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ANALES de DERECHO

Maritime borders in the Central Mediterranean

Search and Rescue and access to asylum

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Fronteras Marítimas en el Mediterráneo Central

Resumen

El artículo sostiene que la frontera para los migrantes en el Mediterráneo Central sólo puede identificarse entrelazando las disposiciones del derecho marítimo internacional y las normas humanitarias internacionales, llegando a la conclusión de que la frontera se desplaza a bordo de las embarcaciones que realizan operaciones de búsqueda y salvamento (SAR), independientemente de su posición en el mapa y de las fronteras oficiales creadas por los Tratados Internacionales. Al poner de relieve la discrepancia entre las tendencias políticas/operativas restrictivas y el compromiso jurídico en materia de búsqueda y salvamento y fronteras marítimas, este artículo demuestra cómo la jurisprudencia europea de derechos humanos en materia de búsqueda y salvamento y de no devolución configuró la respuesta europea en el mar y determinó el desplazamiento de las fronteras marítimas a bordo de las embarcaciones que realizan operaciones de rescate o interceptación. Circunstancia que explica la criminalización de las ONG SAR, las cuales se instituyen en puestos fronterizos no deseados en el mar.

Palabras clave: *Search and Rescue, Mediterráneo central, migración, fronteras, externalización de fronteras de la UE.*

"Maritime borders in the Central Mediterranean"

Abstract

The article argues that the border for migrants in the Central Mediterranean can only be identified by intertwining provisions of international maritime law and international humanitarian norms to find that the border is shifted on board of the boats that perform Search and Rescue (SAR) or Interdiction Operations regardless of their position on the map and of the official borders created by International Treaties. By highlighting the discrepancy between the restrictive political/operational trends and the legal commitment towards search and rescue and maritime borders, this article demonstrates how European human rights jurisprudence on search and rescue and non-refoulement shaped the European response at sea and determined the shifting of maritime borders on board of the boats performing rescues or interceptions. As a consequence, this explains the criminalization of SAR NGOs, which become unwanted border outposts at Sea.

Keywords*:* Search and Rescue, Central Mediterranean, Migration, Shifting borders, EU border externalization.

I. INTRODUCTION

On the night between the 5th and the 6th of November 2017, a rubber boat left Libya carrying around 150 people.[1] They had managed to send an SOS to the Italian Maritime Rescue Coordination Center (MRCC), which was forwarded to the Sea Watch 3 (SW3) at 5:53 AM. It was around 6 AM when the Italian authorities were able to identify the exact position of the boat in distress and communicated it to the NGO boat Sea Watch 3, instructing them to proceed with caution as the Libyan Coast Guard (LCG) would have been there as well.[2]

Once on site, the NGO started recovering people from the water, while the Libyan Coast guard collected people from the boat. Unhappy with the NGO's intervention, the Libyan Coast Guard started throwing objects towards the RHIB[3] drivers of Sea-Watch to force them to move away and hinder the operation. Gennaro Giudetti, interpreter and rescuer on board the Sea Watch 3 at the time of the incident says: "The Libyans started throwing hard life rinks and potatoes at us. In the meantime, others were beating people with a rope so they would not try to jump towards us from the deck. I was yelling in Arabic: please stop, it's haram, it's a sin. They yelled back to stay away because it was their operation."[4] One of the rescued people on board the Libyan vessel jumped overboard in a desperate attempt to reach safety, but as he was jumping, the vessel departed at full speed, forcing him to hang onto the outside ladder of the Libyan vessel. Only after the radio intervention of an Italian military helicopter, the Libyan boat finally decreased speed, brought the man back on board, and left. The LCG faded into the distance with 47

[1] Forensic Architecture and Forensic Oceanography, "Sea Watch Vs The Libyan Coastguard ← Forensic Architecture Investigation," 2018, https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard.

[2] Ibid.

[3] RHIB stands for Rigid Hull Inflatable Boat and it's a light weight and high performance type of boat generally used in rescue operations.

[4] Giudetti G., Interview, conducted by Isabella Trombetta, 2020.

people on board.[5] According to reconstructions in April 2018, upon arrival in Libya, the 47 people were held captive in Tripoli's Tajura detention center for one month in cells with hundreds of prisoners and given scarce food and water. While some of the survivors were released and deported to their countries of origin, others were sold to another captor. The other 59 people that had left Tripoli with them on November 5th 2017, but instead were rescued by the Sea-Watch crew, were brought to Italy the following day, where they could apply for asylum.[6]

In the same Search and Rescue Operation at the same coordinates in international waters, the race to recover people between the Sea-Watch crew and the Libyan officials turned into a race to cross the European border or the Libyan one. "In this moment, the distance between Africa and Europe was only as far apart as the Libyan Coast Guard and the Sea-Watch vessel."[7]

Five years since the SW3 incident, and at the decade mark from the first disastrous shipwreck off the coast of Lampedusa in October 2013, the toll in the Central Mediterranean counts over 20 thousand deaths and disappearances and approximately 100 thousand people intercepted and sent back to Libyan detention centers, making it the deadliest migratory maritime route in the world.[8] These numbers were accompanied on the one hand by an increasingly distanced approach to Search and Rescue (SAR) activities by EU maritime authorities and the criminalization of SAR NGOs, and on the other, by a growing body of European and national jurisprudence that protects the rights of people rescued at sea.

In the paragraphs that follow, the article will pose the question: where are maritime borders in the Central Mediterranean for migrants trying to reach Europe? The complex interactions of international maritime law regulations analyzed ahead will show where the border would be for migrants as intended by the States through an analysis of the main rules of international maritime law: the division of waters according to the Montego Bay

[5] Krüger, J., "Clarification on the Incident of November 6th • Sea-Watch e.V.," Sea-Watch e.V., November 7, 2017, https://sea-watch.org/en/clarification-on-the-incident-of-november-6th/.

[6] Forensic Architecture and Forensic Oceanography, "Sea Watch Vs The Libyan Coastguard ← Forensic Architecture Investigation."

[7] Forensic Architecture and Forensic Oceanography. Minute 15.50.

[8] Fargues, "Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence" (IOM Publications, 2017), https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

treaty and according to the SAR Convention, as well as the principles of Port of Safety and Disembarkation following a SAR or a Migrant Interception Operation. Further on, the paper will continue explaining how the border can only be identified by intertwining provisions of international maritime law and humanitarian norms[9] to find that the border is shifted on board of the boats that perform SAR or Interdiction Operations regardless of their position on the map. By highlighting the discrepancy between the restrictive political/operational trends and the legal commitment towards search and rescue and maritime borders, this article demonstrates how European human rights jurisprudence on search and rescue and non-refoulement shaped the European Union's response at sea and determined the shifting of maritime borders on board of the boats performing rescues or interceptions.

The European political debate around borders has focused solely around territorial waters and the disembarkation of rescued people on Italian or European territory, taking into account only the traditional identification of maritime borders with the line dividing territorial waters. But, while the act of disembarkation of people rescued at sea evokes a literal border crossing and became synonymous in the public discourse with the acceptance of migrants into the disembarkation country and into Europe, the research shows that it is the rescue itself that binds States to respect the principles of international law. The interconnection of international maritime law and asylum and human rights provisions creates a chain of obligations for States that starts on board of the boat that performs the rescue operation. According to international law and to the decisions of European courts, a rescue can only be concluded with disembarkation in a place of safety (see Rackete cases) and the principle of non-refoulement is applied extraterritorially (see *Hirsi v. Jaama and Others*), therefore moving the actual border-crossing on board of the rescuing boat.

Building on different bodies of literature and shifting the focus of the analysis to the sea, this original conception of borders in the Mediterranean Sea opens new possibilities to interpret State and non-state power dynamics at sea, which ultimately shape the maritime shifting border. A renewed interpretation of maritime borders explains the growing absence of European States from the high seas, and sheds a new light on the

[9] With the term "humanitarian norms" the article groups together principles of International Refugee Law (IRL) and International Human Rights Law (IHRL) insofar as they are guided by the spirit of humanitarian protection in situations of distress.

policy choices of the European Union and its Member States. It also explains the criminalization of SAR NGOs, since according to this new border interpretation, their boats become uncomfortable border outposts for European States.

II. WHERE ARE MARITIME BORDERS?

There is no internationally accepted definition of migration, but no matter what definition one prefers adopting, migration always implies the crossing of a border, a line on a map. Therefore in order to study migration it is fundamental to understand the dynamics that come from the power geometries created by the drawing of these "lines".[10] Juxtaposing the concepts of borders and sea at the same time is almost an oxymoron. "From the Great Wall of China to the Berlin Wall, fortified manifestations of the border have long served as a powerful symbol of sovereignty, real and imagined […] The remarkable development of recent years is that 'our gates' no longer stand fixed at the country's territorial edges. The border itself has become a moving barrier, an unmoored legal construct".[11] Bordering practices, that are in constant motion, generate and define space[12], which is delineated by the human attribution of a symbolic meaning to the space.[13]

1. UNCLOS

The most notable attempt of the international community to come together to draw the lines to cross was the 1982 Montego Bay Treaty (UNCLOS) which divides marine areas into five zones with different legal status: Internal Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone (EEZ) and the High Seas. It also provides specific rights and obligations tied to the zones. International maritime law establishes that the waters up to 12 nm (22 km ca) from the baseline of a coastal state are considered 'territorial

[10] Durand, J, and Massey, D, eds., *Crossing the Border : Research from the Mexican Migration Project* (New York: Russell Sage Foundation, 2006), https://www.si.edu/object/siris_sil_796241; Doreen Massey, "Concepts of Space and Power in Theory and in Political Practice," *Documents d'Anàlisi Geogràfica*, no. 55 (2009): 15–26.

[11] Shachar, A., et al, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (Manchester, UNITED KINGDOM: Manchester University Press, 2020), http://ebookcentral.proquest.com/lib/bu/detail.action?docID=6144183.

[12] Victor Konrad, "Toward a Theory of Borders in Motion," *Journal of Borderlands Studies* 30, no. 1 (January 2, 2015): 1–17, https://doi.org/10.1080/08865655.2015.1008387.

[13] Cutitta, P. (2006). Points and Lines: A Topography of Borders in the Global Space. Ephemera, Global Conflicts. Theory & Politics in Organization, 6(1), 27-39. Retrieved from http://www.ephemerajournal.org/sites/default/files/6-1cuttitta.pdf

waters', and consequently should be understood as part of the territory of a State on which national sovereignty and national jurisdiction are applied, as according to art. 2 of UNCLOS (Figure 1). From a legal point of view, this is the only part of the sea on which states can exercise full sovereignty. In fact, normally, the most contentious areas of the sea are formed by the contiguous zone and the high seas, especially because of their vague definition and their complex legal characteristics.

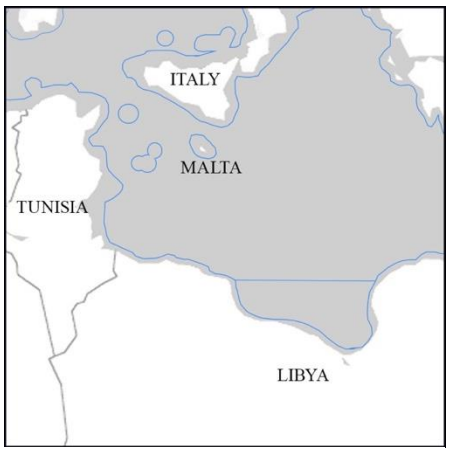

Figure 1Map of the division of waters in the Mediterranean Sea according to UNCLOS

At a first glance then, the response to the research question is that "the line to cross" at sea is the state line, meaning the one defining the territorial waters of a State. Yet, while this might be true for commercial ships or cruise travelers, in the context of irregular migration in the Central Mediterranean route, it is rare for vessels to be able to cross the territorial waters of another state and make it to shore before sinking or encountering other boats who could offer assistance or intercept them.

It is, in fact, an essential duty for all states and shipmasters to render assistance to anyone in distress at sea. This duty is established by 1979 SAR Convention, article 2.1.10 stating that:

> "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."

In the same way, UNCLOS, article 98 also states that:

> "1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to any person found at sea in danger of being lost;
>
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;"

While UNCLOS refers only to the obligation of States, the duty to rescue applies both to States and to masters of ships, as expressed by Article 10(1), of the International

Convention on Salvage, duty provided also by Regulation 33.1 of the International Convention for the Safety of Life at Sea (also known as SOLAS Convention).

The definition of distress in this case is crucial. SAR Convention defines distress as "a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance". Factors that can be taken into consideration to determine distress, under EU Law, are for instance if the vessel is unseaworthy, the number of passengers on board, the availability of supplies, qualified crew and equipment, the weather and sea conditions. Other relevant factors include overcrowding, poor conditions of the vessel, or lack of necessary equipment and expertise, as well as the presence of particularly vulnerable, injured, or deceased persons (Regulation (EU) No 656/2014). So, taking into consideration the fact that almost all vessels used by migrants are unseaworthy for navigation in high waters as well as overcrowded, and lacking equipment and trained personnel, we can consider them to be in distress even before assessing the presence of health or other relevant issue.

2. Search and Rescue (SAR) Convention

Therefore, there is another set of divisions that are necessary to our argument, adding a layer to the map: the division into SAR zones or areas (Figure 2). The 1979 Convention, adopted at the Conference in Hamburg, was aimed at developing an international SAR plan to ensure efficient coordination and organization by cooperation between neighboring SAR entities throughout the world. In accordance with the Convention all coastal States must have a SAR service and must collaborate to render assistance at sea to those in need efficiently, and SAR zones or SAR regions (SRR) are areas associated with a rescue coordination center within which search and rescue services are provided. They do not give exclusive rights or obligations, but are established to ensure the provision of proper operational coordination to effectively support search and rescue services.[14] In particular, in the Mediterranean the responsibility of SAR was divided between the coastal States

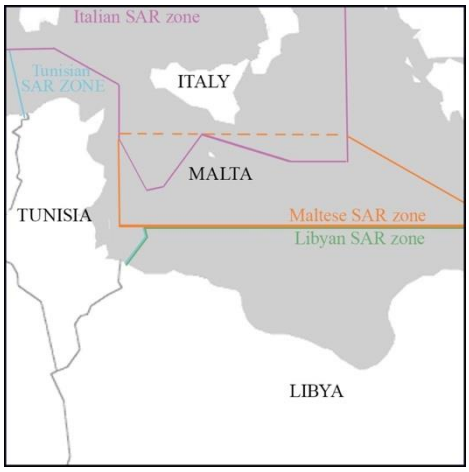

Figure 2 SAR Zones in the Central Mediterranean

[14] 1979 SAR Convention 2.1.3

during the IMO Conference (International Maritime Organization) held in Valencia in 1997.

So, for the purposes of the argument, the map of the Mediterranean borders can be redrawn according to international maritime law, by layering the UNCLOS water division and the SAR zones on the Mediterranean Sea as it appears today (Figure 3). The division into SAR zones, sub-divided what the UNCLOS provisions had left as common good, the international waters. In light of this division, specifically in the context of migrant sea crossings, did the SAR zones draw the new line to cross?

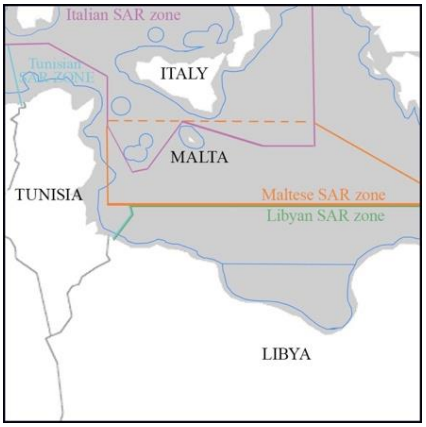

Figure 3 Map of the central Mediterranean with the division of international waters and SAR Zones

The map represents the SAR zone division in the Mediterranean today, yet this has only been true as of 2018. It was in fact only that year that the newly UN-recognized Libyan government, self-declared its new Search and rescue zone. At that point Libya had already been undergoing a second wave of civil war for 4 years, after the first wave of 2011 brought by the Arab spring. The territory of Libya was, and still is, divided between the fighting parties: the UN-backed Government of National Accord (GNA), based in the capital Tripoli and led by Fayez al-Serraj; the Libya National Army (LNA) based in Benghazi and led by general Khalifa Haftar, and other local militias that rose and flourished as the power became more fractioned. Powerful militant groups such as al-Qaeda, Ansar al-Shari and ISIS have also taken part in the local uprisings. The role of these militias had become so relevant that some analysts even speculated that there was not just one Coast Guard Corp, but two, three, or as many as the militias controlling coastal cities. None of them controlled more than a few dozen kilometers of coastline.[15] The lack of a central power able to control the Libyan territory caused as a consequence the downfall of institutions, more so of those institutions tied with national defense, such as the Coast Guard. In addition to that, "in Libya it is difficult to understand who is who. A person who belongs to a militia can alternatively deal with fighting their enemies, patrolling the sea and exercising police functions; or carry out various activities to enrich themselves, including illegal ones. The most significant case is that of Abd al-Rahman

[15] Misculin, L. (2017, August 26). *La guardia costiera libica non esiste.* Il Post. Retrieved from https://www.ilpost.it/2017/08/26/guardia-costiera-libica/

Milad head of the Coast Guard in Zawiyah" as stated by Cusumano in several interviews with the press.[16] Al-Bija (as Abd al-Rahman Milad was known) who was in fact commander of the Zawiya Coast Guard and head of militias loyal to Fayez al-Sarraj, was accused of violence against migrants.[17] On June 7, 2018, he was included by the UN in the list of persons subject to sanctions under UN Security Council Resolution 1970 (UNSC LYi.026, 2018).

The original definition of the SAR zones at paragraph 2.1.7 of the SAR Convention explicitly mentioned that "the delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States." But the scope of the ratification of the SAR treaties by Libya, and the creation of its large SAR zone in 2018 was far from the original mission of the treaties, meaning the rescue of lives at sea, and instead was directly tied to migration management. Evidence of this can be found in the statements by the European Union saying that: "Libya has ratified the SAR Convention (Hamburg 1979) [...] The declaration of the Libyan SRR clearly defines the Libyan authorities as the primary authority responsible for coordinating responses to distress situations in the designated SRR. This support has significantly increased the Libyan coast guard's SAR activity, and cooperation has been consolidated between the Libyan Coast Guard, IOM and UNHCR at points of disembarkation for registration and initial screening." (EP Question E-001793/2019).

When looking at the map of SAR events created by MSF (Figure 4), it can be noticed that most rescue/interceptions at sea occur in the international waters that span between the Italian, Maltese, Italian/Maltese contested area, and the Libyan SAR Zones, between 20 to 40 nm off the coast of Libya.

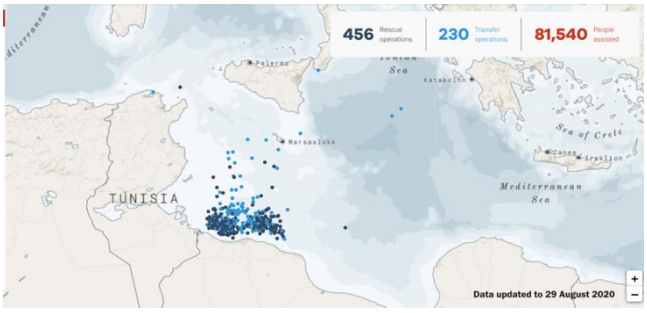

Figure 4 Map of SAR events in the Central Mediterranean - source: MSF Search and Rescue http://searchandrescue.msf.org/map.html

It could then be argued that the new SAR zone limits were definitely intended to become the line to cross for migrants in the Mediterranean, since it is the Maritime Rescue Coordination Center (MRCC) of each coastal state that

[16] Ibid.

[17] Ibid.

can best coordinate a SAR operation in its SAR zone and is the one who is supposed to assign a safe port. But the outcome of operations that happen in the same area on the map varies completely depending on who is the actor performing the rescue/interception. At the same coordinates on a map – in international waters and in the Libyan SAR Zone – and under the coordination of the same MRCC, a boat in distress could be rescued by a European or private/NGO boat and the people would be brought to Europe, or it could be intercepted by the Libyan Coast Guard and brought back to Libya with a fate of imminent detention. One of the most notable example is the aforementioned 2017 Sea Watch 3 (SW3) case, when a SAR case initiated by the Italian MRCC was assigned to the NGO boat SW3 and then passed to the newly-established Libyan Coast Guard, who rushed to the scene and violently fought the NGO crew to intercept migrants before they could be retrieved by the NGO. On site, there was a French War Ship that did not engage on the scene until much later in the process.[18] It is the perfect representation of the European borders 'going around' international waters, avoiding the first contact with the migrant boat to avoid implications and obligations dictated by treaties. By keeping their boats away, European countries keep their borders away.

III. INTERNATIONAL MARITIME LAW MEETS INTERNATIONAL HUMANITARIAN NORMS

"That of June 9th seemed like any other night rescue, although rescues are never the same. When the Aquarius arrived on the scene, the situation was critical, there were two boats to rescue and we could already count 40 people in the water. It was a moonless night, people looked like black dots without life jackets, and there was no way, despite our flashlights and thermal cameras, to understand where they were, where they were in the middle of the sea, drifting with the wind and the waves carrying them away, so we did something unusual. We turned off the engines, we started listening to the screams with our ears to try to track people down by listening to their cries and so we recovered 40 of them.

The next day was the 10th of June, I was on deck bringing assistance to the people. There were 630 of them, so the ship was really crowded. And at a certain point our coordinator calls us to have a meeting, he takes us to the canteen - which is the place on

[18] Forensic Architecture and Forensic Oceanography, "Sea Watch Vs The Libyan Coastguard ← Forensic Architecture Investigation."

the ship where we operators can have some privacy - and he tells us that something is happening, that the newspapers have started tweeting, writing, telling us that the ports would be closed and that we would not arrive in Italy. And it was really a disorienting moment because it seemed like a joke... a game... because we know that the international rules are there. The international rules say that no, you have to go to the nearest safe port -- the nearest safe place." - Alessandro Porro, SOS MEDITERRANEE rescuer on board the Aquarius and president of SOS MEDITERRANEE Italy on June 14, 2019 recalling the events of June 2018 (SOS MEDITERRANEE, 2019)

The Port of Safety, or more accurately Place of Safety,[19] has been a hot topic in the European debate surrounding migration, especially since the Libyan Coast Guard has started assigning Tripoli as a one. The act of disembarkation of people rescued at sea has become synonymous with the acceptance of migrants into the disembarkation country and into Europe, which evokes a sense of a literal border crossing from the sea to the land in both the political debate and public opinion. This, therefore, led to the so-called 'closed port policy' of several European countries, following the example set by Italy with the Decreto Sicurezza bis. Yet, because of the obligations established by both international maritime and humanitarian laws, and in light of the *Hirsi Jamaa and Others v. Italy* and the *Rackete* cases,[20] the research shows that it is the rescue itself that binds States to respect the principles of international law. These obligations include disembarkation in a safe place and non-refoulement, which cannot be granted at sea. Consequently, the borders of Europe cannot be found in the territorial waters of its member states nor at the moment of disembarkation, but on the boats that rescue migrants in the Central Mediterranean route themselves.

While the duty to render assistance at sea for shipmasters, and the duty to coordinate rescues for coastal states are both clearly prescribed by UNCLOS (Art. 98), the duty to disembark people in a Place of Safety is only specified in the 1979 SAR Convention. In Annex 1.3.2 to the SAR Convention, the Place of Safety is defined as "a location where rescue operations are considered to terminate, and where the rescued persons' safety of

[19] Place of Safety (PoS) is the terminology used in the international documents, in which it is clearly stated that it is not necessarily a port. Yet, in the European debate over disembarkation, Place of Safety and Port of Safety have been used interchangeably.

[20] The term Rackete case / cases refers both to the European Court of Human Rights Rackete and Others v. Italy ECHR 240 (2019) 25.06.2019 and the legal proceedings against Carola Rackete in the Italian jurisdiction.

life is no longer threatened; basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the rescued persons' next or final destination." (ANNEX 34 RESOLUTION MSC.167(78)). Yet, neither the SAR Convention nor any other international instrument elaborates on the criteria for disembarkation, which leaves the debate open on whether the port should be the one geographically closest to the place of the shipwreck, the next port of call of the ship operating the rescue, a port within the SAR region of the coastal State coordinating the operation, or the safest port in terms of human rights. [21]

In light of the international political debate, can Tripoli, or any other port in Libya, be considered a Place of Safety? While the criteria for the designation of a Place of Safety of disembarkation are not identified by any treaty, it can be safely stated that Libyan ports cannot be considered safe under the definition given by the SAR convention. In September 2018, the UN High Commissioner for Refugees (UNHCR) had published a report stating that:

"[i]n the context of rescue at sea and in line with international maritime law, disembarkation is to occur in a predictable manner in a place of safety and in conditions that uphold respect for the human rights of those who are rescued, including adherence to the principle of non-refoulement. When asylum seekers, refugees and migrants are rescued at sea, including by military and commercial vessels, 'the need to avoid disembarkation in territories where [their] lives and freedoms (…) would be threatened' is relevant in determining what constitutes a place of safety. In light of the volatile security situation in general and the particular protection risks for third-country nationals (including detention in substandard conditions, and reports of serious abuses against asylum-seekers, refugees and migrants), UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea"[22]

[21] Moreno-Lax, V., and Efthymios Papastavridis, eds., *"Boat Refugees" and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff, 2016), https://brill.com/view/title/32131.

[22] United Nations High Commissioner for Refugees, 2018, point 42, page 22

Several other reports by Human Rights Watch[23], the UN Support Mission in Libya, and the UN Human Rights office[24] denounce the unstable situation involving human rights abuses in Libya. Furthermore, even if it is up to the coordination center to indicate a safe port to disembark, how could a Captain, in good faith and to the best of their knowledge, consider Libya as a safe place if the people on board had reported hardship and expressed that they feared for their lives if brought back?

1. The Rackete case

In June 2019, the NGO rescue boat Sea-Watch 3, was at the center of a notable dispute over the disembarkation of people rescued in the Central Mediterranean. On June 12, 2019 the Sea-Watch 3 rescued 53 people from a rubber boat about 47 nautical miles off the coasts of Zawiya [25], in the international waters of the Libyan SAR zone. Having refused to bring the people that had just been rescued to the port of Tripoli, the ship set course North towards the Italian coasts waiting for the assignment of a Place of Safety in Europe. On June 15th, the Italian Coast Guard approached the boat in international waters and boarded it for a medical assessment of the people that had been rescued, after which 10 of them were taken ashore due to poor health conditions. That same day marked a turning point in SAR cooperation and management in the Mediterranean, as the Italian Minister of the Interior, Matteo Salvini, signed what became known as the "Decreto Sicurezza bis" - the second security decree - which attributed the power to limit or prohibit the entry, transit, or stopping of ships in Italy's territorial sea[26] to the Minister of the Interior[27] for reasons of public order and safety. In revising the Consolidated Law on Immigration, the decree instituted an administrative fine of between 10,000 and 50,000

[23]Human Rights Watch (2019) *No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya.* Retrieved at https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies- contribute-abuse-migrants-libya#_ftn53; Human Rights Watch (2017). *EU: Shifting Rescues to Libya Risks Lives*. Retrieved at https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives.

[24] United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights (2018) "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya". Retrieved at: https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf

[25] Sea-Watch, "Sea-Watch Demands Disembarkation of 43 Survivors, on World Refugee Day Tomorrow • Sea-Watch e.V.," Sea-Watch e.V., 2019, https://sea-watch.org/en/sea-watch-demands-disembarkation-43-survivors-world-refugee-day/.

[26] With the exception of military vessels (which also includes military warships) and ships in non-commercial government service.

[27] Restrictive or impeding measures must be adopted in agreement with the Minister of Defense and the Minister of Infrastructure and Transport, in accordance with their respective responsibilities, and the President of the Council of Ministers must be informed.

euros, the possibility of criminal accusations for the ship's captain, and the immediate precautionary seizure of the ship in the event of non-compliance with the prohibitions and limitations imposed by the Minister.

On the night of June 16th, an Italian Guardia di Finanza vessel approached the Sea-Watch 3 again to notify its crew of the new rules. During their standoff, the Sea-Watch 3 had appealed to the European Court of Human Rights (ECHR) for an urgent intervention, which the court denied, saying that: "The European Court of Human Rights has today decided not to indicate to the Italian Government the interim measure requested by the applicants in the case of *Rackete and Others v. Italy* (application no. 32969/19), which would have required that they be allowed to disembark in Italy from the ship Sea-Watch 3. The Court also indicated to the Italian Government that it is relying on the Italian authorities to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health. Under Rule 39 of the Rules of Court, the Court may indicate interim measures to any State Party to the European Convention on Human Rights. Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm" (ECHR 240 (2019) 25.06.2019).

On June 26th, 2019, after a 2-week standoff and the rejection from the European Court of Human Rights, Carola Rakete, the captain of the Sea-Watch 3, declared her intention to break the imposed blockade and entered Italian territorial waters, arriving late in the evening a few miles from the port of Lampedusa. The Italian Coast Guard denied their request for disembarkation again. Sea Watch 3 stated: "No European institution is willing to take responsibility and to uphold human dignity at Europe's border in the Mediterranean. This is why we have to take the responsibility ourselves. We enter Italian waters as there are no other options left to ensure the safety of our guests whose basic rights have been violated for long enough. [...] The guarantee of human rights must not be conditional to a passport or to any EU negotiations, they have to be indivisible" [28]. In the night between June 28th and 29th, 2019, the Sea-Watch 3 entered the port of Lampedusa without permission. The rescued people were disembarked, the ship was seized, and Carola Rackete was arrested upon her disembarkation. She was accused of 1) Aiding and abetting illegal immigration, according to article 12 of the Italian Legislative

[28] Sea-Watch, "Sea-Watch Demands Disembarkation of 43 Survivors, on World Refugee Day Tomorrow Sea-Watch e.V."

Decree 186/1998; 2) Prohibition of entry imposed by the Minister of the Interior, according to the possibility provided for by the "Decreto Sicurezza Bis".[29]

There are two aspects of the *Rackete* Case that make it exemplary for SAR management in the Central Mediterranean. The first is the approval of the Italian Decreto Sicurezza bis, which formalized Italy's unwillingness to be forced to assign disembarkation ports despite the fact that at that point the Libyan MRCC was the one coordinating most rescues in the Central Mediterranean and that the Maltese RCC would not respond to port requests. By declaring its ports closed, Italy emphasized its territorial sovereignty and declared the closure of its borders, which it then reinforced by seizing the Sea-Watch 3 and arresting Carola Rackete. People rescued at sea in international waters would no longer be able to disembark in Italy and would not be able to 'cross the line' of the border at the moment of disembarkation, this time by law. The second aspect, which introduces the next part of the argument, is the Preliminary Judge's decision not to confirm Rackete's arrest because she had in fact, not committed a crime, but complied with her international obligations.

The introduction of the Ordinanza - the order - of the Judge sets the stage for a very strong position, stating that: "the actions attributed to Carola Rackete cannot be examined alone, but need to be looked at in light of all that precede it, which is rescue at sea and the duties that it entails. In particular, the [Italian] Constitution, the international conventions, customary law, and the general principles recognized by the United Nations set specific obligations for the Captains of the ships and the States for what concerns rescue at sea" (Ordinanza del Giudice per le indagini preliminari (G.I.P.) di Agrigento, 2 luglio 2019, proc. n. 2592/19 RG.GIP). In addition to the SOLAS and SAR Convention analyzed in section II 2 *supra*, the Judge pointed out that Art. 1158 of the Italian Navigation Code, which prescribes criminal sanctions when a national or foreign ship does not comply with the obligations to rescue at sea, and Art. 10 ter of the Decreto legislativo 286/98 (ITA) which states that foreign nationals who are found irregularly crossing the borders, or coming into the national territory following rescues at sea, are to be sent to specific crisis points for first aid, to have their photos and fingerprints taken, and to be informed of the system of international protection (Decreto legge 30 ott. 1995 n. 451).

[29] Procura della Repubblica presso il Tribunale di Agrigento. Richiesta di Convalida dell'arresto e di misura cautelare - artt 390 c.c.p. , 122 D.Lv. 271/89. Retrieved at https://www.giurisprudenzapenale.com/wp-content/uploads/2019/07/Richiesta-convalida-arresto-RACKETE.pdf

According to the Judge, the declarations made by the Captain regarding the conditions of the SAR operation of June 12, 2019 did, in fact, carry obligations to rescue (Art. 98.1 UNCLOS): "the rubber boat was in bad conditions, nobody was wearing a life jacket, they had no fuel to reach any place, no nautical experience and no crew" (Ordinanza del G.i.p. di Agrigento, 2 luglio 2019, proc. n. 2592/19 RG. GIP). The court found that Rackete's decision to refuse to treat Tripoli as a safe port was conformant to the recommendations of the Human Rights Commissioner of the Council of Europe and to recent rulings (Ruling of the GUP of Trapani n. 23 of May 2019). Once the rescued people were safe on board, the Captain had asked the MRCC of Libya for a port of safety, as well as the RCC of Holland since it is the flag of the ship, and the RCC's of Italy and Malta, since they were the closest safe ports. The Captain was told to bring people to the port of Tripoli. Other than Tripoli, the ports in Malta were excluded because they were too far, and Tunisian ports were excluded because she considered that they were not safe according to a report by Amnesty International and due to the recent situation of a merchant ship that remained at sea for 14 days without the possibility to enter the port. Furthermore, Malta did not accept the modifications to the SAR Conventions of 2004, therefore, the decision of Carola Rackete to enter Italian waters despite having been denied entrance is supported, according to the Ordinanza, by art. 18 of UNCLOS, which authorizes passage and stopping for a foreign ship in territorial waters if necessary to give assistance to people, ships, or aircrafts in danger. The docking of Sea Watch 3 is conformant to art. 10 ter of decreto legislativo 286/98, which states that foreign nationals who are caught irregularly crossing the borders, or coming into the national territory following rescues at sea are to be conducted to specific crisis points for first aid. Finally, according to the Judge's Ordinanza, because of the higher rank of the international conventions and laws at issue, the Ministerial Decree calling for 'closed ports' or the Ministerial provisions of June 15, 2019 of the Ministries of the Interior, Defense, and Infrastructure which denied entrance to the ports, created no obligations that the Captain had to follow.

2. Access to asylum and non-refoulement at sea

As analyzed earlier, international treaties of maritime law do not necessarily include specific rules related to human rights or human well-being, but rather general provisions and principles. For instance, article 146 of UNCLOS concerning the respect of human life, states that "with respect to activities in the Area, necessary measures shall be taken

to ensure effective protection of human life. To this end the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties" (Art. 146 UNCLOS).

In the same way, international documents regulating the respect of human rights, the ocean is rarely mentioned. The UN Human Rights Commission -preceding body to the current UN Human Rights Council- has released documents on how to protect the rights of those at international borders, but relatively little attention has been paid to the rights of those on the open sea. This has led to gaps in international protection where trafficking and human smuggling is able to exist. But, as highlighted by the preliminary judge in the Rackete case: "the actions [...] need to be looked at in light of all that precede it, which is rescue at sea and the duties that it entails. In particular, the [Italian] Constitution, the international conventions, customary law, and the general principles recognized by the United Nations set specific obligations for the Captains of the ships and the States for what concerns rescue at sea" (Ordinanza del G.i.p. di Agrigento, 2 luglio 2019, proc. n. 2592/19 RG. GIP). Such obligations do not merely stop at the provisions of the international maritime laws, but in the case of migration at sea, they intersect with International refugee and humanitarian norms. Long before the international debate on the disembarkation of rescued people, which is at the heart of the cases studied in this paragraph, in 2014 the European Parliament and Council Regulation No 656/2014 had stated that the identification of a Place of Safety, in addition to ensuring the respect for basic human needs, should be made "taking into account the protection of their fundamental rights in compliance with the principle of *non-refoulement*" (art. 2 (12), EU Regulation No 656/2014).

The principle of non-refoulement is the backbone of international refugee protection, and it is prescribed by Article 33 of the 1951 Geneva Convention on the Status of Refugees, stating that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion". According to customary interpretation of this article,[30] the protection against refoulement can be applied to any person who *is* a

[30] Article I(1) of the 1967 Protocol provides that the States Party to the Protocol apply Articles 2–34 of the 1951 Convention, and as explored in previous sections, the term "refugee" refers to a person "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to

refugee. Because the determination of refugee status is declaratory in nature, a person does not *become* a refugee upon their designation as such by an institution, but instead their status of being a refugee is *recognized* by institutions [31]. It follows that the principle of non-refoulement should be applied to asylum seekers as well, as they may be not-yet-recognized refugees and therefore should not be returned or expelled pending a final response to their asylum request.

The principle of non-refoulement constitutes an essential and non-derogable component of international refugee law, and can be found in several international documents of various nature. For instance, it is protected by the 1966 International Covenant on Civil and Political Rights (ICCPR), and by the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 3 clearly prohibits the removal of a person to a country where he or she is believed to be possibly subject to torture. That is particularly relevant in the case of pushbacks to Libya, where there have been numerous organizations denouncing torture and other crimes, as explored in previous sections. The principle is also protected by regional documents such as in the 1969 Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa[32], and in the 1969 American Convention on Human Rights[33]. The European Court of Human Rights has held that non refoulement is an obligation according to Article 3 of the ECHR when there is a risk of

such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it" as defined in the Convention.

[31] UNHCR, "Note on Determination of Refugee Status under International Instruments," 1977, https://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html.

[32] It entered into force in 1974 and in Article II(3) we can find the reinforcement of the principle of non-refoulement: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order]."

[33] Also referred to as "1978 ACHR", the convention states in Article 22(8) that "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

exposure to torture, inhuman or degrading treatment or punishment.[34] Finally, the principle of non-rrefoulemnt can also be foud in other important non-binding international texts such as the Declaration on Territorial Asylum adopted by the United Nations General Assembly in 1967[35], and the 1984 Cartagena Declaration on Refugees[36].

The international debate has focused deeply on the meaning and interpretation of the word '*refouler'*, which has been translated in English with words such as 'repulse', 'repel' or 'drive back'.[37] Whether or not the concept of non-refoulement is applicable to extraterritorial instances, and therefore in case of rescues in the high seas, is still a topic of discussion.[38] According to the UNHCR, "the ordinary meaning of the terms 'return' and 'refouler' does not support an interpretation which would restrict its scope to conduct within the territory of the State concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way. A contextual analysis of Article 33 of the 1951 Convention further supports the view that the scope *ratione loci* of the non-refoulement provision in Article 33(1) is not limited to a State's territory" [39].

While the UNHCR's interpretation of the extraterritorial applicability of the principle of non-refoulement is that it is applicable "anywhere a state exercises jurisdiction" [40], the United States Supreme Court in *Sale v. Haitian Centers Council, Inc.* had set out in 1993 a contrary and controversial international example by determining that Article 33(1) of the 1951 Convention is applicable only to persons within the territory of the United States, and that the US Coast Guard ships can push back people found at sea without infringing

[34] 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," 2007, https://www.unhcr.org/4d9486929.pdf.

[35] Article 3 of the resolution reads: "No person referred to in Article 1, para. 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.".

[36] The Conclusion in section III(5) states that: "To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees…".

[37] 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."

[38] Moreno-Lax and Papastavridis, *"Boat Refugees" and Migrants at Sea*.

[39] 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."

[40] Ibid.

article 33(1) *supra*. With the aim of avoiding the arrival of Haitian migrants on its national territory, the United States set its new border and border control offshore, officializing the presence of Immigration and Naturalization Service (INS) officials on board the Coast Guard vessels to judge whether or not the asylum claims brought to their attentions by the boat people would be worth further processing. Whether or not the hearing for asylum conducted on board the Coast Guard boats is fair and respects international provisions is a different question. The right to access asylum procedures before being returned or pushed back is still an open debate, so there is no uniformity in the literature on whether undertaking status determination may be an implied obligation derived from the principle of non-refoulement, which is also something that was a deliberate omission of the drafters of the Convention to avoid the creation of a duty for States to undertake status determination [41].

Nonetheless, according to a large part of the international human rights jurisprudence, and to Justice Blackmun, who was the only justice dissenting from the *Sale* decision, the principle of non-refoulement cannot and should not be interpreted with a mere territorial application.

"When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, it pledged not to "return (refouler) a refugee in any manner whatsoever" to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return, because the opposite of 2 "within the United States" is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration."[42]

The European Court of Human Rights, in 2012, officially contrasted the exclusionary approach adopted by the US Supreme Court with the groundbreaking *Hirsi Jaama v. Italy* case, which held that human rights obligations are not tied to the national territory, but to

[41] Moreno-Lax and Papastavridis, *"Boat Refugees" and Migrants at Sea*.

[42] Sale v. Haitian Centers Council, Inc., et. al., 509 U.S. 155, 188-89 (Blackmun, J., dissenting) (1993)

the State that exercises "*de jure* and *de facto* control".[43] Therefore, people rescued or intercepted in the high seas should not be pushed back and returned to the country they are fleeing, in this instance Libya, before having had the chance to claim asylum, according to the 1951 Geneva Convention, even if the push back is done in the framework of bilateral agreements between States. Contrary to the American response to sea crossings that, following the *Sale* case, instituted asylum hearings at sea, in the Mediterranean there is no such system in place, so people need to be brought back to shore in order to have their claim heard. As explored in the previous sections, the shore where rescued people should be brought back according to international law is a Place of Safety, a safe port.

In September 2020 the UNHCR published a new version of the "Position on the designations of Libya as a safe third country and as a Place of Safety for the purpose of disembarkation following rescue at sea" which superseded and replaced the one published in September 2018, cited above. The new version added: *"…UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea. UNHCR therefore calls on States to refrain from returning to Libya any persons rescued at sea and to ensure their timely disembarkation in a place of safety. UNHCR recalls that the principle of non-refoulement applies wherever a state exercises jurisdiction, including where it exercises effective control in the context of search and rescue operations outside its territory. Where a State's coordination or involvement in a SAR operation, in view of all the relevant facts, is likely to determine the course of events, UNHCR's view is that the concerned State's negative and positive obligations under applicable international refugee and human rights law, including non-refoulement, are likely to be engaged"*[44].

In light of the analysis made so far, it is an essential obligation for shipmasters to render assistance to those in distress at sea, and it is the duty of States to have rescue coordination centers that ensure the functioning of SAR systems. It is also the coordinating state's duty to assign a Place of Safety in a swift manner, and to do so in respect of the principle of

[43] Section 81 of *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: https://www.refworld.org/cases,ECHR,4f4507942.html

[44] UNHCR, "UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea," Refworld, 2020, https://www.refworld.org/docid/5f1edee24.html.

non-refoulement. Since the application of international humanitarian norms is not tied to the geographical location but to the State that exercises "*de jure* and *de facto* control", and ship captains have discretion to refuse the Coordination Center's designation of such a place of safety, the "line to cross" becomes the deck of the very ship that is performing the rescue at sea or the interception.

IV. CONCLUSION

What is a state border if not a way to reaffirm and express the idea of sovereignty? And what is sovereignty if not the expression of the laws created by that state?[45] (Cutitta, 2006). The border, in fact, is strictly connected not so much to 'where' it is physically located but to 'which law' governs it. In the Mediterranean Sea, the border, the law enforcement of each country, is detached from its geographical demarcation and moves with each country/region on its sea outposts. International regulations and obligations are not applied to the maritime space, especially in the case of international waters, but to the country's outposts at sea. This created the opposite of the USA's 'constitution free' buffer zone. Instead, it creates a 'constitutionally charged' or more correctly an 'international law charged' buffer zone at sea on board the vessels. The line that migrants have to cross in the Mediterranean Sea is not a physical port of entry attached to a traditional physical border, but the port of entry into a space that is 'constitutionally charged', where international norms of non-refoulement and access to asylum procedure are respected. The Mediterranean border is not just a line of separation between *inside* and *outside* a country, but between the respect of international protection standards or its disregard. Therefore, in the Mediterranean the law does not just follow the shifting border (Shachar *et al*., 2020), it effectively shapes it.

One of the first rules that are taught to chess amateurs is that a good opening aims to dominate the four central squares of the board. That is because those central squares are key to controlling the game and developing a winning strategy. Historically, the game of chess has always been compared with international politics, and has been used as a metaphor to describe events, people, and places. In the (Central) Mediterranean

[45] Cutitta, P., *Points and Lines: A Topography of Borders in the Global Space. Ephemera, Global Conflicts.* Theory & Politics in Organization, 2006, 6(1), 27-39. Retrieved from http://www.ephemerajournal.org/sites/default/files/6-1cuttitta.pdf

chessboard, international waters act as the central squares and play an essential role for migration border control.

While in several cases, international waters are key for States to further their own interests and maximize their power - especially in the realm of security (Lori and Schilde, 2021) and migration control - in the case of migration in the Central Mediterranean, European States have tried to put in place strategies to avoid the international waters. The reason is that, as argued so far, the moment European vessels meet migrant boats in distress at sea they are bound to respect international obligations and therefore must carry out search and rescue of persons, and allow boats to disembark in a Place of Safety and migrants to access fair asylum procedures. Since the new EU borders are the boats that patrol the sea, the States' strategy in the Central Mediterranean chessboard is to avert international waters and avoid the encounter between migrants and their border, in a "game of chess" that has cost already thousands of lives. Throughout the years this has been achieved by a series of actions that range from the retreat of the joint EU SAR forces from the international waters, the stipulation of multilateral agreements with third countries/actors, and the strategic use of jurisdiction for discretionary power. With time, NGO boats that intervened in response to the European retreat, became uncomfortable border outposts for European States, which explains the EU State's political turn against them, focused on removing these independent pieces from the central squares of the chessboard.

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