Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2021, n. 2

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Freedom Security Justice
European Legal Studies

Indice-Sommario
2021, n. 2

numero monografico

VERSO UN QUADRO COMUNE EUROPEO ED UNA NUOVA *GOVERNANCE* DELLA MIGRAZIONE E DELL'ASILO

TOWARDS A COMMON EUROPEAN FRAMEWORK AND A NEW GOVERNANCE OF MIGRATION AND ASYLUM

THE EUROPEAN UNION'S POLICY ON SEARCH AND RESCUE IN THE NEW PACT ON MIGRATION AND ASYLUM: INTER-STATE COOPERATION, SOLIDARITY AND CRIMINALIZATION

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SUMMARY: 1. Introduction. – 2. Setting the scene: the lack of cooperation among EU Member States in the field of SAR at sea. – 3. The New Pact for Migration and Asylum: increasing EU solidarity in the asylum domain? – 4. The proposal for a Regulation on Asylum and Migration Management and for a Regulation addressing situations of crisis and *force majeure*. – 5. The "Criminalization of solidarity" in the European legal space. – 6. The Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of Search and Rescue activities. – 7. Conclusion.

1. Introduction

Migration represents a crucial legal, political and humanitarian element on the policy agenda of the EU. In September 2020, when proposing a New Pact on Migration and Asylum, the EU Commission noted that: "Migration is a complex issue, with many facets that need to be weighed together. The safety of people who seek international protection or a better life, the concerns of countries at the EU's external borders, worried that migratory pressures will exceed their capacities, or the concerns of other EU States, which worry that, if procedures are not respected at the external borders, their own national systems for asylum will not be able to cope".[1]

In light of the complexity of the matter, the New Pact's prospects of success depend on the Commission's ability to correctly disentangle the diverging interests at play. The task of the Commission is to find viable compromises between competing agendas and to strike a fair balance between European Member States' security concerns – included those linked to the sustainability of their reception and asylum systems, and to the "fight against migrant smuggling" – and the protection of asylum-seekers' human rights.

Double blind peer reviewed article.

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[1] Press Release of the Commission, *A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity*, of 23 September 2020.

Historically, sea-borne migration has generated a set of legal, policy and diplomatic responses on the part of the EU and its Member States.[2] Officially, such policies pursued the objective of balancing European security interests and the protection of asylum-seekers' rights, yet they have proved inadequate to tackle the problems raised by the considerable migratory movements from North Africa to Europe, via the Mediterranean Sea.[3] Most notably, the EU has been repeatedly accused of adopting a coherent as well as dangerous strategy of securitization and externalisation of migration management, stipulating deals with third countries and outsourcing the control of European external borders, with dramatic consequences on the lives and rights of people on the move.[4] Further, the infamous Dublin Regulation governing the allocation of responsibility for the examination of asylum applications has been consistently criticized in scholarly literature and by EU coastal States,[5] whose reception systems are confronted with substantial pressure due to the increasing arrivals of migrants on their shores since 2014.[6] However, despite recurring calls for its amendment, attempts to reform the Dublin system have repeatedly failed, leaving the "rule of first irregular entry" intact, and putting EU peripheral States' asylum system under a huge strain.[7]

Nowadays, the public debate on migration is mainly centred on Search and Rescue (SAR) activities launched and operated by private entities. Since 2014, indeed, SAR activities in the Mediterranean have been predominantly performed by non-governmental organizations (NGOs) such as MSF, Save the Children, Proactiva Open Arms and Jugend Rettet. Consequently, the public debate on migration has been catalysed by the role of

[2] For an overview of EU migration policies following the so-called refugee crisis, see S. CARRERA, et al., *The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities*, CEPS essay, 2015, no. 20, pp. 1-22. Also see E. GUILD, et al., *The 2015 Refugee Crisis in the European Union*, CEPS Policy Brief, 2015, no. 332, pp. 1-6.

[3] V. MORENO-LAX, *The EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/rescue-without-protection' paradigm*, in *Journal of Common Market Studies,* 2017, vol. 56, issue 1, pp.119-140. For an overview of the EU's response to the refugee crisis, see S. CARRERA, S. BLOCKMANS, D. GROS, E. GUILD, *The EU's response to the Refugee Crisis: Taking Stock and Setting Policy priorities*, 2015, CEPS Essay, no. 20/16.

[4] T. GAMMELTOFT-HANSEN, *The Externalisation of European Migration Control and the Reach of International Refugee Law*, in T. GAMMELTOFT-HANSEN, *The First Decade of EU Migration and Asylum Law,* Leiden, 2011, pp.273-298. For issues of State responsibility, see F. MCNAMARA, *Member State Responsibility for Migration Control within Third States – Externalisation Revisited,* in *European Journal of Migration and Law*, 2013, vol. 15, no. 3, pp. 319-335. On externalisation of migration, see L. BIALASIEWICZ, *Off-Shoring and Out-Sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean,* in *Geopolitics*, 2012, vol. 17, no. 4, pp. 843-866.

[5] Today, the Dublin system's cornerstone is represented by the Dublin III Regulation, which contains the rules on the identification of the Member State responsible for the examination of applications for asylum. See Regulation 343/2003 of the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person*, of 18 February 2003, in OJ L50/1, 25 February 2003.

[6] R. BAUBOCK, *Refugee Protection and Burden-Sharing in the European Union,* in *Journal of Common Market Studies*, 2018, vol. 56, no. 1, pp. 141-156. The author argues that in addition to their general duties to admit refugees, they have duties towards each other that include sincere co-operation.

[7] For an overview of the performance of the Dublin III Regulation, and proposals to amend it, see F. MAIANI, *The Reform of the Dublin III Regulation: Study*, 2016, pp. 1-72.

such NGOs in the provision of SAR, and by their complex – often antagonistic – relationship with EU coastal States and EU agencies, in particular the EU Border and Coastguard Agency ("Frontex").[8]

As acknowledged by the Commission in its staff working document accompanying the proposal for a New Pact, "migrants disembarked following search and rescue operations represent a significant share of arrivals, reaching 50% of total arrivals by sea in 2019".[9] The data produced by the Commission testifies the centrality of NGOs and other private actors in the management of migratory flows. The New Pact acknowledges that privatised SAR operations are crucial in current debates on migration, proposing a series of measures concerning SAR and disembarkations following rescue operations.[10] This article, hence, aims at examining such measures so to identify the problematic features of the new common European approach to SAR and disembarkation. In doing so, it analyses the strategy proposed by the Commission, evaluating the proposal's potential to specifically tackle the issues – both "institutional" and humanitarian ones – that have historically arisen with regard to SAR activities in the Mediterranean.

Building on the identification of the major flaws characterizing current EU policies on migration, the article emphasizes two particularly unsettling features of such policies: i) the lack of inter-state cooperation and solidarity among Member States in the event of SAR operations and following disembarkation of migrants, and ii) the antagonistic attitude of European States towards SAR activities undertaken by non-governmental organizations. European Union policies on the cooperation with third countries, generally referred to as the strategy of "externalisation" or "outsourcing" of migration management, remain out of the analysis, despite their crucial importance in current EU approaches to migration.[11] This choice is warranted by the high complexity of the subject, which would require a dedicated article, and by the exclusive focus of the present contribution on SAR operations and the legal framework to which they are subjected, in order to identify the positive and negative aspects of the new European Union's strategy on SAR.

The article opens with a brief examination of the legal provisions prescribing state cooperation in the field of SAR at sea, and their practical implementation in the Mediterranean (second section), it then purports to enumerate and describe some of the

[8] E. CUSUMANO, *The sea as humanitarian space: Non-governmental search and rescue dilemmas on the Central Mediterranean migratory route,* in *Mediterranean Politics*, 2017, vol. 23, no. 3, pp. 387-394. Also see P. BARRETTA, G. MILAZZO, D. PASCALI, M. CHICHI, *Navigare a vista. Il racconto delle operazioni di ricerca e soccorso di migranti nel Mediterraneo centrale*, 2017, pp. 1-86.

[9] Staff Working Document of the Commission*, accompanying the Proposal for a regulation of the European Parliament and of the Council on asylum and migration management*, of 23 September 2020, SWD(2020) 207 final.

[10] S. MASSIMO, *Search and Rescue Operations under the New Pact on Asylum and Migration,* in *SIDI Blog*, 2020.

[11] For an overview of the problematic issues linked with the externalisation of migration management by the EU, see G. BOSSE, *From "Villains" to the New Guardians of Security in Europe? Paradigm Shifts in EU Foreign Policy towards Libya and Belarus*, in *Perspectives on European Politics and Society*, 2011, vol. 12, no. 4, pp. 440-461. Also see F. MCNAMARA, *Member State responsibility for migration control within third States – externalisation revisited*, in *European Journal of Migration and Law*, 2013, vol.15, no. 3, pp. 319-335.

solidarity measures adopted at the European level to tackle the issue of the lack of inter-state cooperation in the rescue, disembarkation and reception of rescued migrants, in order to isolate the type of solidarity pursued at the EU level in the migration domain (third section), before delving into the examination of the solidarity measures contained in the so-called Migration Management Regulation, alongside their potential to redress the drawbacks of current EU rules on migration (fourth section), and finally analysing the worrying trend towards the "criminalization of solidarity" in the European legal space (fifth section) and the solutions advanced by the Commission in the so-called SAR Regulation (sixth section).

2. Setting the scene: the lack of cooperation among EU Member States in the field of SAR at sea

The international legal framework governing SAR at sea includes the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safeguard of Life at Sea (SOLAS Convention), and the 1979 International Convention on Maritime Search and Rescue (SAR Convention). These instruments outline the duty of shipmasters to provide assistance to persons in distress at sea, regardless of their nationality. In addition, the legal framework on SAR requires coastal States to establish, operate and maintain adequate and effective SAR services off their coasts, cooperating among each other to ensure the provision of rescue services to all individuals who might find themselves in distress at sea. The central pillar of the SAR system, the SAR Convention, prescribes that States establish search and rescue regions – generally identified as "SAR zones" – defined as "areas of defined dimensions associated with a search and rescue coordination centre within which SAR services are provided".[12] This duty is complemented by an obligation to cooperate with neighbouring States in the establishment of such SAR regions and in their management.[13]

The international SAR system, structured around the mentioned provisions on the duty to rescue people in distress and on the signatories' obligation to cooperate in the event of SAR incidents off their coasts, provides an articulated legal basis on which coastal States can build mutually-beneficial cooperative relationships to enable them to

[12] Annex to the SAR Convention, para 1.3.4. In addition, para 1.3.3 defines search and rescue services as "the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provisions of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircrafts, vessels and other crafts and installations".
[13] The SAR Convention requires States to assist in the rescue of distressed persons, when necessary by co-operation between neighbouring SAR organizations. In particular, Chapter 3, on "Co-operation", provides, in its article 3.1.1, that "Parties shall co-ordinate their search and rescue organizations and should, whenever necessary, co-ordinate search and rescue operations with those of neighbouring States". Further, article 3.1.7 requires that "Each Party should authorize its rescue co-ordination centres to provide, when requested, assistance to other rescue co-ordination centres, including assistance in the form of vessels, aircraft, personnel or equipment". As for the establishment of SAR zones, article 2.1.4 provides that "Each search and rescue region shall be established by agreement among Parties concerned".

conduct crucial lifesaving missions more effectively.[14] Regrettably, despite the existence of an articulated legal system, recurring incidents of non-assistance at sea, and the lacking cooperation among EU Member States in the context of rescue missions carried out in their SAR zones, pose substantial challenges to the international protection of human rights, potentially leading to issues of State responsibility.[15] Violations of human rights are, for instance, repeatedly caused by the legal and political strategies through which EU Member States discharge their responsibilities in the field of SAR activities, neglecting their duties as disciplined in the framework on the law of the sea, in the attempt to avoid the attribution of responsibility for the reception of rescued asylum-seekers and the subsequent examination of their asylum applications.

EU Member States strategy of disengagement from their SAR obligations has also exerted a substantial impact on SAR activities carried out by EU agencies, such as EUNAVFOR-Med Operation Sophia or Frontex Joint Operation Themis.[16] This "policy of disengagement" generates lethal dynamics of non-rescue at sea, with dramatic consequences on the lives of migrants and asylum-seekers. For instance, the report "Death by rescue", drafted by Forensic Oceanography, cites a Frontex concept document of the Operation Triton, which explicitly acknowledges that "the withdrawal of naval assents from the [Mediterranean Sea], if not properly planned and announced well in advance, would likely result in a higher number of fatalities".[17] Further, the report quotes the Frontex Tactical Focused Assessment for Operation Triton, stating that the "fact that most interceptions and rescue missions will only take place inside the operational area [of operation Triton] could become a deterrence for facilitation networks and migrants that can only depart from, the Libyan or Egyptian coast with favourable weather conditions and taking into account that the boat must now navigate for several days before being rescued or intercepted". In light of these findings, the existence of a coherent strategy of disengagement from SAR operations on the part of EU agencies and EU Member States, aimed at curbing arrivals on EU shores, does not appear to be contestable. In addition, the fact that such a strategy will likely impact on the lives of people on the move appears to be clearly accepted by the EU agencies involved.

The human rights' violations stemming from such containment strategy might be attributed to States – or, as recently argued by some scholars, to international organizations – generating issues of international responsibility.[18] The topic of the

[14] R. BUTTON, *International Law and Search and Rescue,* in *Naval War College Review*, 2017, vol. 70, no.1, pp. 1-41.
[15] S. TREVISANUT, *Search and rescue operations in the Mediterranean: factor of cooperation or conflict?* in *The International Journal of Maritime and Coastal Law*, 2010, vol.25, no. 4, pp. 523-542. Also see D. GHEZELBASH, V. MORENO-LAX, N. KLEIN, B. OPESKIN, *Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia,* in *International & Comparative Law Quarterly*, 2018, vol.67, no. 2, pp. 315-351.
[16] S. CARRERA, R. CORTINOVIS, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?,* CEPS Paper in Liberty and Security, 2019, pp. 1-42.
[17] C. HELLER, L. PEZZANI, *Death by rescue: the lethal effects of the EU's policies of non-assistance*, 2016.
[18] F. DE VITTOR, M. STARITA, *Distributing Responsibility Between Shipmasters and the Different States Involved in SAR Disasters*, in *The Italian Yearbook of International Law*, 2019, vol. 28, pp. 77-95. The authors explain that, in case of non-rescue, a shipmaster's conduct can be attributed to a State, and even in

international responsibility in which States may incur whilst pursuing their strategy of disengagement from SAR was recently analysed, in January 2021, in a decision of the UN Human Rights Committee (HRC). In its views, the HRC found that, in 2013, Italy failed to rescue more than two hundred migrants, ignoring the distress calls coming by a dinghy departed from Libya and failing to protect the right to life of all the migrants on board.[19] In its decision, the UN treaty-body found Italy responsible for the death of the migrants perished in the accident, and emphasized Italy and Malta's disregard for the obligation to cooperate in the event of SAR operations, contained in the SAR Convention. Namely, the decision found that Italian and Maltese rescue centres tried to discharge their responsibility for the rescue operation by passing it to one another instead of intervening promptly.[20]

Interestingly, the HRC, examining the specific circumstances of the case, established that Italy and Malta have a shared responsibility in the breach of the right to life of the migrants perished in the accident, enshrined in Article 6 of the International Covenant on Civil and Political Rights. With regard to Italy, the HRC found that: "[I]n the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy. This relationship comprises of factual elements – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of [an Italian navy vessel] to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as relevant legal obligations incurred by Italy under the International law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and a duty to appropriately cooperate with other States undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue".[21]

Then, the Committee proceeded to analyse the obligation of due diligence imposed on coastal States in the event of SAR incidents in which they are involved.[22] Unfortunately, the HRC did not specify what the "duty to appropriately cooperate with other States" would entail, thus missing a precious opportunity to further define the duties

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case of non-attribution, the fact that a shipmaster's conduct violates the duty to rescue can unveil a wrongful act committed to one or more States. On the international responsibility of States, see J. CRAWFORD, *State Responsibility: The General Part*, Cambridge, 2013.

[19] UN Office of the High Commissioner for Human Rights, *Italy failed to rescue more than 200 migrants, UN Committee finds*, Geneva, 27 January 2021. The initial complaint was lodged on 19 May 2017 by three Syrian nationals and a Palestinian, on their own behalf and on behalf of thirteen of their relatives whom on 11 October 2013, were on board a vessel that sank in the Mediterranean Sea, 113 km south of Lampedusa. For a comprehensive reconstruction of the case, see G. CITRONI, *No More Elusion of Responsibility for Rescue Operations at Sea: the Human Rights Committee's Views on the Case A.S., D.I., O.I. and G.d. v. Italy and Malta* in *OpinioJuris*, 2021. Also see M. MILANOVIC, *Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations*, in *EJIL: Talk! Blog of the European Journal of International Law*, 2021.

[20] UN Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No.3042/2017*, views of 27 January 2021.

[21] UN Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No.3042/2017,* para 7.8.

[22] UN Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No.3042/2017,* paras 8.3. and 8.5.

to which coastal States are bound with respect to the treaties on SAR they signed and ratified, and to migrants in distress. Notwithstanding this lack of clarifications on the meaning of appropriate cooperation in SAR activities, the decision of the Human Rights Committee remains a legal milestone for the acknowledgement of state responsibilities in the field of SAR missions undertaken off their coasts.

Political rows and clashes between Italy and Malta with regard to SAR operations and the disembarkation of rescued migrants are caused by conceptual disagreements on the notion of Place of Safety (PoS) where migrants should be disembarked.[23] Often cited in this regard is the April 2009 *Pinar* incident, when a Turkish merchant vessel rescued 153 persons in the Maltese SAR zone off the coast of Lampedusa, being subsequently refused permission to enter Italian territorial waters.[24] The Italian authorities justified the refusal arguing that the responsibility for the disembarkation of rescued persons fell on Malta. On its part, Malta denied responsibility and refused access to its ports.[25] The migrants eventually disembarked in Porto Empedocle (Sicily), but the episode highlighted the lack of political willingness, on the part of both Italy and Malta, to tackle the challenges related to the management of neighbouring SAR zones. In addition, this incident underscored the fact that the Maltese SAR zone, covering a wide part of the central Mediterranean, is too vast for such a small state to be able to properly manage it.[26]

With regard to the concept of PoS, it is important to mention that in 2004, during the general revision of the International Maritime Organization's SAR system, the organization adopted two Resolutions that entered into force in 2006. Such resolutions envisage that the state in whose SAR zone a rescue operation takes place has the duty to provide or, at least, secure a place of safety for the rescued persons.[27] The concept of PoS is defined in the Annex to the SAR Convention as a "place where the lives of the rescued persons are no longer in danger, and where their basic needs can be met".[28] Interestingly, the duty to provide or secure a PoS does not entail an obligation, on the part of the relevant state, to authorize the entry into its port of the rescuing.[29] Indeed, the state can reach an

[23] For an analysis of the legal and political quarrels on the concept of place of safety, and on the Maltese position on sea-borne migration, see S. KLEPP, *A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea,* in *International Journal of Refugee Law*, 2011, vol. 23, no. 3, pp. 538-557.

[24] E. CUSUMANO, *The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility,* in *Cambridge Review of International Affairs*, 2018, vol. 31, no. 1, pp. 53-75.

[25] S. TREVISANUT, cit., p. 523.

[26] S. TREVISANUT, cit., p. 523. The author underlines that Malta has unilaterally declared its SAR zone and has not negotiated its delimitation with neighbouring States. As a result, the extension of the Maltese SAR zone is equivalent to 750 times its territory and partly overlaps with the Italian SAR zone.

[27] M. RATCOVICH, *The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?,* in *Australian Year Book of International Law*, 2016, vol. 22, pp. 81-129.

[28] Paragraph 1.3.2 of the Annex to the SAR Convention. Paragraph 1-1 of SOLAS regulation V/3 and paragraph 3.1.9 of the Annex to the International Convention on Maritime Search and Rescue demand that, in every case, a place of safety is provided within a reasonable time.

[29] International Maritime Organization, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004, Res. 167(78).

agreement with a neighbouring state for the reception of the rescued persons, with the only limit being "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened".[30] Regrettably, this possibility has been widely employed by European coastal States to prevent rescue vessels from entering their ports, while exerting pressures on neighbouring States to negotiate *ad-hoc* agreements for the disembarkation of rescued migrants and for their relocation.[31]

A recent example of delayed disembarkation – and political pressure exerted by Italy on other EU Member States for the reception of rescued migrants – is represented by the *Diciotti* case.[32] In August 2018, almost ten years after the *Pinar* incident, a new dispute between Italy and Malta as to which country had to provide a safe port of disembarkation left an Italian military ship stranded at sea for days, alongside the 177 rescued migrants and asylum-seekers on board. Matteo Salvini, the Italian Minister of the Interior at the time, threatened to return the rescued migrants to Libya – a decision that could have arguably entailed Italian international responsibility for the violation of the prohibition of *refoulement* –[33] and then insisted on obtaining the commitment from other European countries to take in the migrants before letting them disembark on Italian soil. The peculiarity of this incident is represented by the circumstance that, for the first time, the Minister of the Interior closed Italian ports to an Italian navy vessel, thus leading to widespread criticism on the part of commentators, legal scholars, and journalists alike. However, the *Diciotti* incident was only the last one in a string of episodes which took place during summer 2018, when Italy and Malta repeatedly refused or delayed disembarkation of rescued migrants and asylum seekers from rescue ships, while waiting for other EU States to offer a PoS.[34] This debatable strategy led to an erratic approach to disembarkation of rescued migrants, characterized by informal agreements which, on a case-by-case basis, and in an extraordinary and unpredictable manner, attempted to find a solution for the disembarkation of individuals rescued at sea. The following sections will identify some of the unsettling issues generated by this piecemeal approach to disembarkation, and the strategies through which the New Pact attempted to address the dilemma of disembarkation.

[30] Principle 6.17 of the MSC Guidelines on the Treatment of Persons Rescued at Sea.
[31] S. CARRERA, R. CORTINOVIS, *Search and rescue, disembarkation, and relocation arrangements in the Mediterranean*, in S. CARRERA, M. STEFAN (eds.), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union*, London, 2020, pp.1-306.
[32] Reuters, *Italy shuts ports to migrant boats, asks Malta to open its doors*, 10 June 2018.
[33] E. PAPASTAVRIDIS, *The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?*, in *EJIL: Talk! Blog of the European Journal of International Law*, 2017. See also E. PAPASTAVRIDIS, Rescuing migrants at sea and the law of international responsibility, in T. GAMMELTOFT-HANSEN, J. VEDSTED-HANSEN (eds.), *Human Rights and the Dark Side of Globalization. Transnational Law Enforcement and Migration Control*, London, 2017.
[34] J. SUNDERLAND, *Rescued Migrants Held Hostage to Politics. Italy should immediately allow disembarkation,* in *Human Rights Watch*, 2018.

3. The New Pact for Migration and Asylum: increasing EU solidarity in the asylum domain?

The preamble of the 1951 Refugee Convention invokes "international co-operation" for a solution to situations of forced displacement, "considering that the grant of asylum may place unduly heavy burdens on certain countries".[35] The Convention thus establishes a link between international cooperation in tackling forced displacement, burden-sharing and inter-state solidarity in the asylum domain. Within EU asylum law, these principles are embodied in Article 80 TFEU, the most tangible manifestation of the principle of solidarity which should guide EU policies on migration.[36] Solidarity is, as a matter of fact, one of the founding values of the European Union and a guiding principle of the EU asylum policy since the coming into force of the Treaty of Amsterdam.[37] Accordingly, the provision contained in Article 80 TFEU envisages that EU policies on asylum law and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications. Further, Article 4(3) TEU provides that EU Member States should follow "the principle of sincere cooperation" and "assist each other in carrying out tasks which flow from the Treaties".

Identifying the practical implications of the solidarity principle embodied in Article 80, Thym and Tsourdi explained that: "an effective supranational asylum and border control policy requires compensatory action to support the application of supranational rules in practice. Financial support, the relocation of asylum-seekers and the work of asylum and border control agencies are emblematic of the compensatory logic of the solidarity principle".[38] These words reflect the underlying logic of the New Pact, focused on compensatory mechanisms to redress the faults engendered by the application of current EU rules on the allocation of responsibility for the examination of asylum requests.

The need for new compensatory mechanisms in the asylum domain stems from the circumstance that, up until today, EU migration policies have not succeeded in increasing solidarity among Member States. On the contrary, Greenhill explained that "the lack of EU solidarity and the absence of a collective response to the humanitarian and political challenges raised by [migratory flows towards Europe] laid bare the limitations of common border control and migration and refugee burden-sharing systems that have never been wholly and satisfactorily implemented".[39] In other words, today the pressure

[35] Recital 4 of the Preamble to the Convention relating to the Status of Refugees 189 UNTS 150 (the 1951 Refugee Convention), recalled by V. MORENO-LAX, *Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy,* in *Maastricht Journal of European and Comparative Law* 2017, Vol. 24, no. 5, pp. 740-762.

[36] I. GOLDNER LANG, *Is There Solidarity on Asylum and Migration in the EU?,* in *Croatian Yearbook of European law & Policy*, 2013, vol. 9, no. 1, pp. 1-14.

[37] P. MCDONOUGH, A. TSOURDI, *The "Other" Greek Crisis: Asylum and EU Solidarity,* in *Refugee Survey Quarterly*, 2012, vol. 31, no. 4, pp. 67-100.

[38] D. THYM, E. TSOURDI, *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions,* in *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, no. 5, pp. 605-621.

[39] K. GREENHILL, *Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis*, in *European Law Journal*, 2016, vol. 22, no. 3, pp. 317-332.

exerted by migration on certain EU countries' asylum systems does not generate enhanced burden-sharing among Member States, nor increased solidarity, but rather accounts for the lack of cooperation among such countries. In a constant "race to the bottom" EU countries adopt sophisticated legal and political strategies to discharge their responsibilities in the asylum domain, and to render their asylum and reception systems increasingly less appealing to migrants. Accordingly, the so-called "refugee crisis" has been identified, by some scholars, as a "crisis of solidarity".[40] The Commission acknowledged the problem, when presenting the New Pact, and stated that "fragmented and voluntary ad hoc solidarity between Member States has put a disproportionate strain on Member States of first entry, threatened the political cohesion among Member States and put migrants in vulnerable situations at risk".[41]

Thus far, as anticipated in the previous section, recurring incidents of delayed disembarkation of migrants have found a – contestable – solution in *ad hoc*, informal agreements among EU countries. These incidents are caused by the fact that the closure of ports is employed, by some EU governments, as a political tool aimed at "forcing" the relocation of migrants into other States, relieving EU coastal States from part of the pressure exterted on their reception systems. In response, States have answered to the "disembarkation crises" generated by the closure of ports to NGOs' and private vessels through *ad hoc* agreements on the relocation of migrants, such as the one invoked by Salvini in the *Diciotti* case. Before the much debated Malta Declaration, such an approach to disembarkation led to at least twenty-five "disembarkation crises", during which boats were kept off the Italian coast for an average of 9 days before reaching a solution that would have allowed them to disembark rescued migrants in a European port. Initially, during 2018, rescued people were "diverted" to other European countries, in particular Malta and Spain. During 2019, instead, in the 80% of the cases the disembarkation crisis ended with the disembarkation of migrants in Italy.[42]

These initiatives have had an intergovernmental nature and an ad hoc basis, falling outside the EU legal framework. In such a context, the EU Commission has increasingly played the role of "broker" in order to facilitate the negotiations among EU Member States.[43] Indeed, as noted by the EU Commission in its communication on the New Pact: "[S]ince January 2019, at the request of Member States, the Commission has coordinated the relocation of more than 1,800 disembarked persons following rescue operations by private vessels. While the Commission will continue to provide operational support and

[40] S. FINE, *All at sea: Europe's crisis of solidarity on migration,* in *European Council on Foreign Relations (ECRE) Policy brief*, 2019, pp. 1-19.
[41] Commission Staff Working Document, *accompanying the Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund],* of 23 September 2020, COM(2020) 610 final.
[42] M. VILLA, E. CORRADI, *Migranti e UE: cosa serve sapere sul vertice di Malta*, in *ISPI Focus*, 2019.
[43] F.L. GATTA, E. FRASCA, *The Malta Declaration on search and rescue, disembarkation and relocation: Much Ado about Nothing*, in *EU Immigration and Asylum Law and Policy*, 2020.

proactive coordination, a more predictable solidarity mechanism for disembarkation is needed."[44]

As a matter of fact, such *ad hoc* solutions failed in their objective of increasing solidarity among Member States, and did not provide a final answer to the thorny question of disembarkation of migrants, only leading to a piecemeal and fragmented approach to migration by sea.[45] The need for a revised approach is evident.

The very single attempt to overcome the piecemeal approach represented by intergovernmental negotiations on a case-by-case basis was the Malta Declaration, in September 2019, whereby some EU States attempted to identify a more stable and predictable relocation mechanism, with poor results.[46] The central tenet of the proposal was represented by the possibility to propose an alternative place or port of safety for disembarking rescued migrants, different from the Member State that would otherwise be responsible. Such an alternative was to be applied in situations where Italy or Malta would be facing a "disproportionate migratory pressure" on the basis of "limitation in reception capacities, or a high number of applications for international protection".[47] The outcome of such proposal, however, failed to bring the scheme within the EU legal framework, reinforcing the trend of informal solutions and failing to provide for safeguards and remedies to guarantee compliance with fundamental rights and the rule of law.[48] Indeed, the Malta Declaration did not gather much support in the Council and eventually failed. Several authors pointed to the intergovernmental and extra-EU Treaty character of the Malta Declaration to argue that the initiative raised a number of concerns regarding its compliance with EU Treaties and principles such as the one of equal solidarity and fair responsibility sharing for asylum seekers.[49]

With the proposal for a New Pact for Migration and Asylum, the EU Commission acknowledges the persisting problems and, in describing the need for reform, underlines that "there is currently no effective solidarity mechanism in place, and no efficient rule on responsibility".[50] In addition, the Commission notes that "until today, the relocation of asylum seekers based on the 2015 Council Decisions [the Council Decisions establishing provisional measures in the area of international protection for the benefit of

[44] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on a New Pact on Migration and Asylum*, of 23 September 2020, COM(2020) 609 final.
[45] V. MORENO-LAX, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment,* in *EU Migration Law blog, New Migration Pact - Blog Series*, 2021.
[46] M. VILLA, E. CORRADI, *Migranti e UE: cosa serve sapere sul vertice di Malta,* cit.
[47] S. CARRERA, R. CORTINOVIS, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility,* cit.
[48] V. MORENO-LAX, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment,* cit.
[49] S. CARRERA, R. CORTINOVIS, *The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?,* in *CEPS Policy Insights*, 2019, no. 2019/14, pp. 1-7.
[50] Proposal for a Regulation of the European parliament and of the Council, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund*, of 23 September 2020, COM(2020) 610 final.

Italy and Greece][51] has been the *only* time Member States were *obliged* to offer their solidarity in terms of relocation".[52] As well-known, the Council Decisions were consistently boycotted by some EU Member States, belonging to the "Visegrad Group": Poland, Hungary, and Czech Republic. The non-compliance with the decision on the part of these EU countries resulted in infringement procedures brought by the Commission before the Court of Justice of the European Union, which ruled against the three countries. Notably, in its decision, the CJEU stated that "[…] the burdens entailed by the provisional measures provided for in Decisions 2015/1523 and 2015/1601 […] must, in principle, be divided between all the Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, which, in accordance with Article 80 TFEU, governs the Union's asylum policy".[53]

Echoing the Refugee Convention, as well as the EU Treaty provisions on solidarity in the asylum domain, the CJEU's judgment highlights the link between the concepts of "burden" – epitomized by the reception of asylum seekers on European soil – and "solidarity", reinforcing the idea that the solidarity pursued at the European level, in the migration domain, is primarily aimed at sharing the number of refugees and asylum-seekers – the so-called "burden" – among the Member States. The concept of solidarity embraced by the CJEU, by the Commission in its proposal for a New Pact, and by the Member States in their narratives on the "migration crisis", is thus an "horizontal" one, exclusively designed to materialize within the relationship among Member States, rather than in the "vertical" relationship between States and individuals. In other words, the solidarity sought for, at the EU level, is a type of solidarity that leaves asylum-seekers completely out of its scope. Regrettably, the following section will argue that this is also the case for the proposals of the Commission, which fail to introduce a real paradigm shift in the conception of solidarity at the EU level.

4. The proposal for a Regulation on Asylum and Migration Management and for a Regulation addressing situations of crisis and *force majeure*

The new "European strategy" proposed by the Commission revolves around a: "[…] solidarity mechanism that is *flexible* and responsive in order to be adjustable to the different situations presented by the different migratory challenges faced by the Member

[51] E. GUILD, C. COSTELLO, V. MORENO-LAX, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Study for the LIBE Committee of the European Parliament*, 2017. The authors explain that in September 2015 the Council adopted two Decisions regarding the relocation of asylum-seekers from Greece and Italy to other Member States. In total, the number of asylum seekers to be relocated was 160,000. By 2 February 2017, only a total of 11,966 asylum seekers had been relocated.
[52] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management*, of 23 September 2020, COM (2020) 610 final.
[53] Court of Justice, judgment of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic*, joined Cases C-715/17, C-718/17 and C-719/17, par. 181.

States, by setting solidarity measures from among which Member States can choose to contribute".[54]

Such a flexible solidarity mechanism is designed to address the lack of infra-European solidarity, to generate a fair sharing of responsibility among Member States, and to build mutual trust among them, whilst alleviating the pressure on the Member States of first entry, such as Italy and Greece. Arguably, however, such flexibility was primarily devised to accomodate the interests of all the Member States – including those historically not eager to relocate migrants in their territory, "sharing the burden" with other States – rather than to set up a system that is adequately responsive to different migratory challenges. As this section will demonstrate, the solidarity mechanism outlined in the Migration Management Regulation seems to incorporate the lessons drawn from the historical resistance of some EU States, such as the States of the Visegrad Group, which did not comply with the relocation decisions of the Council in 2015 and which are generally recalcitrant to relocate individuals in their territory. Indeed, a careful reading of the proposals contained in the Migration Management Regulation will clarify that the Commission attempted to find a compromise between the interests of frontline States and those of other States, which are not on the frontline of the reception of migrants yet remain concerned for the viability and sustainability of their own asylum systems, should peripheral States not be able to properly "defend" EU's borders from unwanted arrivals.

The mechanism envisaged by the Commission is outlined in the so-called Migration Management Regulation, one of the central pillars of the package proposal. The document "seeks to recognise that the challenge of irregular arrivals of migrants in the Union should not have to be assumed by individual States alone, but by the Union as a whole".[55] Accordingly, the mechanism addresses situations of migratory pressure on specific Member States, triggering the solidarity measures required from contributing Member States. Article 45 of the proposal, under the chapter on solidarity mechanisms, lists the different types of solidarity contributions required from contributing Member States in situation of migratory pressure on some, benefitting Member States.

Article 45 explains that solidarity contributions shall consist of relocation of applicants, return sponsorships of illegally staying third-country nationals, relocation of beneficiaries of international protection, capacity-building measures in the field of asylum, reception and return, operational support and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries. Notably, the Regulation envisages that those Member States committing to provide return sponsorships, as part of their solidarity contributions, will be obliged to relocate individuals concerned in their territories if they are not expelled within a period of eight months. Article 55 provides that: "Where a Member State commits to provide return sponsorship and the illegally staying third-country nationals who are subject to a

[54] Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management,* of 23 September 2020, COM(2020) 610 final, p. 2, (emphasis added).
[55] Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management*, cit., p.17.

return decision issued by the benefitting Member State do not return or are not removed within 8 months, the Member State providing return sponsorship shall transfer the persons concerned onto its own territory".

Disembarkations following SAR operations are also specifically addressed in the proposal. Article 47 and the following provisions contain the solidarity measures envisaged with regard to disembarkations following SAR operations that generate recurring arrivals of third-country nationals or stateless persons onto the territory of a Member State. Pursuant to these provisions, Member States are required to complete a SAR Solidarity Response Plan indicating the solidarity contributions they intend to make, among the ones listed in Article 45, following the recurring arrivals to which the provision makes reference.

The new approach to migration adopted by the Commission also includes the amendment of the rules on the responsibility for examining an application for international protection, in order to "contribute to reducing unauthorised movements in a proportionate and reasonable manner".[56] Nonetheless, the proposal maintains, among the criteria for the allocation of responsibility for the examination of asylum applications, the much contested criteria of the "state of first entry". In fact, Article 21 of the proposal, headed "Entry" provides that: "Where it is established […] that an applicant as irregularly crossed the border into a Member State by land, sea or air having come from a third country, the first Member State thus entered shall be responsible for examining the application for international protection".

The provision clarifies that such a responsibility criterion also applies "where the applicant was disembarked on the territory [of the Member State] following a search and rescue operation". Clearly, such a rule will likely lead to an escalation of the closed ports policy adopted by some EU States, in the attempt of avoiding the allocation of responsibility for the examination of asylum applications.

By maintaining the criterion of the "first irregular entry", the Commission neglects the existence of a broad understanding that the first irregular entry rule for distributing responsibility for assessing asylum applications carries profound deficits and should be abandoned.[57] Presumably, the maintainment of this criterion will hardly contribute to reducing pressure on frontline States such as Greece and Italy. Indeed, although the "first state of entry" criterion is designed to be applied only where other criteria – referring to unaccompanied minors, family members, meaningful links with a Member State and the prior education in a Member State – are not applicable, the situation envisaged in Article 21 remains the most common. Further, search and rescue operations usually end with the disembarkment of migrants in Greece, Italy or Malta. Hence, the criterion enshrined in Article 21 will represent the most commonly applied one, and its mainteinance among

[56] Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management*, cit., p. 2.

[57] S. CARRERA, *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum,* in S. CARRERA, A. GEDDES (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees. International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, Florence, 2021, pp.1-25.

the criteria for establishing responsibility for the screening of asylum applications will not contribute to reducing pressure on EU coastal States.[58]

A simplified proceedure to trigger the solidarity mechanism introduced in the Migration Management Regulation is contained in the proposal for a "Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum". In the words of the Commission, this instrument "[C]overs exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union".[59]

The mechanism involves a simplified procedure aimed at triggering the compulsory – yet flexible – solidarity mechanism provided for situations of pressure in the Regulation on Asylum and Migration Management. Pursuant to this procedure, the "Commission shall assess the reasoned request by a Member State requesting the application of the specific rules for *compulsory* solidarity and determine whether there is a situation of crisis on the basis of substantiated information". The procedure for the implementation of solidarity measures under this proposal will be carried out within specific shortened timeframes as compared to those provided for in the Regulation on Asylum and Migration Management. Pursuant to the proposal, "Member States would be required to submit a Crisis Solidarity Response Plan within one week from the finalisation of the assessment on the existence of a situation of crisis in the Member State concerned and after the convening of the Solidarity Forum by the Commission. Following this, the Commission shall adopt the implementing act setting out the solidarity measures for each Member State within one week".[60]

The fundamental difference between the solidarity measures envisaged by the two proposals is represented by the circumstance that, in the Regulation addressing situations of crisis and *force majeure,* Member States are not allowed to contribute through capacity building and operational support. Indeed, such Regulation only envisages, among the solidarity measures required from contributing States, the mandatory relocation of applicants under international protection or return sponsorships.[61]

The combined reading of the two proposals generates a number of concerns. In the first place – leaving aside fundamental considerations of humanity raised by the persisting objectification of migrants and their characterization as burdens to be shared, or numbers

[58] F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in *EU Migration Law blog, New Migration Pact - Blog Series*, 2021.
[59] Proposal for a Regulation of the European Parliament and of the Council*, addressing situations of crisis and force majeure in the field of migration and asylum*, of 23 September 2020, COM (2020) 613 final, p. 1.
[60] Proposal for a Regulation of the European Parliament and of the Council*, addressing situations of crisis and force majeure in the field of migration and asylum*, of 23 September 2020, COM (2020) 613 final.
[61] S. CARRERA, *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum*, cit.

and percentages to be added up – the proposal does not introduce the "compulsory" solidarity mechanism it purports to do. Political considerations linked to the quest for consensus-building among Member States prevented the Commission from putting forth a *truly* compulsory solidarity mechanism.[62] As we have seen, the proposal contains an alternative to the relocation of migrants disembarked in the state faced with a crisis: sponsoring the resettlement of migrants – the so-called "return sponsorhip". This has raised heavy criticism on the part of some commentators, who underlined that "countries with larger wallets could buy themselves out of the duty to host refugees, pushing this duty onto those who cannot afford alternative action".[63] In other words, these authors underline that Member States could be incentivised to give priority to the sponsorship of returns or logistical support for returns, rather than to the relocation of asylum-seekers in their territories. This is indeed a potential drawback of such a proposal, which would shift the responsibility for hosting migrants from EU coastal States such as Greece and Italy onto poorer Member States (in terms of GDP per capita), such as Croatia, Romania or Bulgaria. Carrera notes that such a shift of responsibility would ultimately lead to "asymmetric responsibilities", where Member States are given the flexibility to evade participating in the relocation of asylum seekers.[64]

In addition, the alternative measures to relocation could prove to be inadequate and insufficient to alleviate the pressure on coastal States, as the individuals subject to return sponsorships would be transferred to the State of return, or to the sponsoring state, only after a considerable period of time: after the end of the return procedure, in the first case, and after eight months, in the second case. Therefore, the burden of the management of migratory flows and of the first reception of asylum-seekers will remain with the States at the southern and eastern external borders of the Union for a considerable amount of time.[65] Such observation, again, does not take into account the questionable consideration of migrants and asylum-seekers as a burden or as "pawns" to be easily moved from one Member State to another, completely disregarding the possible contrary will of migrants themselves. Such a feature of the Commission's proposal is highly questionable and contrary to the protection of migrants' human rights and of their interests, and should be adequately addressed.

As anticipated at the beginning of the section, the alternatives to relocation encapsulated in Article 45 of the Migration Management Regulation – which represent an essential element of the flexible solidarity mechanism introduced by the Commission in its proposal – were most probably designed to trump the resistance of some States, such

[62] As underlined by Carrera, "while the Commission has carried out long consultations and informal exchanges with EU Member States and other EU actors, this does not formally mean that the Pact has been concluded or agreed in any form by any of these national governments or any other EU institutional actor". Therefore, a formal acceptance of the Pact will be necessary.
[63] European Council on Foreign Relations, *Uncertain solidarity: Why Europe's new migration pact could fall apart*, 2020.
[64] S. CARRERA, *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum*, cit.
[65] M. BORRACCETTI, *Il nuovo patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?,* in *Diritto, Immigrazione e Cittadinanza*, 2021, vol. 1, pp.1-27.

as the States of the Visegrad Group, to the relocation of migrants in their territory. And indeed, to support this view, States of the Visegard Group circulated a non-paper containing their position on the New Pact.[66] In the non-paper, Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia, declared that "effective returns should be the main outcome of the cooperation with third countries" and that "whilst there is a common acceptance for mandatory solidarity in crises, the flexibility and use of wide and open catalogue of instruments are crucial. It should be underlined that the actions on the external dimension and the external borders protection should be considered as solidarity measures". This joint position clarifies how flexibility in the provision of solidarity and the presence of an open catalogue of instruments, not limited to relocation, represent the central elements in the pursuit of a wide political consensus among Member States on the Commission's proposal. Regrettably, the measures to which States of the Visegrad Group refer to have very little to do with solidarity. On the contrary, they demand measures centred on the cooperation with third-countries and on the enhanced protection of European external borders, relying on a type of "solidarity" – if we may call it solidarity – designed to keep migrants out of EU's border and its territory, rather than to share the responsibility for the reception of migrants and the examination of asylum applications.

Reflecting the will of Member States, in its quest for consensus-building, the approach adopted by the Commission remains centred on the securitization of migration,[67] with the focus of EU action on the contrast to irregular migration and to secondary "unauthorised" movements.[68] For instance, Article 5(b) of the proposal for a Migration Management Regulation suggests that, as part of sharing responsibility, Member States should take measures to reduce and prevent irregular migration to the EU in close cooperation with third countries. Such a provision highlights how the type of solidarity pursued by the Commission is an horizontal one, which only materializes in the relationship among Members States, rather than in the horizontal relation between States and asylum-seekers. The article at hand, however, also revives ancient concerns linked to the externalisation of migration management and border control, which have been repeatedly aired in scholarly literature. As a matter of fact, since the EU manifested its intention to stipulate "mutually beneficial" partnerships with third countries – the "Dialogues on Migration, Mobility and Security" – in the context of the Global Approach to Migration and Mobility (GAMM),[69] European States launched multiple partnerships with third countries, to manage migration flows and to outsource the control of EU's external borders, and several voices underlined that such an externalization of migration management had serious and concerning consequences on the human rights of people on

[66] Non-Paper, New Pact on Migration and Asylum: Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia. Available at: download.php (visegradgroup.eu).
[67] For an overview of the securitization trend historically characterizing EU migration policies, see J.M., WILLIAMS, *The Safety/Security Nexus and the Humanitarianisation of Border Enforcement,* in *Geographical Journal*, 2016, vol. 182, no. 1, pp. 27-37.
[68] M. BORRACCETTI, *Il nuovo patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?,* cit.
[69] European Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 2011.

the move.[70] The perpetuation of such an externalisation effort, on the part of the Commission, will likely continue to cause violations of the human rights of migrants, victim of the externalisation strategies of the EU.

Further, as we said, as the sections of the proposal dedicated to international protection mantain the criterion of the "state of first entry", the responsibility for the examination of applications for asylum will remain on coastal States, with little mitigation of the substantial pressure exerted on their reception and asylum systems.[71] This decision not only impacts on Member States of first entry – as already explained – but also endangers applicants' rights, as the proposal adds to the incentives for Member States of first entry to refrain from fulfilling their identification and registration obligations and to avoid investing in their reception systems. In addition, such a situation is also likely to encourage asylum seekers to resort to irregularity as a means to avoid being identified and confined to countries of arrival.[72]

In conclusion, some faults are inherent, and quite evident, in the two analysed proposals. Most notably, the announced "solidarity" which should have represented the central pillar of the entire package proposal remains dead letter, as States enjoy a substantial leeway in choosing the "solidarity measure" they prefer among a pool of extremely different and variegated instruments. It is interesting, in this regard, to note that while the Pact states that "solidarity is not optional", it advances a package of proposals implementing the concept of "mandatory flexible solidarity" among EU States in the field of asylum and returns. In addition, the proposal eventually clarifies that the concept of "solidarity" has a predominantly infra-EU meaning, referring exclusively to the relations among Member States, leaving the human rights of migrants and asylum-seekers out of the scope of solidarity. Indeed, the inclusion of expulsions within the EU notion of solidarity problematically leaves the rights and lives of migrants at the periphery. In other words, the pact notion of solidarity does not include *solidarity towards asylum-seekers*.[73]

Therefore, not only the Commission disattends its own reassurance of a "human and humane approach" to migration,[74] but also seems to fail in its attempt to enhance solidarity among Member States. It proposes a kind of solidarity which is both "compulsory" and "flexible" but which eventually considers people as burdersome percentages and leaves States free to choose the best way to "get rid" of their responsibilities towards rescued migrants and other EU Member States. A more suitable course of action could have been to introduce at least a percentage of *compulsory*

[70] A. DE GUTTRY, F. CAPONE, E. SOMMARIO, *Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements Between Italy and Libya,* in *International Migration*, 2018, vol. 56, no. 3, pp. 44-60.
[71] Article 8(2) of the "Migration Management Regulation".
[72] European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management*, 2021, pp.1-76.
[73] S. CARRERA, *Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum*, cit.
[74] President von der Leyen, State of the Union Address 2020: "We will take a humane and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must be able to rely on the solidarity of our whole European Union… Everybody has to step up here and take responsibility."

contributions – among the solidarity contributions offered by Member States – in the form of relocation on the part of contributing Member States. This would have eased the migratory pressure on the peripheral States of the EU, incentivised coastal States to enhance their efforts in SAR at sea and their cooperation with neighbouring States in the event of joint SAR operations, and disincentivised migrants from resorting to irregularity and dangerous coping mechanisms.

5. The "Criminalization of solidarity" in the European legal space

A widely debated and much contested aspect of EU migration policies is the criminalization of NGOs' activities aimed at filling the humanitarian gap in the Mediterranean SAR scene.[75] Several scholars pinpointed that the criminalization of humanitarianism is strategically connected to EU Member States' disengagement from SAR and to the termination of institutionalized SAR missions in the Mediterranean, such as the Italian Navy operation Mare Nostrum and EUNAVFOR Med Operation Sophia. As noted by researchers of Forensic Oceanography in the report "Death by rescue: the lethal effects of non-assistance at sea", recurring deaths of migrants in the Mediterranean are "the result of EU policies toward at-sea rescue, particularly the retreat of state rescue operations and a resulting onus on commercial vessels to fill the rescue gap".[76] These policies represent the outcome of a carefully planned strategy, aimed at decreasing institutional and governmental involvement in SAR, so to reduce the number of arrivals on EU territory, and hence the migratory pressure on EU coastal States. As a consequence, since 2014, in addition to the important contribution to saving lives at sea provided by commercial vessels, volunteers, NGOs, and civil society groups have launched their own, privately-managed, search and rescue missions.[77]

The crucial role played by non-state actors in the protection of life at sea has been acknowledged by the European Commission in its SAR Recommendation, analysed in detail in the following section. In the recitals of the Recommendation, the Commission highlights that: "Since 2015, search and rescue capacity, coordination, and effectiveness

[75] E. CUSUMANO, M. VILLA, *From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy,* in *European Journal on Criminal Policy and Research*, 2021, 27, pp. 23-40. See also M. TAZZIOLI, W. WALTERS, *Migration, Solidarity and the limits of Europe* in *Global Discourse: An interdisciplinary journal of current affairs*, 2019, vol. 9, no. 1, pp. 175-190. Notably, the paper notes that "through transnational solidarity practices" a sort of "infrastructure of migrant support" has been built. Then, the paper focuses on the criminalisation of solidarity in France and Italy, arguing that such legal actions represent a radical challenge to Europe's principles of solidarity across borders.

[76] C. HELLER, L. PEZZANI, *Death by Rescue: the Lethal Effects of the EU's Policies of Non-Assistance* in *Forensic Oceanography*, 2016.

[77] P. CUTTITA, *Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean,* in *Geopolitics*, 2018, vol. 23, no. 3, pp. 632-660. Also see E. CUSUMANO, *Emptying the Sea with a Spoon? Non-Governmental Providers of Migrants Search and Rescue in the Mediterranean,* in *Marine Policy*, 2017, vol. 75, pp. 91-98.

in the Mediterranean have been enhanced considerably in response to the migratory crisis, including with […] the increased involvement of private and commercial vessels".[78]

Today, despite their crucial life-saving role, NGOs providing humanitarian assistance to refugees and asylum-seekers are increasingly under attack and subjected to legal proceedings and criminal investigations.[79] These attacks certainly exercise a strong deterrent effect on the activities of NGOs, hampering their life-saving role and threatening the lives of migrants and refugees. Violeta Moreno Lax, among others, argued that one of the features of what she identifies as an "interdiction by omission" model in the Mediterranean is represented by the criminalization of "solidarity rescues" undertaken by civil society organizations.[80] Within European public discourse, the criminalization of NGOs' rescue activities is justified with the "fight against human smuggling".[81] In fact, in 2015, at the peak of the so-called "refugee crisis", the European Commission's Agenda on Migration identified as a key priority of the European migration policy the "fight against smugglers and traffickers" and the improvement of the current EU legal framework "to tackle migrants smuggling and those who profit from it".[82] Nonetheless, as repeatedly acknowledged by legal scholars and EU institutions alike, a balance should always be struck between European legitimate security objectives, centred on the "fight human smuggling", and the duty to provide assistance to people in distress at sea, alongside the necessary protection of humanitarian actors from biased legal proceedings.

Regrettably, recent research indicates that the careful balancing of the policy objective of countering organised criminal groups involved in migrant smuggling with the right of association and humanitarian assistance has been challenged, and this has resulted in considerable obstacles in the legal space for civil society actors such as NGOs and private volunteers.[83] The expert council on NGO law of the Council of Europe, for instance, denounced that the increasing criminalization of NGOs in the European legal space threatens the freedom of association of such organizations, alongside the respect for the rule of law within Council of Europe Member States. Further, the expert council

[78] Commission Recommendation (EU) 2020/1365, *on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities*, of 23 September 2020, in OJ L317, 1 October 2020. See recital 4 of the Recommendation.

[79] The criminalisation of NGOs, like Doctors without Borders, Save the Children, SOS Mediterranee, Sea-Eye, Sea-Watch, Jugend-Rettet and Pro-Activa Open Arms started with the simultaneous implementation of the Libyan sea-barrier, charging the Libyan Coast Guard with responsibility for intercepting migrant vessels and bringing them back to Libya. See M. TAZZIOLI, *Crimes of solidarity: migration and containment through rescue,* in *Radical Philosophy,* 2018, vol. 2, no. 1, pp. 4-10.

[80] V. MORENO-LAX, *Protection at Sea and the Denial of Asylum*, in C. COSTELLO, M. FOSTER, J. MCADAMS (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 2020.

[81] For an overview of the intersection between the provisions setting out the duty to rescue people in distress at sea and the issue of state jurisdiction against migrant smuggling, see I. CARACCIOLO, *Migration and the Law of the Sea: Solutions and Limitations of a Fragmentary Regime* in I. CARACCIOLO , *The International Legal Order: Current Needs and Possible Responses,* Leiden, 2017, pp. 274-287.

[82] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, of 23 May 2005, COM(2015) 240 final.

[83] L. VOSYLIUTE, C. CONTE, *Crackdown on NGOs and volunteers helping refugees and other migrants. Final Synthetic Report*, ReSoma (Research Social Platform on Migration and Asylum), 2019, pp. 1-52.

notes that the criminalization of solidarity exercises a chilling effect on the activities of NGOs at sea, with a foreseeable – and detrimental – impact on the lives and rights of migrants attempting to cross the Mediterranean.[84]

The legal framework against smuggling of migrants, to which the European Agenda on Migration makes reference, is hinged on the "Facilitators Package", adopted in 2002 to define the offence of facilitation of unauthorised entry, transit or residence in the EU and to set out related criminal sanctions.[85] Central pillar of the package is the Facilitation Directive, which criminalizes "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens".[86] Notably, whilst the UN Protocol against Smuggling of Migrants requires proof of a financial benefit for the crime of smuggling to materialise and be prosecuted, the EU Directive does not contain such a specification.[87] Therefore, based on the implementation of the EU provision in domestic criminal codes, some EU countries launched legal proceedings and criminal investigations against NGOs and volunteers providing humanitarian assistance at sea. It should be also noted that the Facilitation Directive envisages the possibility not to impose sanctions when the facilitation of irregular entry, transit or stay is carried out on humanitarian grounds. Nonetheless, such a provision is not binding, allowing States some leeway in the domestic implementation of the so-called "humanitarian clause".[88]

Arguably, the combined effect of the absence of an element of material or financial gain in the definition of the crime of smuggling and the non-mandatory character of the "humanitarian clause" in the Facilitation Directive resulted in the increasing use of criminal law against civil society organizations and NGOs providing support to asylum-seekers and refugees. In particular, the optional character of the "humanitarian clause" entailed that most Member States did not avail themselves of the possibility provided for in the Directive, failing to implement such clause in their legal systems. The European

[84] Conference of INGOs of the Council of Europe, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States*, 2019, pp. 1-50.
[85] Directive 2002/90/EC of the Council, *defining the facilitation of unauthorised entry, transit and residence*, of 28 November 2002, in OJ L328, 15 December 2002. Framework Decision 2002/946/JHA of the Council, *on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, of 28 November 2002, in OJ L328, 5 December 2002.
[86] Article 1(a) of the Facilitation Directive.
[87] In its 2017 paper on the Concept of 'Financial or Other Material benefit' in the Smuggling of Migrants Protocol, the United Nations Office on Drugs and Crime (UNODC) describes such financial or other material benefit as the very purpose of migrant smuggling. See UNODC, *The Profit Element in the Smuggling of Migrants Protocol*, 2017, pp. 1-83.
[88] S. CARRERA, *Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update*, European Parliament, 2018. The Author explains that only in Germany, Ireland, Luxembourg and Portugal criminal proceedings require a proof of migrant smugglers obtaining financial or other material benefit for their actions. However, the 2020 Commission Guidance on the implementation of the Facilitation Directive states that today, eight Member States include in their national law an exemption from punishment for facilitating unauthorised entry and/or transit in order to provide some form of Humanitarian assistance. Such States are: Belgium, Greece, Spain, Finland, France, Croatia, Italy and Malta.

Commission's evaluation of the Facilitation Directive acknowledged that humanitarian actors working with migrants still perceive a risk of criminalisation.[89]

By way of example, it should be noted that in 2018 Hungary passed the so-called "Stop Soros" law, criminalizing anyone working for NGOs supporting migrants in their asylum applications in Hungary. In addition, the new law tightened Hungarian asylum law, foreseeing that anyone trying to enter Hungary from a third country where there is no real risk of prosecution will be expelled and his/her right to asylum denied.[90] Clearly, the law substantially expands the scope of the permissible criminalization of humanitarian aid, representing a worrying restriction of the legal space available for the activities of NGOs in Hungary. Today, the law is subject to an infringement procedure open by the Commission against Hungary, and currently pending before the CJEU.[91] In its opinion on the case, the AG Athanasios Rantos underlined how the combined effect of the newly-introduced offence and the reform of the Hungarian asylum system will foreseeably lead to an increase of the criminal cases against NGOs and humanitarian actors, as anyone supporting migrants entering Hungary from "safe" third countries, such as Serbia, will be potentially subjected to investigation and criminal prosecution.[92] This example, based on domestic legislation, clearly demonstrates how the leeway allowed by the Facilitation Directive to EU Member States, when it comes to the criminalization of humanitarian actors, may lead to absurd outcomes, and seriously impinge on the fundamental work of humanitarian actors, and on their freedom of association.

6. Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of Search and Rescue activities

The Recommendation on privately-operated rescue missions was announced by the Commission as a tool to generate a virtuous circle of cooperation among EU Member States and between them and private entities operating SAR in the Mediterranean. In fact, under the New Pact, the Commission aimed to propose a more coordinated approach to SAR aimed at strengthening cooperation among the involved actors, also introducing the first European Contact Group on search and rescue. It should be noted at the outset that – as well known – EU recommendations do not constitute binding acts of the EU, yet they certainly exercise some political weight and may persuade States to adopt specific

[89] Working Document of the European Commission, *Commission Staff Working Document. Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA),* of 22 March 2017, SWD (2017) 117 final.
[90] The Guardian, *Hungary passes anti-immigrant "Stop Soros" laws*, 20 June 2018. Available at: https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws.
[91] Court of Justice, *Commission v Hungary*, Case C-821/19.
[92] Opinion of Advocate General Athanasios Rantos, delivered on 25 February 2021, in the case C-821/19, *Commission v Hungary*, Case C-821/19.

legislation on the topics touched by recommendations. Therefore, the SAR Recommendation could have been the opportunity to introduce a change of paradigm in the Member States' attitude towards NGOs. Regrettably, however, the focus of the Recommendation is neither on the protection of migrants nor on the elimination of the structural factors that effectively impede cooperation among the relevant stakeholders – States and NGOs. On the contrary, in a similar fashion to the two above-analysed proposals, the "SAR Recommendation" is principally focused on "ensuring effective migration management" and "curbing irregular crossings", rather than ensuring that the humanitarian activities of NGOs take place in a safe and predictable legal and political environment.[93]

The crucial role played by NGOs in the Mediterranean is acknowledged by the Commission at the beginning of its Recommendation, when it States that: "several non-governmental organisations have […] been operating private vessels, mostly in the Central Mediterranean area, significantly contributing to the rescue of persons at sea, who are then brought to EU territory for safe disembarkation".[94] Yet, the recital is not followed by any concrete proposal on the improvement of the conditions under which NGOs operate, and remains a façade, concealing the securitization paradigm characterizing EU policies on SAR NGOs. Remarkably, for instance, there is little in the Recommendation that would suggest a specific concern on the scarcity of public resources invested in SAR, or on the dilemma of disembarkation following SAR operations conducted by NGOs, or on the questions raised by the increasing criminalisation of solidarity rescues undertaken by NGOs. These questions remain unanswered by the Commission, representing the main flaw of the Recommendation.

Before delving into a detailed analysis of the SAR Recommendation, it should be noted that attempts at correcting the problems linked to NGOs operations in the Mediterranean were undertaken in 2019, most notably through a motion for a Resolution of the EU Parliament on search and rescue in the Mediterranean.[95] The resolution, urging EU States to "make full use of all vessels able to assist in search and rescue operations, including vessels operated by NGOs" and "calling on Member States to maintain their ports open to NGO vessels", while also hinting at the fact that "actions taken by some Member States to prevent rescue boats from entering their territorial waters without prior authorisation may be contrary to EU asylum law and to the Charter of Fundamental Rights", did not receive enough support in the EP and ultimately failed, by a margin of two votes.[96] Detractors of the proposal argued that it was aimed at "opening the doors to

[93] Commission Recommendation, *on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities*, of 23 September 2020, COM(2020) 6468 final.
[94] Recital 5, Commission Recommendation, *on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities.*
[95] Motion for a Resolution on search and rescue in the Mediterranean, of 21 October 2019, 2019/2755(RSP).
[96] Those who voted against were the MEPs from the ECR (Conservatives and Reformists), Identity and Democracy (the political group to which the Italian Lega belongs), the EPP and some liberals from Renew Europe (mostly from eastern countries), but also four Socialists and one member from the GUE/NGL (left-wing). Italian M5S abstained from the vote.

NGOs" and at filling countries with "illegals".[97] The failed resolution certainly represents a missed opportunity for the EP, and for the EU at large. Arguably, if adopted, the resolution could have led to enhanced proactive search and rescue by increasing the search and rescue capacity of European States, and to a homogeneous and coherent European approach to the issue of disembarkation of rescued migrants.

With the New Pact, the Commission proposes two distinct documents, aimed at regulating NGOs' SAR activities and their interaction with EU Member States: a Communication preventing the criminalization of humanitarian actors based on the Facilitators package, and a Recommendation addressing administrative cooperation among Member States concerning SAR operations carried out by private vessels. It is regrettable that the Commission decided to address the topic of SAR by means of a Recommendation, one of the non-legally binding acts of the EU, which only exercises political influence on Member States and EU institutions.[98] Probably, a binding act would have been more suited to guide States in their interpretation of SAR provisions.

In the "Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities", the Commission acknowledges that since 2015 the search and rescue capacity in the Mediterranean has benefitted of significant contributions from the increased involvement of private vessels, and notes that: "[A] new form of search and rescue operations in the European maritime landscape has emerged whereby vessels operated by NGOs in the Central Mediterranean Sea have been engaged, as their predominant activity, in search and rescue operations, which they have performed under the coordination of national Maritime Rescue Coordination Centres or on their own initiative".[99]

In addition, SAR is acknowledged by the European Commission not only as "a moral duty and binding legal obligation under international law", but also as "a key element of the European integrated border management".[100] The acknowledgement of the centrality of NGOs in the Mediterranean, as well as the emphasis on the existence of binding legal obligations enshrining the duty to rescue people in distress at sea, could persuade some readers that the Commission realized the crucial contribution of NGOs in the preservation of life at sea, and the necessity to adequately coordinate state action and NGOs' activity in this field. Regrettably, however, this section will underline how the Commission missed a precious opportunity to improve the legal and political environment in which NGOs' rescue activities take place.

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[97] These were the words of Matteo Salvini, the former Italian Minister of Interiors. See A. POLLICE, *European parliament says no to NGOs, rejecting open ports resolution for refugees,* in *Il Manifesto*, 2019.
[98] Article 288, Treaty on the Functioning of the European Union.
[99] Commission Recommendation, *on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities*, of 23 September 2020, Recital 8 of the proposal.
[100] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on a New Pact on Migration and Asylum*, of 23 September 2020, COM(2020) 609 final, p.13.

On the crucial issue of inter-state cooperation, one of the pillars of this contribution and the New Pact, the Commission recommends that: "Member States should cooperate with each other, and with the Commission, in particular through its Contact Group, liaising with all relevant stakeholders, including as appropriate private entities owning or operating vessels for the purpose of carrying out search and rescue activities, with a view to identifying best practices and take any necessary actions to ensure: a) increased safety at sea; and b) the availability to the competent authorities of all information that they require to monitor and verify compliance with standards for safety at sea as well as relevant rules on migration management".

This specific recommendation warrants some considerations. In the first place, the Commission fails in providing a reason why, in a document specifically targeting privately-managed rescue operations, state cooperation with private entities is recommended "as appropriate", whilst the Commission is to be constantly included in the cooperation efforts of EU countries. This aspect of the recommendation is the more concerning in light of the circumstance that, in its "Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence", the Commission explicitly acknowledges the problem posed by the lack of appropriate communication between authorities and those operating on the ground.[101] The current wording of the recommendation will fail in redressing such a lack of communication between authorities and field workers. On a comparative note, it should be underlined that the UN Smuggling Protocol contains a dedicated provision requiring States to cooperate with NGOs in the prevention and eradication of migrant smuggling. Regrettably, the Commission failed to embrace a similar approach towards the issue of cooperation between States and NGOs.[102]

In the second place, the Recommendation adopts and perpetuates the security-oriented approach characterizing recent EU strategies on migration. Indeed, the Commission recommends a strict scrutiny on the activities of SAR NGOs, based upon the hardly-justifiable concern that NGOs' vessels be duly equipped to conduct rescue missions - one that has never appeared on the European migration policy agenda before. This view is further reinforced by the reading of recital 12, that specifies that "it is a matter of public policy, including safety, that these vessels be suitably registered and properly equipped to meet the relevant safety and health requirements associated with this activity, so as not to pose a danger to the crew or the persons rescued". Nonetheless, whilst safety and health represent two legitimate policy concerns, their specific mention in the Commission's recommendation appears unnecessary and superfluous, in light of the existence of a dedicated European legal framework on safety and environment protection in the maritime field. The EU legal regime on port state control, on rules and

[101] Communication from the Commission, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, of 23 September 2020, C(2020) 6470 final, p. 1.
[102] See Article 14(2) of the UN Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention Against Transnational Organised Crime.

standards for ship inspection and survey organizations, on maritime accident investigation, and on the prevention of marine pollution from ships is well-structured and comprehensive.[103] EU Commission's clarifications on the necessity that NGOs' vessels be suitably registered and properly equipped thus appear superfluous, unnecessary and justify the argument that the Commission, while highlighting NGOs' crucial role in the Mediterranean and calling on States not to impinge on their activities with lengthy legal proceedings, imposes a strict scrutiny on civil society organizations, treating them as suspicious and legitimizing EU Member States' investigations of their activities.

As for the criminalization of solidarity, the SAR Recommendation does not contain any incentive for States to keep humanitarian actors exempt from punishment for having rescued migrants. On the contrary, notwithstanding the acknowledgement, contained in the recitals of the Recommendation, of the need to ensure that humanitarian actors be exempt from punishment, the Commission fails in explicitly exhorting States to implement the "humanitarian clause" contained in Article 1(2) of the Facilitation Directive. Despite its non-binding character, the Recommendation could have made an explicit reference to the "humanitarian clause", which, in turn, could have served the cause of humanitarian actors at sea, encouraging States to implement the "humanitarian clause" in their legal systems, and ensuring a more homogeneous interpretation of the Facilitation Directive throughout the European legal space. Regrettably, however, the Recommendation does not even refer to the "humanitarian clause", thus missing an important occasion.

With regard to the criminalization of humanitarianism, a positive development is represented by the communication of the Commission containing the Guidance on the interpretation of the Facilitation Directive. The guidance states that "the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law".[104] In addition, in the conclusion of the document, the Commission: "[I]nvites Member States that have not already done so to use the possibility provided for in Article 1(2) of the Facilitation Directive, which allows them to distinguish between activities carried out for the purpose of humanitarian assistance and activities that aim to facilitate irregular entry or transit, and allows for the exclusion of the former from criminalisation".

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[103] Directive 2009/16/EC of the European Parliament and of the Council, *on port State control*, of 23 April 2009, in OJ L131, 28 May 2009. Directive 2009/15/EC of the European Parliament and of the Council, *on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations*, of 23 April 2009, in OJ L131, 28 May 2009. Directive 2009/18/EC of the European Parliament and of the Council, *establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council*, of 23 April 2009, in OJ L131, 28 May 2009. Directive 2019/883 of the European Parliament and of the Council, *on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC*, of 17 April 2019, in OJ L151, 7 June 2019.

[104] Communication from the Commission, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, p.7.

Some authors explained that the Communication, despite its non-binding nature, could be interpreted as producing legal effects. For instance, the Communication could reduce national judges' margin of discretion in the interpretation of Article 1(2) of the Facilitation Directive. The Communication could be employed to clarify that the Facilitation Directive cannot be construed as authorizing unlawful conducts of its Member States, such as the criminalization of a legally required conduct like the rescuing of people in distress at sea. In addition, the Communication could serve as a source for a systematic interpretation of EU law with international rules and principles on SAR and the protection of the right to life at sea.[105] This would be a positive development, with a view to the uniform application of European law in all the EU Member States. Indeed, the presence of a non-binding clause on humanitarian assistance to migrants leaves national judges with the burden of the difficult interpretation – and balancing – of international and EU rules on human smuggling, the duty to rescue people in distress at sea, and the protection of asylum-seekers' lives, pursuant to human rights and refugee law. Whilst such an interpretative effort is constitutive of the very exercise of judicial functions, leaving the application and interpretation of EU law, as well as the coordination of different legal regimes, to the discretion of single judges in different EU States might lead to discrepancies in the application of the law within the European legal space, with foreseeable consequences on the rights of human rights defenders and on the principle of equality. The communication could therefore prevent such a risk.

Having considered both the SAR Recommendation and the Commission's Guidance on the interpretation of the Facilitation Directive, we can draw the conclusion that, whilst the SAR Recommendation fails in inducing a real shift in the relationship between States and NGOs, as well as in substantially improving the position of NGOs conducting rescue activities at sea, and the legal environment in which their activities take place, the Guidance leaves some hope as to the imperative to end the criminalization of humanitarian rescue activities in the European legal space. However, the focus of the Commission's action remains centred on the increase of maritime safety and on the monitoring of the activities of private actors, rather than on the cooperation of Member States with private actors for the purpose of SAR activities at sea, and on the protection of refugees' human rights. The aim of the Commission seems, on one hand, to discharge the responsibility for SAR activities onto NGOs and private actors, and, on the other hand, to increase state control on the activities of said private actors, essentially disregarding multiple concerns linked with human rights and the protection of life at sea, while focusing its action on a security-oriented approach to migration. Accordingly, it has been underlined that "the foreseeable impact of the SAR Recommendation, rather than increasing SAR capacity in the Mediterranean, may well be the opposite by subjecting

[105] M. STARITA, *Search and rescue operations under the New Pact on Asylum and Migration*, in *SIDIBlog*, 2020.

SAR NGO vessels to strict scrutiny, using "safety of navigation" as an excuse to police their activity".[106]

7. Conclusion

Despite recurring tragedies in the Mediterranean, as explicitly admitted by the EU Commission in its press release published with the package proposal, "current EU rules on migration have shown significant faults, and for the past years the EU has not managed to fix it".[107] As a matter of fact, the 2015-2016 so-called "refugee crisis" unveiled the shortcomings of the current EU migration regime. During the crisis, the lack of solidarity, cooperation, and mutual trust among Member States in the application of international and EU rules on SAR and asylum became painfully clear, causing an intolerable death toll among migrants crossing the Mediterranean. With the New Pact, the Commission attempted to introduce a comprehensive strategy to tackle the weaknesses of the EU migration policy, by proposing integrated measures to enhance cooperation and solidarity among EU Member States. In the words of the Commission, the ambition of the New Pact is to propose a "broad framework based on a comprehensive approach to migration management, promoting mutual trust among Member States. Based on the overarching principles of solidarity and a fair sharing of responsibility, the new Pact advocates integrated policy-making, bringing together policies in the areas of asylum, migration, return, external border protection and relations with third countries."[108] Despite the pompous wording and ambitious program contained in the New Pact, as demonstrated throughout the article, the EU Commission failed to deliver on its own promises.

In the first place, the approach adopted by the Commission remains security-oriented, with a strong focus on managing irregular migration, preventing arrivals on the EU territory, ensuring that the activities of humanitarian NGOs are strictly scrutinized by Member States, and securing faster return procedures for those migrants with no right to stay in the EU. In this way, not only the analysed proposal disregards migrants' human rights, but it also fails in introducing effective and compulsory solidarity measures and in increasing cooperation among EU States. Namely, the article demonstrated that Member States might evade their responsibilities in the reception of asylum-seekers by buying out of the proposed solidarity mechanism, sponsoring the return of migrants instead of choosing to relocate them in their territory. Paradoxically, the proposal provides States with added incentives to finance the return of migrants, rather than hosting those with the

[106] V. MORENO-LAX, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment*, in *EU Migration Law blog, New Migration Pact - Blog Series*, 2021.
[107] European Commission Press Release, *A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity*, 23 September 2020.
[108] Proposal of the European Commission, for a Regulation of the European Parliament and of the Council *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund],* of 23 September 2020.

right to stay. In other words, there is little mandatory about the "flexible solidarity" mechanism proposed by the EU Commission.

As for the long-awaited revision of the Dublin system, the expectations were not met. The Dublin system, including the much-contested irregular-entry criterion, remains in force, failing to mitigate the migratory pressure exerted on the traditional States of first entry: Italy, Greece and Malta. This was undoubtedly a precious occasion lost by the Commission, which appears to overlook the fact that the Dublin system for allocation of responsibility has failed. The preservation of the Dublin system in its current form will potentially have two combined effects. On the one hand, it will add to the incentives for coastal States to avert the arrival of migrants on their shores, including through bilateral agreements with third countries for the containment of irregular flows (e.g. the Italy-Libya MoU), on the other hand, as argued above, the system will encourage migrants to resort to negative coping strategies in order not to be registered – through the finger-printing – in the country of first arrival, which almost inevitably coincides with States where migrants do not intend to remain. In addition, the preservation of the Dublin system is clearly not conducive to increased solidarity among Member States in the reception of asylum-seekers.

Similarly, the Commission lost its opportunity to protect and support the life-saving activities of rescue NGOs. In fact, the article found that the Commission's approach to privately managed rescue operations fails to substantially improve the legal environment in which humanitarian actors operate, perpetuating old stereotypes which characterize NGOs as a pull-factor of migration and calling for an increased scrutiny of NGOs' search and rescue operations, thereby legitimating Member States' suspicions towards such non-state actors. As shown, the approach adopted with regard to SAR NGOs is particularly worrying, in light of the crucial role played by such non-state actors in the protection of life at sea, and of the strategic retreat of EU Member States and other institutional actors from SAR activities. Further, the approach adopted towards NGOs will likely fail in providing States with a clearer and more homogeneous interpretation of the Facilitation Package.

The criticism on crucial features of the New Pact is shared by legal scholars and institutional actors alike. Notably, in May 2021, the European Economic and Social Committee (EESC)'s thematic study group on immigration and integration held a conference on the state of play in the negotiations on the building blocks of the New Pact. The conference brought together representatives of the EESC, of other European and international institutions, alongside civil society representatives. The main objections raised during the conference were that the current proposal is too focused on border controls and on stopping illegal migration, while paying little attention to improving legal migration pathways. In addition, concern was expressed with regard to the new solidarity mechanism contained in the proposal, described as "solidarity *à la carte*".[109] Further, in

[109] European Economic and Social Committee, *The New Migration Pact: fraught with flaws and stuck in limbo*, 26 May 2021, available at: https://www.eesc.europa.eu/en/news-media/news/new-migration-pact-fraught-flaws-and-stuck-limbo.

its opinion on the Commission's proposal, the EESC stressed that the "EU needs to strike the right balance between effective migration management that is humane and sustainable, while ensuring security and control of its external borders".[110] Regrettably, as this article argued, the Commission failed to strike such a balance.

On a concluding note, the Commission seemed to overlook the need to ensure effective and adequate SAR mechanisms in the Mediterranean Sea. As rightly pinpointed by IOM, when drafting a comment on the package proposal, "EU's primary objective should be to save lives at sea. The roadmap rightly recognizes the need for predictable Search and Rescue in the Mediterranean. To this end, dedicated EU-led SAR capacity needs to be strengthened and unhindered, coordinated access needs to be ensured for rescue operations, including by NGOs, with prompt disembarkation in line with international standards".[111] Much to our disappointment, however, this contribution found that the New Pact will likely fail in enhancing the predictability of SAR in the Mediterranean Sea, in enhancing the cooperation between States and NGOs in the SAR field, in ensuring prompt disembarkation to NGO vessels, and in improving the coordination among Member States during SAR operations. The Commission seems to have forgotten that, whilst the protection of external maritime borders and the sustainability of domestic reception and asylum systems are crucially important and represent legitimate policy aims of EU migration strategies, the EU should strengthen its commitment to the protection of human rights and make sure that its migration policy reflects such a commitment and remains consistent with EU legal and moral values.

ABSTRACT: The New Pact for Migration and Asylum, proposed by the European Commission in September 2020, embeds a comprehensive and multi-layered strategy addressing migration, asylum, border management and infra-European solidarity. The pact aims to create fair migration processes, building mutual trust among Member States and leading to more efficient burden-sharing mechanisms in the reception of migrants. Building on a preliminary analysis of the faults characterizing current EU policies on migration, this contribution aims at examining the rules on search and rescue contained in the Commission's package proposal, with a view to identifying the problematic features of this aspect of the proposal, and putting forth some ideas for amendment or improvement.

KEYWORDS: search and rescue – international cooperation – asylum – criminalization of solidarity – NGOs.

[110] European Economic and Social Committee, *Opinion on the Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, SOC/649.
[111] IOM, *Views on the Roadmap for the EU's New Pact on Migration and Asylum*, 27 August 2020.