

Two Boats in the Mediterranean and their Unfortunate Encounters with Europe's Policies towards People on the Move

Leonhard den Hertog

No. 48/July 2012

Abstract

This paper examines two recent events in which people on the move making their way from Libya to Europe across the Mediterranean were either abandoned to die at sea or 'pushed back' (Hirsi case). It argues that these two cases are not incidental or isolated but rather part of a broader situation of concern in the Mediterranean. The paper highlights this situation and also connects it to Europe's response to migratory flows during the Arab Spring. On the basis of independent reports, case law and first-hand accounts, it attributes these tragedies to two fundamental structural deficiencies in Europe's approach to people on the move in the Mediterranean: 1) a general lack of accountability, among the most salient of which are the lack of legal clarity for SAR (search & rescue) and disembarkation obligations as well as a lack of monitoring of what actually happens in the Mediterranean and 2) a lack of solidarity amongst European states as well as across the Mediterranean. The paper then goes on to propose recommendations to correct those cross-cutting deficiencies.

CEPS Papers in Liberty and Security in Europe offer the views and critical reflections of CEPS researchers and external collaborators on key policy discussions surrounding the construction of the EU's Area of Freedom, Security and Justice. The series encompasses policy-oriented and interdisciplinary academic studies and commentary about the internal and external implications of Justice and Home Affairs policies inside Europe and elsewhere throughout the world. Unless otherwise indicated, the views expressed are attributable only to the author in a personal capacity and not to any institution with which he is associated. This publication may be reproduced or transmitted in any form for non-profit purposes only and on the condition that the source is fully acknowledged.

ISBN 978-94-6138-217-7

Available for free downloading from the CEPS website (<http://www.ceps.eu>)

©CEPS, 2012

Contents

Introduction	1
1. The case of the ‘left-to-die’ boat	1
2. The Hirsi case.....	2
3. The broader situational picture: people on the move in the Mediterranean.....	3
4. Specific causes: Why was this journey made? Why were the refugees left-to-die? Why others pushed ‘pushed back’?	4
5. The cross-cutting failures of lacking accountability and solidarity	6
6. Conclusion and Recommendations	8

Two Boats in the Mediterranean and their Unfortunate Encounters with Europe's Policies towards People on the Move

Leonhard den Hertog*

CEPS Paper in Liberty and Security in Europe No. 48/July 2012

Introduction

Two stark reminders of the difficulties that people on the move encounter in the Mediterranean have been grabbing headlines recently: the so-called 'left-to-die' boat report and the groundbreaking *Hirsi* judgment. These two instances present the worst of both worlds: the first concerns a migrant boat that was ignored altogether, resulting in many deaths, whereas the second concerns a migrant boat being intercepted but subsequently dealt with in a way that contradicts Europe's human rights standards. These two cases are neither isolated nor incidental. Instead they are of wider concern to the EU and reminders of structural deficiencies in Europe's approach to people on the move in the Mediterranean. This paper identifies those cross-cutting deficiencies and proposes recommendations to correct them.

1. The case of the 'left-to-die' boat

The 'left-to-die' boat report of the Council of Europe's (CoE) Parliamentary Assembly (PACE) describes the tragic chain of events that led to the death of 63 people at sea.¹ The case, first featured by British daily *The Guardian*,² was carefully investigated by PACE Rapporteur Tineke Strik. She concludes that due to a "catalogue of failures" by Search and Rescue (SAR) teams and by private and military (NATO) authorities, a small rubber 'zodiac' boat (a so-called 'dinghy') was left afloat for 15 days without water, food or rescue. The persons on board the dinghy were all sub-Saharan Africans³ fleeing Libya on 26 March 2011. Their situation in Libya had become increasingly precarious as a result of the intensifying conflict: sub-Saharan Africans were specifically at risk due to a general suspicion of their involvement in Gadhafi's mercenary forces.⁴

A disconcerting story line emerges from the PACE report. After travelling 18 hours without coming into sight of their intended destination, the Italian island of Lampedusa, and under quickly deteriorating weather conditions, their emergency situation was communicated to the Italian Maritime Rescue Coordination Centre (MRCC) in Rome. NATO Headquarters (then

* Marie Curie PhD Fellow, Universities of Cologne & Edinburgh. EXACT Project on EU External Relations. The author would like to express his gratitude to Prof. Elspeth Guild and Dr. Sergio Carrera for substantive comments and suggestions on an earlier version of this paper.

¹ T. Strik, "Lives lost in the Mediterranean Sea: Who is responsible?", Report for the Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March 2012.

² J. Shenker, "Aircraft carrier left us to die, say migrants", *Guardian.co.uk*, 8 May 2011 (<http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>).

³ There were about 70 adults of Ethiopian (47), Nigerian (7), Eritrean (7), Ghanaian (6) and Sudanese (5) origin. They included about 20 women, some of whom were pregnant and 2 were babies. See p. 7 of the PACE report 2012, op. cit.

⁴ Ibid.

enforcing the no-fly zone over the area under operation ‘Unified Protector’), the Maltese MRCC, Frontex (Warsaw-based EU External Borders Agency) as well as all other vessels in the area were then informed of the precarious situation of the dinghy. Moreover, a French aircraft took pictures of the assumed boat and transmitted them to the Italian MRCC. According to the survivors, shortly thereafter a military helicopter showed up, left again and later returned with a small stock of water and biscuits. Rescue seemed imminent, but finally no one returned to offer help. Weather conditions further deteriorated and the boat began taking in water and ran out of fuel. Several individuals drowned. At some point, the dinghy encountered two private fishing boats, but they did not render assistance. After about ten days, and with only half of the crew surviving, a large military vessel came in sight and approached the dinghy. Despite clear indications of distress by the remaining individuals on board, such as holding up dead babies and empty fuel tanks, the military personnel took pictures but did not engage in a rescue operation. Finally, after some 15 days, the dinghy washed ashore in Libya. All 11 survivors were instantly arrested, two of whom died shortly thereafter.⁵

2. The Hirsi case

This case⁶ started with a similar scenario but ended in a radically different way. A ship with Eritrean and Somali nationals left the shores of Libya in May 2009 for Italy. They were intercepted by Italian police and coast guard forces in international waters and returned to Libya by Italian military vessels. According to the returnees, they had been led to believe that they were being taken to Italy and their personal effects were confiscated. Once it became apparent that they would be disembarking in Libya, some individuals objected and requested to be taken to Italy, but to no avail: the individuals were handed over to Libyan authorities. All this happened on the basis of an Italian-Libyan agreement that allowed for such extra-territorial ‘push-backs’.⁷ This new Italian strategy was also publicly announced and hailed by the Minister of the Interior. At a later stage, several of the individuals managed to obtain refugee status from the United Nations High Commissioner for Refugees (UNHCR) in Tripoli and one even obtained refugee status in Italy after making a second attempt. It is thus undisputed that the refugees were in need of international protection. Two of the returnees died in unknown circumstances after the events.⁸

Some of the returned individuals, with European legal representation, managed to bring a case before the European Court of Human Rights (ECtHR). They argued that their forced return exposed them to the risk of inhuman and degrading treatment, in violation of Article 3 (*non-refoulement*) of the European Convention on Human Rights (ECHR; Convention) in Libya as well as in their countries of origin (i.e. Somalia and Eritrea) by possible *chain refoulement* (cf. Article 19(2) Charter of Fundamental Rights of the EU; Charter). Furthermore they claimed a violation of Article 4 of Protocol 4, which prohibits collective expulsion (cf. Article 19(1) Charter), and of Article 13 of the Convention, which grants the right to an effective remedy (cf. Article 47 Charter). The ECtHR’s Grand Chamber unanimously found a violation of all those Articles. It held, inter alia, that the situation in Libya was widely documented as being at odds with the Convention rights and hence Italy could not have considered it as a ‘safe country’. The

⁵ See for a more detailed account of the disastrous journey see the PACE report, op. cit., pp. 6-10. For a detailed scientific analysis of the chain of events, including an oceanographic assessment: see also C. Heller, L. Pezzani and Situ Studio, “Forensic Oceanography – Report on the ‘Left-To-Die Boat’”, Centre for Research Architecture, Goldsmiths, University of London.

⁶ ECtHR 23 February 2012, Judgment, *Hirsi Jamaa and others v. Italy*, Application no. 27765/09.

⁷ The concept of ‘push-backs’ entails the practice to divert back to a third country boats with individuals on their way to Europe.

⁸ For the facts, see the ECtHR ruling, *Hirsi* 2012, op. cit., pp. 9-17.

absence of a remedy to suspend the return operation was furthermore held to be in contravention with Article 13 ECHR. What was groundbreaking about the Court's judgment was that it clearly held that these Convention rights can also be enjoyed extraterritorially. There was a strong signal in the Court's argument indicating that these new forms of extraterritorial border control necessitate a dynamic interpretation of the Convention, and especially of the jurisdiction concept (Article 1, ECHR) so as to avoid 'legal vacuums'. The ruling thus clearly denounced the push-back practice.⁹

3. The broader situational picture: people on the move in the Mediterranean

It is clear that these are neither rare nor isolated instances: rather they are exemplary indications of a wider situation of concern for people on the move in the Mediterranean. According to the UNHCR, 2011 was the deadliest year so far with an estimated 1,500 individuals reported dead or missing.¹⁰ Of course, on many occasions search and rescue is undertaken and lives are saved. However, unseaworthy vessels continue to perish, with bodies regularly washing ashore on both sides of the Mediterranean. Despite the Mediterranean being a stretch of water dominated by an increasingly dense network of shipping and ever-advancing monitoring, and even more so during the NATO operations in Libya, the number of deaths keeps rising. This is an alarming development which cannot be accounted for easily. Hence the conclusion may be warranted that deeper factors than the mere 'coincidental' lack of proximity or capability of potential rescuing vessels contribute to this development.

The *Hirsi* case, with 24 applicants, represents only a tip of the iceberg. The practice of push-backs appears to have been much more widespread, also amongst EU member states and Frontex.¹¹ Italy carried out at least nine such operations in 2009; in only a four-day time span in May 2009 it managed to push back 471 migrants.¹² Furthermore there are reports that Spain engaged in return operations off the West-African coast¹³ and that Frontex did so during its HERA joint operations in roughly the same area.¹⁴ The Italian authorities suspended the

⁹ See for the most relevant parts of the judgment, *ibid.*, pp. 76-82, 122-138, 146-158, 166-186 and 201-207.

¹⁰ UNHCR, *More than 1,500 drowned or go missing trying to cross the Mediterranean in 2011*, 31 January 2012 (<http://www.unhcr.org/4f2803949.html>). Some estimate the number is much higher; see also the numbers featured in Statewatch analysis, quoting 'Fortress Europe' which presents numbers of over 1900 deaths in only the first seven months on 2011: M. Martin, *The Arab Spring and the death toll in the Mediterranean; the true face of Fortress Europe*, *Statewatch Analysis*.

¹¹ Human Rights Watch, *Pushed Back, Pushed Around*, New York, 21 September 2009, pp. 38-40; (<http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0>); UNHCR, "UNHCR interviews asylum seekers pushed back to Libya", Briefing Note, UNHCR, Geneva, 14 July 2009.

¹² *Hirsi* 2012, *op. cit.*, pt. 13.

¹³ P. Ceriani, C. Fernández Bessa, A. Manavella, V. Picco and L. Rodeiro, "Report on the situation on the Euro-Mediterranean borders (from the point of view of the respect of human rights)", CHALLENGE: The Changing Landscape of European Liberty and Security, Work Package 9, University of Barcelona, 2009, pp. 45-47. They describe the 'Marine I' case.

¹⁴ BBC News, "Stemming the immigration wave", 10 September 2006 (<http://news.bbc.co.uk/2/hi/europe/5331896.stm#map>). Frontex does not deny these diversions (Frontex, "HERA III Operation", News Release, Frontex, Warsaw, 13 April 2007). It claims these diversions always took place under the responsibility of a Mauritanian officer, but in our opinion the role of Frontex was absolutely indispensable for such diversions to occur. See Frontex, "HERA 2008 and NAUTILUS 2008 Statistics", News Release, Frontex, Warsaw, 17 February 2009(a); see also J.J. Jeandesboz, "Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and Eurosur", CHALLENGE Research Paper No. 11, CEPS, Brussels, August 2008, pp. 15-16.

practices and agreements in 2011 due to the events in Libya. However, despite the clear ruling of the Strasbourg Court and due to the policy's relative 'effectiveness' in reducing arrivals of irregular migrants,¹⁵ future attempts may be expected from Italy and other EU member states in the Mediterranean to shift responsibility onto third states for keeping migrants 'at home', thereby stretching the boundaries of jurisdiction and responsibility. As a matter of fact, there have been media reports that Italy is currently in the process of concluding a new agreement with Libya in this area, the details of which are still unclear.¹⁶

4. Specific causes: Why was this journey made? Why were the refugees left-to-die? Why were others pushed 'pushed back'?

Why has the situation developed in this direction? After assessing the question of why people leave on such dangerous voyages, the specific causes of the two cases are addressed here.

First, the question of *why people undertake such journeys* should not be overlooked. Of course, any trip with unseaworthy boats that can be prevented could decrease casualties. As we are speaking of 'mixed flows',¹⁷ the motives are diverse; ranging from seeking labour opportunities to international protection. In the case of the 'left-to-die' boat, the specific motives originated clearly from the revolutions and war in North Africa. More attention should be given to create other avenues for these individuals to reach European territory and thereby safety and access to an asylum procedure. After all, if no regular means exist to bring oneself into safety, especially in a conflict situation, taking recourse to dangerous escape routes becomes the only option. Already now, a large portion of asylum-seekers enter the EU in an irregular way.

It is also important to understand the larger context of Europe's policy responses to the migratory flows produced during the 'Arab Spring' across the Mediterranean and how they do not facilitate ways for individuals to obtain protection. Italy, at that time, was attempting to stem the influx of individuals from North Africa, also by seeking cooperation with Tunisia.¹⁸ The EU's immediate response, alongside funding humanitarian aid and repatriations, was to launch a Frontex joint operation named HERMES focused on "detecting and preventing illegitimate border crossings".¹⁹ Among these various EU efforts, the priority seemed strongly in the sphere of border control and reducing irregular migration. Analogously, its long-term response as worded in the Commission Communication of DG Home entitled "Dialogue on Migration, Mobility and Security" presents a regime of conditionality with the Mobility Partnership as a central instrument whereby third States would have to take initiatives in this sphere: sign readmission agreements, sign working arrangements with Frontex, cooperate in joint

¹⁵ Italy stated that as a result of the push-back practices, the flow of irregular migrants has decreased fivefold; *Hirsi* 2012, op. cit., p. 4.

¹⁶ "Libya-Italy agree joint action against immigration", *Times of Malta*, 4 April 2012.

¹⁷ This refers to groups of people on the move consisting of individuals that may be covered by diverging legal regimes, such as legal statuses applicable to refugees versus labour migrants. Cf. R. Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization", *Journal of Refugee Studies*, Vol. 20, No. 2, 2007, pp. 172-192. This concept is developed to account for increasingly complex migration and refugee flows, but it may also facilitate discussion that promotes the distinction of 'bogus' versus 'genuine' asylum-seekers, legitimate versus illegitimate migrants and individuals legally versus illegally on the move. It should therefore be used with caution.

¹⁸ ANSA, "Italy continues talks with Tunis, no halt to migrant flood", 5 April 2011 (http://www.ansa.it/web/notizie/rubriche/english/2011/04/05/visualizza_new.html_1526735437.html); "Italy, Tunisia sign deal to ease migrant crisis", Reuters (Africa), 5 April 2011.

¹⁹ Frontex Press Release, "HERMES 2011 running", 21 February 2011, p. 2.

surveillance and capacity-building in border control.²⁰ It is hence clear that the primary focus has not been on SAR or fundamental rights-compliant interception practices. Rather, it is access to Europe that is framed as problematic.

The lack of regular access to Europe is illustrated in the story of one of the survivors. He was born in Eritrea and had worked for years in Libya as a mechanic and had no plans to migrate to Europe. It was only after the battles between pro-Gadhafi forces and rebels broke out, and NATO started its bombing campaign, that his situation became increasingly precarious. As highlighted above, his sub-Saharan origin made him a suspect and easy target for rebel forces. He took a huge risk by being cramped on an overcrowded dinghy, and, even more strikingly, even made a second attempt after the failure of the first doomed voyage.²¹ If this person would have been aware of other ways to escape his predicament, perhaps his cross-Mediterranean boat journey could have been prevented. Access to and awareness of initiatives to bring those to safety, such as emergency visas issued by embassies or resettlement operations, are thus vital.²² Again, this exemplifies a broader picture whereby Europe is cutting ever more access routes to its territory, and thereby to its asylum system, through its visa, border and migration policies. Only hazardous routes to Europe thereby remain; some are thereby forced to take such risks. So, it is a noble cause to prevent these perilous journeys across the Mediterranean but this should be accompanied by opening up other options for those in need of safety.

Second, as far as the 'left-to-die' boat case is concerned, the question of how this could happen is analysed quite extensively in the CoE PACE report. Apart from the gross and inexcusable neglect of the dinghy's precarious situation by the authorities and private actors, the report also identifies some factors that may have allowed for this situation to arise:

- a) The legal regime covering SAR is found to be insufficiently clear and binding. This concerns both the definition of distress and allocation of the responsibility to act, especially in the rare instance where a coastal state (here Libya) loses the capacity to maintain responsibility for its SAR region.
- b) Several factors *decrease the likelihood* of private entities engaging in rescue operations. Apart from the clear economic repercussions of engaging in rescue, the fear of criminalisation also contributes to the reluctance to engage in such operations. Cases in Italy where rescuers faced trial add to this fear on the part e.g. of fishermen.²³ Moreover, the on-going disagreement between Malta and Italy over the 2004 amendments to the SAR Convention and the Convention for the Safety of Life at Sea (SOLAS) regarding disembarkation create a lack of legal certainty. There have already been several instances where long negotiations were needed before a disembarkation point was agreed upon, sometimes risking the lives of those waiting to be rescued. This could also add to delays on the part of potential rescue vessels.
- c) The report identifies an apparent lack of planning on behalf of NATO and European States to prepare for the foreseeable human migratory flows out of Libya. According to the report, no working agreement was established between the NATO Headquarters in Naples and SAR authorities and NATO did not seem very pro-active or approachable with SAR requests.²⁴

²⁰ European Commission, Communication, A dialogue for migration, mobility and security with the Southern Mediterranean countries, COM(2011) 292 final.

²¹ See the personal story on video footage (<http://www.fidh.org/Death-of-63-migrants-in-the>).

²² Although on an ad hoc basis, France and Germany have reportedly issued some of these visas.

²³ PACE Report 2012, op. cit., pp. 16-17, fn. 20.

²⁴ Ibid., p. 3.

Thirdly, the reasons for the push-back practices are of a different nature. Here, rather, the abovementioned ‘effectiveness’ of the practice in reducing irregular migration flows is of paramount importance to understand the attractiveness of this option for politicians and policy-makers. Moreover, the push for the ‘externalisation’ or ‘extraterritorialisation’ of border checks is also encouraged in EU discussions: in recent years, starting from the Tampere European Council in 1999,²⁵ the priority given to cooperation with countries of origin or transit has featured high on the Brussels policy agenda.²⁶ Extraterritorial push-back practices, although in no way legitimized by this debate, are the ultimate consequence of a line of thinking whereby responsibility is *shifted* to third states. Moreover, the popular belief of an increasing need ‘to do something’ and reduce the irregular migration flows adds to the pressure on politicians and policy-makers to resort to such far-reaching ‘solutions’. However, this popular belief does not come out of nowhere. Some EU and member state authorities, especially those with a ‘home affairs’ focus,²⁷ have aided the process of linking migration and crime (or rather: *criminals*),²⁸ thereby criminalising or ‘insecuritising’ it, imposing an ever-greater imperative to ‘combat’ or ‘fight’ it.²⁹ Inter-agency cooperation, such as by Frontex and Europol,³⁰ reinforces this lack of distinction between people on the move and criminals and erodes the position of individuals as holders of rights against the background of ‘mixed flows’ and ‘bogus’ migrants.³¹

5. The cross-cutting failures of lacking accountability and solidarity

Cross-cutting failures in Europe’s policy in the Mediterranean Sea emerge from these cases and their specific causes. They are neither incidental nor isolated; in fact they are systemic to the way the EU and its member states work when it comes to human mobility, especially in the external dimension of migration and asylum.

First, there is a general lack of accountability for what happens on the Mediterranean Sea. As the Court held in the *Hirsi* case, the push-back practices violated the applicants’ right to an effective remedy. Furthermore, so far no one has been held accountable for the lost lives at sea in the ‘left-to-die’ boat case. This lack of accountability has two particularly salient features: a lack of clarity and a lack of monitoring.

- a) There is a lack of clarity concerning the responsibility for SAR and disembarkation concerning the applicability and binding nature of legal norms. It becomes clear from the ‘left-to-die’ boat case that the small void left by the relevant legal rules was exploited by

²⁵ European Council, Conclusions of the Presidency, Tampere, 15-16 November 1999.

²⁶ See e.g. the Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ 2010, C 155/01, p. 28.

²⁷ For an overview of some of the characteristics of a ‘home affairs’ focus, see S. Carrera, E. Guild, L. den Hertog and J. Parkin, “Implementation of the EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies - Frontex, Europol and the European Asylum Support Office”, EP Study (Citizen's rights and constitutional affairs), August 2011, section 6.1.

²⁸ Illustrative in this respect is Europol’s assessment of migration flows from North Africa as a terrorist threat: Europol, “EU Terrorism Situation and Trend Report”, TE-SAT 2011, Europol, The Hague, 19 April 2011 (www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TE-SAT2011.pdf).

²⁹ See S. Carrera, “Towards a common European Border Service?”, CEPS Working Document No. 331, CEPS, Brussels, 2010, p. 10; D. Bigo, «Police en Réseaux: L’expérience européenne», Paris: Presses de Sciences Po, 1996, pp. 258-266.

³⁰ See Council of the European Union, *The Joint Report by EUROPOL, EUROJUST and FRONTEX on the State of Internal Security in the EU*, 9359/10, Brussels, 7 May 2010.

³¹ This and some other arguments in this paper have been argued more extensively in S. Carrera *et al.* 2011, op. cit.

the actors to shift responsibility (and afterwards the blame) amongst each other. The lack of clarity, although by no means justifying refraining from action, also applies to the selection of a point of disembarkation; especially the persisting disagreement between Malta and Italy over the 2004 amendments to the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) is worrisome.³² This produces a lack of clarity and legal certainty, thereby adding an incentive for potential rescue vessels to be hesitant about engaging in SAR. Currently, rules concerning search and rescue and disembarkation applicable to Frontex operational coordination at sea are before the Court of Justice of the European Union (CJEU).³³ However, these rules in themselves do not meaningfully reinforce the SAR legal framework and would thus not provide the much-needed full clarity. The unclear and overlapping ways of working of relevant actors in the Mediterranean Sea – i.e. Frontex, Member States, NATO, third States and international organisations – make it difficult to demarcate responsibility and establish liability, which is crucial for meaningful accountability. Furthermore, some actors are expanding their activities in an ‘experimentalist’ way, which means that their practices and policy tools take them into originally unforeseen domains of intervention.³⁴ Inherently, these new activities are often not regulated and lack a clearly defined legal basis. This aggravates the above-mentioned demarcation of responsibility. For example, Frontex joint operations have formally been ‘coordinated’ by the Agency, without a clear definition of what this entails, but in practice this role is of a highly operational nature.³⁵

- b) These ways of working remain obscure by the lack of effective monitoring. It is very hard to establish *what actually happens* in the Mediterranean Sea as no proper independent oversight of the actions is in place. The apparent unwillingness of certain actors (NATO, participating States) in the ‘left-to-die’ boat case to provide relevant evidence to reconstruct the chain of events illustrates the general tendency to work in secrecy. During the negotiations of the new Frontex mandate in 2011, the member states insisted that independent observers would not be allowed on board without their approval.³⁶ As a result, SAR failures and push-backs could go, and probably continue to go, unnoticed and thereby unaccounted for. Certainly, if proper monitoring would have been in place, the likelihood of such events would be lower and at least someone could be held accountable.

Some of these issues relate to the current negotiations on the Commission’s EUROSUR (European Border Surveillance System) proposals.³⁷ Unfortunately, and apart from the question of the proportionality of this initiative, these proposals as such cannot be expected to improve the situation. At the outset it should be noted that the proposal itself excludes the member states’

³²See A. Díaz Tejera, Parliamentary Assembly, Council of Europe, *Report on the interception and rescue at sea of asylum seekers, refugees and irregular migrants*, Doc. 12628.

³³ Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code. The EP challenged these rules before the Court arguing that an invalid legal procedure had been used; case C-335/10, *Parliament v Council*. On 17 April 2012, Advocate-General Mengozzi delivered his opinion recommending the Court to annul the decision.

³⁴ For work on ‘experimentalist governance’ and Frontex, see J. Pollack and P. Slominski, “Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders”, *West European Politics*, Vol. 32, No. 5, September 2009, p. 905.

³⁵ See also Carrera et al., 2011, op. cit., p. 13

³⁶ Regulation (EU) No. 1168/2011 of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 (Frontex Regulation), Art. 13 (par. 3), 14 (par. 6).

³⁷ European Commission, Communication, Proposal for a Regulation of the EP and of the Council establishing the European Border Surveillance System (EUROSUR), COM(2011) 873 final.

SAR obligations from the scope of the Regulation.³⁸ Thus it does not offer more clarity on SAR responsibilities. Moreover, the situational awareness that the system is promised to bring about cannot be expected to improve the SAR capabilities of the EU and its member states or end potential push-back practices; instead this ‘tool’ would only make more visible the enduring problems identified in this paper as the issues identified above remain unresolved. Despite its rhetoric on saving lives, its dominant focus on border control and reducing irregular migration as well as the deep involvement of ‘Home Affairs’-minded Frontex further aggravates the challenges to much-needed clarity, scrutiny and accountability.

Second, the lack of solidarity amongst European states (internal) as well as with third states (external) is a clear obstacle to many advances that would alleviate the situation. The lack of solidarity is evident from the abovementioned disagreement over the disembarkation rules. Moreover, the southern member states have to mount greater efforts to ensure a fundamental rights-compliant response to migratory flows in the Mediterranean. The Dublin regime (EU rules on the designation of the responsible member state for an asylum application)³⁹ amplifies that imbalance further. The absence of regular access to protection for those seeking refuge is another sign of inadequate solidarity. Exemplary in this regard is the fact that only Switzerland maintains its procedure to process asylum requests at its embassies. It is currently debating whether to abolish this instrument of international protection, partly because of the overburdening of Swiss embassy personnel. This is related to the fact that no other European state has yet been willing to open a similar procedure, although it is true that some countries do so on an ad-hoc basis.⁴⁰ If this policy would be shared amongst EU member states (plus Schengen countries such as Switzerland), the work load could be divided. This would be a sign of both internal and external solidarity. The on-going and difficult debate at EU level about resettlement is further evidence of a low level of solidarity among the member states. The recent agreement on the EU Joint Resettlement Programme is a good step in the right direction, but EU countries still lag far behind other industrialised states.⁴¹

6. Conclusion and Recommendations

Hence, a picture emerges of a policy field with unclear, secretive and experimentalist ways of working which has fostered informal and non-binding coordination networks of ‘law enforcement’ actors involved in border control and surveillance where responsibility can sometimes be evaded.⁴² The individual on the move on the Mediterranean Sea is thereby in no position to challenge decisions or have rights enforced but is rather dependent on good will. Moreover, it follows from the ECtHR’s *Hirsi* judgement that pre-border control and extra-territorial push-back operations are *inherently problematic* for human rights compliance; it is precisely the absence of rights protection that makes the policy so ‘effective’. It is hard to imagine an arrangement whereby European authorities can fulfil the requirements of *non-refoulement* and effective remedy in an extraterritorial setting. Continuing this policy would seem unacceptable, especially in a post-Lisbon era with the Charter in effect and expected increased accountability. Seen in the context of wider EU external relations, such practices may

³⁸ Ibid., see preamble, recital 16.

³⁹ See S. Peers, “The revised ‘Dublin’ rules on responsibility for asylum-seekers: The Council’s failure to fix a broken system”, Statewatch Analysis.

⁴⁰ C. Hein and M. de Donato, *Exploring avenues for protected entry in Europe*, March 2012, pp. 54-60

⁴¹ See the text adopted by the European Parliament on 29 March 2012 (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-104>); see also UNHCR, “UNHCR welcomes adoption of Joint EU Resettlement Programme”, 30 March 2012 (<http://www.unhcr.org/4f7589ef9.html>).

⁴² We have argued this more extensively in Carrera et al. 2011, op. cit.

also jeopardise the legitimacy of the EU's central objectives, such as the promotion of human rights and the rule of law,⁴³ and hamper the success of its key initiatives, such as the European Neighbourhood Policy (ENP).

Apart from recommending the end of the continuous linking of migration with crime and criminals – a systemic threat to solidarity in this field and the fulfilment of the obligation to protect – this final section advances several *policy suggestions* aimed at improving the situation. The CoE report already proposed several recommendations; we shall partly follow those and add to them.

1. There should be **a set of clear rules and effective coordination concerning SAR and disembarkation** in the Mediterranean. The past has shown that individual member states are unable to resolve their differences; Malta's resistance to the 2004 SOLAS and SAR amendments has created continuous uncertainty. The EU should therefore take the lead to end this situation via the following measures:
 - a. **Introducing EU legislation with unambiguous rules** concerning SAR and disembarkation, hereby explicitly bringing these matters under the EU's competence. The legislation should follow existing international law but allow for introducing more binding obligations and sanctions for non-compliance – filling those remaining legal lacunae on e.g. the definition of 'distress'. Non-binding guidelines concerning SAR from the International Maritime Organisation (IMO) should also be codified and become binding at EU level. If these would have been followed, the deaths of the individuals on the 'left-to-die' boat could have been prevented.⁴⁴ The proposed rules for Frontex sea border operations adding to the Schengen Borders Code (SBC) are a step in the right direction, but they need additional clarification (e.g. on informing individuals to be disembarked on their asylum rights in the EU) and should become binding.⁴⁵
 - b. **Establishing a pan-Mediterranean MRCC** that would oversee the national MRCCs. This body (probably in the form of an EU Agency) would ensure the follow-up of distress calls and the coordination of SAR operations. It would thereby prevent the shifting of responsibility of SAR duties between different actors in the Mediterranean. It should have the power to make binding decisions on the basis of the introduced EU legislation to allocate responsibility for SAR and disembarkation. It would also have the competence to report non-compliance to the relevant law enforcement authorities, such as the Commission and competent national administrative and criminal authorities.
 - c. The EU and its member states should strive to **include non-member states in this EU-led Mediterranean SAR framework** of clear legal rules and oversight. To that end, it should strive to conclude a pan-Mediterranean treaty in which these third States would be bound by the identical set of unambiguous norms and the oversight by the newly established MRCC. The EU should use its full leverage to this end, especially in the framework of the European Neighbourhood Policy (ENP) and could use the Mobility Partnerships as an instrument. This involvement of third States should, however, fully respect the rights of people on the move and should not negatively impact the access of these people to asylum procedures in the EU.

⁴³ See Art. 21 TEU.

⁴⁴ See PACE Report 2012, op. cit., p. 14. See for instance the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR), issued jointly by the IMO and the International Civil Aviation Organisation, and the IMO Guidelines on the treatment of persons rescued at sea.

⁴⁵ Council Decision 2010, op. cit.

2. To obtain reliable facts on the situation in the Mediterranean Sea and to increase accountability, **effective monitoring should be put in place**. As a matter of principle, on all Frontex Joint Operations and national operations, *independent* observers should be allowed. These observers can be recruited from relevant NGOs, international organisations (such as the UNHCR) or legal experts. This monitoring could be coordinated by the soon-to-be-created post of EU Border Monitor, as recommended earlier.⁴⁶ It should have two main competences: “The first would be to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights. The second would be to monitor the conditions under which expulsions take place under the framework provided by the Return Directive.”⁴⁷ Furthermore, the proposed pan-Mediterranean MRCC should have access to relevant data, such as satellite imagery and operational plans. As far as EU agencies and national authorities are concerned, there should be a time limit on the confidentiality and non-disclosure of documents, reports and arrangements of the agencies. They should retroactively disclose documents previously considered to be ‘sensitive’ after a certain time period.
3. Acknowledging that SAR by governmental assets cannot sufficiently alleviate the situation, **private entities should be encouraged** to engage in such operations and **face sanctions** if they refrain from doing so. The proposed EU legislation and pan-Mediterranean treaty should therefore introduce meaningful sanctions for non-compliance and should prohibit any criminalisation of those offering a helping hand. Moreover, all actors engaging in SAR operations should be ensured that disembarkation of the rescued shall be swift. The proposed rules and oversight powers of the pan-Mediterranean MRCC should offer that clarity. Moreover, an EU fund should be established covering (partly) the incurred economic loss for private entities.
4. To increase solidarity and ensure regular ways of taking refuge, the EU and its member states should **increase the relocation and resettlement** of migrants, i.e. both within the EU as well as from third States. The recently agreed EU Joint Resettlement Programme is a step in the right direction, but it needs now to be implemented loyally and pro-actively by all member states.
5. All EU member states should put in place a **regulated and permanent in-Embassy humanitarian visa or asylum application procedure**, to allow individuals and families to escape situations of risk in a regular way. A common approach would avoid the overburdening of European states currently offering or willing to offer this option, such as Switzerland.
6. Implementing the unambiguous ECtHR *Hirsi* ruling, **push-backs should be explicitly prohibited by EU law**. Extraterritorial maritime operations should always have the objective of SAR and disembarkation in an EU member state.

⁴⁶ E. Guild, K. Groenendijk and S. Carrera, “Ten Recommendations on Freedom, Security and Justice for the European Parliament Election”, CEPS Policy Brief, No. 173, CEPS, October 2008.

⁴⁷ *Ibid.*, p. 1.



ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

Programme Structure

In-house Research Programmes

Economic and Social Welfare Policies
Financial Institutions and Markets
Energy and Climate Change
EU Foreign, Security and Neighbourhood Policy
Justice and Home Affairs
Politics and Institutions
Regulatory Affairs
Agricultural and Rural Policy

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network for Better Regulation (ENBR)
European Network of Economic Policy
Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)