The European Union’s Agenda on Migration: Focus on Human Rights and the Migration Crises in the Mediterranean Sea

Abstract: On the 10th December 2018 global leaders adopted the Global Compact for Migration, making a strong commitment to protect the human rights of all migrants everywhere, but the global “paxis” show that the United Nations collective security system does not, in theory, have jurisdiction to address illegal activities performed by private individuals. Therefore, what kind of approach can Europe and individual European countries adopt regarding the migration and refugee crises? And what kind of changes would then be necessary? The European Union’s agenda on migration represent a great humanitarian challenge. The European refugee relocation system struggled to get implemented as several member States failed to adopt it. On 1 February 2018, the European Border and Coast Guard Agency, FRONTEX, launched Operation Themis (Unlike Operation EUNAVFOR Med, Operation Themis employs “civilian” resources) in the Mediterranean and Adriatic seas, replacing Operation Triton. The European Union asserted its foreign policy and common security policy thanks to EU NAVFOR Somalia, also known as Operation Atlanta, a counter-piracy military operation off the coast of Somalia. In 2012, the EU launched EUCAP Nestor, a program which contributes to the establishment and capacity creation of a maritime civilian law enforcement capability in the Horn of Africa and the West Indian Ocean. In 2013, the EU announced a new initiative to reinforce security in the Gulf of Guinea (CRIMGO). Could a similar regional approach be adopted to address the migratory movements seen since 2015, in particular in the Mediterranean Sea? The European Union was facing an unprecedented crisis which at first was left mostly to Italy, later on joined by Greece to tackle on their own. Other member States then closed their land borders.

Keywords: Agenda on migration, European-Union, Protection, Human rights.

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Introduction

On 1 November 1988, the discovery of the corpses of migrants who had attempted to reach Europe aboard a flimsy migrant boat known by the Royal Spanish Academy (2001) as a ‘patera’ (from the word ‘duck’ or pato, in Spanish, the word entered in 2001 in the Dictionary of the Spanish language, refers to a “small boat, flat bottom, without keel”) through Spain’s extreme south impacted Europe’s collective conscience. Although, sadly, other shipwrecks would later occur, November 1988 remains a major reference of migrant casualties on the Spanish coast.

Since one of the more dramatic migrant death on 1 November 1988, when the corpse of a young Moroccan child was discovered on a beach in Tarifa (Playa de los Lances), still no end to tragedies at sea. In the next few days, 11 bodies in total were recovered and seven people were declared missings (Alemany, 2002). This tragedy marked the start of a period of so-called “constant tragedies”. In total, 99,534 refugees and migrants have arrived by sea to Italy, Greece, Spain and Cyprus (UNHCR/ACNUR, 2018a) and, according to official sources, at least 5098 people perished in the Mediterranean Sea in 2016 alone (O.I.M. 2016).

The European Union’s members affirm to respect fundamental rights “as general principles of law”, Article 6 paragraphs 3, (Lisbon Treaty, 2012). However, the material conception of these rights understood by doctrine and by the Court of Justice of the European Union as designating human rights and fundamental freedoms goes beyond the formal source of general principles of law (CJEU, 2003). Fundamental rights are also shaped by the global social reality, as is the case with the migratory crisis in the Mediterranean.

The establishment of the Agency for Fundamental Rights of the European Union in 2007 (Council Regulation, 2007), the adoption of the Charter of Fundamental Rights of the European Union in 2000, the inclusion in its Treaties of provisions empowering the institutions to enact measures to protect Human Rights, the adoption of several directives having this purpose, or the development of a jurisprudence protecting rights defined as “fundamental” demonstrate an effective contribution of the European Union to the protection of human rights (Picod, 2007).

Indeed, for lack of a small space of analysis to develop this study, and the immense discussion around the subject, including the capabilities of the FRONTEX Agency, its effectiveness and especially its future, it is necessary to mention that the agency is a decentralized body of the European Union, which implies that
it must comply with its rules for the management of operational cooperation at the external borders of the Member States of the Union (Billet, 2018). So do the challenges lie more with the European Union or with the international community?

The renewed challenges facing the European Union with regards to the migration crisis in the Mediterranean Sea

The EU’s relief operations, including those conducted in the Mediterranean area, are subject to the Treaty of Lisbon which lays the legal foundations for aid to people in distress regardless of their nationality, religion, gender or ethnic origin. Yet, questions remain regarding the effectiveness of the protection mechanisms provided for in relation to fundamental rights; rights which, according to the CJEU, “are an integral part of the general principles of law of which the Community judicature ensures respect.” This formula has indeed been the subject of continuing jurisprudence (TPICE, 1997; CJUE, 1997; TPICE, 2005; CJUE, 2005).

For the EU to be a credible actor, it must act in a coherent manner, in accordance with the Treaties and its secondary legislation, but also be able to reconcile its human rights policy with its foreign policy (European Parliament, 2012a), notably in terms of migration and surveillance of its borders. Indeed, the EU’s ability to guarantee human rights (A) has been undermined by the crisis at sea caused by significant migratory flows (B).

(A) The respect for human rights by the European Union

The Union has thus put in place a wide range of instruments in order to stimulate cooperation in the context of maritime governance as well as guarantee respect for human rights. The European Union has made respect for human rights a major principle. It has a legal obligation, laid down in the Treaties, to put them at the center of all its policies and to ensure their consideration by the Member States (European Parliament resolution, 2012b).

More specifically, human rights constitute one of the eight objectives of common policies and actions in the field of international relations (Treaty on European Union, Art. 21). From a legal standpoint, the objective of respect for human rights motivates all its external policies.

Under the Lisbon Treaty, the EU’s foreign policy powers concern several areas, such as the Common Foreign and Security Policy (Treaty on European Union,
Title 5, Chap. 2), the Common Security and Defence Policy (CSDP) (Treaty on European Union, Title 5, Chap. 2, sec.2), the Common Commercial Policy, the development cooperation, technical cooperation and humanitarian aid (Treaty on the Functioning of the European Union, Part 5, Title 2).

In addition, several EU policies have an external dimension. They are themselves subdivided into integrated policies on the one hand (including in particular the common commercial policy, development cooperation and humanitarian aid), and foreign and common security policy on the other, which is essentially intergovernmental; and covers the fields of foreign policy but also all matters relating to the security of the Union (NCCHR, 2014, p. 3). Today, the issue that holds most of the European attention is the increasing number of migratory flows to Europe, which poses enormous difficulties in terms of control in the Mediterranean Sea.

(B) The actual Mediterranean crisis and major migratory flows

For 70 years, the Universal Declaration of Human Rights has been a global beacon – shining a light for dignity, equality & well-being declared the United Nations Secretary-General António Guterres on Monday’s Human Rights (ONU, 2018). The influx of migrants to Europe by Sea has been dramatic, in 2016 alone, at least 5098 people died in the Mediterranean Sea according to official sources. One of the most beautiful seas in the world is now tinged with blood (International Organization for Migrants, 2016). Following the Figure 1 is clear to see how the migration phenomena of refugees and migrants have arrived by sea to Italy, Greece, Spain, Malta and Cyprus according to official sources (UNHCR/ACNUR, 2018a).

The idea that Europe is facing a “migration crisis” was recorded in April 2015, following two shipwrecks that successively occurred in the Mediterranean Sea. These incidents led the European Council to adopt a “Ten Points Action Plan on Migration” (European Council, 2015).

It should be noted that several types of migrants can be distinguished: migrants escaping from war from, for example, Libya, Syria, or Jordan; migrants who are forced to flee the dangerousness of their country of origin; or who do not have the ability to survive. The latter category mainly consists of migrants from Africa (Chaumette, 2018a).

Behind the influx of migrants in 2015, with almost a million migrants attempting to reach Europe, lies a severe global humanitarian situation caused by wars and economic crises, of which Africa is a hot-spot. In 2011 alone, 42.5 million people
around the world were forced to leave their country or region, among which 800,000 were new refugees (UNHCR, 2012). Europe, however, is still far from a so-called “invasion”, a powerful populist myth that serves among other things to justify increasingly severe migration policies (Parrot and Imbert, 2016).

**Figure 1. Sea and land arrivals to Europe³**

![Map showing sea and land arrivals to Europe](https://example.com/map.png)

Source: UNHCR/ACNUR (2018b).

While the European Union has abolished controls at its internal borders, European migration policies follow repressive orientations manifested in legal barriers and physical walls. At sea, organizations such as the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) of the Member States sometimes have to play conflicting roles of protection and repression. Nevertheless, the agency is a decentralized body of the European Union, which implies that it must comply with its rules (Billet, 2017).

The main dilemma facing the European Union today does not concern surveillance of its own agencies, human rights, or its ability to accommodate migrants crossing the Mediterranean Sea; a real problem that has become a major talking point for nationalist parties in almost all European countries. The European Union must seek a more humanitarian and holistic response to this migration issue, and to arrive it is important to have the political groups and policies more open minded.

³ The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.
The new European Union’s humanitarian challenges

The European Committee of the Regions, in its September 2015 resolution for a sustainable EU approach to migration, called on all stakeholders — European institutions, national, regional and local media and civil society — not to stigmatize migrants or immigration. It also emphasized that relocation and resettlement policies should involve all European countries. Indeed, cooperation, for example with the stable governments of North Africa, has been shown to have reduced departures from the coasts of these countries, thus decreasing the number of casualties at sea (The European Committee of the Regions, 2015).

The European Union aims to limit the influx of refugees crossing the Mediterranean to Europe and is studying new measures to implement. It has improved the legal framework and strengthened the role of border control agencies and coastguards. Other measures include support to international organizations present in African countries bordering the Mediterranean and aid to local NGOs (i.e. SOS Mediterranean, European Association of Rescue at Sea, Doctors Without Borders, Save the Children and Sea Eye, among others) to prevent the smuggling of migrants. In addition, the European Union is striving to enable the return of migrants, especially those who do not need international protection.

However, Member States have not managed to reach a consensus on how to deal with this issue and are far from having reached a common answer that will suit all. This is especially true, of inter alia interim measures taken in the field of international protection for Italy and Greece (Council Decision-EU, 2015a), creating a European Refugee Relocation Scheme. Defended by Italy and Germany but contested by other countries such as Hungary and Slovakia (CJUE, 2017), this mechanism operated from 25 September 2015 to 26 September 2017 (Council Decision-EU, 2015b).

The characteristics of this EU response to the migration crisis in the Mediterranean (A) needs to be clarified and the role of European monitoring agencies in guaranteeing human rights must be understood in order to be able to identify the elements of a more humanitarian action by the European Union (B).
(A) The European Union’s response to the migration crisis in the Mediterranean Sea

According to the Treaty on the Functioning of the European Union (TFEU),

‘in the event of one or more Member States being in an emergency situation characterized by a sudden influx of third-country nationals, the Council, on a proposal from the Commission may adopt provisional measures for the benefit of the Member State(s) concerned. He shall act after consulting the European Parliament’ (TFUE. Art. 78, paragraph 3).

However, the migration crisis that hit Europe between 2014 and 2015 left many people clearly in need of international protection (CJUE, Press. 2017). In response to this situation, in 2015 the Council of the European Union adopted Decision 1601 (Council Decision-EU, 2015a) to better manage the massive influx of migrants. This decision provided for the relocation of refugees over a period of two years, thus relieving the Member States receiving the most migrants; namely Italy and Greece. However, Slovakia and Hungary, like the Czech Republic and Romania, supported by Poland, voted against the adoption of this decision while Finland abstained. From that moment on began one of the worst periods of internal political instability in the European Union which led some EU Member States to speak out against its humanitarian values.

Indeed, Slovakia and Hungary asked the CJEU to annul Decision 1601 on two grounds. In support of their action, these Member States argued that “the adoption of the decision was vitiated by errors of a procedural nature or arising from the choice of an inappropriate legal basis” and that this decision was “neither a suitable response to the migrant crisis nor necessary for that purpose”. It should be noted that during the proceedings before the Court, Poland intervened in favour of Slovakia and Hungary. Belgium, Germany, Greece, France, Italy, Luxembourg and Sweden and the Commission intervened in support of the Council.

Slovakia and Hungary argued that an appropriate legislative procedure under the TFEU should have been applied because its Article 78(3) provides for consultation of the European Parliament when a measure based on that provision is adopted. However, the CJEU rejected these appeals in their entirety (CJUE, Joined Cases C-643/15 and C-647/15. (2005).

The judges held that since the requirements of Article 78 are applicable only for legislative acts and since the contested decision was a non-legislative act, its adoption was not subject to parliamentary consultation (CJUE, Press. 2017).
In practice, the European Refugee Relocation System has not been highly effective. Council Decision (Council Decision-EU, 2015a) aimed to relocate, on a voluntary basis, 40,000 people based on an estimation of the number of migrants. However, in July and August 2015, Europe experienced an unprecedented influx of migrants. In September 2015, the European Commission proposed the relocation over two years of 120,000 people to Italy and Greece. Finally Italy received 30,755 and Greece only has been received 7,475, asylum applications in 2015 (European Commission, 2016). The results are disappointing. In total, less than 28,000 people were transferred. Two years on, no migrant was relocated to Hungary although 1,300 migrants had been expected to. Slovakia, welcomed 16 migrants compared to the 800 expected at first.

The CJEU pointed out (CJEU, press. N° 91, 2017) that the low number of relocations carried out pursuant to Decision 2015/1523 (Council Decision-EU, 2015b) was due to a combination of factors which the Council could not foresee at the time of the adoption, including the “lack of cooperation” of some Member States.

(B) The European Union towards a more humanitarian maritime action

Following Artis Pabrik (2016) “the European Union needs safer, better managed external borders and thus the European Border and Coast Guard as soon as possible”. Anyhow, the key question here is how to coordinate the management of the external borders of the European Union to fight against the trafficking of people, while respecting human rights?

Since its establishment, FRONTEX has been criticized for its role and responsibility for the violation of fundamental rights (Council Regulation – EC, 2004). The migration crises are even more important in Europe than on the other side of the European maritime borders. The problem has been accentuated for lack of real cooperation with the European Union. In 2012, for example, the CJEU (2012) highlighted that “the arrest and removal of apprehended persons constituted a breach of the fundamental rights of the persons concerned”. Delicate issues of foreign policy, human rights and fundamental rights should not be forgotten.

For example, on 10 August 2017, Libya initiated the creation of its Search and Rescue Zone (SAR) beyond 12 nautical miles from its territorial waters. The breadth of territorial waters is governed by International Law (UNCLOS, Art 3, 1982). The SAR areas are governed by the 1979 Hamburg Convention. Due to the lack to coordinating measures of body, Libya had never declared a SAR zone.
Remember that the SAR convention says that he is obliged to land the refugees in a safe place as soon as possible (Chaumette, 2018b).

Subsequently, the Libyan authorities were banned in the SAR zone declared by Libya without prior authorization from the same Libyan authorities. After this measure, almost all humanitarian organizations working in the Mediterranean Sea announced the suspension of their operations. It is possible to deplore a misappropriation of the SAR Convention (Chaumette, P. 2017).

In June 2015, the EU finally launched EU NAVFOR MED and Operation Sofia to dismantle the network of migrant traffickers and smugglers, and prevent loss of life at sea adding to operations Triton and Poseidon conducted by FRONTEX. On 9 October 2015, the United Nations Security Council adopted Resolution 2240(2015), authorizing Member States to seize vessels that were confirmed as being used for migrant smuggling or human trafficking.

Finally, the European agency FRONTEX officially launched on 1st February 2018 operation Themis in the central Mediterranean and the Adriatic (EU News 20/2018). Operation Themis replaced operation Triton and paralleled the conduct of Operation EUNAVFOR Sophia which has a mandate to fight against human trafficking in Libya (Frontex, 2018). Anyway, no technical cooperation was changed. It was triggered by a development policy that encompasses the activities of developing countries.

Member States must be able to cooperate at an operational level with other Member States or third countries at external borders, including in law enforcement operations. Cooperation is compatible with the actions of FRONTEX.

Conclusion

The Solid Principles to the Solid Union in the European Union are indispensable for the survival of its structure. Today more than ever, the international social reality requires collective and collaborative action by the Member States in order to meet the European Union’s challenges.

It must be ensured that the promotion of human rights is a responsibility of the European Union and its Member States undertake as a whole and that only comprehensive, coordinated and coherent action can ensure progress in this area.

Every tragedy in the Mediterranean Sea, as bloody as that narrated by the four survivors of the 1988 shipwreck in Spain, highlights the need for effective legal and political responses applicable on both sides of the Mediterranean. Fight against traffic people, illegal migration and against poverty go hand in hand.
The European Union’s response must take the form not only of legal, institutional and operational mechanisms for migrants to Europe; but also of a more technical cooperation seeking to guarantee peace in the countries of origin of the migrants. It is time for the elaboration and implementation of an effective European strategy with the aim to better supervise collaborative work between all EU countries with countries that are undergoing crises that cause massive displacements of people. All in the name of respect for the founding principles of the European Union but most of all to ensure respect for human rights as a major, universal and collective responsibility.

References


**International Treaties and Conventions**


**Jurisprudence**


