EUNAVFOR MED Operations: refoulement by proxy and the externalisation of EU borders

Aisling Torrallardona Murphy

ABSTRACT

The two consecutive EUNAVFOR MED operations launched by the EU in response to the 2015 migration crisis reflect the Union's distancing from humanitarian values and a tendency towards the securitisation of all its policy aspects. Operation Sophia, faced with legal challenges through the ECtHR ruling in the Hirsi Jamaa and Others vs. Italy case and increasing the tensions among member states because of the disparity in burden sharing, turned into Operation Irini, where all humanitarian responsibilities are avoided or deflected towards the Libyan Coast Guard, with no regard for the flagrant and continuous abuse of migrants in Libyan territory.

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ABBREVIATIONS

EU: European Union

SAR: Search And Rescue

EUNAVFOR: European Naval Force

EUNAVFOR MED: European Naval Force - Mediterranean

ECHR: European Charter for Human Rights

ECtHR: European Court for Human Rights

CSDP: Common Security Defence Policy

UNSC: United Nations Security Council

HR: High Representative of the Union for Foreign Affairs and Security Policy

UNCLOS: United Nations Convention on the Law of the Sea (1982)

SOLAS: International Convention for the Safety of Life at Sea (1974)

LCG: Libyan Coastal Guard

IMO: International Maritime Organisation

INTRODUCTION

Irregular migration across the Mediterranean Sea presents a complex and persistent challenge for the European Union (EU) and its member states. The influx of irregular migrants fleeing conflict, poverty, persecution and natural disasters exacerbated by climate change has significant economic and social consequences for receiving countries. Real, but often exaggerated, concerns about the economic strain and cultural impact of migration have fueled the rise of populist and far-right political movements, particularly in countries that take the brunt of irregular migration for other inland European countries, as is the case with the Mediterranean EU countries. Italy is the clearest illustration of this strain, both for its current political landscape and its protagonist role in the most prominent migration route in Europe: the Central Mediterranean Route.

THE CENTRAL MEDITERRANEAN ROUTE AND THE CHANGE IN EU MIGRATION POLICIES

The Central Mediterranean Route is one of the main migratory routes used by migrants and refugees to reach Europe from Northern African countries, particularly Libya, across the Mediterranean Sea. Although Tunisia and Algeria are also included in the Central Mediterranean Route, Libya serves as a major departure point for these dangerous sea crossings, due to its proximity to both Italy and Greece. These journeys often include crossing international waters in overcrowded and unseaworthy vessels, leading to this route being known as the deadliest migration route in the world.

Concerns over this route reached their peak during the 2015 migration crisis, which saw a significant influx of migrants and refugees particularly through the Mediterranean Sea. This particular wave captured global attention due to the sheer scale of these arrivals and the tragic incidents at sea, exposing the gaps in coordination, communication and cooperation among European countries in managing the influx of migrants. NGOs and coastal governments alike emphasised the need for burden-sharing among EU member states, as well as the establishment of relocation schemes and common asylum policies to ensure a more cohesive approach to the complex humanitarian and political dimensions of irregular migration.
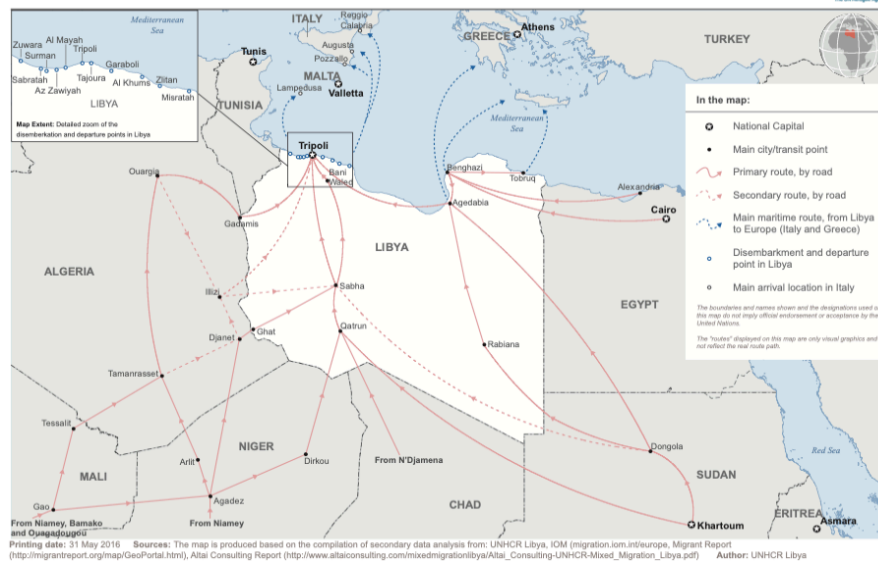
FIGURE 1. *Depiction of the main migration routes departing from Libya, constituting the Central Mediterranean Route.* *Source: UNHCR Libya, 2016* https://reliefweb.int/attachments/23064fd4-7841-372a-94db-36753cc5a79f/unhcr_a4_libya_migration_routes_31may201

The migration crisis had significant and far-reaching consequences in Italy. It exacerbated political divisions both internally and with other EU member states, hinging on their differing opinions on issues such as border control and asylum policies, leading to strained relationships between political parties and governments. It also led to increasing social tensions, particularly in communities where migrants are settled; concerns about cultural differences, about the competition for resources and about security (especially in the fields of terrorism and organised crime) have fueled social anxieties that notably contribute to xenophobia and discrimination. From an economic point of view, the costs associated with providing social services, housing, healthcare, integration programs, language training and employment support has impacted national budgets and access to public services; accompanied by a strain on the infrastructure meant to ensure the well-being and meet the basic needs of newcomers, the overcrowding and limited resources in reception centers and housing facilities had pushed the already frail Italian economy to the point where they couldn't afford to take in any more migrants and refugees on their own. For countries like Italy, Greece or Spain, the response to the 2015 migration crisis at an EU level needed to include a review and revision of asylum and immigration policies, an improvement in legislation, procedures and practices and a concerted effort to harmonise asylum systems and improve cooperation among EU member states.

Thus, for the first time, migration policies were considered to be part of the EU's CSDP, instead of internal member states' jurisdiction.

STATEMENT OF OBJECTIVES

This paper delves into the EU's response to irregular migration through the lens of two key naval operations active in the Central Mediterranean Route: Operation Sophia (2015-2020) and its successor, Operation Irini (2020-present). While Operation Sophia attracted criticism for its shortcomings in search and rescue (SAR) missions and its potential violation of international law, Operation Irini has largely flown under the radar, despite its continuation of some controversial practices. This analysis will explore the continuities and divergences between these operations, particularly regarding the training of the Libyan coastguard and the seizure of vessels involved in migration.

By examining the broader trends in EU foreign policy, the perceived failings of Operation Sophia as highlighted by both governmental and non-governmental actors, and the specific mandates of each operation, we aim to shed light on the rationale behind the design and implementation of Operation Irini. We argue that Operation Irini represents a calculated shift in EU policy, allowing the bloc to maintain a degree of control over migration flows while potentially skirting some of the legal complexities that plagued its predecessor, in what is effectively an externalisation of its maritime borders. This analysis has crucial implications for understanding the direction of future EU migration policy and its potential impact on regional stability.

METHODOLOGY

In accordance with this objective, our methodological approach is based essentially on the formal analysis of polity and doctrinal texts, as well as a substantial and necessary consideration of the political and judicial contexts in which the texts were created. The frame for our analysis is a combination of international and European ordinance, establishing a basic conceptualisation outline that properly encompasses the nature and specificity of this topic. Additionally, incursions and references to other aspects of policymaking are made with the sole intention of properly contextualising and interpreting international and European law.

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The highly complex nature of the issue at hand demands an interdisciplinary approach, with a strong emphasis on the political and historical elements that necessarily influence all policymaking, but that are especially conclusive in the field of international law.

This multi-method approach includes the referral to official legal documents from EU institutions, the UN Security Council, international conventions, migration policies and Italy's bilateral agreements with Libya. These official sources are accompanied by doctrine relating to migration trends, externalisations, European foreign policy, relevant human rights law and the specific set of circumstances surrounding this particular case, along with reports and news articles from NGOs and reputable sources in the human rights law field. Landmark court rulings and relevant procedural decisions were included, but are scarce and far between; due to the fundamental uncertainty in terms of jurisdiction that characterises the analysed situation, which is argued to be precisely designed as such to evade juditial scrutiny and humanitarian responsibilities, courts like the ECtHR have been unable to see to any of the relevant cases that would benefit the object of this dissertation.

In addition to this research, theoretical knowledge of European Foreign Policy and International Relations, acquired throughout this university education, has been applied in the analysis of these documents and reinforced by further academic sources, where deemed necessary.

To explore the relevance of the two hypotheses of naval mission Sophia, the analysis relies on the following sources. First, all official EU documents regarding the operation, from the Commission, the EEAS, and the (European) Council. Unpublished working documents about the mission were collected from WikiLeaks. Documents were also collected from a selection of member states: Italy (where the Operational Headquarters is situated) and the three big countries Germany, France and the UK. News articles have also been a source for detecting these states' positions. Lastly, as discussed above, to study the extent to which the mission was conducted in line with the humanitarian hypothesis, data were collected from a number of observers and specialists: the UNHCR, the Council of Europe, and human rights organizations including Human Rights Watch and Amnesty, the UK House of Lords, and legal scholars.

By delving into the data and exploring the shifting operational landscape, we can begin to unpack the complex motivations and consequences of the EU's migration policy in the Central

Mediterranean. This not only sheds light on the EU's evolving image as a humanitarian actor but also raises crucial questions about the legal, ethical, and political dimensions of managing one of the most pressing challenges of our time.

OVERVIEW

In chapter 1, we'll discuss the context in and with which migration policy has evolved in the past decade.

In chapter 2, we'll analyse the jurisdiction and extent of EUNAVFOR MED Operation Sophia and discuss whether the circumstances surrounding its policies give us any indication that the true intent of the military operation differs from those stated in its mission description, particularly in a way that actively and knowingly puts fundamental and human rights at risk.

In chapter 3, we'll analyse the jurisdiction and extent of EUNAVFOR MED Operation Irini, establish the differences between this mission and its predecessor and discuss which aspects of it create loopholes liable to weaken the upholding of the UNHR Charter.

In chapter 4, we'll confront Operation Sophia and Irini with all their relevant context and discuss whether the continuation and discontinuation of certain elements between them is indicative of a wilful neglect of human rights in favour of the EU's self-interest.

In chapter 5, we'll summarise the conclusions we've reached throughout the dissertation.

CONTEXT

The Central Mediterranean Route has historically been the busiest route for irregular migration to Europe. According to the European Border and Coast Guard Agency (Frontex), nearly 160.000 migrants crossed this route in 2023 alone, marking a significant increase compared to previous years. As discussed, this influx has had a substantial impact on receiving countries, particularly coastal states like Italy.
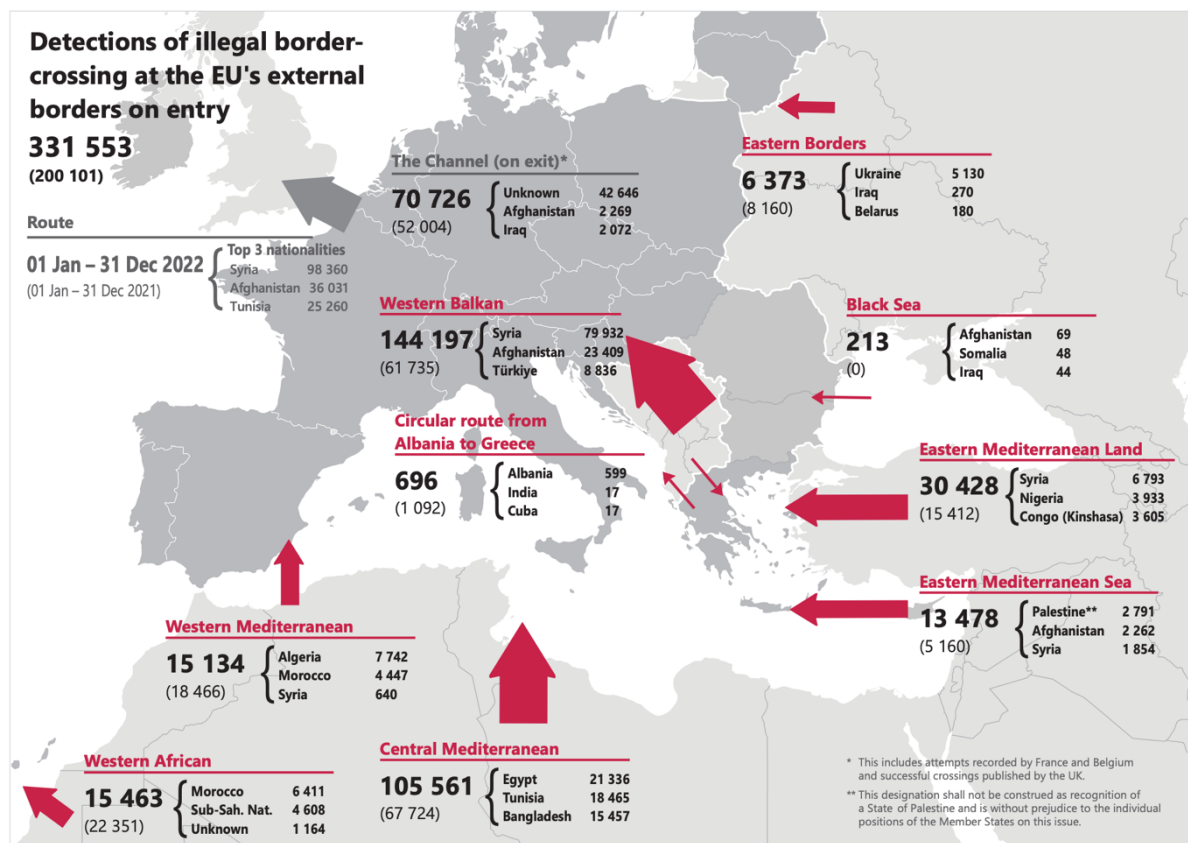

FIGURE 2. *Detections at EU external borders in 2022 compared to 2021. Source: FRAN (Frontex Risk Analysis Network), Risk Analysis for 2023/2024 https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/ARA_2023.pdf. Data collected as of February 2023*
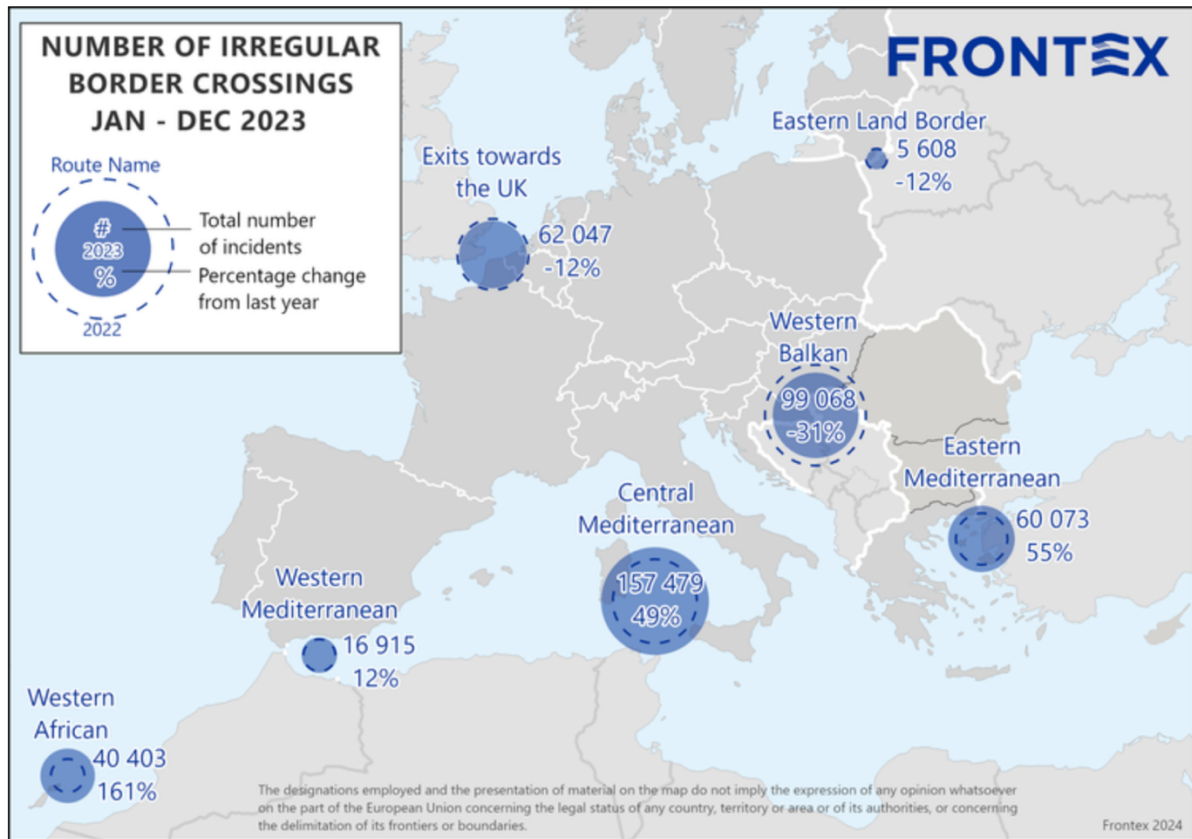
FIGURE 3. *Detected crossings at EU external borders in 2023, and percentage change from 2022. Source: FRAN, Significant rise in irregular border crossings in 2023, highest since 2016* https://www.frontex.europa.eu/media-centre/news/news-release/significant-rise-in-2023-highest-since-2016-C0gGpm

AN INTRODUCTION TO EU MIGRATION POLICIES

Even in the wake of the Ukraine war and the new wave of displacement it created at the Eastern EU borders, the Central Mediterranean Route remains the heaviest transit point for migration. Discussion and analysis of the Central Mediterranean migration flow is vital; not only because of the sheer numbers it deals with, but also for the societal and political climate around it. While the EU responded to the Ukrainian migrants with the implementation of a temporary protection drive, enabling a swift and streamlined access to safety, work permits and healthcare for the people fleeing the ongoing conflict, this is in stark contrast to the harsher, stricter policies employed for irregular migrants coming from the North of Africa. This disparity in treatment highlights just how complex the political calculus at play is in EU migration policy.

The EU's migration policies aren't just important at an internal level, among member states, but also affects the EU's status and role as an international actor. While the EU has nary a

military asset capable of making it a key player in the international stage, it thrives on the soft power derived from being an authority on the promotion and guarantee of human rights in all its aspects[1]. Having laid its foundation and strongest asset in being a trade union, the EU generally includes a moral clause into all its bilateral or multilateral trade deals, aiming to incentivise its partners to move away from questionable practices in favour of better accepted methods that don't rely on exploitation and the infringement of human rights. Overseeing this aspect is the ECtHR, instated to rule over the implementation of EU laws and directives in member states. As such, any member state who overstepped the bounds of international humanitarian law ratified at an EU level would respond to the ECHR and any other organism with a more specific jurisdiction over their unlawful actions.

TIMELINE[2]

In order to properly illustrate the EU's migration policies trends towards limiting freedom of movement from outside to inside its borders, we need a comprehensive timeline that highlights not only the migration policies that have shaped the EU's current configuration, but the key political and historical events that have instigated those changes.

While this timeline reflects the evolution of operational responses, it's crucial to recognize that these efforts aren't isolated. They're not mutually exclusive, often overlapping in time and scope. Additionally, numerous bilateral agreements and internal EU policies contribute to the broader picture of migration management. Therefore, these operations need to be recognised to exist within a wider framework of diplomatic negotiations, development aid, and internal EU debates on asylum and migration policies. Understanding this wider context is essential for comprehensively analysing the EU's approach to the Mediterranean migration crisis.

1951: Along with a number of other humanitarian treaties, the Convention Relating to the Status of Refugees is adopted, establishing a framework to protect refugees fleeing persecution.

1957: The Treaty of Rome establishes the European Economic Community (EEC), simultaneously laying the foundations for the free movement of workers within EEC member states.

1968: The abolition of internal border controls within the EEC further increases labor mobility.

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[1] **Molnar, Anna & Takács, Lili. (2021)**. The European Union's Response to Mass Migration Through Mediterranean: A Shift from Humanitarian Foreign Policy Actor Towards a Pragmatist Foreign Policy Actor? P. 200 10.1007/978-3-030-70554-1_10
https://www.researchgate.net/publication/352547649_The_European_Union's_Response_to_Mass_Migration_Through_Mediterranean_A_Shift_from_Humanitarian_Foreign_Policy_Actor_Towards_a_Pragmatist_Foreign_Policy_Actor
[2] https://migreurop.org/IMG/pdf/chrono_pol_mig_en_10022013.pdf

1973: The economic downturn and rising unemployment rates derived from the First Oil Crisis leads to an increased scrutiny of migrant workers.

1985: The Schengen Agreement is passed, eliminating border controls between signatory countries and further facilitating free movement within member states. It's no longer a provision that mentions "workers".

1989: The fall of the Berlin Wall and the collapse of the Soviet Union lead to a surge in migration from Eastern Europe to Western Europe, prompting calls for stricter external border controls.

1990: The Dublin Regulation designs and establishes a system to determine which EU member state is responsible for processing asylum applications, to avoid multiple asylum applications from being filed in differents member states. It's the first step towards a unified and harmonised asylum system.

1993: The Maastricht Treaty formally establishes the European Union (EU) and incorporates the Schengen Agreement. However, it includes a provision that allows for temporary border controls in exceptional circumstances.

1995: The Schengen Convention comes into full effect, creating the Schengen Area – a zone of passport-free travel.

1997: The Amsterdam Treaty strengthens the EU's ability to control external borders and combat illegal immigration.

2001: The 9/11 terrorist attacks heighten security concerns across the Western world and lead to more restrictive border controls across Europe.

2004: The EU gains ten new member states, mainly from Eastern Europe, raising concerns about new potentially destabilising migration flows.

2004: The EU establishes the European Border and Coast Guard Agency, also known as Frontex, to coordinate border management activities among EU member states.

2007: The Lisbon Treaty strengthens the EU's role in migration policy and establishes a common asylum system.

2011: The start of the Arab Spring uprisings leads to the first significant increase in irregular migration across the Mediterranean Sea.

3rd October 2013: Tragedy strikes near the island of Lampedusa in Italy, with the death of over 360 migrants when their boat sank before reaching safety.

18th October 2013: Italy launches a national search and rescue (SAR) mission, Operation Mare Nostrum, to avoid further tragedies like the one in Lampedusa. It's widely considered to

be the most sucessful SAR mission in the Mediterranean, with over 150.000 migrants rescued in its single year of operation.

2014: Frontex launches Operation Triton as an EU-level SAR operation, taking over for Italy's Operation Mare Nostrum.

2015: Continued conflict and instability in the Middle East and North Africa has hundreds of thousands of people fleeing across the Mediterranean seeking refuge in the EU, in what we now call the 2015 migrant crisis.

2015: The EU launches EUNAVFOR MED Operation Sophia, a military naval mission launched to disrupt human smuggling networks in the Mediterranean Sea, with a secondary focus on search and rescue.

2016: The European Council and the Turkish government make a highly controversial agreement, the EU-Turkey Statement, aimed at reducing irregular migration flows from Turkey to Greece by returning migrants to Turkey.

2018: A rise in populist and anti-immigration sentiment in several EU member states leads to stricter national border controls and increasingly more challenges to EU migration policy.

2019: Disagreements among member states regarding Operation Sophia's focus on SAR versus border control aspects leads to first the removal of its naval assets and its eventual dissolution in 2020.

2020: From the remnants of EUNAVFOR MED Operation Sophia comes EUNAVFOR MED Operation Irini, with a primary focus on enforcing the UN arms embargo on Libya and a secondary focus on disrupting human smuggling networks. SAR missions are not contemplated in its mission statement nor objectives.

2022: In response to the increased flow of migrants from the Ukraine war, the EU instated a Temporary Protection Directive that offers Ukrainians seeking refuge in the EU immediate protection, access to registration and documentation, access to accommodation and housing, access to the labour market, access to healthcare and social benefits and special protection for children, as well as a plan for the redistribution of migrants among EU countries.

THE SECURITISATION OF MIGRATION POLICY

The EU's Common Security and Defence Policy is the main framework for the European Union's efforts to develop its own military and security capabilities. Here are some key attributes of the CSDP:

1. Focus on Crisis Management:

- The CSDP prioritizes managing international crises through a combination of civilian, police, and military missions. These missions can involve peacekeeping, conflict prevention, and post-conflict stabilization efforts.

2. Gradual Development:

- Unlike a traditional military alliance, the CSDP has developed gradually since the 1990s. It's still a work in progress, with ongoing debates about the level of military integration and burden-sharing among member states.

3. Civilian and Military Instruments:

- The CSDP toolbox includes a range of civilian and military instruments. Civilian missions involve police officers, rule-of-law experts, and other specialists deployed to support crisis situations. Military missions can include peacekeeping forces, combat operations (rarely used), and training missions.

4. Decision-Making and Structures:

- Decision-making within the CSDP is complex and requires unanimity among member states for major deployments. The EU has established permanent political, military, and civilian structures to support CSDP operations, including the European External Action Service (EEAS) and the European Defence Agency (EDA).

5. Relationship with NATO:

- The CSDP is seen as complementary to NATO, with the EU focusing on crisis management and NATO as the primary provider of collective defense for its members. However, there's ongoing discussion about how the EU and NATO can cooperate more effectively.

6. External Perception:

- The CSDP has faced criticism for its slow decision-making, limited resources, and lack of a unified military command structure. However, it has also been praised for its contributions to international crisis management and its efforts to promote a more civilian-oriented approach to security.

Overall, the EU's CSDP represents a significant step towards a more independent European security role. While it still faces challenges, it remains an evolving framework with the potential to play a more significant role in global security affairs.

Several theoretical perspectives within International Relations (IR) and European Foreign Policy (EFP) can explain the EU's CSDP shift from humanitarianism towards stability and securitization:

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1. Liberal Institutionalism:

- **Initial Focus on Civilian and Humanitarian Missions:** This theory suggests that the EU, as a normative power promoting peace and democracy, initially focused on civilian and humanitarian CSDP missions.

- **Shift Towards Stability:** However, as the EU encountered complex security challenges and internal disagreements over burden-sharing, it may have prioritized stability operations that could address root causes of conflict and migration.

2. Realism and Security Dilemmas:

- **Realist perspective:** This view emphasizes the anarchical nature of the international system, where states prioritize their own security. As the EU grapples with external threats like terrorism and instability on its borders, it may have felt a need to adopt a more securitized approach to its CSDP.

- **Security Dilemmas:** The EU's actions can be seen as responses to security dilemmas, where attempts to increase security through military means can lead to an arms race or escalation. This can explain the cautious approach to large-scale military deployments while focusing on stability operations.

3. Constructivism and the Securitization of Migration:

- **Securitization Theory:** This perspective highlights how issues can be constructed as security threats. Migration flows have been increasingly securitized, leading to a focus on border control and externalization as a means of ensuring stability. The EU may have adopted this approach to address anxieties about migration and its impact on European security.

4. Two-Level Game Theory:

- **Domestic Politics and External Action:** This theory suggests that EU member states need to balance domestic pressures with external action. The rise of Euroscepticism and anti-immigrant sentiment within some member states may have pushed the EU towards a more securitized approach to migration, aligning with domestic political agendas.

5. The Externalization Debate in EFP:

- **Externalization:** This concept refers to the practice of managing migration pressures by shifting responsibility to third countries. The EU's CSDP operations in the Central Mediterranean, like Sophia and IRINI, exemplify this trend. This shift can be seen as a response to the limitations of internal burden-sharing and the desire to deter migration flows at the source.

Overall, a combination of these theoretical perspectives likely explains the observed shift in the EU's CSDP focus. Humanitarian values remain important, but they are increasingly balanced with security concerns and the need to address the root causes of instability and migration.

Additional Points to Consider:

- The specific context of each CSDP mission will influence its focus.
- Debates about the appropriate role for the EU's CSDP are ongoing.
- Some argue for a return to a more robust civilian and humanitarian role, while others see a continued emphasis on stability and security as necessary.

EXTERNALISATION OF BORDERS

Interdiction and diversion manoeuvres

When talking about the externalisation of borders, we're referring to the practice of shifting border controls and migration management processes beyond a country's physical borders and into external territories or third countries. This enables countries to contain and stem the migration flow before it reaches their shores, thereby shifting the burden of protection and support to countries of first arrival or transit. While the intention of this externalisation is never explicitly mentioned, a policy aiming to enact it can be identified through the concurrence of any or all of the following elements:

1. Temporal control: an emphasis on preventing unauthorized entry by conducting border controls before individuals reach the actual physical border. This includes intensification of visa regimes, delegating passenger identification duties to carriers before travel, and immigration controls and surveillance before entry, even on the high seas, if needs be (page 4 Mitsilegas).

2. Spatial control: border controls physically taking place outside the territorial border to prevent migrants from reaching the real border. This includes controls on the high seas and in the territory of third states targeting migrants and asylum seekers (page 4 Mitsilegas).

3. Delegation of control: though border controls are meant to be legally carried out by state officials, these are supplemented border by delegating control to other actors or

agencies. This includes, but is not limited to, a privatisation of immigration control, where the private sector is involved in performing elements of immigration control (page 4 Mitsilegas).

4. Alienation of control: by targeting carriers, airlines, civilians and NGOs for their perceived role in assisting migrant flows, states are able to criminalise humanitarianism and co-opt civil rights to state law enforcement and immigration control efforts (page 5 Mitsilegas).

To further illustrate this point, the following are widely accepted to be examples of policies of externalisation[345]:

1. Non-entrée policies: These are direct mechanisms explicitly aimed at preventing migrants from reaching the territory of the destination country. Although prohibited under no uncertain terms, these policies are particularly prevalent in the context of refugees and asylum seekers (page 4 Frelick).

2. Additional migration control policies: through formalized migration policies like visa regimes, bilateral and multilateral initiatives, as well as ad hoc practices, countries seek to administratively or legally prevent the entry of migrants into the destination state, or to have indirect impacts on migration flows through a procedural deterrence (page 5 Frelick).

3. Transnational crime-control efforts: by seemingly engaging in efforts to counter human trafficking and people smuggling, often conflating the two, there's a criminalisation and therefore a delegitimation of migration. This includes providing law enforcement or military assistance to stop the flow of illicit materials, seal borders, encourage

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[3] Frelick, B., Kysel, I. M., & Podkul, J. (2016). The impact of externalization of migration controls on the rights of asylum seekers and other migrants. *Journal on Migration and Human Security*, *4*(4), 190-220.

[4] Red Cross EU Office (2013), Shifting borders: externalising migrant vulnerabilities and rights? *European website on integration*. European Commission https://migrant-integration.ec.europa.eu/library-document/shifting-borders-externalising-migrant-vulnerabilities-and-rights_en

[5] Mitsilegas, Valsamis, Extraterritorial Immigration Control, Preventive Justice, and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade (May 21, 2018). Pages 4, 5 and 14. Queen Mary School of Law Legal Studies Research Paper No. 278/2018, Available at SSRN: https://ssrn.com/abstract=3182455

pushbacks, increase apprehensions, and reduce access to protection mechanisms (page 5 Frelick).

The amalgamation of all the policies and measures that a state has at its disposal to prevent migrants from reaching their territory is referred to as their "toolbox" (page 3 Frelick). Therefore, any further mention of an actor's toolbox refers to and can include anything from simple administrative deterrence measures to criminal persecution.

APPLICABLE LAW

Operation Sophia's mandate intersects with a broad spectrum of international treaties and conventions, as the Council's decision itself reflects in its contents. Given the scope and breadth of the object of this dissertation, we'll be focusing only on those that are primarily humanitarian or instill regulations directly related to the promotion and protection of human rights, and setting aside those that have to do with the criminal persecution and prosecution of human traffickers and smugglers.

HUMAN RIGHTS LAW

PRINCIPLE OF NON-REFOULEMENT

(Thulin, "Italian deterrence policies", 2018, page 30)

The principle of non-refoulement is a fundamental principle in international law that prohibits states from returning or expelling individuals to a country where they may face persecution, torture, inhuman or degrading treatment, or other serious human rights violations. This principle is enshrined in various international treaties and conventions, including:

1. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT): Article 3 of the UNCAT prohibits the expulsion, return ("refoulement"), or extradition of a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture.

2. International Covenant on Civil and Political Rights (ICCPR): Article 7 of the ICCPR protects individuals from being subjected to torture or cruel, inhuman, or degrading treatment or punishment.

3. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol defines who is a refugee, their rights, and the legal obligations of states to protect them. It also includes the principle of non-refoulement, which prohibits the return of refugees to a country where they may face persecution or harm.

4. The UNHCR's Global Consultations on International Protection provides guidance on the interpretation and application of international refugee law, including the principle of non-refoulement.

The principle of non-refoulement is considered a cornerstone of refugee protection and human rights law, ensuring that individuals are not sent back to situations where their life or freedom would be at risk. States have an obligation to respect and uphold this principle both internationally and domestically when dealing with refugees and other persons entitled to international protection.

RIGHT TO APPLY FOR ASYLUM

The right to seek asylum is recognized under international law, including the already mentioned 1951 Refugee Convention and its 1967 Protocol. Article 14 of the Universal Declaration of Human Rights also upholds the right to seek asylum from persecution. (page 20 Watered-down rights on the high seas).

Actions that are considere to hinder or deny migrants the right to apply for asylum include:

1. Interceptions: Measures applied by a State outside its national territory to prevent, interrupt, or stop the movement of persons without the required documentation crossing international borders by land, air, or sea, and making their way to the country of prospective destination (page 2 Strasbourg court vs. extraterritorial migration control).

2. Push-backs: Returning individuals to a country where they may face persecution or serious harm without allowing them to apply for asylum (page 2 Watered-down rights on the high seas).

3. Lack of access to asylum procedures: Failing to provide migrants with the opportunity to lodge their asylum claims or denying them access to fair and effective asylum determination procedures (page 20 Watered-down rights on the high seas).

4. Complex legal processes: Creating overly complex systems of protection that hinder asylum seekers from effectively exercising their right to seek asylum (page 15 Watered-down rights on the high seas).

These actions can undermine the right of migrants to apply for asylum and seek international protection, a right guaranteed under international law.

PROHIBITION OF COLLECTIVE EXPULSION

The prohibition of collective expulsion is a fundamental principle in international human rights law that aims to protect individuals from being expelled or returned as a group without consideration of their individual circumstances and without the opportunity to challenge their expulsion. At an international level, it's recoginsed through a combination of legal instruments and principles, not in a legal document. It is, however, explicitly described in Article 4 of Protocol 4 to the European Convention on Human Rights.

Collective expulsion refers to any measure taken by a competent authority that compels a group of individuals to leave a country without considering the specific circumstances of each person in the group. The purpose of this prohibition is to prevent States from removing groups of individuals without assessing their need for protection or allowing them to challenge the decision on an individual basis.

In the context of migration and asylum, the prohibition of collective expulsion emphasizes the importance of individualized assessments and due process in expulsion decisions to safeguard the rights and dignity of all individuals, particularly those in vulnerable situations.

MARITIME LAW

(Thulin, "Italian deterrence policies", 2018, page 21)

The applicable laws regarding maritime migration and human rights include:

1. United Nations Convention on the Law of the Sea (UNCLOS): UNCLOS is a comprehensive international treaty that establishes the legal framework for all activities in the oceans and seas. It defines the rights and responsibilities of nations concerning the use of the world's oceans, including provisions on the high seas, territorial waters, and exclusive economic zones. UNCLOS sets out the rights and obligations of states regarding maritime activities, including search and rescue operations and the treatment of individuals on the high seas.

2. International Convention for the Safety of Life at Sea (SOLAS): SOLAS is an international maritime safety treaty that sets minimum safety standards for the construction, equipment, and operation of ships. It includes provisions related to search

and rescue operations at sea, ensuring the safety of passengers and crew members. SOLAS is relevant to discussions involving the interception of migrants at sea, as it establishes protocols for responding to distress situations and providing assistance to those in need.

3. International Convention on Maritime Search and Rescue (SAR Convention): The SAR Convention establishes an international framework for coordinating and conducting maritime search and rescue operations. It outlines the responsibilities of states in responding to distress signals and coordinating search and rescue efforts in their respective areas of jurisdiction. The SAR Convention is pertinent to discussions on intercepting migrants at sea, as it governs the procedures for rescuing individuals in distress and ensuring their safety.

4. International Maritime Organization (IMO) Conventions and Guidelines: The IMO develops and maintains international conventions and guidelines related to maritime safety, security, and environmental protection. Relevant IMO instruments include the International Ship and Port Facility Security (ISPS) Code, which addresses maritime security measures, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), which sets training standards for seafarers. These conventions and guidelines are important in ensuring the safety and security of individuals involved in maritime activities, including migrants intercepted at sea.

THE OBLIGATION TO RESCUE PEOPLE IN DISTRESS AT SEA

In maritime law, the mere receival of a distress signal is considered to generate an obligation to rescue, when and if possible[67]. SOLAS Regulation 10.a) clarifies that exceptions can only be made if the "*special circumstances of the case (...)* [make the rescue] *unreasonable or unnecessary*", meaning that if the rescue will put the aiding vessel at risk or there's already someone else performing the rescue, this obligation can be ignored. Therefore, the receival of a distress signal and no reasonable impediment to respond to it should signify the immediate start to a SAR operation.

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[6] Regulation 10. A) - Chapter V, SOLAS https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf
[7] Article 98 UNCLOS https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

RETURN TO A PLACE OF SAFETY

A crucial point of reference we will be continuously referring back to, especially in discussions about possible practices of refoulement, is the notion of a place of safety.

The SAR Convention's Annex 1.3.2 defines a "rescue" as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety", dividing it into 3 lines of action: (1) an extraction from the dangerous situation, (2) providing primary or basic medical attention, and (3) delivery to a place of safety, also known as disembarkation.

The SAR Convention doesn't explicitly establish the parameters of what a place of safety is, but the IMO redefined the concept further in 2004[8], establishing 3 determining factors:

1. It must be a place where there's no risk posed to the life or security of those rescued.
2. The place must guarantee that all basic human needs of the rescued people will be met.
3. It must be somewhere from which transport to their final destination can be arranged.

Additionally, this list is classified as numerus apertus, meaning that any individual personal circumstance also decisively affects the appropriateness of a certain place as a disembarkation location.

EUROPEAN LAW

EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Article 3 of the ECHR prohibits the expulsion, return, or extradition of individuals to a country where they would face a real risk of torture or inhuman or degrading treatment.

As mentioned previously, article 4 of Protocol 4 to the European Convention on Human Rights prohibits collective expulsions. The ECtHR has clarified that collective expulsion occurs when individuals are compelled to leave a country as a group without a reasonable and objective examination of each individual case. The prohibition of collective expulsion ensures that each person's human rights, including the right to seek asylum and protection from persecution, are respected and upheld.

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[8] Articles 6.12 to 6.18 International Maritime Organization (IMO), *Guidelines on the Treatment of Persons Rescued at Sea* Resolution MSC 167(78) (adopted 20 May 2004)

OTHERS

While there's an extensive list of regulations and directives that legislate on the EU's internal migration policies, their legal implications fall outside the scope of this dissertation, for jurisdictional reasons that will be discussed further in the following chapters. Instead, they'll be considered only in their capacity as factors that have impacted the decisionmaking we'll discuss.

THE MATTER WITH LIBYA

Libya's status as a stateless country makes it a necessary exception to the EU's preferred method of collaborative foreign policy. Because it doesn't have a unified and effective government who can exert full control, the EU cannot make the same kind of agreements it make with other major transit countries like Turkey, who've been able to take in a considerable amount of migrants destined for the EU.

Therefore, Libya as an actor is characterised as divided by a civil war, with weakened institutions unable to fight the rise of militias and criminal networks and a worsening humanitarian concern as its infraestructure continues to crumble under no clear leadership.

The Libyan Coastal Guard and Navy were recognised by the UN as legitimate institutions that obeyed the Government of National Accord, established in a 2015 UN-led initiative to instate a stable government. On this basis of legitimacy, the EU had legal grounds to collaborate with these institutions and was able to incorporate them into their plans to stem migration flows in the Mediterranean. According to the UN Secretary General at the tail end of Operation Sophia, January 2020, the operation had instructed 477 libyan soldiers, including 265 coastguards and 212 naval officials.

MIGRANT ABUSE IN LIBYA

Since 2015, numerous claims of abuse against migrants in Libya have been reported, documented by human rights organizations, journalists, and the UN. These claims paint a disturbing picture of the violence, exploitation, and inhumane conditions faced by migrants in the country.

The documented abuses include:

1. Detention in inhumane conditions: migrants are often detained in overcrowded and unsanitary detention centers with limited access to food, water, and sanitation.

2. Torture and violence: reports detail physical abuse, beatings, and even extrajudicial killings by guards and militia members within detention facilities.

3. Sexual violence: women and girls are particularly vulnerable to sexual assault and exploitation by guards, smugglers, and traffickers.

4. Forced labor: migrants are sometimes forced into labor through threats or violence, working in agriculture, construction, or other sectors.

5. Extortion and arbitrary detention: militias and criminal groups often kidnap or detain migrants, demanding ransoms from their families for release.

6. Limited access to protection: migrants in detention often lack access to legal representation, interpreters, or the ability to file complaints about abuse.

These allegations are corroborated by various sources, including extensive reports of abuse in Libya by the UNHCR and OCHA, organisations like Amnesty International, Human Rights Watch and Doctors Without Borders, and independent journalists going undercover and reporting witness testimonies [9][10].

The claims of abuse against migrants in Libya are a major concern for the international community, but is massively damaging to the EU's approach to migration control, which, as we will discuss, relies on cooperation with the Libyan Coast Guard to intercept migrants at sea and return them to Libya.

The situation in Libya is complex, and attributing blame can be difficult. Militias, criminal groups, and even some government officials have been implicated in abuses; the EU's own Frontex has reported knowledge of the direct involvement of high-ranking officials in the Libyan Coastal Guard in the human trafficking and smuggling schemes that EUNAVFOR MED is trying to dismantle. And yet, despite the ample proof of wrongdoing, the lack of a unified government and the ongoing conflict in Libya contribute to the overall environment of impunity, making it difficult to hold perpetrators accountable.

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[9] Council of Europe Comissioner for Human Rights, "Commissioner publishes observations on alleged human rights violations of migrants returned from Italy to Libya" https://www.coe.int/en/web/commissioner/-/commissioner-publishes-observations-on-alleged-human-rights-violations-of-migrants-returned-from-italy-to-lib-1

[10] Council of the European Union "Note 11538/19" https://www.statewatch.org/media/documents/news/2019/sep/eu-council-libya-11538-19.pdf

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ITALY – LIBYA BILATERAL AGREEMENTS

Though still in the middle of the Gaddafi regime, it's said that Italy and Libya have shared understandings in the matter of migration since at least 2003[11]. The contents of the 2007 and 2009 Agreements for Technical and Police Cooperation were shrouded in secrecy, but are likely to include outlines for collaboration between Italian and Libyan police forces on issues like information sharing, joint investigations into organised crime and the use of surveillance equipment to control irregular migration flows[12][13].

2008 Partnership Treaty

The 2008 Treaty of Friendship, Partnership and Cooperation between Italy and Libya, also known as the Benghazi Treaty, aimed to establish a special and privileged bilateral relationship between the two countries. Though some aspects of this treaty remain confidential, the consensus seems to be that the aim of the treaty was for Italy to acknowledge and compensate for its colonial past, to then ensure Libya's full cooperation in economic and security concerns, through a framework of regular political dialogue and consultation. The enforcement of this treaty was interrupted by Gaddafi's removal from power in 2011, but it perfectly illustrates Italy's need to establish ties with Libya, no matter the interlocutor on the other side.

2017 Memorandum of Understanding on Migration

The 2017 Memorandum of Understanding (MoU)[14] on cooperation in various fields between Italy and Libya, often referred to as the Italy-Libya MoU, addressed a range of issues but focused heavily on stemming irregular migration across the Mediterranean. It was renewed without amendments in 2020.

The Memorandum includes the provision of developmental aid to Libya, as well as a commitment to strengthen the Libyan Coast Guard through information sharing, technical assistance, training and potentially supplying equipment, with the understanding that this will be used to better control the flow of irregular migration departing from Libyan shores. It also includes the agreement that the LCG would return migrants intercepted at sea to Libya, with

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[11] page 575 Strasbourg Court versus Extraterritorial Migration Control Moreno-Lax
[12] Mariagiulia Giuffré's "State Responsibility Beyond Borders: What Legal Basis for Italy's Pushbacks to Libya?"
[13] https://www.aljazeera.com/news/2023/2/2/italy-complicit-in-crimes-for-renewing-pact-with-libya-ngos
[14] https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf

Libya basically promising to fulfill the requirements needed to be considered a place of safety and therefore a suitable place to disembark migrants at the end of a SAR mission.

Despite these assurances, reports on the abuse of migrants in Libya have remained consistent in the yearly UNHCR reports, citing infrahuman conditions in Libyan detention centres and flagrant abuse of power by officials.

EUNAVFOR MED: OPERATION SOPHIA

On the 18th of May 2015, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) was approved, giving the go-ahead to what was later renamed "Operation Sophia" after the name of a baby girl born on a rescued vessel in the Mediterranean. Its primary objective is stated as de prevention of unnecessary loss of life at sea, through the dismantling of human trafficking and smuggling operations active along the Central Mediterranean Route.

Operation Sophia was divided into 3 phases. First, a recognissance phase, to gather information on the trafficking and smuggling networks and how they operated. Second, the boarding, search, diversion and seizure of vessels suspected to being used to traffic and smuggle, in virtue of article 110.1.d) UNCLOS, and articles 8.1 and 8.7 from the 2000 Protocol Against the Smuggling of Migrants. This phase would be split into two, initially taking part only in high seas until they could gain entry into Libyan territorial waters. And third, the adoption of necessary measures to disrupt these networks with incursions on Libyan state territory.

The accomplishment of this objective in the extent described in its mandate depends on access permissions granted by either the UN Security Council or "consent by the coastal state concerned", which is understood to refer mainly to Libya. As already discussed, the civil war that has embroiled Libya since 2011 means there's no effective control of its territory by a singular unified government, which would have made it near impossible to obtain the lawful consent described in Decision 2015/778.

Apart from giving their approval to the naval military mission, the UNSC also put forth Resolution 2240 (2015), where they urged states to take action against any vessels suspected of being used in trafficking or smuggling operations on the high seas. This resolution played a crucial role in shaping the operational framework and legal authority of Operation Sophia in its efforts to combat migrant smuggling and human trafficking off the coast of Libya.[15] By aligning with Resolution 2240 (2015), Operation Sophia now operated within the framework of international law and the UN, thus providing a clear legal basis for the mission's actions and facilitated coordinated efforts among participating states by providing a clear mandate for

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[15] (page 3 Rey)

action and squashing any jurisdictional challenges that may arise in their interventions at sea (Estrada-Cañamares, 2016:3).

It's also relevant to note that Resolution 2240 (2015) explicitly reaffirms the need to protect and enforce the rights of the migrants and refugees involved.

A second UNSC resolution relevant to Operation Sophia's mandate was passed in 2016, when UNSC Resolution 2922 (2016) placed an arms embargo on Libya. Given the difficulty to advance the missions objectives due to their lack of authorisation to act in Libyan territorial waters, in 2016 Operation Sophia took on additional tasks related to this resolution, including the monitoring and training of the Libyan Coastal Guard (LCG) and navy.

After successive extensions, Operation Sophia came to an end in March 2020, citing a lack of agreement among member states about where rescued migrants and refugees should be disembarked.
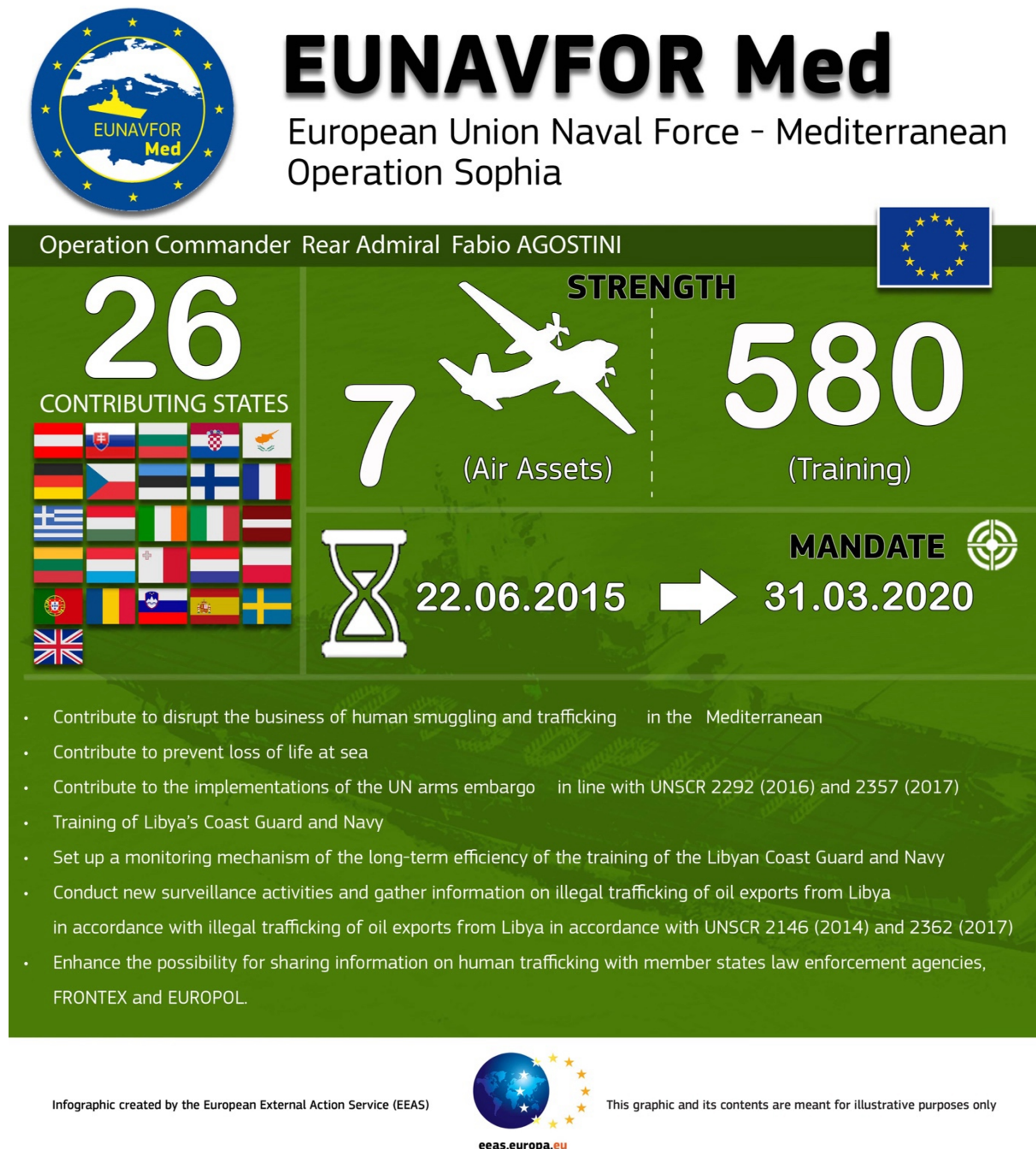
FIGURE 4. Infographic on Operation Sophia. Source: Operation Sophia https://www.operationsophia.eu/mission-at-a-glance/

HIRSI JAMAA AND OTHERS VS. ITALY

CASE SUMMARY

The case centered on the extraterritorial interception and return of migrants on the high seas without providing them access to asylum procedures or the opportunity to challenge their interception. The European Court of Human Rights (ECtHR) held that Italy had failed to ensure the protection of the applicants against the risk of ill-treatment and refoulement to countries

where they faced persecution[16], and therefore violated several articles of the European Convention on Human Rights, including Article 3 (prohibition of torture and inhuman or degrading treatment), Article 4 of Protocol 4 (prohibition of collective expulsion of aliens), and Article 13 (right to an effective remedy).[17]

Overall, the judgment in the Hirsi Jamaa case marked a significant milestone as the European Court of Human Rights unanimously found a European State in violation of human rights concerning migrants and refugees intercepted at sea. The case highlighted the importance of upholding the rights of individuals in vulnerable situations and ensuring access to protection and asylum procedures in accordance with international legal standards[18].

EFFECTIVE CONTROL AND THE QUESTION OF JURISDICTION

Effective control: page 10 Implications for interceptions on the high seas

The Hirsi Jamaa ruling addresses the concept of effective control in the context of extraterritorial interception of migrants at sea. The European Court of Human Rights found that Italy, through its actions, exercised both de jure (legal) and de facto (factual) control over the migrants intercepted at sea before they were handed over to Libyan authorities. The Court emphasized that during the period between boarding the ships of the Italian armed forces and being transferred to Libyan authorities, the migrants were under continuous and exclusive control of the Italian authorities.

The ruling underscores that the level of control exercised by a State, both legally and factually, is crucial in determining jurisdiction under the ECHR. In the case of Hirsi Jamaa, the Court concluded that Italy's control over the intercepted migrants on the high seas was sufficient to trigger the application of the Convention, even though the events occurred outside Italian territory.

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[16] (page 4 Strasbourg Court)
[17] (page 2 Watered down rights on the high seas)
[18] (page 2 Watered down rights on the high seas)

Therefore, the judgment in the Hirsi Jamaa case reaffirms the principle that States can be held accountable for violations of human rights obligations, including the prohibition of torture and inhuman or degrading treatment, even in situations where they exercise control over individuals outside their national borders.

INFLUENCE ON EUNAVFOR MED OPERATIONS

"The influence of the decisions of the ECHR on Operation Sophia" Daniel Rey Moral

The decision of the European Court of Human Rights (ECtHR) in the case of Hirsi Jamaa and Others v. Italy had a significant impact on the maritime operation of EUNAVFOR MED Operation Sophia.

1. Disembarkation in Italy: The ECtHR ruling required that migrants rescued at sea be disembarked in Italy page 2. This ruling influenced the operational procedures of Operation Sophia, as rescued migrants had to be transferred to Italian ports, which were designated as safe ports for their reception page 8.

2. Lack of Progress: The adherence to the ECtHR ruling, combined with the need to respect international law and Libyan sovereignty, contributed to limitations on how Operation Sophia could be conducted page 2. This, in turn, led to challenges in fulfilling the mission's objectives and resulted in a lack of progress in combating migrant smuggling and human trafficking page 1.

3. Individualization of Circumstances: The author's experience on board the operation's vessels revealed that there were shortcomings in mechanisms to thoroughly individualize the personal circumstances of each migrant, as required by the ECHR criteria page 7. This limitation affected the ability to expel migrants from the high seas.

4. Perception of Safe Ports: While Italian ports were considered safe for the disembarkation of rescued migrants based on the ECHR ruling, there were differing interpretations among Member States regarding the concept of a "place of safety" page 8. This discrepancy added complexity to the operational dynamics of Operation Sophia.

Overall, the ECHR decision in the case of Hirsi Jamaa and Others v. Italy played a crucial role in shaping the operational framework of Operation Sophia, particularly concerning the treatment and disembarkation of rescued migrants.

THE EFFECTS OF OPERATION SOPHIA

ON MIGRATION
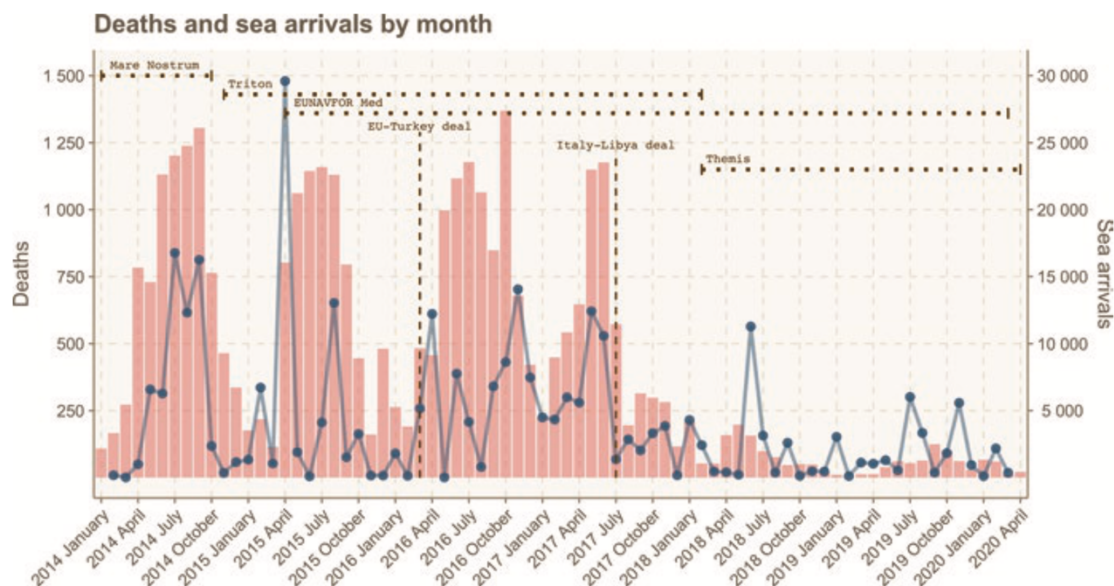
FIGURE 5. *Sea arrivals and deaths by month, compared to a timeline of relevant missions and agreements.*

Blue: Number of deaths in the Central Mediterranean Route (data: Missing Migrants 2020)

Red: Number of arrivals (data: UNHCR 2020)

Source: Molnár's "The European Union's Response to Mass Migration Through Mediterranean- A Shift from Humanitarian Foreign Policy Actor Towards a Pragmatist Foreign Policy Actor?" page 203

ON TRAFFICKING AND SMUGGLING

Operation Sophia had notable effects on the mafia's modus operandi in the Mediterranean Sea. In the article "The influence of the decisions of the ECHR on Operation Sophia", by Daniel

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Rey Moral, the following key points regarding the impact of the operation on the activities of the mafias involved in migrant smuggling are discussed[19]:

1. Alteration of Modus Operandi: The mafias altered their modus operandi in response to Operation Sophia's activities in the maritime areas. They changed their tactics by no longer accompanying migrants to the high seas but instead restricting their operations within the 12 nautical miles bordering Libya's sea territory. This adjustment aimed to avoid encounters with Operation Sophia vessels.

2. Limiting Activities: By confining their operations closer to the Libyan coast, the mafias aimed to evade interception by Operation Sophia vessels, which were primarily focused on the high seas. This shift in strategy limited the opportunities for direct intervention by the mission against the mafias' vessels.

3. Impact on Boarding Operations: The altered behavior of the mafias made it challenging for Operation Sophia vessels to board and seize suspected vessels without violating international law. The need for consent from the Libyan government or authorization from the United Nations Security Council (UNSC) posed obstacles to effectively countering the mafias' activities.

4. Increased Security: The mafias sought greater security by operating closer to the Libyan coast, where they could conduct their smuggling operations from land. This strategy allowed them to continue their illicit activities while minimizing the risk of interception by maritime forces like Operation Sophia.

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[19] Page 3

EUNAVFOR MED: OPERATION IRINI

On the the 31st of March 2020, the same day that Operation Sophia was dissolved in Council Decision (CFSP) 2020/471, Council Decision (CFSP) 2020/472 instated a new EUNAVFOR MED operation: Operation Irini, after the Greek word for peace. Its stated primary objective is to contribute to the implementation of the already mentioned UNSCR 2292 (2016) arms embargo on Libya through aerial, satellite and maritime assets.[20] Like its predecessor, Irini also includes 3 secondary tasks, namely (1) contributing to the implementation of the UN measures against illicit exports of petroleum from Libya as mandated by UNSCR 2146 (2014) and UNSCR 2509 (2020), (2) the disruption of the business model of human smuggling and trafficking networks and, last but not least, (3) the capacity building and training of Libyan Coast Guard and Navy.

Unlike the Council Decision that established the parameters for Operation Sophia, the new mission statement and mandate made no reference to international migrant nor refugee law, and made no appeal to prevent the loss of human life. Instead, it establishes a precedent of needing the consent of the member state in order to unload anything at its port. Given that the reason for the failure to renew Operation Sophia was indicated to be a disagreement among member states as to the disembarkation protocols, this seems to very much be a compromise that was reached – let's be reminded that the two happened on the very same day – when talking about migrant disembarkations, and not about offloading cargo.

It's also relevant to point out that, in listing the assets destined to Irini, aerial and satellite assets took precedence over maritime assets. Seeing as Operation Irini is only ever going to have 2 maritime vessels, one contributed by Italy and the other by Greece[21], where Operation Sophia had 52 of them[22], it's establishing from the outset that it's not going to give priority to a forceful show of numbers as a deterrent to the Mediterranean criminal networks. While the implications of this choice for EU migration policy will be discussed at length in the following chapter, the practical aspects of this meagre showing of force, when the mission's stated intent is to

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[20] https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf

[21] Soler, page 61

[22] https://www.operationsophia.eu/media_category/assets/?deployment=no_deployed&tax=media_category&categories=surface-vessels&nation&search_archive=filter#038;tax=media_category&categories=surface-vessels&nation&search_archive=filter

reinforce the UN embargo on arms and on oil and petroleum exports, must be pointed out to be less than sufficient to sucessfully bring the mission to term.

FIGURE 6. Depiction of Operation Irini. Source: Operation Irini https://www.operationirini.eu/

TRANSITION FROM SOPHIA TO IRINI

The transition from Operation Sophia to Operation Irini reflects a reevaluation of priorities and objectives in response to the evolving challenges in the Mediterranean region, including the lack of access to Libyan territorial waters and the loss of a consensus among member states of how to handle the migration crisis.

CONTINUITIES AND CHANGES BETWEEN OPERATION SOPHIA AND OPERATION IRINI

	Operation Sophia (2015-2019)	Operation IRINI (2020-Present)	Potential Continuity/Change
Stated Primary Objective	Disrupt smuggling networks in the Central Mediterranean and save lives at sea	Enforce the UN arms embargo on Libya	Change
Secondary Activities	Capacity building for the LCG, with a focus on human rights and international law	Capacity building for the LCG	Continuity - with some change in rhetoric
EU Actors Involved	Various EU member states contributing naval vessels and personnel	Similar involvement from EU member states, minus naval vessels	Continuity - with a slight decline
Areas of Operation	Central Mediterranean Route	Central Mediterranean Route	Continuity
Number of Rescued Migrants	Data suggests a decline over time	Data not available for all years, but focus on LCG interceptions suggests a decrease in direct rescues	Continuity
Number of Intercepted Migrants by LCG	Data shows a steady increase	Continued increase in interceptions	Continuity

FIGURE 7. Continuities and changes between Operation Sophia and Operation Irini. Data: Pricopi, M. (2020) "The military operation EUNAVFOR MED Irini – a downscale of the EU's involvement in the migration crisis", pages 302-305. *Land Forces Academy Review* Vol. XXV, No. 4(100), 2020

The implications of these continuities and changes are evident and consistent with a trend of securitisation and externalisation of borders. There's a notable lack of emphasis on direct

humanitarian assistance to migrants in distress[23], both through the lack of SAR operations and the dramatic reduction of maritime vessels patrolling the high seas, which are being replaced by surveillance assets incapable of rendering assistance, only able to pass on information. This also means that, if faced with a sudden spike in migration flow or humanitarian emergencies the EU may have a challenging time addressing them in a timely manner, further endangering lives at sea.

It seems obvious that the reduced presence of vessels is intentional, a way to ensure that all SAR missions are performed by the LCG and not in European vessels subjected to EU jurisdiction. In 2020, Operation Irini reported the following: "Regarding the migratory flows from Libya, the Libyan Coast Guard and Navy (LCG&N) reportedly rescued over 11.000 migrants at sea. The LCG&N prevented the departure of approximately 42 percent of the migrants trying to reach Europe."[24] While a mere statement of facts, it seems like a confirmation that Operation Irini actively involves and keeps tabs on the LCG in its SAR missions in the Mediterranean, where they'll return the migrants to Libya.

Operation Irini has also been criticised for indirectly influencing the Libyan civil war. By blocking the flow of arms alog the Mediterranean, the Libyan militias that depend on that supply route are left at a disadvantage in respect to those who get their supplies by land, unimpeded. This is suspected to be an important enough factor that Turkey, who has a vested interest in the Libyan civil war's outcome, has refused to consent to Operation Irini's search of Turkish vessels suspected to be carrying arms to Libya[25].

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[23] Pricopi, M. (2020) "The military operation EUNAVFOR MED Irini – a downscale of the EU's involvement in the migration crisis", page 303. *Land Forces Academy Review* Vol. XXV, No. 4(100), 2020

[24] https://www.operationirini.eu/libyancoastalwaters/

[25] Soler, page 61

DISCUSSION

The point of this dissertation isn't to simply prove that there's a gap between what the EU says and does in its policymaking. This assumption, that references to norms are used largely in a rhetorical manner to help foreign policy actors promote particular material interests, is one of the most basic axioms of rationalist political theory. What we aim to highlight is the extent to which this humanitarian masquerading is used purpousefully to avoid the legal responsibilities that the EU's hidden migration policies necessarily create.

HUMANITARIAN OR PRAGMATIC?

According to the statements of EU institutions, Operation Sophia was launched in 2015 as a direct response to the Mediterranean migrant crisis, as increasingly more people died at sea while trying to reach Europe's shores.

> **COUNCIL DECISION (CFSP) 2015/778 - 18 May 2015, on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)**
>
> (2) On 23 April 2015, the European Council expressed its indignation about the situation in the Mediterranean and underlined that the Union will mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of this human emergency, in cooperation with the countries of origin and transit, and that the immediate priority is to prevent more people from dying at sea.

Despite the unambiguous nature of such a statement, its legitimacy has been challenged by critics, classifying this declaration of intent as "mainly rhetorical, covering up the member states' self-interest in trying to reduce the flow of sea-borne migration to the EU" (Riddervold, page 1)[26]. When considering the actual measures and substance of the operation, "NGO's and other refugee advocacy organizations have argued that this approach fails migrants by predominantly focusing on the challenges posed to the EU, rather than on those faced by the human beings whose lives continue to be lost at sea" (Berry et al. 2016: 4)[27].

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[26] INSERT
[27] INSERT

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Literature in the fields of International Relations and EU Foreign Policy would lead us to expect any international actor to propose a mission well in line with its interests, following the kind of pragmatic, rational choice-based procedure that already links the EU's other policies to its member states' internal policies and economic or security-related interests (Hyde-Price 2006, 2008; Moravcsik 2010; Schimmelfennig 2003)[28].

Intuitively, this hypothesis makes the most sense. Against the backdrop of all the effects and consequences of increased irregular migration flows we've already discussed in previous chapters, it's reasonable, if not obvious, to assume that the EU's response would focus on updating and upgrading their toolbox to limit these problems. Even by looking at the precedent set by the cancellation of Operation Mare Nostrum, which had bolstered the Italy's role as a human rights' promoter through a straightforward application of law of the seas and its associated human rights, EU policies are expected to shift their focus towards security and stability. Any references to international humanitarian norms would therefore be explained as a purely rhetorical behaviour, that is, used instrumentally to achieve or justify particular EU policies, and will always be at the very least secondary to the EU's material interests (Riddervold[29]).

The alternative hypothesis, the narrative that Operation Sophia was launched to spare human lives and adhered in design and execution to humanitarian norms, as is expected from an eminent humanitarian foreign policy actor (Eriksen 2009; Sjursen 2006, 2007; Cross 2011; Riddervold 2011) who traditionally prefers to apply non-military foreign policy means (Nye 2004; Toje 2010), is easily disproven when faced with the practical aspects of the operation.

The two main indicators of a humanitarian policy are that it (1) promotes and (2) binds itself to global human rights law (Riddervold page 6). EU Council Decision (CFSP) 2015/778 meets both these criteria, by stating in their motivation that lives at risk at sea must be saved (promoting the obligation to rescue those in distress at sea) and binding the mission to global human rights law with the following text:

> (6) "The Union CSDP operation will be conducted in accordance with international law, in particular with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 2000 Protocols against the Smuggling of Migrants by Land, Sea and Air (the Protocol against the Smuggling of Migrants) and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search

It's safe to say that Sophia's mission statement is emminently obvious in its intention of establishing it as a humanitarian mission in line with the EU's image as a humanitarian foreign policy actor.

This characterisation, though thorough, doesn't exclude it from being a pragmatic policy. The requirements that would take this from a humanitarian policy to a pragmatic one would be any and all deferences to utility over the protection of human rights when such rights are in conflict with the non-stated pragmatic aims, in this case, reducing migration.

But why, then would the same commitment to humanitarian law not be shown in Operation Irini's mission statement, when we've seen that most elements of Operation Sophia present a continuity into Operation Irini?

THE MATTER OF JURISDICTION AND STATE RESPONSIBILITY

Building on Alagna (2020 page 2) the core task of Operation Irini is the implementation of the UN arms embargo on Libya, using aerial, satellite, and maritime assets to inspect vessels suspected of carrying arms to or from Libya in violation of the embargo. Additionally,

Operation Irini has secondary tasks related to preventing the illicit export of petroleum from Libya, assisting in developing the capacities of the Libyan Coast Guard and Navy, and disrupting human smuggling and trafficking networks through information gathering and patrolling. This transition marked a shift in the EU's approach to the Mediterranean, moving away from a focus on migration-related activities to a more targeted mission related to arms control and maritime security.

However, continuing the kind of scrutiny we used on Operation Sophia, it seems fortuitous that the kind of interference that Irini, through the UNSC Resolution, gives EU jurisdiction to enforce is the same kind of inspections that Sophia carried out on the high seas, targeting vessels suspected to be involved in human smuggling and trafficking operations.

What's more, there's one more key element that clearly sets apart Irini from Sophia and, based on the leaked internal memos of the 2015 operation[30], finally solves Operation Sophia's naval commander's biggest frustration: by making the LCG practically an extension of EU forces through funding and training, there is no reason to think that the EU doesn't have several layers of control over what happens in Libyan territorial waters while avoiding incurring any responsibility towards any migrant vessels they happen to come across in the area.

As we've already discussed, one of the main factors that engages EU responsibility is the terms of jurisdiction of its naval assets, wherein the mere detection of a migrant vessel in need of rescuing by an EU ship triggers the responsibility to rescue the people in it and disembark them at the nearest safe place, which as established by the ECHR in the Hirsi Jamaa and Others vs. Italy ruling, cannot be Libya. This very straightforward obligation, stemming from SOLAS, UNCLOS and the principle of non-refoulement, is circumvented in Irini on two fronts: first, a slashing of the number of sea vessels attached to the operation, replaced instead by aerial surveillance assets, and secondly, by the recruitment of the LCG to rescue the vessel in distress, avoiding the esablishment of EU effective control over the migrants and enabling the anarchic LCG to return the migrants to Libya without any consequences for either of them.

However, in virtue of what's argued in articles 16 and 17 of the UN Comission "Responsibility of States for Internationally Wrongful Acts" text, if a state participates in practices that

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[30] https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf

contribute to refoulement, even if not directly returning someone themselves, they could be held responsible for violations of international law.

ARTICLE 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

ARTICLE 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

It is easily argued that nudging the coastguard of a country known for abusing migrants to locate, rescue and return migrant vessels through, for example, a policy of consistent information sharing on the location of said boats, accompanied by the direct formation and funding of said coastguard corps, is definitely grounds to consider that as aiding or assisting them, if not fully directing and controlling them.

CONCLUSION

1. EUNAVFOR MED operations haven't acquired the necessary means to enact their stated mission objectives. The operations are kept active because they're satisfying other objectives that aren't overtly stated in the mission description.

2. If Operation Sophia and Operation Irini were properly thought out for their stated objectives, they would include supervision clauses and explicitly submit their actions to the supervision of the European courts, as most other EU level policies do. This lack of accountability is characteristic of EU Foreign Policies due to the process they need to go through to gain approval.

3. The EU benefits greatly from projecting itself as a promoter of human rights and a trendsetter in fields of humanitarian law. This doesn't negate the fact that, like most other international actors in times of economic or civil instability, it makes foreign policy decisions based on the security and defence interests of its member states.

4. While there are drawbacks to Libya's statelessness, like the inability to obtain permission to operate in Libyan territorial waters, it also greatly benefits the EU's interests to have no government to interfere with its easy influence over the Libyan Coast Guard; also, the fact that there is no Libyan government to hold accountable for migrant rights' abuses gives them a usefulness that they wouldn't have otherwise. This pragmatic view of Libya as a useful asset is proven in Italy's willingness to enter into bilateral agreements no matter the interlocutor, from the ones with the most totalitarian control (Gaddafi) to the ones with no control whatsoever (GNA).

5. Although it's not a binding treaty per se, the EU and could be held accountable for the Libyan Coastguard's refoulement in virtue of what's argued in articles 16 and 17 of the UN International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts, for aiding countries in what has been proven and acknowledged to be an infringement of the principle on non-refoulement (refoulement by proxy). Despite not directly triggering article 33 of the 1951 Refugee Convention and its 1967 Protocol due to their intentional and malicious withholding of effective control over the returned migrants, their proven assistance in these operations and undeniable influence over the Libyan Coastguard's actions is more than enough to establish that there's a demonstrable link between their actions and the EU. The same should be applied for responsibilities related to article 3.1 of the UN Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and article 98 of the UN Convention for Law of the Seas.

6. At an internal EU level, the EU's actions should be considered as directly against article 3 and 34 of the ECHR, as no court could in good faith object to the fact that Libya's migrant abuse practices are recognised and well known to EU officials. Furthermore, the analysis of the court ruling in Hirsi Jamaa and Others vs. Italy perfectly reveals and proves the motivation of the policy design behind Sophia and Irini.

7. The analysis of the EUNAVFOR MED operations is a true reflection of EU interests because of the way the narratives and stated objectives shifted between Sophia and Irini, but kept almost all assets and objectives considered secondary to the main intent of the operation constant between one and the next – such as the ability to board, search and seize any vessel suspected to be involved in trafficking or smuggling activities and the eagerness to train the Libyan Coastguard, instead of simply contributing to a readymade UN mission, like with other Libyan corps involved in the civil war.

8. The origins of EUNAVFOR MED operations are rooted in political decisions derived from the self-interest of member states, not in a supranational will to defend humanitarian principles.

BIBLIOGRAPHY

DOCTRINE

Alagna, F. (2020). From Sophia to Irini: EU Mediterranean Policies and the Urgency of 'Doing Something'. *IAI Commentaries*, *20*(32).

Barnes, J. (2022). Torturous journeys: Cruelty, international law, and pushbacks and pullbacks over the Mediterranean Sea. *Review of International Studies*, *48*(3), 441-460.

Bevilacqua, G. (2017). Exploring the ambiguity of Operation Sophia between military and search and rescue activities. *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests*, 165-189.

Bialasiewicz, L. (2012). Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean. *Geopolitics*, *17*(4), 843-866.

Butler, G., & Ratcovich, M. (2016). Operation Sophia in uncharted waters: European and international law challenges for the EU Naval Mission in the Mediterranean Sea. *Nordic journal of international law*, *85*(3), 235-259.

Carli, E. (2018). Operation EUNAVFOR MED Sophia in the framework of the European Agenda on Migration: Practical aspects and questions of International Law.

D'Argent, P., & Kuritzky, M. (2017). Refoulement by proxy? The Mediterranean Migrant Crisis and the Training of Libyan Coast Guards by EUNAVFOR MED Operation Sophia. In *Israel Yearbook on Human Rights, Volume 47 (2017)* (pp. 233-264). Brill Nijhoff.

Essink, J. (2021). From Humanitarian Rescue to Border Security in the Central Mediterranean: the Dublin system as an explanatory factor for the adoption of Italian non-entrée policies?. *Available at SSRN 3941066.*

Estrada-Cañamares, M. (2016). Operation Sophia before and after UN Security Council resolution no 2240 (2015). *European Papers-A Journal on Law and Integration*, *2016*(1), 185-191.

Giuffré, M. (2012). Watered-down rights on the high seas: Hirsi Jamaa and others v Italy (2012). *International & Comparative Law Quarterly*, *61*(3), 728-750.

Giuffré, M. (2012). State responsibility beyond borders: What legal basis for Italy's push-backs to Libya?. *International Journal of Refugee Law*, *24*(4), 692-734.

Lehner, R. (2019). The EU-Turkey-'deal': Legal challenges and pitfalls. *International Migration*, *57*(2), 176-185.

Mitsilegas, V. (2018). Extraterritorial immigration control, preventive justice and the rule of law in turbulent times: lessons from the anti-smuggling crusade. *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered, Edward Elgar*.

Molnár, A., & Takács, L. (2021). The European Union's Response to Mass Migration Through Mediterranean: A Shift from Humanitarian Foreign Policy Actor Towards a Pragmatist Foreign Policy Actor?. In *The New Eastern Mediterranean Transformed: Emerging Issues and New Actors* (pp. 199-217). Cham: Springer International Publishing.

Molnár, A., & Vecsey, M. (2022). The EU's Missions and Operations from the Central Mediterranean to West Africa in the Context of the Migration Crisis. *International Journal of Euro-Mediterranean Studies*, *15*(1).

Moral, D. R. (2019). The Influence of the Decisions of the European Court of Human Rightson EUNAVFOR MED Operation Sophia. *Spanish Yearbook of International Law*, *23*.

Newsome, A., Riddervold, M., & Trondal, J. (2021). The migration crisis: An introduction. *The Palgrave Handbook of EU Crises*, 443-448.

Pijnenburg, A. (2018). From Italian pushbacks to Libyan pullbacks: Is Hirsi 2.0 in the making in Strasbourg?. *European Journal of Migration and Law*, *20*(4), 396-426.

Pricopi, M. (2020). The military operation EUNAVFOR MED IRINI–a downscale of the EU's involvement in the migration crisis. *Land Forces Academy Review, 25*(4), 302-306.

Quick, H. (2022). Navigating the stormy waters of legitimacy: An analysis of Operation Sophia and EU-Libya relations.

Riddervold, M. (2018). A humanitarian mission in line with human rights? Assessing Sophia, the EU's naval response to the migration crisis. *European security, 27*(2), 158-174.

Riddervold, M., & Riddervold, M. (2018). The EU's Naval Mission Sophia: A Humanitarian Operation to Help Refugees in Distress at Sea?. *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration*, 57-76.

Sacho, A. P. (2019). Training the Libyan Coast Guard and Navy in the framework of Operation Sophia: a practical example of the externalisation of borders within the EU scope.

Soler García, C. (2022). LA UNIÓN EUROPEA, ¿UN GENDARME EN EL MEDITERRÁNEO CENTRAL?. *Revista Española de Derecho Internacional, 74*(1), 48-64.

Strauch, P. (2017). When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation to Combat Smuggling in Libya's Territorial Sea. *the yale law journal, 126*(8), 2421-2448.

Thulin, M. (2018). Italian Deterrence Policies: An examination of the State´s non-entrée policies in response to the migration crisis.

Vos, R. (2023). The many beginnings of Operation Sophia: international law and literature in the governance of the EU. *London Review of International Law, 11*(1), 31-58.

DOCUMENTS

INTERNATIONAL TREATIES

UN DOCUMENTS

EU DOCUMENTS

CHAMBER, G. (2012). Case of Hirsi Jamaa and Others v. Italy.

INTERNAL DOCUMENTS