

Is EU policy making matters worse? Towards a Human Rights Based Approach to Irregular Migration by Sea

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Background

(Irregular) Migration continues to be the European Union's ('EU') Achilles' heel as its policy measures *ad infinitum* fail to adopt a human rights based approach in external border management. In turn, the thousands of migrant lives that perish each year in the Mediterranean Sea have become a humanitarian concern that is growing in scale and demanding significant attention.

At present, we are increasingly witnessing contemporary manifestations of State power exercised in the form of AI and other border control technology across maritime borders of the Mediterranean. For example, the use of unmanned aerial vehicles (UAV), like drones, to detect the movement of persons across borders allows State governments to *remotely control* the fate of migrants, epitomizing the securitization paradigm in this domain.

The main problem with the use and deployment of technologies in external border controls is that they operate through unprecedented asymmetries in knowledge and the power that accrues to knowledge, warranting closer examination between the intersection of rights and technological advancements.

The decades-long cooperation agreements that make use of such technologies by the EU and Italy with Libya are a case in point. Despite technological advancements having the capacity to make an invisible phenomenon *visible* – as sea crossings are put under substantial (if not total) surveillance – the externalization of Europe's border has led to thousands of avoidable deaths, and push- and pull- backs to Libya, constituting an absolute disregard of the *non-refoulement* principle (not to return a person to a place where their life or liberty would be at risk) and a bar to protection.

The tragic, recent shipwreck off Pylos island (June 2023) where approximately, according to the UN, 80 lives were lost, 500 people are still missing and only 104 survived, is another stark reminder of the failure of migration policies. In this incident, which I have analysed [here](#), despite information generated *inter alia* by technologies and from AlarmPhone about an

overcrowded boat in distress within Greece's Search and Rescue Region (SRR) to the Hellenic Coast Guard, no rescue attempt was initiated.

More effective and humane policy solutions are thus needed to strengthen search and rescue ('SAR') efforts, which is one of the key components of the European integrated border management. This paper examines maritime migration and the increasing technological complicity in rights abuses, suggesting possible policy recommendations with a focus on the EU, its Member States ('MS'), and related organisations.

The International Legal Framework for Rescues at Sea

At the outset and for clarity purposes, it must be noted that the law of the sea imposes a long-established duty to rescue persons in distress at sea, which functions as one of the most important tools in safeguarding safety of life at sea.

Article 98, United Nations Convention on the Law of the Sea ('UNCLOS') 1982: The first paragraph of Article 98 imposes an obligation upon the flag States to ensure that the shipmaster of a vessel flying its flag renders assistance to persons whose life is in danger of being lost at sea. The second paragraph lays down a second duty to be observed for an operative SAR system, shifting the focus this time to coastal States. This obligation requires States to promote SAR services and cooperate with States nearby for the purpose of maritime safety in order to strengthen the effectiveness of the duty to render assistance. In this vein, coastal States have authority over their SAR zone and hold an obligation of due diligence to provide adequate and effective SAR provides in their SAR region.

Relatedly, the International Maritime Organization's ('IMO') role as the 'competent international organization' of UNCLOS is preeminent in laying down implementation instruments and complementary rules for the fulfilment of rights and duties of States that must be exercised in the different maritime zones. As such, the general basis of the duty to rescue in UNCLOS becomes operational with the support of the international harmonised framework for maritime SAR laid down in the auspices of the IMO instruments, namely the International Convention for the Safety of Life at Sea 1974 ('SOLAS'), the International Convention on Maritime Search and Rescue 1979 ('SAR Convention') and the International Convention on Salvage 1989 ('Salvage').

Libya: Interceptions of Migrants at Sea

Libya as a departure point for migrants has always had a crucial role to play in migration between Africa and Europe. With the status of a 'migration corridor' where thousands of Sub-Saharan Africans are stranded, Libya has yet no domestic asylum system able to recognise any legal status for refugees and neither is it a party to the 1951 Refugee Convention; contrariwise, since the 2000s, it is operating a repressive migration policy.

The governments of the Central Mediterranean, especially the ones most affected by migratory flows (like Italy and Malta) in virtue of geographic proximity to the countries of origin in North Africa, have strengthened their border control and adopted migration policies that project an extraterritorialisation of European borders.

A particularly worrying development concerns the increasing cooperation with Libya including at the operational level, which takes place without clarity on the applicable legal framework or human rights safeguards. For instance, the Memorandum of Understanding (‘MOU’) agreed between Italy and Libya in February 2017, acts as a continuation of what was already the case ten years ago (the then bilateral agreement was condemned in 2012 by the European Court of Human Rights (ECtHR) in *Hirsi Jamaa and Others v Italy*). However, this time, it goes a step further, as Italy is no longer at the forefront of migrant interceptions and push-backs, since the Libyan Coast Guard and Navy (‘LCGN’) have undertaken those tasks.

Alarmingly, the latest report of the UN Independent Fact-Finding Mission ([March 2023](#)) concluded that there are grounds to believe that crimes against humanity have been committed by Libyan security forces and armed militia group including the LCGN. In particular, the report highlighted that these entities in Libya are provided *inter alia* with technical, logistical and monetary support from the EU and its MS for the interception and return of migrants.

With reference to international law of the sea provisions, rescue operations must end in a safe harbour. It is dubious, as such, whether Libya can be considered a safe place to disembark shipwrecked persons rescued/intercepted at sea.

Adding to the above, while Libya now has its own SAR zone, the Libyan declaration submitted in December 2017 is highly problematic and raises many legality issues since Libya is not a party to UNCLOS. In this regard, there are countless ongoing attempts by human rights organisations, lawyers and activists calling for the strike off of the Libyan SAR zone from the IMO’s records.

Henceforth, one of the policy recommendations put forth in this paper is for the **IMO to reconsider the classification of the Libyan SAR zone** until the LCGN shows that it is capable of undertaking SAR operations in line with international obligations and without putting migrants’ lives at risk. For example, in the pending ECtHR case of *S.S. and Others v Italy*, the applicants of the intercepted vessel submitted that the LCGN authorities ‘beat people with ropes who were in the water’, and threw objects at them during the rescue operation. Hence, European States through their Rescue Coordination Centres, which coordinate a SAR operation taking place outside its SAR zone ‘should refrain from giving directions or advice which it knows or ought reasonably to know would have negative human rights implications for those requiring assistance’ (Moreno-Lax, 2020).

Ireland’s Response in the Mediterranean

Against this backdrop, whilst Ireland is not a front-line State for migration in the EU, its response amidst the European ‘migration’ crisis has been notable. For example, Ireland has proactively contributed to deploying civil vessels for humanitarian SAR missions to help Central Mediterranean States tackle irregular migration flows by sea.

In particular, the Irish NGO ‘Refugee Rescue’ currently partners with the German NGO Sea-Eye to assist with rescue missions in the Central Mediterranean route, the deadliest migrant route, with per capita death rate rising each year. What is particularly unsettling is the fact that

the number of migrant crossings has fallen starkly since 2016, which marks the relative increase in the mortality rates.

Besides pro-active SAR missions, Ireland has deployed several Irish Naval Service ships to the Mediterranean Sea in an operation known as *Operation Pontus*, which was conducted by way of a bilateral arrangement with Italy (2015-2017). Since its involvement the Irish Naval Service ships have helped rescue overall 17,509 people.

Following, in 2017, Ireland decided to contribute this time by supporting the controversial EUNAVFOR (MED) *Operation Sophia* (2015-2020), by the deployment of Naval Service assets for security and interception operations which were part of the mission. The focus was on preventing departures, disrupting smuggling networks, and ultimately ‘to better contain the growing flows of illegal migration’. Whilst the mission was expected to comply with the legal and moral imperative of saving lives at sea, it did not include active SAR activities as part of its mandate. Hence, it has long been clear that the humanitarian aspects of the mission are subservient to the goal of external border management.

It needs to be noted that *Operation Sophia*, which was established under the Common Security and Defence Policy, has been replaced in March 2020 with the military *Operation Iridi*, which is very much tasked with a similar operational focus and keeps the controversial elements of the training of the LCGN, as well as the disruption of the business model of human smuggling and trafficking networks. Also, it expanded its scope to ‘allow for use of aerial surveillance within Libyan airspace’.

The use of technologies in this sphere, like surveillance drones, allow for interceptions and return of migrants to harm, by their capabilities to act as pre-frontier detection mechanisms. They can detect and trace migration movements by generating visual knowledge of people on the move. One would have legitimately anticipated that the availability of situational awareness would have enhanced the SAR capacities of States by providing early warning of distress incidents. Nonetheless, the policy itself seems to result in a clear denial of the right to leave a country, including one’s own, and to seek and enjoy asylum-rights that are enshrined in EU law as much as international law and which European States must respect and protect.

Such policy initiatives aimed on the Central Mediterranean route will necessarily have an impact on migrant flows in another route. For instance, in another relatively recent shipwreck outside Italy’s coast in Crotona (February 2023), the migrants in the case attempted to cross the Eastern Mediterranean route arguably because of the intensification of efforts on the Central Mediterranean, which have clearly diverted migrant crossings to other routes, which in itself has further reduced the safety of crossings.

In this light, early in 2023, Ireland has agreed to deploy a single Naval vessel in the Mediterranean as part of *Operation Iridi* during the summer months of 2023. Importantly, Ireland stressed its commitment to the obligation under international law to provide assistance to persons in distress at sea, should a distress incident arise, as well as that disembarkation of those rescued will be handed to a European Coast Guard ship (and not LCGN) with minimum

delay. This is a critical point as those responsible for SAR missions should conduct their work in a human rights compliant manner.

In particular, it is important to recall that the law of the sea provides that a State's due diligence obligations to carry out properly the coordination of a rescue include the obligation to refrain from assigning the rescue to an incompetent authority that could hinder in a reasonably foreseeable manner the protection of life and protection against *refoulement*.

A Human Rights Based Approach to Migration by Sea

To effectively address these challenges while at the same time benefit from technological advancements, a human rights-based approach needs to be embedded in the design, deployment, and regulation of border control technologies. This approach can be an effective means in bringing together the different actors that play out in external border management, based on shared responsibility to manage irregular migration and help produce recommendations for the performance improvement of rescue activities.

In addition to the above recommendation for a reconsideration of the Libya's SAR zone by the IMO, this paper makes the following general policy suggestions:

Recommendation No. 1: The EU and its MS should refrain from shifting responsibility for SAR operations on the high seas to the LCGN.

Recommendation No. 2: The EU and its MS should ensure that EU funding received by Frontex is being channeled to proactive maritime and aerial surveillance.

Recommendation No. 3: All agreements with third countries and all arrangements for external action are adopted in a human rights compliant manner, consisting of monitoring and accountability mechanisms.

Recommendation No. 4: New amendments are necessary to the IMO's Conventions governing the SAR system (SOLAS and SAR Conventions) that will address and clarify when and under what circumstances the duty to render assistance at sea will be triggered, especially with reference to the role of technologies acting as knowledge generators.

These suggestions demonstrate only some of the steps that could be taken in order to fill the vacuum of human rights protection, and come amidst tantamount findings of violations and abuses taking place in the Mediterranean region and Libya.

Conclusion

Migrant deaths at sea occur across the globe. However, the Mediterranean Sea is slowly turning into a maritime graveyard, with thousands of people drowning each year in an effort to reach European shores. Treating migration movements as a 'threat to national security' makes it legitimate to require ad-hoc arrangements, action and policies such as the prioritisation of securing borders over humanitarian concerns. The reliance *inter alia* on aerial and maritime

assets of surveillance demonstrates a progressive abstention from SAR activities but also an intensification of ‘contactless’ interceptions and returns.

The EU might have been in part successful in decreasing the migration flows by such policies that aimed to strengthen the LCGN to ‘hold’ people back from leaving in the first place. However, cooperation with third countries does not absolve the EU and its MS from their international obligations. In turn, policies aimed at tackling migrant flows should incorporate an effort to minimise unintended side-effects (including foreseeable deaths of people and refoulement practices) and operationalise protection of human rights at sea.

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