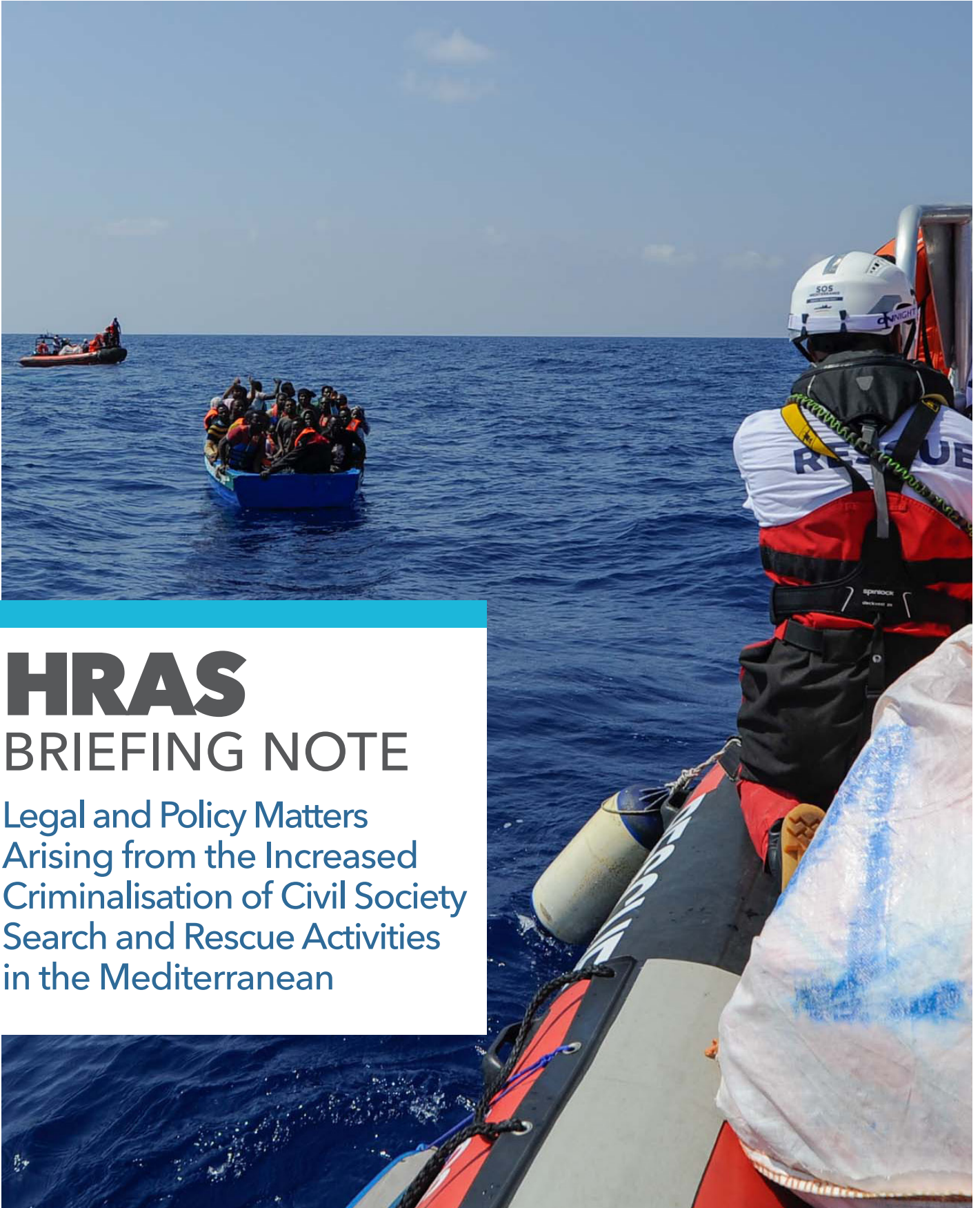




HUMAN RIGHTS AT SEA



HRAS

BRIEFING NOTE

Legal and Policy Matters
Arising from the Increased
Criminalisation of Civil Society
Search and Rescue Activities
in the Mediterranean

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BRIEFING NOTE

Contents

	page
1. Introduction	2
2. Fears of Criminalisation Materialised: The Facts	3
2.1 The Seizure & Detention of the Spanish NGO Proactiva Open Arms Rescue vessel and the German NGO Jugend Rettet vessel 'luventa'	3
2.2 The De-flagging of MV Aquarius	4
2.3 Individual Rescuers' Criminalisation Saving Migrants' Lives at Sea	4
3. Political Interference in Humanitarian Operations and the Role of the European Union	5
3.1 Sea Watch 3 Case	5
3.2 The EU-funded Libyan Coast Guard	6
4. Migrants Crossing the English Channel	6
5. The Legal Framework on SAR Operations & the Effects Criminalisation has on Civil Society Humanitarian Individuals and Humanitarian Organisations	7
5.1 The Legal Framework	7
5.2 EU Legal Framework to Combat Illegal Immigration, Illegal Employment, Trafficking in Human Beings and the Sexual Exploitation of Children	8
5.3 Comment on the Effect Criminalisation has on Civil Society Humanitarian Citizens and Humanitarian Organisations	8
6. Recommendations	9
7. Conclusion	9
8. HRAS Map	10



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BRIEFING NOTE



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1. Introduction

In 2016, the UK-based independent maritime human rights charity, Human Rights at Sea, issued a voluntary advisory publication entitled: **'Awareness of Criminalisation for Volunteer Maritime Rescuers'**,¹ in response to the then perceived and emerging threat by some European Union Member States to criminalise civil society rescuers, who undertook what they perceived as lawful and necessary humanitarian relief work both at sea, and in adjoining coastal zones. This reflected the issue of everyday people, invariably as EU citizens, who voluntarily assisted in the humanitarian rescue of people in distress in and along the Central and Eastern Mediterranean Sea routes.² In 2016, there was a very real perception of the threat that they might face the risk of being individually criminalised "for their actions in terms of being subject to existing European legislation previously established to combat people smuggling"³

Three years later in 2019, this threat has become a reality, which, at the time of writing, is directly related to the EU's collective stance towards migration, both forced and voluntary from States and regions outside of the EU borders. As a result, there has been a number of incidents regarding the arrest of humanitarian Non-Governmental Organisations (NGOs) vessels in Italy, with the claim that they conducted search and rescue (SAR) operations in violation of international law,⁴ as well as the arrest and detention of young humanitarians in Greece on charges of human smuggling.⁵

¹ Human Rights at Sea, "Volunteer Maritime Rescuers: Awareness of Criminalisation" available at: https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-Voluntary-Maritime-Rescuers-Awareness-of-Criminalisation_2016-SP-LRSecured-.pdf > accessed 26 January 2019

² The central Mediterranean route is the one that connects Europe to Africa and the Eastern Mediterranean route is the one that connects Middle East to Europe in the Aegean Sea.

³ Human Rights at Sea, "Volunteer Maritime Rescuers: Awareness of Criminalisation" available at: https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-Voluntary-Maritime-Rescuers-Awareness-of-Criminalisation_2016-SP-LRSecured-.pdf > accessed 26 January 2019

⁴ See for example: Info Migrants, "Pro Activa Open Arms' Rescue Ship Seized in Italy" available at: <http://www.infomigrants.net/en/post/8174/proactiva-open-arms-migrant-rescue-ship-seized-in-italy> accessed 26 January 2019

⁵ For instance: BBC News, "Sarahardini: 'I'm not a people's smuggler.'" available at: <https://www.bbc.co.uk/news/av/world-europe-46535372/sarah-mardini-i-am-not-a-people-smuggler> accessed 26 January 2019

2. Fears of Criminalisation Materialised: The Facts

2.1 The Seizure & Detention of the Spanish NGO Proactiva Open Arms Rescue Vessel and the German NGO Jugend Rettet Vessel 'luventa'

The fears of criminalisation of civil society SAR NGOs' have regrettably now materialised. The seizure of NGO Pro Activa Open-Arms rescue vessel is the most recent example.

In March 2019, the rescuers of the Spanish NGO, Proactiva Open Arms, declined to follow the Italian Maritime Rescue Coordination Centre's (MRCC) instructions to return rescued migrants⁶ back to the Libyan forces.⁷ The reason for doing so was based on documented reports that migrants who are returned to Libya are subject to human rights abuses.⁸ In fact, a detailed independent Report issued by the United Nations Office of the High Commissioner for Human Rights (OHCHR) reports that asylum seekers, refugees and other migrants intercepted by the Libyan coast guard 'face indefinite detention and frequent torture and other ill-treatment in centres unfit for human habitation'.⁹ The detainees are subject to serious human rights violations, as '**lack of adequate healthcare, and disturbing accounts of violence by guards, including beatings, whippings, and use of electric shocks**' have been reported by Human Rights Watch.¹⁰ It should also be mentioned that children are not excluded from these practices.¹¹

In light of such evidence, the members of Proactivas Open Arms rescue ship did not follow Italian authorities' instructions. This disobedience resulted in a legal case being brought against Proactiva in Italy, with the Italian Prosecutor charging the crew members on board of 'enabling illegal immigration'.¹²

Approximately one month after charges were raised, the Spanish NGO ship was released, but it was found to be damaged due to weather conditions during the period of its confiscation.¹³ To add to that, the prosecutor, Carmello Zuccaro, still had to investigate whether the crew members should be brought to trial for their alleged crimes.¹⁴

Unfortunately, the seizure of Proactiva Open Arms by Italian authorities was not the first incident of criminalising the SAR operations in the Central Mediterranean Route.

In August 2017, Italian authorities impounded a boat owned by the German NGO Jugend Rettet,¹⁵ the 'luventa', in the port of the island of Lampedusa with the charges of 'contacting Libyan smugglers'¹⁶ and allegedly aiding illegal immigration from Libya.¹⁷ The Italian Prosecutor noticed that this was not a case of rescuing, but one of smuggling instead.¹⁸ The Italian authorities instructed that the rescued migrants should 'be taken to shore' and then the police interrogated the crew.¹⁹ Yet, it has to be underlined that no evidence of Jugend Rettet receiving any monetary payments from smugglers was found.²⁰ On the contrary, the German NGO explicitly stated that their SAR operations in the Mediterranean purely followed the humanitarian principles of maritime law.²¹ In the absence of disclosed evidence, the allegations by the Prosecutor are unsubstantiated and otherwise false.



Photograph credit: SOS Méditerranée

⁶ The term migrant is used here in all encompassing manner, including the asylum seeker, the refugee, the individual in need of subsidiary protection and the economic migrant. Having said this, as a matter of international law, the legal status of the rescued person is irrelevant to the legal duty to save a life in distress at sea.

⁷ Human Rights Watch, "Italy: Migrant Rescue Ship Impounded, Don't Criminalizing Saving Lives" available at: <https://www.hrw.org/news/2018/03/19/italy-migrant-rescue-ship-impounded> accessed 26 January 2019

⁸ *ibid.*

⁹ UN Office of the High Commissioner for Human Rights (OHCHR) Report 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya' 20 December 2018 available at <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>

¹⁰ Human Rights Watch, "No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya" available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 26 January 2019

¹¹ *ibid.*

¹² Human Rights Watch, "Italy: Migrant Rescue Ship Impounded, Don't Criminalizing Saving Lives" available at: <https://www.hrw.org/news/2018/03/19/italy-migrant-rescue-ship-impounded> accessed 26 January 2019

¹³ The Guardian, "Migrant -Rescue Boat Open Arms Released by Italian Authorities" available at: <https://www.theguardian.com/world/2018/apr/16/migrant-rescue-boat-open-arms-released-by-italian-authorities> accessed 26 January 2019

HRAS

BRIEFING NOTE

2.2 The De-flagging of M/V Aquarius

The current general stance of the European states against SAR operations culminated in the de-flagging of the M/V Aquarius Dignitus (IMO No. 7600574) ("Aquarius"). The Aquarius was a special purpose vessel chartered from Jasmund Shipping by the civil society non-governmental organisation (NGO) SOS Méditerranée (charterers), and operated in partnership with the Amsterdam-based branch of Médecins Sans Frontières ("MSF").²² It had been operating in the Central Mediterranean since February 2016²³ and it has been estimated that **'Aquarius assisted more than 29,000 people in distress at sea'**.²⁴

Aquarius was, for a period, the only rescue vessel operating in the Central Mediterranean, until its de-flagging first by Gibraltar Maritime Authority (GMA) which it was argued it was a voluntary request by the

charterers, and then by Panama Maritime Authority (PMA) following political pressure from Italy.²⁵ It should be noted that the Aquarius incident is not a case of criminalisation, rather a case that appears to be one of commercial flag States being subject to political interference and pressure from an EU Member State. Nonetheless, the Aquarius was forced to stop SAR operations, and it has since been handed back by the charterers to the owner.

Meantime, the virtual absence of NGO civil society SAR vessels operating in the Central Mediterranean translates to more endangered lives at sea as highlighted by UNHCR in its December 2018 Desperate Journeys Report, which highlighted that **'an estimated 2,275 people perished in the Mediterranean in 2018 - an average of six deaths every day'**.²⁶

2.3 Individual Rescuers' Criminalisation Saving Migrants' Lives at Sea

Apart from the civil society-led humanitarian NGO vessels, individuals also face charges of aiding and abetting illegal migration and human smuggling. A recent worrying incident has taken place in Greece on the island of Lesbos, where two young humanitarians, Miss Sarah Mardini, a refugee from Syria, and Mr. Sean Binder, an Irish national were accused of *inter alia*, human trafficking in an effort to criminalise humanitarian activism on behalf of refugees and migrants in Greece.²⁷ They faced charges of money laundering and espionage according to Article 148 of the Greek Penal Code.²⁸ They were accused for having violated Law 4251 of 2014,²⁹ although those provisions do not apply to those who assist asylum seekers. Therefore, the charges were effectively unfounded in Greek law.³⁰

In addition to human trafficking, the pair was accused of being volunteers in a Greek not-for-profit organization, called ERCI. ERCI³¹

was deemed to be a criminal organization by the Greek authorities under Article 187 of the Greek Penal Code, and had to put its humanitarian operations to an end due to the detention of Mardini, Binder and one of their employees, Mr Karakitsos.³² After spending more than three months in jail, Sarah Mardini was finally released from Korydallos prison in Athens, while Sean Binder was released from imprisonment on the island of Chios.³³

In terms of the same circumstances, the active criminalisation of individuals in Greece who participate in civil society SAR operations in the Central Mediterranean, shows that Greece appears to be following a similar political and legal strategy to that of Italy in an effort to criminalise those people who volunteer to preserve the fundamental human right to life.³⁴

¹⁴ *ibid.*

¹⁵ <https://jugendrettet.org/en/> accessed 10 February 2019

¹⁶ Jugend Rettet, "Free Luventa-Sea Rescue is not a Crime" available at: <https://jugendrettet.org/en/archive> accessed 29 January 2019

¹⁷ Reuters, "Italy seizes NGO Search and Rescue Boat for allegedly aiding illegal migration" available at: <https://www.reuters.com/article/us-europe-migrants-italy-ngo-idUSKBN1A121B>

¹⁸ The Guardian, "Italy Impounds NGO Rescue Ship and sends Navy Patrol Boat to Libya" available at: <https://www.theguardian.com/world/2017/aug/02/italy-impounds-ngo-rescue-ship-sends-navy-patrol-boat-to-libya-migrant-refugee-route-europe> < accessed 26 January 2019; see also Human Rights Watch, *supra* note 5; The Independent, "Charity Demands Return of Ship as Court Hearing Begins" available at: <https://www.independent.co.uk/news/world/europe/italy-refugee-rescue-ship-jugend-rettet-iuventa-libyan-smugglers-mediterranean-migrant-a7955796.html> accessed 29 January 2019

¹⁹ *ibid.* The Independent.

²⁰ *ibid.* The Independent.

²¹ Jugend Rettet, "Free Luventa-Sea Rescue is not a Crime" available at: <https://jugendrettet.org/en/archive> accessed 29 January 2019.

²² <https://onboard-aquarius.org/our-mission/> accessed 26 January 2019.

²³ "Aquarius" (Gibraltar Registry flagged) became "Aquarius 2" when the shipowner resigned from the Gibraltar Registry and registered with the Panamanian Registry. "Aquarius 2" (Panama flagged) was subsequently deregistered by the Panamanian Maritime Authority and became "Aquarius Dignitus" for her registration with the Liberian Flag Registry.

²⁴ *ibid.* (Exact figure 29523)

²⁵ For a detailed description and analysis of the incident See Human Rights at Sea 'Human Rights and International Rule of Law Ramifications of the De-Flagging of M/V Aquarius Dignitus', available at https://www.humanrightsatsea.org/wp-content/uploads/2019/02/HRAS_Aquarius_Review_and_Commentary_2019_SECURED.pdf

²⁶ UNHCR, 'Desperate Journeys' available at: <https://www.unhcr.org/desperatejourneys/> accessed 10 February 2019

²⁷ <https://www.theguardian.com/world/2018/dec/05/syrian-aid-worker-sarah-mardini-refugees-freed-greece>. See also, Human Rights Watch, "Greece: Rescuers at Sea face Baseless Accusations, Prosecution Seeks to Criminalize Saving Lives" available at <https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations> accessed 26 January 2019

²⁸ *ibid.*

²⁹ Greece: Law No. 4251, G.G. A' 80 of 2014, Code for Migration and Social Integration and other provisions (Greece)] 1 April 2014, available at: <https://www.refworld.org/docid/54eb40114.html> accessed 27 January 2019

³⁰ *ibid.*

³¹ <https://www.france24.com/en/20180919-greek-ngo-founder-arrested-migration-probe>

³² The Guardian, <https://www.theguardian.com/world/2018/dec/05/syrian-aid-worker-sarah-mardini-refugees-freed-greece>

³³ The Guardian, "Syrian Aid Worker who Swam Refugees to Safety Freed from Greek Jail" available at: <https://www.theguardian.com/world/2018/dec/05/syrian-aid-worker-sarah-mardini-refugees-freed-greece> accessed 27 January 2019

³⁴ UN Genral Assembly, Universal Declaration of Human Rights, 10 December 1948 Article 3, 'Everyone has the right to life, liberty and security of person'.

3. Political Interference in Humanitarian Operations & the Role of the European Union

The so-called 'migrant and refugee crisis' which arose in Europe in 2015³⁵ has had as an effect the heavily politicising of migration and forced displacement related movements. This is evident in the overall negative stance of Mediterranean coastal States towards those individuals arriving at their shores onboard SAR NGOs vessels.

Italy, which since 2015 has witnessed 478,172 arrivals of migrants³⁶ is faced with increased internal political pressure reflected in the rise of far-right and populist anti-migrant politics,³⁷ as well as in a harsher legal stance towards the civil society SAR NGOs operating in the Central Mediterranean Sea.

The previous Interior Minister, Marco Minniti, was a supporter of the cooperation with Libya regarding the issue of migrant flows in Italian shores.³⁸ To be more specific, in 2017, addressing the Council of Ministers, he presented the **"Measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity"**.³⁹ This plan became known as 'Minniti Law', and in reality, the aim was to restrict the SAR operations in the Central Mediterranean ultimately seeking to reduce the number of arrivals in Italy.

Likewise, his successor, the right-wing Matteo Salvini adopted an anti-immigration stance, in an effort to protect Italian borders, as he declared.⁴⁰ One observes that the issue of migration is strategically linked to wider

security and border related matters. It was under Salvini that the Aquarius was forbidden from entering Italy in June 2018, whilst carrying 629 rescued on board.⁴¹ To add to this, Salvini threatened that any disembarkation of the rescued in Italy would follow their immediate return back to Libya,⁴² despite UN reports documenting human rights violations and even torture.⁴³

Yet, this hostile stance towards SAR NGOs in the Central Mediterranean is not only Italy's practice, or sole responsibility. In fact, the lack of meaningful responsibility sharing and solidarity at the EU level⁴⁴ has had a direct impact upon Italy's stance. As it has already been highlighted, the EU, as an institution, and Italy as a Member State, have provided technical and financial support to the Libyan Coast Guard, by equipping them with boats so that in exchange Libya effectively becomes the regional processing center for migrants arriving at Europe.⁴⁵ Such practice raises a series of legal concerns both for the EU, as a regional State-led organization, as well as for the individual Member States, which is further discussed in the next section.

In a nutshell, it is obvious that while political games are being played at the expense of vulnerable people, the EU as the powerful main player with a leading Member State, is looking to circumvent international law responsibilities of non-refoulement by attempting to transfer exclusive responsibility for those rescued back to the Libyan authorities.

3.1 Sea Watch 3 Case

Most recently and particularly on the 3rd of February 2019, the tide appears to have turned with the dismissing of any potential charges against the migrant rescue ship Sea Watch 3 held in Catania port. The Italian newspaper, The Local, highlighted: **'It was stated that it had committed no offences when it saved 47 migrants off the coast of Libya and delivered them to Italy. A joint investigation with police had not established any criminal responsibility in the conduct of those running the Sea Watch 3, said a statement from Catania prosecutor Carmelo Zuccaro'**.⁴⁶ That said, on 11th February, the vessel remained held alongside in Catania without permission to sail.

Further, at the time of writing, there appears to be a judicial backlash internally against Salvini, when in late January a three-judge panel in Catania, a Sicilian port city, issued a ruling saying Salvini should be prosecuted for his decision to detain for several days 177 asylum-seekers, rescued from the Mediterranean Sea.⁴⁷

³⁵ UNHR Tracks, "2015: The Year of Europe's Refugee Crisis" (8 December 2015) available at: <http://tracks.unhcr.org/2015/12/2015-the-year-of-europes-refugee-crisis/>

³⁶ International Organization of Migration, Flow Monitoring Europe, available at: <http://migration.iom.int/europe?type=arrivals> accessed 27 January 2019.

³⁷ The Local, "Salvini's anti-migrant Security Decree becomes law in Italy" available at: <https://www.thelocal.it/20181129/salvinis-anti-migrant-security-decree-becomes-law-in-italy> accessed 29 January 2019.

³⁸ *ibid.*

³⁹ European Commission, "Action Plan on Measures to support Italy, reduce pressure along the Mediterranean Route and increase solidarity", [2017] available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf accessed 27 January 2019; see also *supra* note 8

⁴⁰ The Guardian, "Matteo Salvini and Viktor Orbán to form anti-migration front" available at: <https://www.theguardian.com/world/2018/aug/28/matteo-salvini-viktor-orban-anti-migrant-plan-brussels> accessed 29 January 2019

⁴¹ BBC News, "Italy's Matteo Salvini shut Ports to migrant Rescue Ship" [2018] available at: <https://www.bbc.com/news/world-europe-44432056> accessed 27 January 2019

⁴² UN Office of the High Commissioner for Human Rights (OHCHR) Report 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya' 20 December 2018 available at <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> > accessed 29 January 2019.

⁴³ UN Support Mission in Libya OHCHR, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya (20 December 2018) available at <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>

⁴⁴ See for an analysis E Tsourdi and and Philippe De Bruycker, Migration Policy Centre, EU/ Asylum Policy: In Search of Solidarity and Access to Protection', available at http://cadmus.eui.eu/bitstream/handle/1814/35742/MPC_PB_2015_06.pdf?sequence=1&26isAllowed=y

⁴⁵ <https://www.thetimes.co.uk/article/italy-gifts-migrant-rescue-boats-to-libya-coastguard-j2vtqqdd>

⁴⁶ The Local, 'Ship committed No Offence' available at: <https://www.thelocal.it/20190203/rescue-ship-committed-no-offence-italian-prosecutor> accessed 10 February 2019.

⁴⁷ Courthouse News, 'Anti-Immigrant Policies Face off with Italian Judiciary' available at: <https://www.courthousenews.com/anti-immigrant-politics-face-off-with-italian-judiciary/> accessed 10 February 2019.

3.2 The EU-funded Libyan Coast Guard

It is noteworthy that the EU, and particularly Italy, have spent a significant amount of money, as well as provided technical and material equipment in order to assist the Government of National Accord in Tripoli 'to intercept boats leaving Libya and detain those intercepted in detention centers where they face appalling conditions', as Human Rights Watch comments.⁴⁸ It goes without saying, that this practice aims at 'freeing' Italy's and European shores from the large numbers of migrants arriving, as well as circumventing the legal responsibility for the rescued.⁴⁹ It therefore appears that the EU and the Member States have collectively shown a disregard for the legal obligations to shield those seeking protection from abuse by shifting the responsibility to the under-resourced, allegedly corrupt and abusive Libyan Coastguard authorities.

Most notably was the UN action (reported early June 2018) to freeze the assets and impose sanctions on those Libyans involved directly with the Coast Guard, thereby challenging the validity of the EU-funded initiative. As reported in The Guardian Newspaper, Abd Al Rahman al-Milad, who is the head of the EU-funded regional unit of the Libyan coastguard in Zawiyah, has been targeted, as has Ahmad Oumar al-Dabbashi, who is quoted as being "widely seen as central to a deal with the Italian interior ministry last year to control the flow of migrants."⁵⁰

Meantime, there is much academic work today exploring the issue of complicity in international law as legal basis for the international responsibility of a State under the ILC Draft Articles on State Responsibility.⁵¹ With the EU to have funded and equipped the Libyan Coast Guard to intercept migrants attempting the crossing, in full knowledge of the large-scale human rights violations occurring in Libya,⁵² the argument that such acts could amount to complicity is extensively explored in academic scholarship. Having said this, it is a complex legal argument to make both in international law, as well as in terms of gathering the degree of the necessary evidence to prove any such allegations, which would be required to be brought at State-level.

4. Instances of Migrants Crossing the English Channel

The Central Mediterranean route is not the only locus of migrants crossing fleeing from their home States, as migrants push further through mainland Europe to its northern shores.

On 27 December 2018, there were reports to Littlestone lifeboat station that there were people in a lifeboat near the coast at Sandgate in Kent.⁵³ There were nine migrants and among them three children. After being located on a beach by a lifeboat crew from Dover and a Coastguard helicopter, they were detained.⁵⁴ Further, on 21 January 2019, another 23 migrants, who claimed to be Iranian, were located by the UK Border Force in the English Channel.⁵⁵ After being transferred

to Dover and examined by doctors, they were sent to immigration officials for their cases to be investigated.⁵⁶

These incidents show a recent rise in migration flows this time from France to the United Kingdom. They have been considered by the Immigration Minister, Mrs. Caroline Nokes,⁵⁷ as 'deeply concerning.' Additionally, crossing the English Channel in small boats in the heart of winter constitutes a deliberately risky and life threatening situation facilitated by criminal trafficking gangs operating from the French coastal areas.⁵⁸

⁴⁸ Human Rights Watch, "No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya" available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 26 January 2019.

⁴⁹ *ibid.*

⁵⁰ The Guardian, 'UN Accuses Libyan linked to EU Funded Coastguard of People Trafficking' available at: <https://www.theguardian.com/world/2018/jun/08/un-accuses-libyan-linked-to-eu-funded-coastguard-of-people-trafficking> accessed 11 February 2019.

⁵¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf See for an outline of such argument <https://www.ejiltalk.org/torture-in-libya-and-questions-of-eu-member-state-complicity/>, E Papastavridis, Rescuing migrants at sea and the law of international responsibility, in Human Rights and the Dark Side of Globalisation. Transnational law enforcement and migration control, Gammeltoft Hansen, Jens Vedsted-Hansen (eds) 2016.

⁵² Human Rights Watch, "No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya" available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed 26 January 2019.

⁵³ Evening Standard, 'Nine Migrants Including three Children Found on Kent Beach after Crossing Channel in 13ft Inflatable Boat' available at: <https://www.standard.co.uk/news/uk/nine-migrants-including-three-children-found-on-kent-beach-after-crossing-channel-in-13ft-inflatable-a4025771.html> accessed 11 February 2019.

⁵⁴ *ibid.*

⁵⁵ Evening Telegraph, "Another 23 Migrants Intercepted in Channel by UK Border Force" (2019) available at: <https://www.eveningtelegraph.co.uk/2019/01/21/another-23-migrants-intercepted-in-channel-by-uk-border-force/> accessed 27 January 2019.

⁵⁶ *ibid.*

⁵⁷ Daily Echo, 'Number of Incidents of Migrants trying to Cross Channel Deeply Concerning', available at: <https://www.bournemouthecho.co.uk/news/national/17322565.number-of-incidents-of-migrants-trying-to-cross-channel-deeply-concerning/> accessed 11 February 2019.

⁵⁸ *ibid.*

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BRIEFING NOTE

5. The Legal Framework on SAR Operations & the Effects Criminalisation has on Civil Society Humanitarian Individuals and Humanitarian Organisations



Photograph credit: SOS Méditerranée

5.1 The Legal Framework

The recent incidents of SAR NGOs criminalisation raise serious concerns from an international law perspective. The issue is complex and therefore requires some understanding.

To start, one could mention that there are two counterforces. On the one hand, the existence of legally-binding international law treaties that protect and promote fundamental human rights, and on the other hand, the various domestic national legislations (both criminal and administrative ones) that may hinder the humanitarian work of NGOs.⁵⁹

The fundamental and undeniable right to life, is affirmed in various international law provisions. First and foremost, it is enshrined in Article 3 of the 1948 Universal Declaration on Human Rights⁶⁰ and is further reiterated in Article 6 of the International Covenant on Civil and Political Rights.⁶¹ The right to life of persons under the age of 18 and the obligation of States to guarantee the enjoyment of this right to the maximum extent possible are both specifically recognized in article 6 of the Convention on the Rights of the Child.⁶² At the EU level, there is the European Convention of Human Rights and the EU Charter of Fundamental Rights both respectively providing for the right to life.⁶³

In the context of SAR operations, there is a clear international legal framework pertinent to rescue operations, precisely developed in support for the right to life. The starting point here is the 1982 United Nations Convention Law of the Sea (UNCLOS)⁶⁴ explicitly providing for the duty to rendering assistance to those in distress at sea by the 'master of the ship' as well as the duties of coastal states. The same rationale is also found in the 1979 Safety Of Life At Sea Convention (SOLAS).⁶⁵

The latter obliges States to establish maritime rescue coordination centres (MRCC) and outlines operating procedures to follow in the event of emergencies and during SAR operations.⁶⁶ Another legal instrument dealing with the duty of providing assistance 'to any person in distress at sea' is the 1979 Convention on Maritime Search and Rescue. To be more specific, chapter 2.1.10 explicitly states that the parties to the Convention 'shall ensure that assistance be provided to any person in distress at sea'.⁶⁷

Additionally, Article 33 of the 1951 Convention Relating to the Status of Refugees stipulates the principle of *non-refoulement*, which is considered to be the 'cornerstone of international refugee law'⁶⁸ and is widely acknowledged by states to be part of customary international law.⁶⁹ Pursuant to the prohibition of *refoulement*, refugees must not be returned to 'frontiers of the territories' of the countries where their 'life or freedom' might be at risk.⁷⁰ Beyond the Refugee Convention, the principle of *non-refoulement* can be found in a variety of international and regional treaties as well. To name but a few, it is Article 3 in the **1984 Convention against Torture and other Inhuman or Degrading Treatment or Punishment** and Article 3 of the European Convention of Human Rights.⁷¹ Thus, Italy's return of migrants back to Libya, where it is proved that they might face imminent danger, amounts to *refoulement* under international law.

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BRIEFING NOTE

5.2 EU Legal Framework to Combat Illegal Immigration, Illegal Employment, Trafficking in Human Beings and the Sexual Exploitation of Children

Regarding the EU Framework of the aforementioned obligation on the duty to render assistance to people in distress at sea one should refer to 'Facilitation Directive and its accompanying Framework Decision 2002/946/JHA' both known as "EU Facilitation Package",⁷² which explicitly declares that Member States 'punish anyone who assists a person to irregularly enter, transit or stay in the territory of a Member State. Member States may, **however, refrain from punishment if the aim of enabling the migrant in an irregular situation to enter or transit through the country is to provide that person with humanitarian assistance.**'⁷³

The above framework notwithstanding, the criminalisation of NGOs and volunteers' in domestic fora on the basis of the EU Facilitations Directive

render their job both harder and risky. In 2018, the European Parliament in an attempt to prevent the criminalisation of SAR operations and humanitarian assistance 'formulated guidelines' for its Member States.⁷⁴

In addition to this, in many cases NGOs and Volunteers' SAR operations in the Central Mediterranean have been linked to aiding and abetting illegal entry. All 28 Member States of the EU criminalise smuggling as well as 'irregular entry' according to FRA.⁷⁵ Again, the main problem lies within the domestic legislation of States, which is not in accordance with article 1(2) of the Facilitate Directive, hence this results in punishment even of those providing humanitarian assistance.⁷⁶ Consequently, both NGOs and volunteers face the risk of being criminalised or some of them have indeed been.

5.3 Comment on the effect Criminalisation has on Civil Society Humanitarian Citizens and Humanitarian Organisations

There is a current and worrying trend in some Member States of the EU to criminalise citizens acting as humanitarians who provide assistance to those in distress at sea, or adjoining coastal regions. These citizens are advocates and guardians of fundamental human rights, whose efforts, apart from being individually viewed as being legitimately needed are, in the absence of effective and coordinated State-led SAR facilities, even more essential for those people in distress at sea. To this end, EU Member States should assess individual actions when deciding on the legitimacy of such humanitarian acts under respective domestic laws, including the laying of any potential criminal charges. Respect for

well-established international rules must be maintained at all times, even if strict adherence to it may conflict with national interests, while the criminalisation of individuals acting in good faith must be avoided.

If there is extensive push for criminalisation of civil society SAR operations, then those, who direct and run them in good faith, may understandably be reluctant to continue their work in the fear of being criminalised, arrested and jailed. The EU should never forget the job NGOs have undertaken in the Mediterranean Sea and how many human lives have been saved because of them.

⁵⁹ European Union Agency for Fundamental Rights (FRA), "Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in Mediterranean and Criminal Investigations" available at: <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities> accessed 27 January 2019.

⁶⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available at <http://www.un.org/en/universal-declaration-human-rights/index.html> article 3

⁶¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <https://www.refworld.org/docid/3ae6b3aa0.html> accessed 11 February 2019

⁶² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 11 February 2019].

The right to life is further contained in the following treaty provisions: Charter on Human and Peoples' Rights (Article 4), African Charter on the Rights and Welfare of the Child (Article 5), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 4), Arab Charter on Human Rights (Article 5, 6) American Declaration of the Rights and Duties of Man (Article 1), American Convention on Human Rights (Article 4), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" (Article 4).

⁶⁴ UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at <https://www.refworld.org/docid/3dd8fd1b4.html> accessed 28 January 2019 Article 98

⁶⁵ International Maritime Organization (IMO), International Convention for the Safety of Life At Sea, 1 November 1974, 1184 UNTS 3, available at: <https://www.refworld.org/docid/46920bf32.html> accessed 28 January 2019.

⁶⁶ SAR Convention

⁶⁷ International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS, available at <https://www.refworld.org/docid/469224c82.html> accessed 29 January 2019.

⁶⁸ UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, available at <https://www.refworld.org/docid/438c6d972.html>

⁶⁹ UN High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at <https://www.refworld.org/docid/45f17a1a4.html>

⁷⁰ Convention Relating to the Status of Refugees, Article 33.

⁷¹ https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁷² European Union: Council of the European Union, Council Framework Decision 2002/946 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence, 28 November 2002, 11015/01, available at <https://www.refworld.org/docid/3ddce9a14.html> accessed 28 January 2019.

⁷³ Article 1 (2) of the Facilitation Directive

⁷⁴ Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>

⁷⁵ *ibid.*

⁷⁶ *ibid.*

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6. Recommendations

- EU Member States must assess each incident on a case-by-case basis through competent constabulary and judicial authorities to avoid automatically criminalising humanitarian assistance provided by individuals, and other volunteers, to those in distress at sea
- There should be a common cooperative SAR framework with collectively available maritime assets backed by meaningful solidarity among EU Member States for the protection of those in distress at sea
- The non-derogable human right to life should never be forgotten, nor weighted lesser than other interests, be they commercial or political
- Member States should never put migrants' lives and security at risk by sending them back to States that are not safe, and where their life, and/or personal freedom could be threatened

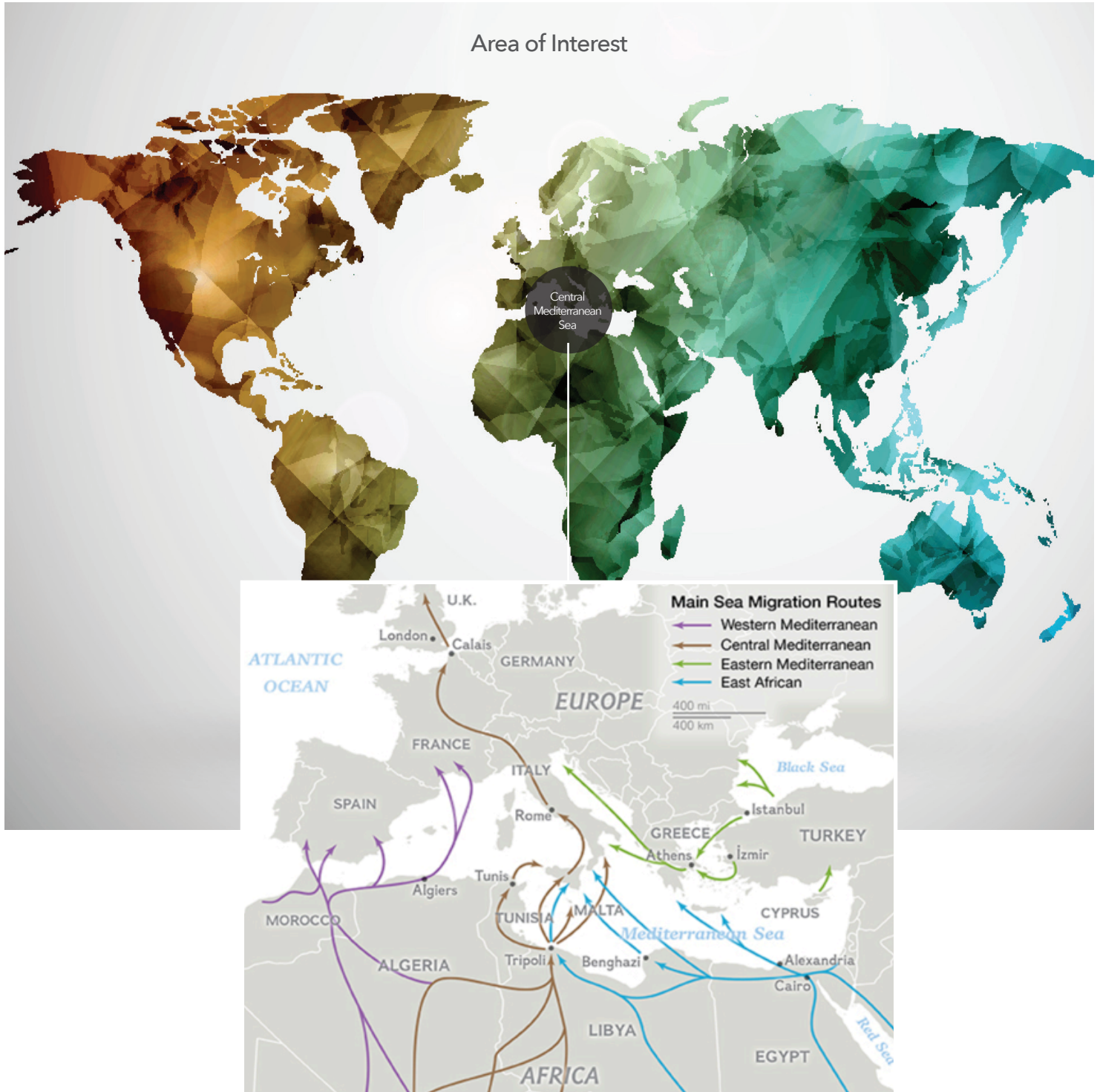
7. Conclusion

Summing up, it can be argued that the current migrant crisis in Europe is less of a crisis about logistical capacity and policies at sea (while highlighted as inadequate, hence civil society intervention), and more a crisis and challenge of the previously accepted norms of territorial integrity which have been destabilised through the unexpected increase in migration through North-African and Eastern Mediterranean routes into Europe. In the case of North Africa, the unintended and unplanned for consequences of the 2011 military intervention in Libya led by French and UK Governments has come back to 'bite' Europe as a whole.

In response to the migrant crisis, the EU collectively, and some of its leaders, in an attempt to guarantee territorial control over their borders, currently act in a way that puts the lives and human rights of migrants in severe jeopardy. Alongside this, those to whom it applies, appear to have relegated all the usual responsibilities for those rescued at sea in an attempt to circumvent their legal obligations under international law to protect those in need. EU States have therefore regrettably prioritized their national interests over their international obligations, thereby further eroding the heart of the idealised unified European model that is founded on the respect for fundamental human rights and the rule of law.

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Infographic: Credit National Geographic 2015

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HUMAN RIGHTS AT SEA



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Legal and Policy Matters
Arising from the Increased
Criminalisation of Civil Society
Search and Rescue Activities
in the Mediterranean

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