maritime area or contiguous zone in Italy. Not even the Frontex has jurisdiction to intervene where the NGO's have been acting, according to the International Legal Framework already mentioned in the second chapter. That said, its necessary to remember that the scope of NGO's work is to rescue, which means that in between their capacities and training, is not included monitor, identify or the arrest of smugglers and traffickers, nor the inspection or boarding for security control. Bearing in mind that they are able to act in a geographical area where Italian police forces are not and they do not have the training or the mandate to proceed with any action against criminals, it makes the harder to identify and trace this organizations if they are not entering in the maritime area where police forces have jurisdiction to act. Adding to this fact, because criminal organization are aware that Italy has no jurisdiction to act and that NGO's are performing rescues very close to the Libyan Coast and relying on the fact that will be

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<sup>118</sup> The exert is taken from the Breit Bart, a right wing news portal from UK:  
<http://www.breitbart.com/london/2017/03/22/public-anger-growing-at-taxi-ngos-picking-up-migrants-from-mediterranean/>

better if the migrants are found by NGO's immediately, considering also that since the boat where migrants are embarking does not need to reach Italy, trying to profit more, they embark even more people and in worst conditions.

In 2002, the penalties related to people found connected with smuggling were raised to a more severe level<sup>119</sup>, where smugglers can be subjected to detention from three to fifteen years, depending on the aggravators<sup>120</sup> but in reality, this does not dissuade smugglers to act, where they know it is a hard job to trace them or even to perform arrests because of the jurisdiction problems. This perspective is showing the side of the criticism of rescuing operations by NGO's in relation to border control and combatting smuggling, which does not diminish their intense work or justify any interruption of it. NGO's are clearly doing a great complementary work in the Mediterranean along the other Governmental and European Agencies, whereas the two lasts were not able to completely handle the situation.

#### **4. Filling the Gaps between a Security and a Humanitarian approach: a possible solution?**

To resolve the migration problem in the Central Mediterranean, not only the structures involved in the process must be analyzed but a further discussion on their failures is crucial to the development of new strategies. A variety of criticisms were highlighted previously and can serve as a starting point to the fulfilment of gaps on managing migratory flows from Libya to Italy in a more efficient way. Consequently, the next topics will briefly touch upon obstacles found through this work and will propose general recommendations that could serve as an inspiration for change.

##### **4.1 The Legal problems regarding human rights obligations towards irregular migrants**

The legal framework used to address irregular migration by the sea is diverse in its approach and relates to the phenomenon different institutional levels. Nonetheless, it is possible to affirm that they are not cohesive and many times contradict each other. The problem is that each instrument was thought overweighting or the security side or the humanitarian side of migration, making the operational derivative structures incompatible to each other. This characteristic is sometimes as flexible and sometimes as dubious. The fact that Italy has never formally declared the extension of its Contiguous Zone<sup>121</sup> and because of it, the jurisdictional area for the Italian authorities is uncertain.

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<sup>119</sup> Italian Legislative Decree n. 286 of 1998, art. 12, 1.

<sup>120</sup> di Pascale (2010). p. 300.

<sup>121</sup> Tulio Scovazzi, *Il dilemma dell'esistenza e dei poteri esercitabili nella zona contigua italiana* (2016). p. 27.

It is a condition stated in the UNCLOS, Part II, article 3 that each State should declare the limits of its own contiguous zone. In reality, it is very likely that these legal provisions are intentionally written in this way to give space for the justification of actions performed by state authorities. Undoubtedly, this feature indicates the importance of diplomacy when dealing with migration, since its adjustability permits the resolution of issues based on agreements. However, when accountability measures should be prioritized, diplomatic talks may not be enough.

There is a concrete idea that being an irregular migrant is being a criminal and because of a legal infringement, they do not deserve protection. In addition, provisions that penalizes authorities for not fulfilling humanitarian obligations are rare. A brief analyzes of the T.U shows that even if there are important aspects of human rights being dealt such as human dignity, protection against discrimination, access to information, it fails to engage in the consequences on disrespecting it. For example, article 2 of the T.U. states the respect human rights and international treaties signed by Italy in the first paragraph towards foreigners present on the border, but right after continues listing duties of the State and foreigner's obligations without considering a possible irregular entrance in the Italian State or irregularity of their status. The only provisions in regard to irregular migrants are the ones penalizing it in articles 10-bis, 11(5-bis) and 12. It does succeed on penalizing also smugglers according to their actions in article 12(3), but does not offer further protection to the irregular migrants. As it was highlighted before, one third of the amendments in the T.U. were in relation to security or to impose a grave penalization on irregular migration, whiteout properly addressing it.

What was seen at the Decree of 2003 is not much different. It sets an operational basis for State actions against irregular migration. There are three mentions to the safeguard of human life in articles 2, 6 and 7 - also mentioning human dignity- as being one of the principles that guides the border control activities that State authorities are engaged, however, it is limited and does not make any reference to the consequences of human rights violations. The Decree has the title of "*Disposizioni in materia di contrasto all'immigrazione clandestina*" but is very focused on the border control attributes of it and does not address human rights problems that could be arising from this.

As in relation to EU Legislation, considering the Schengen Borders Code, there is no mention to respect of human rights. The only terms in this sense are the ones related on granting entrance, residence or asylum based on humanitarian grounds. As a matter of fact, the Code is very specific and efficient on relating illegal migration to border control measures, which shows the European tendency on focusing in the security aspect of the situation.

The establishment of Frontex also illustrates another issue. There isn't a legal binding document that holds Frontex accountable in a European Court for its violations as a European Agency. The jurisdiction lays down on the individual Member States, which means that an Italian working under Frontex's supervision in the Central Mediterranean can be only held accountable for his action by the Italian Courts<sup>122</sup>. Yet, there isn't a legal way to build a case on, for example, the joint operations where several people from different member states respond all together to their violations to a European Court. They can be prosecuted individually and have separated decisions by the Host State. Decisions from national courts, however, can be controlled by the European Court of Justice, once it is related to EU law and to the European Court of Human Rights, when it is a violation concerning the European Convention of Human Rights<sup>123</sup>. The Treaty of Lisbon tried to address this problem by giving power to the ECJ to "review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effect vis-à-vis third parties"<sup>124</sup>. The debate relies, as well mentioned by Baldaccini, on the fact that even though the ECJ will be able to review Frontex's acts, the court's expertise and scope is different than the European Court of Human Rights, which means that the actual problem of human rights violations may not be taken care as it would be and may even been suppressed by Communitarian Law when is not compatible.

International law instruments on the contrary, have shown, apart from the UNCLOS, more commitment in certain documents with human rights in the SOLAS, SARcon and the Smuggling Protocol. The Convention on the Law of the Sea does not deal with irregular migration by the sea but limits itself to the aspects related to security of a State and the regulation foreign boats. One clause that could indirectly apply to the illegal entrance of persons is the right to innocent passage (article 25), although, fails to delimit which are the responsibilities of a State when applying this principle. It is understandable that the Convention is not updated with the current challenges and has a particular difficulty to be amended. As a consequence, humanitarian ideas were left to be touched by regulations concerning irregular migrations by other complementary instruments. It is important to remember that Libya is not a party to Convention, which exclude them or boats with its flag, rendering more difficult for Italian authorities to proceed with the interception of Libyan vessels.

In what concerns the Smuggling Protocol it is clear that the focus is on criminalizing the activity of smugglers and national security interests than to offer support to the victims of smuggling. People who trust on the services on smugglers are particularly vulnerable, as for being involved in a criminal

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<sup>122</sup> The responsibility for prosecuting is on the Host Member State and not on the State where the official comes from.

<sup>123</sup> Baldaccini (2010), p. 236.

<sup>124</sup> *ibid.* p. 237.

act, they are often subject to degrading conditions, tortured, deprived of food and water. The Protocol does not consider smuggled migrants as victims. Some of the provisions, such as article 11 even indirectly criminalizes whoever transports illegal migrants. This is dangerous because if the context is not taken into consideration, whereas for example they were on board because they were rescued, it can easily fall into a penalization to the ship master. That means that the need of protection of these people according to human rights law should be superior to any other rule, but if the Protocol text fails to address humanitarian causes properly, a dubious area on the legality of rescuing people is built with the fear of sanction. Even though there it not further mentioning to human rights than the very limited article 19, the Protocol in 2006, added some protection to the migrants, which are listed in article 16. Bearing in mind that this article is, in one hand, offering a legal basis for smuggled migrant's protection, in the other, is insufficient to deal with accountability of State authorities for their negligence. On top of that, the Smuggling Protocol cannot impose legal sanctions on States because of its nature. As a Protocol, the State Parties are subject to review sessions where they receive recommendations from the States Parties, which don't have a mandatory implementation, meaning that the State is not obliged to do anything about it. In this sense, it makes very difficult to enforce any changes in the way Parties apply the Protocol.

Moving to the SOLAS Convention, it follows all the previous documents analyzed: it does not charge authorities for failing to act according to human rights law. The convention, even lacking obligations ensuring accountability for violations, focused on the rescue of people in distress, differently than most of the previous one, does give specific obligations towards irregular migrants found in the sea. For instance, regulation 33, modified by resolution MSC 153(78) tried to implement procedures that would guarantee the protection not only to the migrants but also to the ship master. The regulation, while stating the obligation of embarking people in distress, also ended up drawing the obligation to disembark. The problem with disembarkation is the no existence of a provision that states where exactly should the boat dock, leaving the decision to be accorded between States. International Cooperation, although, is not always easy and often renders harder to proceed with rescue operations stated in the SAR. The question would be than, if people in distress were rescued in the Italian SAR zone, but the nearest and safest port is one in Malta, it is clear that Italian authorities should coordinate the rescue, but where should they dock?



### **4.1.1 Recommendations**

Bearing in mind the considerations made above and the interaction between human rights and security measures towards illegal migration within the legal framework, some general recommendations may be put in place for further studies:

- 1) The recognition that, in all levels, the law is very much focusing on the criminalization of irregular migration, whereas the phenomenon has clearly different sides, including a humanitarian one. There is a necessity to link illegal migration, border control and human rights violations in the legal framework, making the provisions more compatible to each other;
- 2) The need to address illegal migrants in Italian Law and Community Law by offering protection of their rights and not only to those who are in a regular situation;
- 3) The addition of clear provisions on the consequences arising for not neglecting human rights obligations, especially in regard to State's authorities;
- 4) More commitment of EU Member States on developing a mechanism that make authorities accountable for disrespecting migrant's human rights and, the further enlargement of the jurisdiction of European Court of Human Rights, having the possibility to directly bring violations performed by officials when working for any EU agency;
- 5) To review broad provisions that confers legal ways for States to circumvent their responsibilities, especially in regard to Search and Rescue and disembarkation obligations;
- 6) To eliminate articles that criminalize solidarity or somehow, dissuade ship masters to perform rescue operations when necessary.

### **4.2. The difficult coordination between actors**

Actors are placed in a more one-sided approach than the Legal Framework. They are bound by a certain mandate, which means that they usually relate only border control or to search and rescue operations. However, there is a reason why they operated focused on one or the other: these actors are conferred different powers and different geographical areas of actuation. In addition to that, they have to follow unclear regulations that are supposed to serve as guide to the operational structure, a fact that renders more difficult the coordination between them. Aside these problems, it is true that every ship master has to respect the general obligation stated in the UNCLOS to aid of people in distress in sea but many times what happens is that, even they are the nearest boat, they notify another authority responsible to proceed with the rescue and this often delays providing help. The only problem is to know which agency is responsible for what.

The answer is rather difficult, once that many of these actors end up having to proceed with rescue operations even if it's not their main focus, such as the *Guardia di Finanza* or Frontex. This means that it is not only a problem of coordination or clarifying responsibilities, but of assuming incidental obligations that are laid on Agencies when in activity. Thinking in the opposite way now, when NGO's are rescuing people, it can happen that a smuggler is among the people but, since they do not have police power to proceed with any kind of inspection, boarding a criminal is an incidental consequence of their work. It is normal that many different actors operate in different geographical areas with different mandates, but there is still a need to recognize the incidental consequences of their work and regulate it. Once, these cases were considered exceptional, but not anymore.

In respect to Frontex's role in the Central Mediterranean, it could be noticed that their activities still remain in a cloudy zone. The EU had the opportunity to make Frontex a success, implementing operations based on the format of the Italian's *Mare Nostrum*. Instead, it remained timid. Is very difficult to understand their work because there is very little information available for the public regarding their activities, their powers and as mentioned in the previous chapter, if officials are charged for violations of human rights occurring under the command of Frontex. The Agency represents a joint action between EU countries launched to monitor European Borders and should be playing at least, a more significant role in the question. The migration pressure on Italy occurs not because most of the people want to live in Italy but they believe that by reaching the Italian coast they will be able to keep on the road to countries like Germany, Austria or Sweden. This phenomenon is generated as a consequence of the Schengen Agreement's no checks policy and its taking very long until Member States actually take their share of responsibility and put solidarity first in the table.

#### **4.2.1 Recommendations**

Different than the point 4.1, it will not be further described here the different mandates of each actor, once it was already proved that is very difficult do delimit it properly without considering the incidental operations that emerge from their activity. The debate on their actions refers to situations of overlapping tasks that arise, obligations that contradict each other, insufficiency of regulations and operational guidance and, the non-recurrence on the human rights topic. However, some proposals in those fields might be taken into consideration:

- 1) For the Italian authority's responsible of border controlling to consider the possibility of performing search and rescue. This is not an exceptional case anymore and as a representation of

the State, should be prepared to act in this regard if necessary. Adapted ships and training could be provided to officials on both search and rescue and human rights obligations;

- 2) In the operational field, it would be interesting to have a RCC combined with Malta englobing both SAR zones, having also a mixed team to end the circumvention of responsibility; It would be even more effective if an EU Agency or a Frontex division is created to coordinate Search and Rescue englobing all the SAR zones belonging to EU Member States, under the command of officials coming from the Coastal countries but having a joint European team. This way, the EU would have more action on the matter, would not take away the sovereign power of Member States to control their borders - since it does not involve police power-, and still leave the command of operations to the concerned Member States.
- 3) To the necessity of Frontex's to enlargement of scope and have operational teams formed by Member States only focused in Search and Rescue;
- 4) To review the effectiveness of operations such as Triton and take into consideration a more balanced approach between Border surveillance and Search and Rescue such as the limited geographical area of operation;
- 5) To give more visibility and information on the EUNAVFOR MED Sophia Operation;
- 6) To examine the necessity of cooperation with NATO not only on the Operation Sea Guardian on the Greek Coast but also in the Central Mediterranean area;
- 7) To the recognition of NGO's work and increase collaboration, considering the viability of joint operations that would not have the scope of monitoring the Central Mediterranean and investigate criminal activities, not forgetting to respect and recognize irregular migrant's rights and derivative human rights;
- 8) The clear regulation and establishment of parameters in regard to Ports of disembarkation between authorities concerned.

### **4.3 The need of a strategic and balanced policy**

Earlier on July 2017, the European Commission proposed an Action plan in regard to the Central Mediterranean Route<sup>125</sup>. The proposal was a quick draft released in response to the threat by the Italian government on closing the ports, after the arrival of 12,000 migrants in less than a week<sup>126</sup>.

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<sup>125</sup> European Commission, 'Central Mediterranean Route: Commission Proposes Action Plan to Support Italy, Reduce Pressure and Increase Solidarity' <[http://europa.eu/rapid/press-release\\_IP-17-1882\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1882_en.htm)> accessed 9 July 2017.

<sup>126</sup> Giovanni Gagliardi and Umberto Rosso, 'Migranti, l'Italia Alla UE: Ipotesi Blocco Alle Navi Straniere. Mattarella: Situazione Ingestibile' (*La Repubblica*, 28 June 2017) <[http://www.repubblica.it/cronaca/2017/06/28/news/migranti\\_italia\\_ue\\_sbarchi-169383917/?ref=RHPPLF-BH-I0-C8-P2-S1.8-T1](http://www.repubblica.it/cronaca/2017/06/28/news/migranti_italia_ue_sbarchi-169383917/?ref=RHPPLF-BH-I0-C8-P2-S1.8-T1)> accessed 9 July 2017.

The proposal presented a number of tasks to be accomplished by the European Commission, the Italian Government and the EU Member States. It focuses both on restrictive measures and on providing assistance to migrants in different fronts. It does not however, change ways to act or operational structures but rather reaffirms commitments and previous ideas. Despite this characteristic, the document presents a few interesting proposals among the Commission's tasks such as mobilize EU Agencies on the European Asylum and Support Office to provide more assistance and mobile teams to analyze asylum application and to support the work with IOM to assist Voluntary Returns from Libya. Unfortunately, the weak proposals surprises more than the good ones. For instance, one of them suggests helping Libya to establish a MRCC and another asks the disposal of more officials for RABIT's operations. It is quite logic that the situation in Libya at the moment shows that there will be no respect for human rights on Operations coordinated from a Libyan MRCC, as there were episodes of Libyan authorities shooting migrants and there isn't any guarantee on the safety of people after they are rescued. In what concerns the RABIT's, it seems unworthy to deploy 500 hundred more officials if, until now, they were never asked to take action.

To Member States even less was asked. The main suggestions were in regard to the necessity of raising the contributions to the EU-Africa Trust Fund, to work better with Italy on the relocation requests, to engage in diplomatic talks with countries like Tunisia, Libya and Egypt in order to convince them to declare their SAR zones and support the return of irregular migrants from Italy. Apart from this, there is also a mention to the reform of Dublin system, which now seems one of the is crucial points to start diminishing the pressure on Italy in regard to asylum seekers. As it was mentioned in the previous chapters, almost 50% of the people who applied for asylum in Italy were granted, which shows that among all the migrants arriving, the demand for refuge is very high.

Finally, to Italy was proposed the draft in conjunction with Civil Society of a "Code of Conduct for NGO's" in relation to search and rescue activities. Every other commitment asked form Italy in the proposal was related to relocation, security checks, speed up asylum procedures, increase the capacity of detention centers and returns.

#### **4.3.1 Recommendations**

Besides these specific proposals, it is mentioned in the text the need of more cooperation and action with third countries that are either a country of passage or a country of origin of migrants coming from Africa to Europe. The only problem is that, if people are running from these places, is not because the government is being active or respect towards its people and negotiation should be taken

more carefully and with a more human rights perspective rather than only try to impede people to arrive in Italy. What is present in the European Commission's Action Plan is in line with the policies that have been adopted through the past years. Instead of proposals, the following list will focus on the obstacle the adoption of the current policies presented in the MOU and in the European Commission's draft may implicate:

- 1) There is a need to treat the migration influx into Italy in a more balanced way. It is not only a matter of increasing surveillance but also of a humanitarian action; proposals to accelerate procedures, increase capacity of detention centers, develop a safe-country of origin fixed list are only making the situation of human rights of the migrant more problematic, failing to evaluate clearly their situation of vulnerability and putting them in a position that equals to criminals;
- 2) There is an even bigger need to understand that this is not an Italian problem but a European one, and it should be dealt with a lot more cooperation from EU agencies and Member States. They cannot remain only in the level of financing Trusts in Africa or in Diplomatic talks, but also on mobilizing personnel for operations, technology, research capacity jointly with Italy;
- 3) The suggested Code of Conduct for NGO's is already implying that they have not been able to act under a correct conduct. It is to be noticed that half of SAR operations are conducted by them, and mainly because there aren't enough governmental actions to do it. Instead of codifying conducts, the most adequate policy is to develop a cooperation plan between authorities and NGO's;
- 4) The whole draft looks over accelerating actual procedures and increasing funding, which means that they are not looking for a quality solution but only a faster one. There is a need for legal framework and institutional reform and this problem must be highlighted. Instruments like these could have been used as a way to gather attention to more entrancing problems.
- 5) As in relation to agreements with third countries, it surely is a very important way to control the situation, however, it needs to be handled more carefully and transparent to the public. It needs to address the specific necessities without forgetting to observe human rights issues that may arise as consequences of what has been agreed, which the MOU doesn't do. These types of cooperation could and should involve at some extent UN Agencies and Civil Society;
- 6) Migration is a flexible event. It has to be considered that irregular migration may have risen because legal channels to enter in Europe were closed after the creation of European Union. It is important to rethink and analyze the current immigration policies and open legal ways for migrants to establish themselves;
- 7) To reduce push factors, injecting money indiscriminately in a country does not make much difference and specially if it finances the government. People leave their houses exactly because

their State was not able to fulfill their needs. The funding should be carefully analyzed and have a monitoring system, always trying to work with local civil society.

## **General Conclusion**

The Central Mediterranean Sea migration's influx seems to be growing along with the number of registered fatalities each year. Meanwhile, experts, NGO's, diplomats, military organizations and other actor involved tries to find a quick solution for the problem. It is true to affirm that the migration flow from Libya to Italy is not a new event but its dimension certainly is. The size of it, however, cannot serve as an excuse for not addressing the situation in an effective way, once the factors that cause people's mass flow can be previewed with data collection and a political background study on the migrant's countries of origin. "The EU was not expecting the arrival of this many people" is not a very strong argument but it leads to the question, if it was known by authorities, why so many people still die in the Central Mediterranean trying to reach Italy?

"The EU is not doing anything" is the most common answer. Despite the fact that it was demonstrated in the previous chapters that the European Union could have been playing a bigger role in the matter, to affirm that any of the actors is not doing anything is to reduce the migration crisis to a simplistic level. Notably, the variety of the elements that compose the scene permits to say that a solution can be only posed if migration is analyzed through an interdisciplinary work that doesn't ignore its complexity. More important than a question of whether the EU is doing something, it's the discussion on how to adapt legal frameworks, actor's mandates or diplomatic strategies to the contours of the case.

Considering these three main areas, this study tried to compare contrasting approaches that have being applied, whereas it is related to the expansion of rescue operations or to the increase of border control efforts. Migration, however, is a neither a static nor a simple phenomenon and as it was mentioned before, it occurs in consequence of a variety of factors. The research's answer was that, as more apart are the security and the humanitarian sides of the problem, more complicated is to find an adequate action plan. States have massively ignored the need to address irregular migration, to connect its provisions with human rights principles, to impose actor's obligation to respect human dignity, to understand that migrants crossing the sea are in a vulnerable position and in need of protection. The overweight of surveillance's aspects in immigration policies and the poor debate on how to ensure

compliance with humanitarian standards led the crisis to reach the level it is today. By recognizing these problems, it would be possible to work on a durable and efficient solution, that would balance State's power on controlling who is entering in its territory without neglecting that migrants are still people and need to have their rights guaranteed. It may be time to accept that migrant's flows in the Central Mediterranean is more than a pure matter of surveillance but, a humanitarian issue.

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United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, signed in 12 December 2000, entered in force in 28 January 2004.

### **Relevant Case-Law**

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