UNIVERSITA' DEGLI STUDI DI TORINO

DIPARTIMENTO DI GIURISPRUDENZA

DOTTORATO DI RICERCA IN DIRITTI E ISTITUZIONI

CICLO XXXIII

TITOLO DELLA TESI: MIGRATION MANAGEMENT AT THE EDGES OF EUROPE: INTERACTIONS BETWEEN INTERNATIONAL AND EU LAW

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ANNI ACCADEMICI: 2017-2021

SETTORE SCIENTIFICO-DISCIPLINARE DI AFFERENZA: IUS-13

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CHAPTER 1

Introduction

1. Introduction

The Mediterranean as a space of migration traces its origins in ancient times. It has always represented a bridge between cultures, religions and science. The representation of these encounters is still visible in many cities and villages of the Mediterranean. Nonetheless, this space of migration in human history has never been the stage for such an enormous movement of people with different cultural, religious and social background as today. This emergent phenomenon questions the role of Europe, of human rights, of territory, and of security.

The so-called 'Migration Crisis' initiated in the 2014 summer when the arrivals in the Mediterranean Sea increased from 216.054 to 1. 015.078 in 2015.[1] The emergency is still going on at the moment of writing and the responses to this emergency have been often vague, opaque, and late. To understand the phenomenon of transnational migration the thesis focuses on the migration in the Central Southern Mediterranean because it is in this strip of the Mediterranean Sea that divides Europe and North Africa that from 2014 till today 17,000 human beings have lost their life.[2] The reasons for such a humanitarian crime committed by the democratic and enlightened member states of the European Union against innocent human beings are many. Indeed, identifying the causes is not an easy task because the migration phenomenon it's extremely complex and involves a large number of actors some more visible but many invisible. Yet some scholars suggest that since 1990 migration law particularly in European migration policies has seen a shift from migration control to migration management. Their hypothesis is that this shift has contributed to rendering the protection of migrants less effective.[3]

The border management strategies developed by the European Union and by the member states overlooking the Mediterranean from a legal perspective have been often designed on the cases decided by human rights courts and quasi-judicial bodies that decide between two competing tradition of political philosophy. The first is a

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[1] UNHCR Data elaborated by Fondazione Iniziative e Studi sulla Multietnicità (ISMU)

[2] Available from, https://missingmigrants.iom.int/region/mediterranean

[3] See the Research Project ''Human Costs of Border Control'' conducted by the Vrije Universiteit of Amsterdam under the supervision of Prof. Thomas Spijkerboer. For more information see, http://www.borderdeaths.org/?page_id=22

universal/inclusive framework that considers human rights as integral to the individual independently from the compliance with formal conditions set by immigration management policies. The second tradition is a statist/exclusive one that sees the state as the sole authority able to give access to its territory and to set the legal conditions to access to human rights protection.[4] The transformation of the Central Southern Mediterranean in a space of both inclusion and exclusion it's the representation of the jurisprudence developed by the European Court of Human Rights.[5] In fact, the Court adopted the territoriality-based compromise between inclusion and exclusion. In doing so, it has reinforced the idea that human rights protection is dependent from the physical presence of the would-be migrant on the territory. On the one hand, the Court has articulated an inclusive and universal principle of human rights protection. On the other hand, it has produced a new concept of territoriality by adopting the territoriality-based compromise as furthered exclusion.

To understand what are the theoretical before than the practical premises that shaped the Central Southern Mediterranean as a space of both inclusion and exclusion it is essential to identify the theoretical components from a legal philosophical perspective. What I do argue is that in the development of this compromise there has been an instrumental assemblage[6] of three concepts or components: (I) Borders; (II) Territory; (III) Human Rights. Each of these components has diverse interpretation in legal and social theory that can be instrumental for diverse purposes as in the case of border management. In fact, the assemblage of these concepts has been used instrumentally in order to transform the Central Southern Mediterranean in a space of both inclusion and exclusion depending on the political objectives of the border management policy. To see how these have been conceptualized the thesis analyses the three border management strategies that have been pursued from 2013 till 2019 in the Central Southern Mediterranean. In doing so, the project aims at identifying the consequences of the

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[4]Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392. P. 412; Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 6.

[5] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 7.

[6] Here I use the term assemblage as elaborated by sociologist Saskia Sassen. See, Sassen, S. (2008). *Territory, authority, rights: From medieval to global assemblages*. Princeton university press.

different assemblage of borders, territory, and human rights.

The three different border management strategies explored in the thesis were mostly based on a humanitarian rhetoric that presented the rescuing operations as an act of grace. The consequences of these narratives have been several, yet the main implication has been the transformation of the Central Southern Mediterranean in a space of both inclusion and exclusion.[7] The policies examined are the following: (I) the *Mare Nostrum* policies; (II) the Marco Minniti policies; (III) the Matteo Salvini policies. The aim of the thesis is to show that these border management policies have been designed around the assemblage of border, territory and human rights. While discussing the assemblage of these components it is important to consider that these components: (1) are interdependent but maintain a level of specificity; (2) have variable levels of performance.

The research will develop a theoretical part based on different social theory traditions borrowing from political philosophy, sociology, geography and law by analyzing how the concepts of border, territory and human rights have been assembled in social and legal philosophy. This part will serve as methodological background that will be applied to the three border management policies investigated that will represent the legal practical part of the thesis. In doing so, I aim to develop an analysis that is constructed around two level of analysis on the one hand, a solid and theoretically grounded understanding of the three concepts that form the normative assemblage. On the other hand, the practical application of the concepts to the three border management policies that shaped the Central Southern Mediterranean as both a space of inclusion and exclusion.

1.1. Inclusive vs. Exclusive Migration Management

The inclusive policies of migration management developed by Italy during the operation Mare Nostrum are the representation of a specific assemblage of borders, territory and human rights. In fact, to construct an inclusive management policy it is necessary to adopt a Universalist understanding of human rights protection. By inclusive policy it is meant one that gives direct access to the territory of the destination state and that considers the

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[7] Cuttitta, P. (2018). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

borders as a point of entrance to human rights protection. In doing so, the migrant shall be protected from the moment he or she is in proximity of the borders of the destination country.

Inclusion here means temporary protection while awaiting the outcome of the protection formal processes set out by the destination state. This indeed does not prefigure any kind of inclusion within the polity of the state. In fact, migrants are saved because found in distress at sea and are provided with temporary shelter and human rights protection. A universalist reading of human rights protection presupposes that the lives of the migrants in distress shall always be saved and given access to protection. Thus, inclusion policies develop what Walters (2011) calls 'humanitarian border'.[8] Yet is not always clear if the humanitarian border can give raise to exclusionary policies by depicting migrants and transit countries as facilitators of smuggling practices. In these settings, the humanitarian border materializes as a technique of government aimed at humanitarianizing migration management at European hedges.

By contrast, the Minniti exclusive and the Salvini outright exclusive management policies put in place a nuber of instruments to exclude the migrants from borders, territory and human rights protection. To do so, these follow a statist reading since borders are regarded as closed since protection is not guaranteed also if the migrant directly accesses borders. In this scenario, different national and European institutions on the one hand proclaim the importance of human rights protection. On the other hand, these institutions develop legal structures that give access to human rights protection only if some formal conditions set out by the state. Among these conditions, there is the right to not give access to borders, territory and thus human rights protection.

The exclusionary management instruments that are deployed to develop a securitized border are a specific political decision made by national and European politicians. These government techniques aim at making more difficult to reach the territories of the destination state. In these policies, migrants and NGOs are pushed towards the transit countries by (I) externalizing search and rescue operations to the Libyan coastguard or by (II) obliging NGOs to rescue and immediately to transfer

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[8] Walters, W. (2011). Foucault and frontiers. Notes on the birth of the humanitarian border. In U Bröckling, S Krasmann and T Lemke (eds) *Governmentality: Current Issues and Future Challenges*. Routledge.

migrants to the Libyan coastguards. It is important to point out that in Libya the migrants suffer inhuman treatment and tortures. In fact, according to many reports by International Organizations and NGO's Libya is not a safe port to disembark migrants.

1.2.   Research Question (s)

The thesis sheds light on the concept that come to form migration management policies. Borders, territory and human rights are the concepts that while assembled in migration management policies can design an inclusionary, exclusionary and outright exclusionary policy. To understand in detail the three concepts a genealogy of them is offered in Chapter 4. The thesis seeks to unveil the three contested concepts to show how these can be instrumentally assembled in migration management policies. The research question addressed in the first part of the thesis is the following: *To what extent migration management policies assemble the concepts of borders, territory and human rights to achieve specific policy objectives?* The research question contributes to the general debate on migration management in Europe focusing on the Italian case. It does so, by introducing the concept of policy assemblage that has been not sufficiently researched in the migration management literature. Thus, it explores the normative assemblages designed by Italy in the last years of 'crisis' from a multi and inter disciplinary perspective.

In the second part the thesis investigates the legal technique used by Italy to develop an exclusionary migration policy outside and within its borders. Chapter 7 shows how Italy used soft law to externalize the search and rescue and the detention of migrants to Libyan institutions. By signing the memorandum of understanding in a hyper simplified form Italy did not respected some of the check and balances prefigured by the Italian Constitution for the adoption of international agreements. The research question explored in the second part of the thesis is the following: *How is law transformed to ascertain control on migration movements and to decrease the arrivals of migrants?* The research question contributes to the general literature on exclusionary migration policies. To do so, it explores the intersection between International and EU law in the new European migration governance. Overall, it contributes to the literature by exploring on the one hand the informalisation of migration governance; on the other hand, the criminalisation of solidarity and how EU law exercises a protective function.

1.3.   Theoretical Perspectives on Borders, Territory and Human Rights

Borders, territory and human right are contested concept that need a theoretical conceptualization to be fully understood. Chapter 4 offers a theoretical perspective on the three concepts as a sort of 'genealogy'. To do so, the Chapter explores different disciplines following a inter and multi-disciplinary perspective drawing from geography to law and social theory. In particular, the three concepts have not received enough attention in migration scholarship in a legal perspective.

Borders in mainstream scholarship are considered as simple lines of division between states. In such a perspective, it is under emphasized the fluidity of the border itself and its unequivocal and social character. Borders are social structures that operate through dividing practices based on formal conditions set out by states and international institutions. By doing so, borders are used to monitor and divide between people that satisfy the formal conditions and people that do not namely migrants. Migrants are the figures that pose most challenges to the borders erected by states. Yet borders are only imaginary lines on which migrants exert agency trying to open or to circumvent such social structures of control and monitoring.

Territory is an indefinite concept that can be conceptualized in different at times contrasting ways. Territory is a dynamic concept that is in a constant process of negotiations between the institutionalized and non-institutionalized actors. The state is the institution that controls and exercises the power over territory by excluding people that do not bear the right to enter the territorial space of the state. Moreover, territory as a concept is used strategically in order to influence but more importantly to control people. Brought to its conclusion such elaboration of territory prefigures an inside/outside dichotomy[9] that can trigger exclusion and closed border strategies.

Human rights have represented an emancipatory vocabulary around the world. They emerged as an important discourse that thrived for global justice and equality of treatment. Yet in migration management the access to human rights protection is more complex. Formally to trigger human rights protection the migrant has to directly access

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[9] Vaughan-Williams, N. (2008). Borders, territory, law. *International Political Sociology*, *2*(4), 322-338. P. 336; Basaran, T. (2008). Security, law, borders: spaces of exclusion. *International Political Sociology*, 2(4), 339-354.

the territory of the destination states. However, there are substantial legal conditions that the migrant must satisfy to be granted protection. In doing so, human rights can emerge as a twofold discourse. On the one hand, a narrative that considers human rights universal independently from the compliance with the formal conditions set out by the state. On the other hand, a statist perspective that goes into the direction of closed borders for non-right bearing human being on the move.

Thus, the three concepts considered in Chapter 4 appear to be contested and need further scrutiny. For this reason, it is important to do a theoretical exercise to identify the dynamics that characterize the materialization of those concepts in migration management policies.

1.4.   Outline of the Thesis

The thesis is divided into two parts. In the first part – Chapters 3, 4, 5, 6 – the thesis first introduces some aspects of the European external border management to show the overall legal and political dynamics that characterise the European migration governance. Then, it explores the three concepts of borders, territory and human rights to offer a theoretical framework that forms the migration management assemblage. The assemblages are discussed further in detail to show how these three concepts can be used instrumentally to form an inclusive, exclusive and outright exclusive migration management policy.

The Mare Nostrum policy represents an instance of inclusive policy in which migrants in distress are given access to the borders and territory of the destination state. In doing so, the policy follows a universalist reading of human rights that are triggered by the simple proximity to the borders of the destination state. Thus, in such an assemblage migrants' rights at sea are always protected independently from the compliance with the formal conditions set out by the state.

In the Minniti policy it emerges an exclusionary assemblage of the three concepts. In fact, it is not sufficient for the migrant to be in proximity of the border but there is to be a direct access to the border and thus to the territory of the state to trigger human rights obligations. Yet the direct access to borders is rendered more difficult by the externalization of the search and rescue operations to the Libyan coastguards. In so doing, Italy avoids any direct contact with the migrants at sea in order to evade human rights obligations following from international law and from the law of the sea.

In the Salvini policy it is possible to recognize an outright exclusive assemblage. Borders are regarded as an obstacle to human rights protection. Even if migrants at rest are rescued by NGOs and brought to the Italian shores these are still kept on the vessel in the dock of the port without receiving adequate care and shelter. In doing so, also if the migrants directly accessed the borders and are on the territory of Italy those are not protected as prefigured by human rights law. This policy brings further exclusion by forming an assemblage that does not give access to the territory also at migrants saved by NGOs and waiting for disembarkation in Italian ports.

In the second part of the thesis the instruments used to exclude migrants are investigated from a legal perspective. Chapter 7 explores how soft law instruments are used to externalize to the Libyan coastguard search and rescue operations to avoid any direct contact that would trigger international law obligations for Italy. Moreover, the Chapter analyses the institutional soundness of soft law instruments that overcome - through a hyper-simplified procedure - the control of oversight of the Italian Parliament affecting thus the overall check and balances prefigured by the Italian Constitution.

Chapter 8 explores how populist parties in Italy criminalize migration and solidarity by using criminal law instruments to detect, monitor and punish the so-called crimes of solidarity. Luckily, EU law emerges as a legal framework able to pose some limitations to the laws enacted by populist parties. Nevertheless, in this protective function exercised by EU law it is important to stress the legal dialogue with national courts. It seems in fact that only through these dialogues between courts it is able to develop a legal framework that can exercise a protective function from the criminalization of migration and solidarity enhanced by populist parties.

In the two parts of the thesis it emerges how Italy developed policies that aimed at excluding migrants from the Italian borders. To do so, Italian governments have constructed an anti-immigrant rhetoric based on a populist discourse that depicted them as invaders and low skilled job takers. The combination of soft law instruments to externalize migration management and of criminal law instruments to detect and punish crimes of solidarity are the representation of the use of the instrumental use of law by populist and quasi-populist parties in Italy. The use of these instruments puts into question the overall institutional balance of the Italian legal system. In particular, the rights of

migrants are severely affected by these policies and there is a lack of human rights protection outside and within the Italian legal space.

CHAPTER 2

Methodology

''[..] although it is recognized that law has its own strength, some aspects of it would be better understood if a 'social dimension' were added to it [...]''[10]

2. Introduction

Interests in migration studies will expand in the next years.[11] This trend is already visible from the number of works in migration studies that has increased significantly in the last decades.[12] In this scenario, international migration law scholars are often confronted with the question of methodology in migration studies. In their seminal article, Massey et al. (1993) urged that, ''At present, there is no single, coherent theory of international migration, only a fragmented set of theories that have developed largely in isolation from one another, sometimes but not always segmented by disciplinary boundaries''.[13] Luckily, migration studies in these years have moved further in the direction of complexity and interdisciplinarity.[14] Certainly, finding a fit for-all methodology in migration studies it is rather naïve. In fact, in migration studies several disciplines from geography and border studies to law and sociology coexist together. Thus, migration studies require an interdisciplinary knowledge in order to attempt to encompass the many aspects that compose migration.[15] Furthermore, this shift from monodisciplinarity to multidisciplinarity and from national to global is clearly visible also in international law scholarship.[16]

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[10] Latour, B. (2005). *Reassembling the Social*. Oxford: Oxford University Press. P. 3.

[11] Vargas-Silva, C. (Ed.). (2012). *Handbook of research methods in migration*. Edward Elgar Publishing. P. 1.

[12] Pisarevskaya, A., Levy, N., Scholten, P., & Jansen, J. (2019). Mapping migration studies: An empirical analysis of the coming of age of a research field. *Migration Studies*; Yalaz E., Zapata-Barrero R. (2018) Mapping the Qualitative Migration Research in Europe: An Exploratory Analysis. In Zapata-Barrero R., Yalaz E. (eds) *Qualitative Research in European Migration Studies.* Springer, Cham.

[13] Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., & Taylor, J. E. (1993). Theories of international migration: A review and appraisal. *Population and development review*, *19*(3), 431-466. P. 432.

[14] Vargas-Silva, C. (Ed.). (2012). *Handbook of research methods in migration*. Edward Elgar Publishing; Caroline, B.; Hollifield J. (2013). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge; Zapata-Barrero R., Yalaz E. (eds) *Qualitative Research in European Migration Studies.* Springer, Cham.

[15] Zapata-Barrero R., Yalaz E. (2018) Introduction: Preparing the Way for Qualitative Research in Migration Studies. In Zapata-Barrero R., Yalaz E. (eds) *Qualitative Research in European Migration Studies*. Springer, Cham; Favell, A. (2007). Rebooting migration theory: Interdisciplinarity, globality and postdisciplinarity in migration studies; Caroline, B.; Hollifield J. (2007). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge, pp.259-278.

[16] Van Gestel, R., Micklitz, H. W., & Maduro, M. P. (2012). Methodology in the new legal world. *EUI Working Papers*. P. 12. Available from:

It follows that it is not easy to identify a methodology able to capture the interdisciplinarity of migration studies and this is also particularly visible in international migration law scholarship. In fact, as pointed out by Caroline and Hollifield (2014) legal scholars focus on institutions, processes and rights sometimes framed with theories of political philosophy.[17] The thesis follows this approach to law and migration. However, the thesis aims at overcoming the lack of theory building and hypothesis testing in legal scholarship suggested by Caroline and Hollifield (2014).[18] Thus, the thesis explores institution, processes and rights adding to it also a theory building and a hypothesis testing. The hypothesis tested is the following: are EU member states designing migration management policies on an instrumental assemblage of borders, territory and human rights? In light of this, I will try to sketch not precisely a methodology but the objectives of the methodology. In doing so, I will offer a perspective that shall be regarded as open and interdisciplinary as possible in order to capture most aspects that compose migration studies (see tables). Further, such perspective might overcome the disciplinary fragmentation still observable in migration studies.[19]

The starting point of my reasoning is straightforward: without a solid social and historical understanding of the institutions and of the concepts that characterize international migration it is impossible to formulate a normative research hypothesis on the processes that exemplify migration management. This reasoning is in line with what Favell (2014) indicated as a 'postdisciplinary approach' to migration studies. Favel suggests that the postdisciplinary approach, ''[…] is one that begins to question and dismantle some of the fixed points and conceptualizations provided by our standard definitions of international migration in the international state system''.[20] In fact, only by focusing on the multitude of actors that shape the management of migration it may be

https://cadmus.eui.eu/bitstream/handle/1814/22016/LAW_2012_13_VanGestelMicklitzMaduro.pdf?sequence=1&isAllowed=y

[17] Brettell, C. B., & Hollifield, J. F. (Eds.). (2014). *Migration Theory: Talking Across Disciplines.* Routledge. P. 9.

[18] Ibid. P. 10.

[19] Yet is important to note that fragmentation in migration studies is becoming less evident. See, Pisarevskaya, A., Levy, N., Scholten, P., & Jansen, J. (2019). Mapping migration studies: An empirical analysis of the coming of age of a research field. *Migration Studies.*

[20] Favell, A. (2014). Rebooting migration theory: Interdisciplinarity, globality and postdisciplinarity in migration studies. Caroline, B.; Hollifield J. (2014). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge, pp.259-278. P. 269.

possible to illuminate important patterns and to escape the nation-state dominated conceptions.[21]
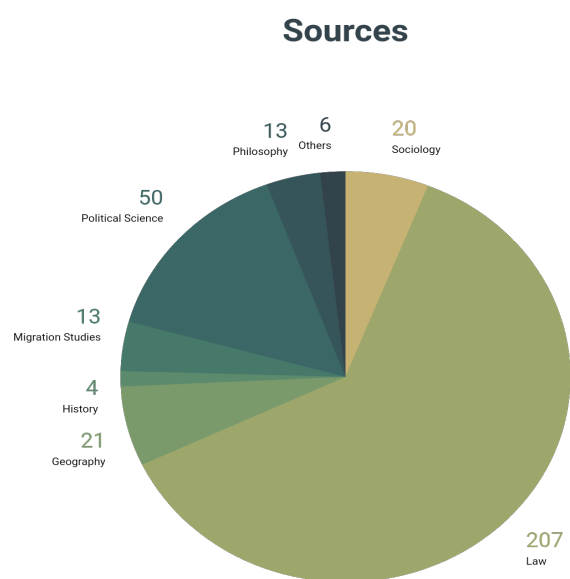
Sources

Legal Sources
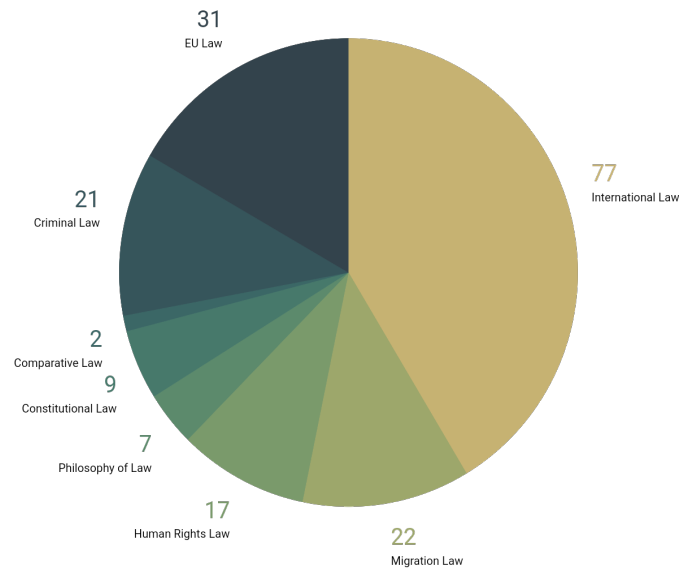
In the theoretical part of the research, I try to unveil the meaning of essentially contested concept such a borders, territory, and human rights.[22] In doing so, this epistemological effort can offer the instruments to design a theoretical framework that will then applied to the three case studies examined in the thesis. Yet, as Castles et al. (2013) notice, it is important to unpack these concepts by relating them to contemporary social transformations of the last decades. They indicate neo-liberal globalisation as the most significant and pervasive.[23] In this exercise it will emerge that all the three concepts have a critical relationship with neo-liberal globalisation. For instance, from the human rights literature it seems that the human rights project and neo-liberalism share important

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[22] Weber, M. (1978). *Economy and society: An outline of interpretive sociology*. University of California Press.

[23] Castles, S., De Haas, H., & Miller, M. J. (2013). *The age of migration: International population movements in the modern world*. Macmillan International Higher Education. See in particular chapter 3. See also, León, A. I. & Overbeek, H. (2015) 'Neoliberal Globalization, Transnational Migration and Global Governance' in L. S. Talani and S. McMahon (eds.). In *Handbook of the International Political Economy of Migration*, Cheltenham: Edward Elgar Publishing; pp. 37-53.

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'ideological' premises that present these projects as neutral and apolitical.[24] Thus, the thesis aims at showing the theoretical and ideological complexity of these concepts to illuminate the context-dependence aspects that can modify the meaning of those concepts.[25]

With this in mind, the thesis follows some of the recommendations contained in two recent handbooks on migrations studies: Vargas-Silva, C. (esd). (2012). *Handbook of research methods in migration*; Zapata-Barrero R., Yalaz E. (eds). (2018). *Qualitative Research in European Migration Studies*. The thesis will offer an epistemological and theoretical Chapter in which the concepts of borders, territory and human rights are critically examined. In doing so, I want to challenge some of the standard definitions in international migration studies.[26] These analyses will form the theoretical framework that will be successively applied to the three case studies of migration management policies in Italy between 2014 and 2019. Indeed, the case studies do represent some cases in which borders, territory and human rights are assembled to design an inclusive, exclusive and outright exclusive migration management policy. Nonetheless, to clarify the methodology I will now turn to the research design of the thesis.

2.1. Research Design

The methodology of this study incorporates social and legal theory with legal practice. On the one hand, social and legal theory are reviewed to explore the social and legal phenomena discussed in the thesis namely border, territory and human rights. On the other hand, legal practice explores the application of social and legal theory to the three case studies discussed. The analysis follows a qualitative and interdisciplinary or postdisciplinary approach as it incorporates a philosophical, legal and policy analysis. With the hope to avoid an atomistic understanding of how the components are assembled

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[24] On this debate see among others: O'Connell, P. (2007). On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights. *Human Rights Law Review*, 7(3); 483-509; Klein, N. (2007). *The shock doctrine: The rise of disaster capitalism*. Macmillan; Moyn, S. (2012) *The last Utopia*. Cambridge: Harvard University Press; Moyn, S. (2014). A Powerless Companion: Human Rights in the Age of Neoliberalism. *Law and Contemporary Problems,* 77; 147-69.

[25] Castles, S. (2012). Understanding the relationship between methodology and methods. In Vargas-Silva, C. (Ed.). (2012). *Handbook of research methods in migration*. Edward Elgar Publishing. P. 12.

[26] Favell, A. (2014). Rebooting migration theory: Interdisciplinarity, globality and postdisciplinarity in migration studies. In Caroline, B.; Hollifield J. (2014). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge, pp.259-278. P. 269.

in migration management policies the research follows a holistic approach.[27] The research design can be summarized in the following sub sections.

2.1.2. Theoretical Framework

'''Epistemology' is concerned with ways of knowing and learning about the social world''.[28] The epistemological effort of the research follows a deductive approach to support a conclusion that in this case is the transformation of the Central Southern Mediterranean sea in a space of inclusion and exclusion.[29] These transformations are visible in migration management policies that assemble the concepts of borders, territory and human rights to either include or exclude migrants. To support this argument the research aims at testing a propositions or hypothesis that are obtained theoretically, with a logically derived process.[30] Further, the thesis as suggested by Bourdieu (1992), seeks to ''[…] to translate highly abstract problems into thoroughly practical scientific operations''.[31] To achieve this end I focus extensively on the rigorous construction of the object of the thesis.[32]

The theoretical framework will try to elucidate in a more socially and historically constructed perspective the assemblage of migration management policies in Italy. In this setting, it is crucial to follow a specific time frame able to identify the numerous facets that are considered in the assemblage of migration management policies. In light of this, the thesis focuses on the period between 2014 and 2019 which saw the implementation of three different and at times complementary migration management policies. These policies are characterized by (1) inclusion, (2) exclusion, and (3) outright exclusion. Thus, this is the object of the research yet to understand how these policies are designed it is

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[27] Castles, S. (2012). Understanding the relationship between methodology and methods. In Vargas-Silva, C. (Ed.). (2012). *Handbook of research methods in migration*. Edward Elgar Publishing. P. 21.

[28] Snape, D. & Spencer, L. (2013). The Foundations of Qualitative Research. In Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. London: Sage. P. 13.

[29] For a detailed account of the case law that prefigured such a compromise see: Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration; Border Walls. *Berkeley J. Int'l L.,* 34, 1; Paz, M. (2017). The Law of Walls. *European Journal of International Law, 28(2),* 601-624.

[30] Snape, D. & Spencer, L. (2013). The Foundations of Qualitative Research. In Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. London: Sage. P. 14.

[31] Bourdieu, P. (1992). Practice of reflexive sociology. In Bourdieu, P., & Wacquant, L. J. (1992). *An invitation to reflexive sociology*. University of Chicago press. P. 221.

[32] Ibid. P. 220.

important to have a solid and consistent methodological framework able to identify the hidden dynamics in the formation of migration management policies.

At this point it is necessary to explain why I decided to explore the concept of assemblage and how it is conceived in the thesis. The first conceptualization of assemblage can be traced in the work of French theorists Gilles Deleuze and Félix Guattari (1988).[33] Starting from this first conceptualization, in the social sciences in recent years there has been more elaborations on the concept of assemblage.[34] According to Anderson and McFarlane (2011) assemblage can be employed in three ways: first, as a broad descriptor able to combine heterogenous elements; second, as an ethos committed to explain the world; and third, as a concept related specifically to the conceptualizations of Deleuze and Guattari.[35] Another point stressed by Allen (2011) is that in an assemblage ''heterogeneous elements can hold together without actually forming a coherent whole''.[36] Others like Shon (2016) propose to frame assemblage theory ''[..] as a conceptual toolbox that is well suited to explore complex systems characterized by non-linearity and far-from-equilibrium operating trajectories''.[37]

Indeed, there are many elaborations of the concept of assemblage in different disciplines. Yet here the point is not to present a comprehensive account of the concept of assemblage. Instead, in the thesis the concept of assemblage is intended in its most descriptive sense without any kind of theoretical conceptualization based on Deleuze and Guattari works. In fact, the thesis follows the approach developed by Sassen (2008) that uses the concept as a descriptor able to explore complex structures by combining heterogenous elements aimed at explaining social processes.[38] Moreover, the concept of

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[33] Deleuze, G., & Guattari, F. (1988). *A thousand plateaus: Capitalism and schizophrenia*. Bloomsbury Publishing.

[34] Among these: Marcus, G. E., & Saka, E. (2006). Assemblage. *Theory, Culture and Society*, *23*(2-3), 101-106; Phillips, J. (2006). Agencement/assemblage. *Theory, Culture and Society, 23*(2/3), 108. For a more recent work on assemblages applied to border studies, see: Sohn, C. (2016). Navigating borders' multiplicity: the critical potential of assemblage. *Area*, *48*(2), 183-189.

[35] Anderson, B., & McFarlane, C. (2011). Assemblage and geography. *Area, 43* (2), 124-127.

[36] Allen, J. (2011). Powerful assemblages?. *Area*, *43*(2), 154-157. P. 155.

[37] Sohn, C. (2016). Navigating borders' multiplicity: the critical potential of assemblage. *Area*, *48*(2), 183-189. P. 186.

[38] Sassen, S. (2008). Territory, Authority, Rights: From Medieval to Global Assemblages. Princeton: Princeton University Press. P. 5.

assemblage should be used as a tool not as a simple result.[39] In doing so, it may be possible to identify the different dynamics that come to form the assemblage of borders, territory and human rights in migration management policies.

In the migration studies literature, the concept of assemblage has been under explored. Yet recently some articles with different elaborations the concept of assemblage emerged.[40] By using Sassen formulation of assemblage the thesis seeks to shed light on the dynamics of migration management. Assemblage has the merit to explain heterogenous social processes that arise in migration politics. In fact, assemblage serves to identify some specificities out of the complexities of migration policies unfolded in Europe.

In light of this, the first part discusses primary sources and secondary sources in order to present a critical reading of the three components discussed. It introduces a theoretical framework that will be successively falsified in the case studies analyzed in the second part. To do so, it follows an interdisciplinary or postdisciplinary[41] method that includes diverse types of sources including legal, philosophical, sociological and geography. Indeed, the sources consulted differ in relation to the component examined. Yet the objective of this theoretical part is to convey a critical understanding on the flexibility of these components in the assemblage of migration management strategies. Hence, the research design adopted in this theoretical part of the thesis is epistemological in nature since it wants to answer to questions such as what is a border? Is there an ideology behind such contested concepts? In other words, this part of the thesis sets out the theoretical framework that will be applied to the migration management cases explored in the thesis.

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[39] Aneesh, A. (2017). 'Relocating Global Assemblages': An Interview with Saskia Sassen. *Science, Technology and Society*, *22*(1), 128-134. P. 129.

[40] Among these see, Rubinov, I. (2014). Migrant assemblages: Building postsocialist households with Kyrgyz remittances. *Anthropological Quarterly*, 183-215; Collins, F. L. (2018). Desire as a theory for migration studies: temporality, assemblage and becoming in the narratives of migrants. *Journal of Ethnic and Migration Studies*, *44*(6), 964-980; Düvell, F. (2019). The 'Great Migration'of summer 2015: analysing the assemblage of key drivers in Turkey. *Journal of Ethnic and Migration Studies*, *45*(12), 2227-2240; Wiertz, T. (2020). Biopolitics of migration: An assemblage approach. *Environment and Planning C: Politics and Space*, 2399654420941854.

[41] Favell, A. (2014). Rebooting migration theory: Interdisciplinarity, globality and postdisciplinarity in migration studies. In Caroline, B.; Hollifield J. (2014). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge, pp. 259-278.

2.1.3 A Three-case Studies

According to Lewis (2003) '' […] the primary defining features of a case study as being multiplicity of perspectives which are rooted in a specific context''.[42] The three-case studies explored in the thesis represent the complexity of migration management policies in Europe by focusing on the Italian case. In fact, we should regard migration management as a multi-dimensional phenomenon in which a number of institutional and quasi-institutional actors participate in the formation of migration management policies. The critical analysis of the three migration management policies will unveil three different but at time complementary assemblages of borders, territory and human rights. It is important to situate these policies in a temporal broader temporal perspective that considers the period within and after the implementation of these policies. These assemblages of migration management policies are:

(I)   the Mare Nostrum policies of inclusion (10/2013-10/2014)

(II)   the Minniti policies of exclusion (12/2016-6/2018)

(III)   the Salvini policies of outright exclusion (6/2018-9/2019)

The focus of the analysis will be on the instruments and methods pursued by the different Italian governments and by EU institutions to design migration management policies. In doing so, the thesis seeks to show the complexities and dynamics of migration management policies. Thus, what will emerge is a highly fragmented and hierarchical structure that comprehends a significant number of institutional and quasi-institutional actors. Among those actors there are national governments, EU institutions, EU courts and quasi-judicial bodies, international institutions, think thanks, contractors[43] and NGOs. Nevertheless, these actors have to operate in a very specific migration management framework developed in particular by EU institutions.

Over the last 20 years, the EU has designed a complex multilateral border regime[44]

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[42] Lewis, J. (2013). 'Design issues'. In Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. London: Sage. P. 52.

[43] Andersson, R. (2016). Europe's failed 'fight' against irregular migration: ethnographic notes on a counterproductive industry. *Journal of ethnic and migration studies*, *42*(7), 1055-1075.

[44] Hampshire, J. (2016). European Migration Governance since the Lisbon Treaty: Introduction to the Special Issue. *Journal of Ethnic and Migration Studies*, 42(4), 537-53; Campesi, G. (2018). Crisis, Migration and the Consolidation of the EU Border Control Regime. *International Journal of Migration and Border Studies*, 4(3), 196-221.

which aimed at creating a 'securitized' and 'humanitarian' European borders.[45] On the one hand, the EU has developed a legal and quasi-legal framework that encompasses directives, regulations, and bilateral and multilateral agreements with third countries.[46] From the case studies it will emerge the complexity of migration management in Italy in Europe dimension. Moreover, it will show how national, European and international norms coexist in migration management policies. In doing so, migration management policies are the representation of a wider shift in migration management from control to management that has contributed to rendering the protection of would-be migrants less effective.[47]

2.3 Research Technique

The research technique combines a documentary analysis with a discourse analysis. The documentary analysis involves the study of primary sources (case law, hard and soft law, and conventions) and secondary sources (analysis of existing academic literature). Documentary analysis is a research technique suggested to discuss events that need further examination to represent the complexities of these events[48] such as the Memorandum of Understanding adopted during the Minniti policies. This technique is useful if you aim at revealing specific dynamics that characterize migration management policies. Further, this type of technique offers to the researcher the possibility to discuss in detail the content of the policies. It examines relevant international, European and domestic legal instruments, policies and jurisprudential interpretations relating to migration governance and conducts comparative legal analysis illustrated through the case studies of three migration management strategies. Yet to gain a further understanding

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[45] Pallister-Wilkins, P. (2017). Humanitarian Borderwork. In C. Günay and N. Witjes (eds.), *Border Politics: Defining Spaces of Governance and Forms of Transgressions*. Cham: Springer; Cuttitta, P. (2018a). Delocalization, Humanitarianism, and Human Rights: The Mediterranean Border between Exclusion and Inclusion. *Antipode,* 50(3), 783- 803; Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection 'Paradigm'. *Journal of Common Market Studies,* 56(1), 119-40.

[46] Adepoju, A., Van Noorloos, F. & Zoomers, A. (2010). Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review. *International Migration*, 48(3), 42-75.

[47] See the Research Project ''Human Costs of Border Control'' conducted by the Vrije Universiteit of Amsterdam under the supervision of Prof. Thomas Spijkerboer. For more information see, http://www.borderdeaths.org/?page_id=22

[48] Lewis, J. (2003). 'Design issues'. In Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. London: Sage. P. 35.

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of the political atmosphere behind the adoption of migration management measurers it is also important to pursue a discourse analysis.

Discourse analysis examines the structure of texts and verbal accounts to explore its social meaning and consequences.[49] According to Potter (1997) discourse analysis explores ''versions of the world, of society, events and inner psychological worlds are produced in discourse''.[50] The analysis is based on a variety of sources among these: written documents, speeches, media reports, and interviews.[51] As such discourse analysis can be an important technique able to complement the documentary analysis. In fact, discourse analysis by being based on more 'informal' types of sources gives further elements to assess the Italian and European approach to migration management. In doing so, the combination of the two technique offers a more structural and informed analysis of migration management policies in Italy in the period from 2013 to 2019.

In light of these considerations, the thesis will try to answer to two main research questions. Yet it is important to underline that the further sub questions will be both descriptive and analytical in order to present a more consistent account of the different migration management policies pursued by the Italian governments in the last five years.[52] In so doing, the thesis investigates two critical research questions by exploring the power relations that shape law, or into the relations between law and politics.[53]

 The two main research questions that thesis explores are:

1. *To what extent migration management policies assemble the concepts of borders, territory and human rights to achieve specific policy objectives?*

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[49] Ibid.

[50] Potter, J. (1997). Discourse analysis as a way of analysing naturally occurring talk. In D. Silverman (ed.) *Qualitative Research: Theory, Method and Practice.* London: Sage. P. 146.

[51] Lewis, J. (2013). 'Design issues'. In Ritchie, J., Lewis, J., Nicholls, C. M., & Ormston, R. (Eds.). (2013). *Qualitative research practice: A guide for social science students and researchers*. London: Sage. P. 35.

[52] Castles, S. (2012). Understanding the relationship between methodology and methods. In Vargas-Silva, C. (Ed.). (2012). *Handbook of research methods in migration*. Edward Elgar Publishing. P. 15.

[53] Lieblich, E. (2020). How to Do Research in International Law? A Basic Guide for Beginners (October 4, 2020). Available at SSRN: https://ssrn.com/abstract=. For more insights see, Koskenniemi, M. (2016). What is critical research in international law? Celebrating structuralism. *Leiden Journal of International Law*, *29*(3), 727-735.

2. How is law transformed to ascertain control on migration movements and to decrease the arrivals of migrants?

While among the sub questions addressed in the thesis there are:

- To what extent the shift from migration control to migration management has contributed to transform the Central Southern Mediterranean in a space of both inclusion and exclusion?
- What are the philosophical legal components of border, territory and human rights?
- What is the role of law in the construction of the inclusion/exclusion paradigm?
- Why soft law is used to design these migration management policies?
- What is the intersection between national, international and EU law in some criminalizing migration management policies?
- What is the role of NGOs and these have been affected by exclusive policies?
- It is possible to design an alternative perspective to the inclusion/exclusion dichotomy that recognizes a contemporary *jus migrandi* and a duty of hospitality?

From the questions and sub questions that the thesis will explore it emerges the interdisciplinarity effort that aims at illuminating important concepts that characterize migration management policies. In doing so, the thesis will try to offer a critical, consistent and well-informed analysis of migration management policies in Italy from 2014 to 2019 in the EU migration management framework.

2.4. Significance of the Research

The significance of this research is that it explores timely issues in a systemic, critical and interdisciplinary way. It does so by building on three levels:

1. Philosophical analysis: it will provide a grounded understanding of the three components that form the assemblage of contemporary migration management strategies. Moreover, it will articulate some reflection on the importance of considering an alternative assemblage of the three components. For instance,

considering the shift in international law from hospitality as a duty of a state to hospitality as a discretionary power of a state.[54] In doing so, it will be suggested an alternative perspective on the right to move and to the duty to host.[55]

2. Legal analysis: it will be established through the case studies whether the assemblage of the three components is instrumental to an inclusive or exclusive migration management strategies. In particular, what are the responsibilities of the Italian government and of the EU in relation to the violations of human rights occurring in the so called 'detention' centres in Libya. If this is the case what are consequences on international law and human rights law?

3. Policy analysis: it will be established whether there is a connection between the three border management policies and the level of protection of would be migrants. Moreover, it will be considered if the compromise between both inclusion and exclusion is a consequence of the failure of EU migration management strategies.

The aim of this research is to combine different disciplines to offer a three-level analysis: philosophical analysis, legal analysis and policy analysis. In doing so, this research offers an interdisciplinary and critical discussion of migration management policies. It does so by identifying three concepts or components that compose a migration management assemblage. These concepts are discussed in detail to offer a comprehensive understanding of the theoretical structure of migration management policies. Moreover, the research suggests that the complexity of migration management policies can be captured only if the three level of analysis are combined together. In fact, the philosophical examination suggests that to analyse migration management policies it is important to recognize the complexity of borders, territory and human rights. These concepts in fact need to be discussed in light of historical, political and economic transformations that can affect significantly how these are conceptualised. Further, the legal analysis based on case law shows how the three concepts are transformed from theoretical concepts into legal language. This is clear from the EU courts decisions that

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[54] Chetail, V. (2016). Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel. *European Journal of International Law*, *27*(4), 901-922.

[55] Di Cesare, D. (2017). *Stranieri residenti: una filosofia della migrazione*. Bollati Boringhieri.

designed a specific understanding of the three concepts that have transformed the central Mediterranean Sea in a space of inclusion and exclusion.[56] In this scenario, EU member states have pursued policies that were eventually designed on the EU courts decisions. In doing so, member states could initiate also exclusive policies that nonetheless remained legally valid in light of the EU court's decisions.

In the legal and policy literature on migration management many works that tackle migration management policies follow a formalistic perspective that does not give adequate account of the complexities of migration.[57] These trends are visible in international law as suggested by some scholars.[58] Instead, the thesis wants to overcome the limits of formalism by adopting a pluralist perspective. In fact, from such a perspective it is possible to recognize the many social, political and economic dynamics that affect migration management. For instance, the EU courts decisions do reflect a specific understanding of migration management that has been pursued by the EU institutions in the last years.[59] It follows, that without an effort to identify the diverse communicative legal and non-legal discourses that shape migration policies it is rather difficult to go beyond a highly specialized and technical understanding of the law.[60] In other words, my interests is not to present the cases and laws as something that exist outside politics. Instead, I aim at identifying the concepts and political processes that shape the development of migration management policies, and to identify the pitfalls of a simplified and highly technical understanding of migration management.

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[56] For a detailed account of the case law that prefigured such a compromise see: Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration; Border Walls. Berkeley J. Int'l L., 34, 1; Paz, M. (2017). The Law of Walls. European Journal of International Law, 28(2), 601-624.

[57] Mann, I. (2016). *Humanity at sea: maritime migration and the foundations of international law* (Vol. 127). Cambridge University Press. P. 3. See also, Teubner, G. (1997). Global Bukowina: Legal Pluralism in the World Society. In Teubner, G. (ed.). *Global Law Without a State*. Brookfield: Dartmouth. PP. 3-28. P. 10

[58] Charlesworth, H. (2002). International law: a discipline of crisis. *The Modern Law Review*, *65*(3), 377-392.

[59] For instance, see the priorities of the Action Plan adopted during the Valletta Summit in 2015. Available from: https://www.consilium.europa.eu/media/21839/action_plan_en.pdf

[60] Teubner, G. (1991). The two faces of Janus: rethinking legal pluralism. *Cardozo L. Rev.*, *13*, 1443.

With this approach I want to bring to the stage migrants' agency as a force able to diverge and to influence the making of migration management policies.[61] In this setting, it will emerge how the laws and the policies enacted by national governments and by international institutions are the representation of a more complex environment in which a crucial and active role is played by migration.[62] These confrontations are clearly visible at the border where two antagonist forces with different power balances struggle either to open or to close the border. In fact, it shall be noticed that in these confrontations affluent states pursue a twofold strategy. On the one hand, affluent states design a system of international protection for migrants; on the other hand, they put in place instruments aimed at decreasing the arrival of migrants.[63] To do so, affluent states externalize to third states the search and rescue operations at sea and the detention of migrants.[64]

From this picture is evident the complexity of migration management policies that puts the researcher in a difficult position because in trying to illuminate the numerous aspects of migration runs many methodological challenges. Indeed, overcoming such difficulties is not an easy task; yet envisioning the possible methodological challenges posed by migration management represents the only starting point for a research in migration studies.

2.5 Methodological Challenges

The methodological challenges in a research on migration management policies are numerous. Certainly, the vast number of works discussed in the research coming from different disciplinary perspectives pose important challenges. In order to overcome such shortcomings, it is important to identify a number of possible challenges and to offer a

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[61] Mainwaring, Ċ. (2016). Migrant agency: Negotiating borders and migration controls. *Migration Studies*, *4*(3), 289-308.

[62] De Genova, N., Mezzadra, S. & Pickles, J. (2015). New Keywords: Migration and Borders. *Cultural Studies,* 29(1), 55-87.

[63] Mann, I. (2016). *Humanity at sea: maritime migration and the foundations of international law* (Vol. 127). Cambridge University Press. P. 4; Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, 1-26.

[64] On this issue see, Zaiotti, R. (ed.) (2016) Externalizing Migration Management: Europe, North America and the Spread of 'remote Management' Practices. New York: Routledge; Frelick, B., Kysel, I. M., & Podkul, J. (2016). The impact of externalization of migration controls on the rights of asylum seekers and other migrants. *Journal on Migration and Human Security*, *4*(4), 190-220; Moreno-Lax, V. & Lemberg-Petersen, M. (2019). Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization. *Questions of International Law,* 56(1), 5-33.

solution that might overcome them.

One of the first challenges of the research is to avoid what is called 'methodological nationalism'.[65] 'Methodological nationalism' suggests that "nation-state institutions are the main social context within which migration occurs and for which migration is relevant".[66] It follows, that the nation-state still represents the main ''disciplining device''.[67] Yet we have to get over such a limitation by developing an alternative vision of migration studies. As Favell (2014) argues, ''[..] will have to recast the subject of migration in a thoroughly decentered, global perspective. We need to renew the conceptual tools with which we think of and recognize migration. The ones we have inherited from scientific disciplines are not sensitive to this need''.[68] Moreover, as Rother (2013) points out, in the recent literature on migration studies there is specific focus on the nation-state[69] and too little on migrant's agency.[70] Luckily, in the last years some works that visibly include migrants agency emerged in migration studies literature.[71]

The thesis to overcome the 'methodological nationalism' recognizes the complexities of migration by identifying the different actors that participate in migration.

[65] Glick Schiller, N. (2010) A global perspective on transnational migration: Theorising migration without methodological nationalism. In Rainer, B. and Thomas, F. (eds) *Diaspora and transnationalism. Concepts, theories and methods*, pp. 109–29. Amsterdam: Amsterdam Univ. Press; Barglowski, K. (2018). Where, what and whom to study? Principles, guidelines and empirical examples of case selection and sampling in migration research. In *Qualitative research in European migration studies* (pp. 151-168). Springer, Cham. P. 153.

[66] Amelina, A., & Faist, T. (2012). De-naturalizing the national in research methodologies: Key concepts of transnational studies in migration. *Ethnic and Racial Studies*, *35*(10), 1707-1724. P. 1709.

[67] Favell, A. (2014). Rebooting migration theory: Interdisciplinarity, globality and postdisciplinarity in migration studies. In Caroline, B.; Hollifield J. (2014). *Migration Theory: Talking Across Disciplines* (2nd ed.), Routledge, pp.259-278. P. 275.

[68] Ibid.

[69] Among these see, Geiger, M., & Pécoud, A. (2010) (Eds). *The politics of international migration management*. Palgrave Macmillan, London; Betts, A. (Eds.). (2011). *Global migration governance*. Oxford University Press; Koslowski, R. (Eds). (2011). *Global Mobility Regimes*. Palgrave Macmillan, New York; Kunz, R., Lavenex, S., & Panizzon, M. (Eds.). (2011). *Multilayered migration governance: The promise of partnership*. Taylor & Francis; Hansen, R., Koehler, J., & Money, J. (Eds.). (2011). *Migration, nation states, and international cooperation*. Routledge.

[70] Rother, S. (2013). Global Migration Governance without Migrants? The Nation-State Bias in the Emerging Policies and Literature on Global Migration Governance. *Migration Studies,* Vol. 1, No. 3, pp.363–7.

[71] Among these see, Jones, R. (2016). *Violent borders: Refugees and the right to move*. Verso Books; Chávez, S. (2016). *Border lives: Fronterizos, transnational migrants, and commuters in Tijuana*. Oxford University Press; De Genova, N. (Ed.). (2017). *The borders of "Europe": autonomy of migration, tactics of bordering*. Duke University Press; Mainwaring, C. (2019). *At Europe's Edge: Migration and Crisis in the Mediterranean*. Oxford University Press; Triandafyllidou, A. (2017). Beyond irregular migration governance: zooming in on migrants' agency. *European journal of migration and law*, *19*(1), 1-11.

In this light, the thesis offers a critical account on the relations between the actors involved in migration management. In particular, such perspective allows me to place the nation-state in a larger framework able include EU institutions, international institutions, migrants, think thanks, contractors and NGOs. This approach is particularly illuminating in the contest of the European migration regime that represents a 'unique migration regime' that encompasses a wide number of regulations, actors and policies.[72] Thus, only by following an interdisciplinary approach it may be possible to include most of the actors that coexist in migration management.

A second possible challenge is that by aiming at offering an interdisciplinary perspective of migration the researcher runs the risk of missing the specificities of each discipline that composes migration studies. Indeed, this challenge is not easy to overcome. Nonetheless, what this research wants to underline is the possibility for researcher to attempt to pursue a more interdisciplinary account of migration management policies. In doing so, it seeks to trace the theoretical components that represent the skeleton of migration management policies. I do recognize that there is an important scholarship on migration management policies. However, in many of these works there is micro analysis or very sectorial approach. In doing so, despite offering significant evidence they sometimes lack theoretical frameworks that represent how these policies are socially constructed. In fact, here I do want to emphasize the importance of such a perspective because it enables a more 'sophisticated' approach that seeks to connect social theory with law and policy making.

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[72] Barglowski, K. (2018). Where, what and whom to study? Principles, guidelines and empirical examples of case selection and sampling in migration research. In Zapata-Barrero R., Yalaz E. (eds) *Qualitative Research in European Migration Studies.* Springer, Cham. P. 152.

PART ONE

ASSEMBLING MIGRATION MANAGEMENT POLICIES IN THE CENTRAL SOUTHERN MEDITERRANEAN: THE CASE OF ITALY

CHAPTER 3
Dynamics of European External Border Management

3. Introduction

The European Union (EU) intensified participation in migration management poses significant challenges for its delicate internal constitutional structures. The EU legal framework is characterised by numerous national, European, and international actors that compete for power and visibility.[73] Such a complexity materialises in a strong intersection between EU, national and international law instruments implemented to contain the so-called migration crisis. These structures of power relation represent the polyarchic and multilevel nature of the EU that is reflected in its model of decision making. It is possible to recognize the intersection of the legislative, executive and judiciary in many initiatives that aim at addressing the migration issues. Thus, these recent developments affect the EU's migration policy in which EU decision-making is controversial, rights-sensitive and illustrative of recent power shifts.

What the EU has developed is a complex system of national and international actors motivated by the ultimate objective to reinforce the control of European borders in order to diminish the arrival of migrants and the death at sea.[74] To reinforce the border, the EU is 'stretching the border' of Europe until North Africa, Niger and Turkey.[75] Indeed, the complexity of the migration management system created by the EU transforms the border of extra-EU neighbouring countries in spaces in which the EU and its member states exercise state agency on both the neighbouring state and on migrants blocked in these countries.[76] Thus, the border is transformed into a space, determined

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[73]Wouters, J., Coppens, D., & Meester, B. (2008). The European Union's external relations after the Lisbon Treaty. *The Lisbon Treaty*, 143-203; Eckes, C. (2019). *EU Powers Under External Pressure: How the EU's External Actions Alter Its Internal Structures*. Oxford University Press, p. 1-2.

[74] Cuttitta, P., & Last, T. (2019). *Border deaths: Causes, dynamics and consequences of migration-related mortality*. Amsterdam University Press; Steinhilper, E., & Gruijters, R. J. (2018). A contested crisis: Policy narratives and empirical evidence on border deaths in the Mediterranean. *Sociology*, *52*(3), 515-533.

[75]Casas, M., Cobarrubias, S., & Pickles, J. (2010). Stretching borders beyond sovereign territories? Mapping EU and Spain's border externalization policies. *Geopolitica (s)*, *2*(1), 71-90; Novak, P. (2017). Back to borders. *Critical Sociology*, *43*(6), 847-864.

[76] Agnew, J. (2008). Borders on the mind: re-framing border thinking. *Ethics & global politics*, *1*(4), 175-191.

'from distance' by EU governance structures, in which legal obligations and international responsibilities are blurred.[77]

To offer a critical EU law perspective of the three migration management policies explored in the three case studies the chapter focuses on the emergence of some specific dynamics: 1) the increase use of soft law; 2) the shift from legal validity to political efficiency.

3.1. Soft Law

In the past years the EU faced a migration management dilemma.[78] Soft law instruments emerged as an important mechanism to address migration issues and to regulate the multi-dimensioned problems of the modern world.[79] The reasons for such a shift from hard to soft law in European migration law can be recognised in relation to the process at both EU and at national level toward a new type of governance in migration management.[80] This new governance uses different tools that operate outside legislative frameworks to achieve specific political priorities. In doing so, it alters the mechanism used to address migration management issues at both European and national level. This shift from traditional or hard legislation toward a multitude of soft instruments brings about two issues. First, the enforceability of these new instruments is more intricate than traditional law.[81] Second, in particular in relation to migrants' rights this new governance

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[77] Moreno-Lax, V. (2018). The EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/rescue-without-protection'paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140.

[78] Geiger, M., & Pécoud, A. (2010). The politics of international migration management. In *The politics of international migration management* (pp. 1-20). Palgrave Macmillan, London; For a more recent analysis see, Pécoud, A. (2021). Philosophies of migration governance in a globalizing world. *Globalizations*, *18*(1), 103-119.

[79] Snyder, F. (1994). Soft law and institutional practice in the European Community. In *The construction of Europe. Essays in honour of Emile Noel* (pp. 197-225). Springer, Dordrecht; d'Aspremont, J. (2008). Softness in international law: A self-serving quest for new legal materials. *European journal of international law*, *19*(5), 1075-1093; Chinkin, C. M. (1989). The challenge of soft law: development and change in international law. *International and Comparative Law Quarterly*, 850-866; For a critical account of Soft law see: Klabbers, J. (1996). *The concept of treaty in international law*. Martinus Nijhoff Publishers. In particular Chapter 5.

[80] Cardwell, P. J. (2016). Rethinking law and new Governance in the European Union: the Case of Migration Management. *European Law Review*, *3*; Cardwell, P. J. (2018). Tackling Europe's migration 'crisis' through law and 'new governance'. *Global Policy*, *9*(1), 67-75.

[81] Vara, J. S. (2019). Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU. In *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*. Edward Elgar Publishing.

complicates the appeal of migrants to national or European courts.[82]

The use of soft law instruments to address EU-External relations is not a new phenomenon.[83] Yet these kinds of international agreements[84] present some problems: the absence of procedural rules for the adoption of the agreement; and the absence of judicial control over the material validity and consequences of the agreement. Indeed, in the literature it is possible to find several reasons for using such instruments. It is argued that such instruments are more tuned with the rapid changes of contemporary democracies that need rapid decisions, usually informal, but with significant political consequences.[85] In particular, in migration management such instruments are becoming key tools to address migration management challenges.

Indeed, this shift happened both at national and at European level to respond to the so-called 'Migration Crisis'.[86] It became difficult for the EU to pursue a homogenous strategy that considered all the interests of the member states following the 2015 'migration crisis'.[87] The EU approach was characterized by so-called 'governance from distance' that aimed at identifying norms, standards and regulation to address the crisis.[88]

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[82] Scott, J., & Sturm, S. (2006). Courts as catalysts: re-thinking the judicial role in new governance. *Colum. J. Eur. L.*, *13*, 565; Vara, J. S. (2019). Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU. In *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*. Edward Elgar Publishing.

[83] See recently for instance, Ott, A. (2021). Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges. *Yearbook of European Law*, *39*, 569-601; Among others see, Terpan, F. (2015). Soft Law in the European Union—The Changing Nature of EU Law. *European Law Journal*, *21*(1), 68-96; Saurugger, S. (2015). Studying resistance to EU norms in foreign and security policy. *European Foreign Affairs Review*, *20*(Special).

[84] When I do refer to international agreements I build upon Richard Baxter (1980) definition: ' [...] as comprehending all those norms of conduct which States or persons acting on behalf of States have subscribed to, without regard 'to their being binding, or enforceable, or subject to an obligation of performance in good faith," in Baxter, R. R. (1980). International law in her infinite variety. *Int'l & Comp. LQ*, *29*, 549. P. 550.

[85] García Andrade, P. (2016). The distribution of powers between EU Institutions for conducting external affairs through non-binding instruments. *European Papers* 1(1) 115-125, p. 116; García Andrade, P. (2018). The role of the European Parliament in the adoption of non-legally binding agreements with third countries. In J. Santos Vara and S.R. Sánchez-Tabernero (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018.

[86] For a critical discussion of the 'crisis' narrative see Casas-Cortes, M., Cobarrubias, S., De Genova, N., Garelli, G., Grappi, G., Heller, C., ... & Tazzioli, M. (2015). New keywords: Migration and borders. *Cultural Studies*, *29*(1), 55-87.

[87] Hampshire, J. (2016). European migration governance since the Lisbon treaty: introduction to the special issue. *Journal of Ethnic and Migration Studies*, *42*(4), 537-553.

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

In doing so, the EU failed to develop strategies that could operate 'on-the-ground', but limiting itself to a management from distance. In particular, also with the Frontex operation the EU activities were limited to patrolling the coast without participating in the rescue of migrants at distress in the Mediterranean but leaving the duty to the Italy and Greece or to the Turkish and Libyan coastguards.

This approach falls in the larger EU approach following the 2015 'Migration Crisis' that builds upon a process of externalization of border management to third states such as Turkey and Libya. These kinds of agreements do not have to follow the ordinary legislative procedure but can overcome the procedure by adopting an administrative or executive type of agreement often in 'simplified form'. In particular, by implementing a soft law agreement the executive power can evade the parliamentary *ex ante* and *ex post* control that may identify some criticism in the agreement.[89] This type of procedure prefigures a form of governance rather than government because it circumvents the control of the parliament at European and national level. Yet these kinds of soft law agreements in migration law do possess some features that rend preferable their adoption: flexibility and promptness.[90] In other words, to manage migration issues you need to operate in the quickest possible way and soft law agreements due to their intrinsic features represent a valid instrument for the governments that are looking for concrete political actions.

To tackle the increase of migration flows European member states are signing bilateral agreements with third countries in order to externalize the management of these flows of people. These kinds of policies do not represent a novelty in fact by many years around the globe to decrease the arrivals of flows affluent countries have devised externalization management policies. These externalizing policies in some cases allow to avoid any legal responsibility for the wrongful doing of the third country involved. These agreements can be signed between a member states and a third state as in the Libya-Italy case. Or in specific political circumstances can be signed between an EU institution and

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[89] See Article 80 of the Italian constitution that prefigures that "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".

[90] d'Aspremont, J. (2008). Softness in international law: A self-serving quest for new legal materials. *European journal of international law*, *19*(5), 1075-1093

a third country as in the so-called EU-Turkey Statement. Nonetheless, in both cases these agreements do come in the form of soft law.

Before identifying the limits of soft law is necessary to introduce the fundamental characteristics that exemplify an act of soft law. The term soft law[91] can be considered a simplification[92] once to include a diverse number of acts that have no binding legal effect for their form,[93] but they have legal effects of great practical importance, as the memorandum between Libya and Italy.[94] In doctrine, it is not easy to find a comprehensive definition of soft law given the diversity and fluidity of the acts that are commonly described as such.[95] Among them there are the statements of principles and the resolutions of the General Assembly of the United Nations, non- binding agreements, as well as, recommendations, statements, opinions, communications, guidelines, code of conduct, adopted by or supranational or international organizations, or bilateral or multilateral memorandum of understanding.[96]

On the one hand, bilateral agreements between countries are adopted in the form of memorandum of understandings.[97] This type of instruments is characterized by an informal negotiation and by a hyper-simplified form of adoption. They are used in particular circumstances to avoid the normally long processes the prefigure a parliamentary passage. On the other hand, EU institutions can adopt bilateral agreements in the form of informal soft law acts as press conferences release, minutes and joint

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[91] For a critical account of Soft law see Klabbers, J. (1996). *The concept of treaty in international law.* Martinus Nijhoff Publishers. In particular Chapter 5. For a genealogy of soft law see Robilant, A. D. (2006). Genealogies of soft law. *The American Journal of Comparative Law*, *54*(3), 499-554.

[92] Chinkin, C. M. (1989). The challenge of soft law: development and change in international law. *International and Comparative Law Quarterly*, 850-866

[93] Baxter, R. R. (1980). International law in her infinite variety. *Int'l & Comp. LQ, 29*, 549.

[94] Bin, R. (2009). Soft law, no law. In Somma, A (Eds). *Soft law e hard law nelle società postmoderne.* Torino: Giappichelli; Algostino, A. (2017). L'esternalizzazione soft delle frontiere e il naufragio della Costituzione. 1 Costituzionalismo.it 139.

[95] Terpan, F. (2015). Soft Law in the European Union—The Changing Nature of EU Law. *European Law Journal*, *21*(1), 68-96; Lagoutte, S., Gammeltoft-Hansen, T., & Cerone, J. (Eds.). (2016). *Tracing the roles of soft law in human rights.* Oxford University Press.

[96] Algostino, A. (2016). La soft law comunitaria e il diritto statale: conflitto fra ordinamenti o fine del conflitto democratico?. 3 *Constitutionalismo.it* 255; Ellis, J. (2012). Shades of grey: Soft law and the validity of public international law. *LJIL, 25*, 313.

[97] Ibid.

statements. These informal acts cannot be found in the official journal yet in the literature they are described as non-binding acts that do have some kind of legal effects.[98]

3.3.   EU Border Management: Legal Validity vs. Political Efficiency

Usually, legal validity comes before political efficiency or put it in another word's legal forms before political substance. Yet by many years, in migration management, we are witnessing a shift from legal validity to political efficiency.[99] This shift is part of a wider transformation that considers the contemporary challenges violent and rapid, and that cannot be overcome with traditional instruments of government. In fact, we are moving from the government of phenomena to its governance. In doing so, for some 'old fashioned' prefiguration's of our constitutions and charters are becoming too slow and formal that we shall embrace a governance approach. It seems that with the idea of migration governance the process of ordering things is being affected by multiple actors with fuzzy and overlapping competences that aim at addressing migration challenges in the most efficient and pragmatic way.[100]

   The efficiency criterion becomes more important than the one of legal validity that bears the cost of a specific and often long form of adoption with all the constitutional procedures of a democracy. These dynamics are displayed in both the Libya-Italy memorandum of understanding and the EU-Turkey statement both will be discussed in detail in Chapter 7. In fact, both instruments achieved the political results the sought namely blocking the arrivals of migrants in Europe. Yet during the implementation of these instruments, in some cases, the legal validity of the instruments was not in line with the rule of law and with human rights obligations. The consequences of the informalization of international agreements from a legal perspective put into question fundamental constitutional principles of liberal democracies such as: transparency of the

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[98]   Snyder, F. (1994). Soft law and institutional practice in the European Community. In *The construction of Europe. Essays in honour of Emile Noel* (pp. 197-225). Springer, Dordrecht.

[99] Triandafyllidou, A. and Dimitriadi, A. (2014). Governing irregular migration and asylum at the borders of Europe: Between efficiency and protection. *Istituto Affari Internazionali.*

[100] Pécoud, A. (2021). Philosophies of migration governance in a globalizing world. *Globalizations*, *18*(1), 103-119.

negotiations and further publication of the agreement; the legal basis and the procedure; the institutional balance with particular tension in the role of the Parliament.[101]

3.4. Conclusion

The EU migration governance has designed a management system that aims at controlling migration flows from distance by avoiding any direct responsibility following from international law. The instruments developed to decrease the number of arrivals has been adopted in the form of soft law. The specific features of such instruments hyper-simplified form of adoption and informality contributed to create a situation of legal uncertainty. This uncertainty poses important challenges to the overall institutional balance of the EU. Yet it is important to point out that in the bilateral relation with third countries often is not possible to adopt legal instruments that would request a much longer procedure of negotiation and adoption. In other words, third countries are not always willing to commit in a more structural obligation.

According to Tsourdi and Costello (2020) to manage its external borders EU institutions oscillate between commitment to protection and deflection of protection.[102] The commitment to protect migrants' human rights is enshrined in EU Treaties and agreements with third countries. However, the management approach developed by the EU of control from distance makes it very difficult to uphold in practice. In fact, by externalising to Turkey and Libya the management of migration, the EU institutions and some of its member states developed a system of contactless responsibility in which legal obligations are blurred.[103]

Deflecting protection translates in decreasing the number of arrivals in the EU territory. If the main political priority was to decrease the arrivals the soft law instruments achieved that result. It seems, as suggested above, that the principle of political efficiency - namely decreasing the landings - becomes more important than the legal validity of the overall procedure. In doing so, we can recognize in migration management a system of

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[101] Ott, A. (2021). Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges. *Yearbook of European Law*, *39*, 569-601.
[102] Tsourdi, L., & Costello, C. (2020). The Evolution of EU Law on Refugees and Asylum. Forthcoming in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law.* Oxford University Press.
[103] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

governance rather than government that is more suited to tackle the violent and tumultuous challenges posed by migration.

In the next chapter some of these dynamics are explored to show how the concepts of borders, territory, and human rights can be instrumental for a specific kind of policy assemblage. In fact, these concepts can determine an inclusive, exclusive and outright exclusive migration management policy.

CHAPTER 4

Determinants of Migration Assemblages

4. Introduction

In the past years, the EU faced a migration management dilemma.[104] The policies developed so far by its member states oscillate between an inclusive and an exclusive migration management approach. These opposing approaches are based on different normative outlooks that recognise a universal understanding of human rights and a statist one that recognises the state as the ultimate authority to initiate human rights protection.

The inclusive or universal approach considers migrants as subjects to which human rights apply before their entrance in the territory. Thus, human rights are inherent to the individual, whether the individual complied with formal conditions for immigration. In doing so, the rights are initiated by the simple presence or physicality and by the proximity of the migrant to the territory of the state.[105] In this case, the state has the obligation to rescue and protect migrants that reach the proximity of the Maritime Rescue Region of competence.[106] Yet in some cases, such as Mare Nostrum Italy has saved people at rest outside its Maritime Rescue Region.[107]

This approach brings to its conclusion the Jamaa v. Italy ruling which recognises that the state has the obligation to rescue and protect the migrant during an interdiction in the high seas.[108] In fact, this idea of jurisdiction grounded in proximity means that getting close to the border of the state would be equal to establishing territorial presence inside the state.[109] Thus, to go back to the landmark ruling of Jamaa v. Italy it follows that in the high seas individuals are always protected even in 'the maritime environment' there is no 'area outside the law'.[110] Brought to its extreme, this approach calls for open borders by a universal application of human rights independently from territorial limitations. In the application of this inclusive approach, there is an instrumental assemblage of the concept

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[104] Geiger, M., & Pécoud, A. (2010) (Eds). *The politics of international migration management*. Palgrave Macmillan, London.

[105] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[106] Please do note that here the concept is not the one of border but of Maritime Rescue Region. See UNCLOS, Art. 98 (2).

[107] Aalberts, T. E., & Gammeltoft-Hansen, T. (2014). Sovereignty at sea: the law and politics of saving lives in mare liberum. *Journal of International Relations and Development*, *17*(4), 439-468.

[108] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 178.

[109] Moreno-Lax, V. (2012). Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?. *Human Rights Law Review*, *12*(3), 574-598.

[110] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 178.

of border, territory and human rights. First, the border is considered not as a limit to the entrance of the migrant but as a point that if it is reached activates the protection of the host state. Second, the concept of territory is fluid because of the exterritorial application of protection independently from the rigid territorial delimitation of the state´s territory jurisdiction. Third, it pursues a universal application of human rights independently from the compliance of the formal conditions of application of the human rights regime.

The exclusive or statist approach initiates protection of migrants if they comply with the formal conditions set out by the state which require the individual to be present in the territory of the state. In doing so, it reinforces the idea of territoriality because 'the state has the sole authority to decide who may enter its domain, under what conditions and with what legal consequence'.[111] In this second approach, the state has absolute dominion of the border and can permit the entrance only to those individuals who comply with the formal conditions of its migration management regime. Thus, merely getting in the proximity of the border does not by itself represent a condition to activate protection by the state. Moreover, jurisdiction initiates only upon entering the territory, thus proximity does not entail any legal obligation for the state. The state utilizes defined physical boundaries to stop migrants from getting in, either by land or by sea, so that their entry does not activate the state´s obligations to protect them as in the case of the Minniti policies discussed further in the thesis.

In the application of this exclusive approach, there is an instrumental assemblage of the concept of borders, territory and human rights. First, the protection of the migrant is activated only by the physical presence of the individual and not by the simple proximity to the border. Second, the role of territory is reinforced and can be called strong territoriality, and thus reinforcing physicality. Third, human rights protection remains an exclusive prerogative of the state that is bound by obligations based on positive law making.[112]

To understand what are the theoretical before than the practical premises that shaped the Central Southern Mediterranean as a space of both inclusion and exclusion it is essential to identify the theoretical components from a legal philosophical perspective.

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[111] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.
[112] Ibid.

What I do argue is that in the development of this compromise there has been an instrumental assemblage[113] of three concepts or components: (I) Borders; (II) Territory; (III) Human Rights. Each of these components has diverse interpretation in legal and social theory that can be instrumental for diverse purposes as in the case of migration management. In fact, the assemblage of these concepts has been used instrumentally in order to transform the Central Southern Mediterranean in a space of both inclusion and exclusion depending on the political objectives of the migration management policy. To see how these have been conceptualized the thesis analyses the three border management strategies that have been pursued from 2013 until 2019 in the Central Southern Mediterranean. In doing so, the thesis aims at identifying the consequences of the different assemblage of borders, territory and human rights.

The Chapter now considers the three components assembled in migration management policies in more detail keeping in mind that: these are interdependent but maintain a level of specificity and have variable levels of performance in migration management assemblages. In fact, the assemblage has to be understood as a broad conceptual descriptor appropriate to explore heterogenous systems characterized by non-linearity and complexity. In doing so, the concept assembled in migration management policies emerge as coexisting and independent unit of analysis that ones are assembled together can contribute to develop inclusive, exclusive and outright exclusive policies. Yet it is important to stress that these assemblages - that European states design from the decisions of European courts – cannot be considered causal. A causal analysis demands significant empirical data to account for the real efficacy of, first, human rights courts' decisions on truly affecting states' migration policy, and, second, of border management to control migration in practice. Thus, the thesis suggests that some dynamics indicate that states design policies that are a logical answer to the compromise that courts worked out.

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[113] Here I use the term assemblage as elaborated by sociologist Saskia Sassen. See, Sassen, S. (2008). *Territory, authority, rights: From medieval to global assemblages*. Princeton university press.

4.1 Borders

We live in a time in which borders in certain contexts disintegrate due to the forces of neoliberal globalization.[114] Yet in other contexts, in particular in relation to human movements, new borders emerge as obstacles to human circulation and movement.[115] In this scenario, for some we assist at a continuous process of border reconfiguration along lines of political and military power.[116] Yet for others the military and economic functions of borders are declining, but are expanding in the control of irregular migrants.[117] It seems that the objective of these policies followed at global level is to liberate the circulation of money and financial capital by opening up financial and real markets around the world.[118] However, if in the last forty years we made incredible steps in abolishing the national borders that impeded the movement of capital nevertheless we made no progress in relation to the free circulation of human beings.[119] In fact, we are going towards the development of an idea of 'fortresses' not only in Europe but also around the world.[120] Thus, the process of border reconfiguration - vividly visible nowadays – represents a strategy that aims at designing two types of border: an open border for capital and a closed border for human beings. Yet, as I show later in the thesis, for human beings that move

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[114] de Sousa Santos, B. (2002). The processes of globalisation. *Reč*, (68.14), 67-131. See also: Novak, P. (2019). 'The neoliberal location of asylum'. *Political Geography*, *70*, 1-13.

[115] León, A. I., & Overbeek, H. (2015). Neoliberal globalization, transnational migration and global governance. In Talani, L. S., & McMahon, S. (Eds.). (2015). *Handbook of the international political economy of migration*. Edward Elgar Publishing; Ramji-Nogales, J. (2016). Freedom of Movement and Undocumented Migrants. *Tex. Int'l LJ*, *51*, 173.

[116] Cuttitta, P. (2007). *Segnali di confine. Il controllo dell'immigrazione nel mondo-frontiera*. Mimesis. P. 7.

[117] Andreas, P. (2003). Redrawing the line: Borders and security in the twenty-first century. *International security*, *28*(2), 78-111. P. 84.

[118] Mezzadra, S., & Neilson, B. (2013). *Border as Method, or, the Multiplication of Labor*. Duke University Press

[119] On the historical development of borders in migration management see: Popescu, G. (2011). *Bordering and ordering the twenty-first century: Understanding borders*. Rowman & Littlefield Publishers. On the tension between open and closed borders see among others: Pevnick, R. (2011). *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty*. Cambridge University Press; Coleman, M., Heynen, N., Doshi, S., Burridge, A., Heller, C., Huemer, M., & Nail, T. (2019). *Open Borders: In Defense of Free Movement*. University of Georgia Press.

[120] Albrecht, H. J. (2002). Fortress Europe?-Controlling Illegal Immigration. *European Journal of Crime Criminal Law and Criminal Justice*, *10*(1), 1-22.

there are no borders but only ways to circumvent or to contest the border that in concrete represents a mere space of political demarcation.[121]

When we study borders we should look them as spaces not just as lines of division.[122] In fact, it is in this space that different discourses produce the border in processes of ''constant encounter, tension, conflict and contestation''.[123] In doing so, borders emerge as a space in which a multitude of actors participate in the process of border configuration.[124] Yet it is important to stress that these processes of bordering do see the participation of migrants that influence and shape the space of the border.[125] Thus, it is necessary to understand that border configuration does not represent a simple and linear binary logic of structure/agency but as a representation of a more complex environment in which a crucial and active role is played by migration.[126] This articulation of bordering signals that in many cases the incentive to border configuration is given by migrants' movements and struggles.[127] In this scenario, the role of state agencies in preventing migration seems too assumed not as a top-down decision but the decisions of state agencies emerge as a counter action produced by the migrants' actions. Hence, to comprehend the struggles and opposite discourses at the border it is important to realize that the border is the creation of two antagonist forces with different power balances that struggle either to open or to close the border.[128]

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[121] De Genova, N., Mezzadra, S., & Pickles, J. (2015). New keywords: Migration and borders. *Cultural studies*, *29*(1), 55-87. P. 69.

[122] Zanini, P. (1997). *Significati del confine: i limiti naturali, storici, mentali*. Pearson Italia Spa. P. XVII.

[123] De Genova, N., Mezzadra, S., & Pickles, J. (2015). New keywords: Migration and borders. *Cultural studies*, *29*(1), 55-87. P. 69.

[124] For an overview see among others: Vaughan-Williams, N. (2009). *Border Politics: The Limits of Sovereign Power: The Limits of Sovereign Power*. Edinburgh University Press; Geiger, M., & Pécoud, A. (Eds.). (2017). *International organisations and the politics of migration*. Routledge.

[125] Mainwaring, Ċ. (2016). Migrant agency: Negotiating borders and migration controls. *Migration Studies*, *4*(3), 289-308.

[126] De Genova, N., Mezzadra, S., & Pickles, J. (2015). New keywords: Migration and borders. *Cultural studies*, *29*(1), 55-87.

[127] See: De Genova, N. (Ed.). (2017). *The borders of" Europe": Autonomy of migration, tactics of bordering*. Duke University Press.

[128] For an International history of the two positions, see: Chetail, V. (2016). Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel. *European Journal of International Law*, *27*(4), 901-922. On the right to control borders unilaterally see: Abizadeh, A. (2008). Democratic theory and border coercion: no right to unilaterally control your own borders. *Political theory*, *36*(1), 37-65.

In these processes of border reconfiguration represented by a constant struggle between social agencies and migrants. It emerges thus the need to define or at least indicate the crucial features of borders. According to Balibar (2002) trying to define what a border is runs the risk of ''going around in circles, as the very representation of the border is the precondition for any definition''.[129] In fact, Balibar continues suggesting that borders possess a ''equivocal character''.[130] The precondition for any attempt to define border is to recognize that the border is the representation of the social and that any representation of the social is based on a conceptualization of the border.[131] With this in mind is now possible to identify some of the features of borders present in the large and interdisciplinary literature on critical border studies. In the constructivist approach, borders are spatial categories that change in relation to social changes, and are characterized by fluidity in the daily manifestation of borders.[132] Moreover, in the design of borders pursued by social agencies we do see a strategic use of borders as a resource in order to satisfy specific policy objectives as the European migration policies show.[133] Other conceptualization close to the Marxist tradition stresses that borders are functional to accumulation because are the production, or the reproduction of different capitalist geographies.[134]

In his work *Theory of the Border* (2016) Nail sets out a sophisticated theoretical framework to study the transformations of borders. It is important to recall some of its elaborations. First, borders do not divide once and for all, but redirect flows of people and things in the space.[135] Second, '' […] the border is both constitutive of and constituted by society'' and ''[..] has become the social condition necessary for the emergence of certain dominant social formations, not the way around''.[136] Moreover, it is important to stress

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[129] Balibar, E. (2012). *Politics and the other scene*. Verso Trade.

[130] Ibid. P. 76.

[131] Novak, P. (2017). Back to borders. *Critical Sociology*, *43*(6), 847-864. P. 851.

[132] Popescu, G. (2011). *Bordering and ordering the twenty-first century: Understanding borders*. Rowman & Littlefield Publishers.

[133] Sohn, C. (2014). Modelling cross-border integration: The role of borders as a resource. *Geopolitics*, *19*(3), 587-608.

[134] Anderson, J. (2012). Borders in the new imperialism. *A Companion to Border Studies*, 139-157; De Genova, N. (2016). The 'crisis' of the European border regime: Towards a Marxist theory of borders. *International Socialism*, *150*, 31-54.

[135] Nail, T. (2016). *Theory of the Border*. Oxford University Press. P. 4.

[136] Ibid.

how the border is in motion in several ways: it moves itself (see geomorphology); is also moved by others (see territorial conflicts); reproduces itself.[137] In fact, borders are not static nor neutral but historically contingent political dynamics of space division.[138] In light of this, as Nail (2016) maintains ''[…] contemporary borders are largely hybrid structures composed of a mixture of different historical bordering techniques.''[139]

Indeed, the latter are specific theorization of borders with different and at time contrasting inclination. As Paasi (2016) points out, ''it is becoming increasingly difficult to distinguish separate academic realms with their own object, concepts, or methods of border research''.[140] However, what is important here is to clarify that independently from the methodological perspective followed in critical border studies there are some epistemological challenges that are very complex and difficult to solve. This may be unavoidable, nonetheless it can be suggested that borders represent the result of the competition of different social and economic forces to design a space that is dynamic, fluid and can be used as a resource for political reasons. Further, to design a border entails a process of abstraction to obtain something: a new space in which it is possible to establish new rules that can signal diversity.[141] In the conceptualization of borders as diversity signifiers, it emerges the importance of borders as the enactment of exclusion policies elaborated by states in the attempt to obstruct human migration.[142] Nevertheless, the important mission for critical border studies is to identify first theoretically, and then practically the research object that influence the production, reproduction and functioning of borders.[143]

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[137] Ibid. P. 6-7.

[138] Vaughan-Williams, N. (2009). *Border Politics: The Limits of Sovereign Power.* Edinburgh University Press. P. 48.

[139] Nail, T. (2016). *Theory of the Border*. Oxford University Press. P. 17.

[140] Paasi, A. (2016). A border theory: an unattainable dream or a realistic aim for border scholars?. In *The Routledge Research Companion to Border Studies* (pp. 33-54). Routledge. P. 18.

[141] Zanini, P. (1997). *Significati del confine: i limiti naturali, storici, mentali*. Pearson Italia Spa. P. 5.

[142] De Genova, N. (2013). Spectacles of migrant 'illegality': the scene of exclusion, the obscene of inclusion. *Ethnic and Racial Studies*, *36*(7), 1180-1198.

[143] Paasi, A. (2016). A border theory: an unattainable dream or a realistic aim for border scholars?. In *The Routledge Research Companion to Border Studies* (pp. 33-54). Routledge. P. 19.

The elaborations of the concept of border presented above must be evaluated in relation to the EU and its member state policies of border management.[144] Over the last 20 years, the EU has designed a complex multilateral border regime[145] that aimed at creating a 'securitized' and 'humanitarian' European border.[146] On the one hand, the EU in the last 20 years has developed a legal and quasi-legal framework that encompasses directives, regulations, and bilateral and multilateral agreements with third countries. On the other hand, the policy framework was based on the concept of 'integrated border management' (IBM) that aims at redefining the 'political geography of border control'[147] by the participation of different national and supranational actors and agencies.[148]

The significance of the EU approach became evident in light of the so called 'migration crisis'[149] during which it appeared evident to the EU the need to reinforce external border controls. It follows, that the EU inaugurated this kind of border management policy during the Valletta summit in 2015. Nonetheless, the main aim of the EU was to boost the cooperation with third countries by designing bilateral or multilateral agreements, often in the form of soft law, to reinforce European border management. Examples of the externalizing migration management policies instigated by the EU are the Turkey-EU statement (2016), the Libya-Italy memorandum of understanding (2017) and the Morocco-Spain (2019) agreement.[150]

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[144] Geiger, M., & Pécoud, A. (2010). The politics of international migration management. In *The politics of international migration management* (pp. 1-20). Palgrave Macmillan, London.

[145] Hampshire, J. (2016). European migration governance since the Lisbon treaty: introduction to the special issue. *Journal of Ethnic and Migration Studies*, *42*(4), 537-553. P. 541; Campesi, G. (2018). Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221. P. 198.

[146] P Pallister-Wilkins, 'The Humanitarian Politics of European Border Policing' (2015) 9 *Intl Political Sociology* 53; P Cuttitta, 'Delocalization, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2018) 50 *Antipode 783*; and Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection'Paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140.

[147] Campesi, G. (2018). Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221. P. 199.

[148] For more information on the IBM strategy see: Campesi, G. (2018). Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221.

[149] For a critical account of the concept of 'migration crisis' see: Campesi, G. (2018). Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221.

[150] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33. P. 12.

According to Bigo (2014) borders in the EU are the representation of a border assemblage composed of three dimensions,

> ''In the first dimension, they exist as the locus of practices of sovereignty and exception. The second dimension adds a disciplinarization of the body, with the biometric identifiers organizing controls and detention centres within a liberal logic, applying security at the limits of freedom, and developing forms of statistical discriminations of population organizing a biopolitical governmentality. The third dimension of cloudy borders, seen through computerized data, emerges as a refinement of biopolitics. Computerized surveillance technologies make it possible to gather traces, to organize dataveillance, and to fight virtual data wars.''[151]

What the EU has developed is a complex system of national and international actors motivated by the ultimate aim of reinforcing the control of European borders in order to diminish the arrival of migrants and the death at sea.[152]

To reinforce the border the EU is 'stretching the border'[153] of Europe until North Africa and Turkey. Moreover, the EU designed a system that does not give access to most of would be migrants to what Spijkerboer (2018) calls ''global mobility infrastructure''.[154] Indeed, the complexity of the migration management system created by the EU transforms the border of extra-EU neighboring countries in spaces in which the EU and its member states exercise state agency on both the neighboring state and on the migrants blocked in these countries.[155] Thus, the border is transformed in a space,

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[151] Bigo, D. (2014). The (in) securitization practices of the three universes of EU border control: Military/Navy–border guards/police–database analysts. *Security Dialogue*, *45*(3), 209-225. P. 220.

[152] On this point see: Cuttitta, P., & Last, T. (2019). *Border deaths: Causes, dynamics and consequences of migration-related mortality*. Amsterdam University Press; Steinhilper, E., & Gruijters, R. J. (2018). A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean. *Sociology*, *52*(3), 515-533.

[153] Casas, M., Cobarrubias, S., & Pickles, J. (2010). Stretching borders beyond sovereign territories? Mapping EU and Spain's border externalization policies. *Geopolitica (s)*, *2*(1), 71-90; Novak, P. (2017). Back to borders. *Critical Sociology*, *43*(6), 847-864. P. 857.

[154] Spijkerboer, T. (2018). The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control. *European Journal of Migration and Law*, *20*(4), 452-469.

[155] These policies reflect the characteristic of borders as ''artefacts of dominant discursive processess'' in Agnew, J. (2008). Borders on the mind: re-framing border thinking. *Ethics & Global Politics*, *1*(4), 175-191. P. 176.

determined 'from distance' by EU governance structures, in which legal obligations and international responsibilities are blurring. As Walters (2006) suggests, ''More than ever, border control has become a dynamic, agonic process, a field of permanent social struggle in its own right''.[156] These border struggles transform the border in a space of human, political and military confrontation in which affluent states 'manage from distance'.

In this scenario 'governance from distance'[157] brought to its ultimate conclusion creates what Moreno Lax and Lemberg Petersen (2019) call 'border induced displacement' effect identifying with this the combination of the processes of extraterritorialization and externalization.[158] According to Shakar (2020) these dynamics give rise to a new paradigm: the 'shifting border'. As she suggests,

> ''In 1989, with the fall of the Berlin Wall, many predicted that sealed gates would soon become relics of a bygone era. Today, we find a different reality. Instead of disappearing, borders are metamorphosing. The border itself has evolved to become a moving barrier, an unmoored legal construct. It has broken free of the map; it may extend beyond the edge of territories or into their interiors. The unmooring of state power from any fixed geographical marker has created a new paradigm: the shifting border''[159]

Indeed, borders are becoming fluid and mobile in order to satisfy the state powers political priorities namely curtailing migration by 'shifting borders' to evade international law obligations and human rights responsibilities.

The thesis explores the developments occurring in the last decade in the Central Southern Mediterranean Sea, focusing in particular on the Italian-Libyan relations. Indeed, the borders of the Central Southern Mediterranean Sea are not defined in time and space. Those are not reducible to historical events but maintained through centuries

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[156] Walters, W. (2006). Rethinking borders beyond the state. *Comparative European Politics*, *4*(2-3), 141-159. P. 4.

[157] Bialasiewicz, L. (2012). Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean. *Geopolitics, 17(4), 843-866*. P. 852.

[158] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33. P. 6

[159] Shachar, A. (2020). *The shifting border: Legal cartographies of migration and mobility*. Manchester University Press.

a specific characteristic: intangible and immaterial.[160] In this space of the sea[161] migrants, experience two sentiments: spatiality[162] and immobility[163]. Thus, the aim of the thesis is to reconstruct the management policies that transform borders by discussing the migration from Libya to Italy, from an interdisciplinary perspective, in which the different actors and practices unfold in the contemporary Mediterranean 'border spectacle'.[164]

In this spectacle borders are not only the instrument to obstruct global migration flows but are emerging as instruments for the articulation of global migration flows. Meanwhile in becoming articulators of migration flows borders underwent significant transformations in relation to the number (proliferation) and the diversity (heterogenization) of borders.[165] Thus, borders are not anymore merely geographical lines but complex social institutions that see the participation of a number of actors that create, manage and shape borders.[166] These phenomena are particularly visible in migration management policies that have been designed in the last years of the so-called 'migration crisis'. In fact, in designing this management polices these actors attribute to the border a performative function[167]: the border can include or can exclude.[168]

Indeed, the capacity to either include or exclude should be regarded as a significantly flexible instrument. In fact, inclusion and exclusion should not be considered in opposition but in continuity between each other.[169] Yet, scholars such as Nail (2016),

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[160] Matvejević, P. (2002). *Mediterraneo: un nuovo breviario*. Garzanti. P. 165.

[161] Cuttitta, P. (2018). Inclusion and Exclusion in the Fragmented Space of the Sea. Actors, Territories and Legal Regimes between Libya and Italy. In Cuttitta, P., Burroughs, E., & Williams, K (2018). *Contemporary Boat Migration: Data, Geopolitics and Discourses*, 75-94.

[162] Zanini, P. (1997). *Significati del confine: i limiti naturali, storici, mentali*. Pearson Italia Spa. P. 70.

[163] Cuttitta, P. (2007). Segnali di confine. Il controllo dell'immigrazione nel mondo-frontiera. Mimesis. P. 10.

[164] De Genova, N. (2013). Spectacles of migrant 'illegality': the scene of exclusion, the obscene of inclusion. *Ethnic and Racial Studies*, *36*(7), 1180-1198.

[165] Mezzadra, S., & Neilson, B. (2013). *Border as Method, or, the Multiplication of Labor*. Duke University Press. P. 3.

[166] Hampshire, J. (2016). European migration governance since the Lisbon treaty: introduction to the special issue. *Journal of Ethnic and Migration Studies*, *42*(4), 537-553. P. 549.

[167] Balibar, É. (2012). *Politics and the other scene*. Verso Trade. P. 79. On this point see also: Johnson, C., Jones, R., Paasi, A., Amoore, L., Mountz, A., Salter, M., & Rumford, C. (2011). Interventions on rethinking 'the border' in border studies. *Political Geography*, *30*(2), 61-69.

[168] Agnew, J. (2008). Borders on the mind: re-framing border thinking. *Ethics & Global Politics*, *1*(4), 175-191. P. 180.

[169] Mezzadra, S., & Neilson, B. (2013). *Border as Method, or, the Multiplication of Labor*. Duke University Press. P. 7.

suggest that this inclusion-exclusion dichotomy has almost no explanatory power. Nail argues that borders cannot be understood from these abstract categories but only by looking at the border in terms of circulation because ''borders regularly change their selection process of inclusion such that anyone might be expelled at any moment''.[170] Having clarified the transformations and the features of borders it appears that the function of borders is to redistribute global migration flows by circulation not solely to include or exclude. Moreover, borders produce differentiated forms of access and "rights" for would be migrants.[171]

Borders are becoming articulation of mobility and the ultimate aim of the actors' involved in bordering is to monitor, differentiate and manage migration flows to respond to the political insecurity attached to such mobilities.[172] Yet to manage migration flows is not enough to control the 'main' borders in fact we assisted in the last years to a process of 'delocalization of the border'[173] and of disaggregation of border functions.[174] On the one hand, we see an expansion of the borders of sovereign authority beyond the territory of the state. On the other hand, we see some border zones are within the state territory with different power dynamics.[175]

These processes are part of a wider transformation particularly evident in the European contest of 'remote control'[176] or 'control from distance'[177] or more generally of 'shifting borders'.[178] It follows that the actors involved in migration management aim at moving the control activities to third countries through a series of legal and quasi-legal

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[170] Nail, T. (2016). *Theory of the Border*. Oxford University Press. P. 7.

[171] De Genova, N., Mezzadra, S., & Pickles, J. (2015). New keywords: Migration and borders. *Cultural studies*, *29*(1), 55-87. P. 57.

[172] Bigo, D. (2002). Security and immigration: Toward a critique of the governmentality of unease. *Alternatives*, *27*(1_suppl), 63-92.

[173] Walters, W. (2006). Border/control. *European Journal of Social Theory 9(2):187–203*. P. 193; see also Ryan, B., & Mitsilegas, V. (Eds.). (2010). *Extraterritorial immigration control: Legal challenges*. Brill.

[174] Bigo, D. (2002). Security and immigration: Toward a critique of the governmentality of unease. *Alternatives*, *27*(1_suppl), 63-92. P. 77.

[175] Basaran, T. (2008). Security, law, borders: spaces of exclusion. *International Political Sociology*, 2(4), 339-354. P. 345.

[176] Guiraudon, V., & Lahav, G. (2000). A reappraisal of the state sovereignty debate: The case of migration control. *Comparative political studies*, *33*(2), 163-195. P. 178.

[177] Bialasiewicz, L. (2012). Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean. *Geopolitics, 17(4), 843-866*. P. 852.

[178] Shachar, A. (2020). *The shifting border: Legal cartographies of migration and mobility*. Manchester University Press.

instruments that are part of externalization policies.[179] By pursuing such an externalizing policy, states put in place instruments to construct a securitized border through 'securitizing practices'[180] or 'border induced displacement'.[181] A securitized border displays two characteristics: first, it renders easier the containment of migration flows; second, it enables an externalization of search and rescue activities to third countries as in the Libyan case.

William Walters (2011) suggested an interesting alternative elaboration of the concept of border as he calls it 'humanitarian border'. In essence, Walters argues that the humanitarian border emerges only in specific settings. Furthermore, it should not be intended as universal but as a multifaceted and overdetermined phenomenon.[182] Indeed, the humanitarian border represents a governmental strategy that aims at constructing a humanitarian narrative at the border.[183] Another characteristic of the humanitarian border is its instability and mobility because is a dynamic concept that changes in relation to changes in migration flows. Thus, actors involved in the design of a humanitarian border such as states, international organization and non-governmental organizations (NGOs)[184] participate in the creation of migration management policies that can aim at both inclusion and exclusion.[185] These multitudes of actors that pursue humanitarian border policies

[179] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[180] Campesi, G. (2014) 'Frontex, the Euro-Mediterranean Border and the Paradoxes of Humanitarian Rhetoric'. *Southeast European Journal of Political Science, Vol. 2, No. 3*, pp. 126–34.

[181] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[182] Walters, W. (2011). Foucault and frontiers. Notes on the birth of the humanitarian border. P. 146. In U Bröckling, S Krasmann and T Lemke (eds) *Governmentality: Current Issues and Future Challenges.* Routledge.

[183] Cuttitta, P. (2017). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*: *A Radical Journal of Geography.* P. 9.

[184] Hardt, M., & Negri, A. (2001). *Empire*. Harvard University Press. P. 36. For an interesting account of the role of NGOs in the search and rescue activities see: Stierl, M. (2018). A fleet of Mediterranean border humanitarians. *Antipode*, *50*(3), 704-724; Cuttitta, P. (2018). Repoliticization through search and rescue? Humanitarian NGOs and migration management in the Central Mediterranean. *Geopolitics*, *23*(3), 632-660.

[185] Cuttitta, P. (2017). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*: *A Radical Journal of Geography;* Pallister-Wilkins, P. (2017). *Humanitarian borderwork. In Border Politics (pp. 85-103).* Springer, Cham. P. 87; Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection'Paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140.

follows the implementation of 'humanitarian borderwork'.[186] This strategy, nonetheless, has also a violent nature[187] because while saving lives prefigures a distinction between refugees and migrants[188] that shows that in the humanitarian borderwork we do see 'dividing practices'.[189]

It seems therefore that to design an inclusive migration management strategy we have to follow a humanitarian narrative. The humanitarian narrative considers saving life at sea and addressing the root causes of global migration as the priorities for a human and decent migration management policy.[190] The case study on the Mare Nostrum operation discussed in Chapter 5 represents a case of inclusive and humanitarian migration management strategy. In this contest, the conceptualization of border represents an important instance to design an inclusive strategy. To do so, borders are regarded as point of access to the protection of human rights.[191] In fact, for would be migrants to trigger the protection is sufficient to be in *proximity* of the border thus jurisdiction is aligned with physicality and grounded in proximity.[192] Certainly, the humanitarian border represents a governmental strategy that purposes to design a humanitarian narrative at the border.[193] Yet it emerges only in specific setting such as the Mare Nostrum humanitarian search and

[186] P Pallister-Wilkins, 'The Humanitarian Politics of European Border Policing' (2015) 9 Intl Political Sociology 53; Pallister-Wilkins, P. (2017). *Humanitarian borderwork. In Border Politics (pp. 85-103).* Springer, Cham.

[187] Hindess, B. (2006). Territory. *Alternatives: Global, Local, Political, 31*(3), 243–257.

[188] For a recent analysis of the humanitarian border relationship with refugees and migrants at the border see: Crawley, H., & Skleparis, D. (2018). Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in Europe's 'migration crisis'. *Journal of Ethnic and Migration Studies*, *44*(1), 48-64; Kallio, K. P., Häkli, J., & Pascucci, E. (2019). Refugeeness as political subjectivity: Experiencing the humanitarian border. *Environment and Planning C: Politics and Space*; Kmak, M. (2020). The right to have rights of undocumented migrants: inadequacy and rigidity of legal categories of migrants and minorities in international law of human rights. *The International Journal of Human Rights*, 1-17.

[189] For 'dividing practices' it is intended in the Foucualtian sense as the ways in which institutionally sanctioned assessment practices often reify distinctions between individuals in ways that serve institutional interests. Foucault, M. (1979). *Discipline and punish: the birth of the prison*. New York, NY: Vintage.

[190] Cuttitta, P. (2017). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*: *A Radical Journal of Geography*. P. 9; Steinhilper, E., & Gruijters, R. J. (2018). A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean. *Sociology*, *52*(3), 515-533. P. 517.

[191] For a theorization of the concept of 'Access' see, Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624

[192] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 26.

[193] Cuttitta, P. (2017). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*: *A Radical Journal of Geography*. P. 9.

rescue operations.[194] Hence, the concept of border can assume an inclusive and humanitarian connotation that shapes would be migrants destiny.

By contrast, border can be conceptualized as an exclusive migration management strategy by following a deterrence narrative.[195] This deterrence narrative is widely shared among European authorities and agencies that frame the so called 'migration crisis' as the incapability to control the external borders and to avoid irregular migration.[196] The case study on the Minniti doctrine explored in Chapter 7 of the thesis exemplifies a case of exclusive and deterrent migration management strategy. In this scenario, the border is conceptualized in way that is instrumental to an exclusive migration management strategy. It follows that borders permit the entrance only to those individuals that comply with the formal conditions set out by the state. However, in some cases countries put in place instruments to render more difficult to reach the border as showed in the externalizing policies pursued by Spain, Italy and Australia.[197] They do so by avoiding any direct international responsibilities.[198] In other words, in the exclusive strategy borders are regarded as an obstacle to access and thus to the protection of human rights.[199] In fact, for would be migrants to trigger the protection is not sufficient to be in proximity of the border but it has to *access* the border to trigger state protection.[200]

While in the outright exclusive migration management policies – the so-called Salvini policies discussed in Chapter 6 – it materializes a specific conceptualization of

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[194] Walters, W. (2011). Foucault and frontiers. Notes on the birth of the humanitarian border. P. 146. In U Bröckling, S Krasmann and T Lemke (eds) *Governmentality: Current Issues and Future Challenges*. Routledge.

[195] For an analysis of the concept of deterrence in global migration see, Gammeltoft-Hansen, T., & Hathaway, J. C. (2014). Non-refoulement in a World of Cooperative Deterrence. *Colum. J. Transnat'l L.*, *53*, 235.

[196] Steinhilper, E., & Gruijters, R. J. (2018). A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean. *Sociology*, *52*(3), 515-533. P. 516.

[197] Ghezelbash, D., Moreno-Lax, V., Klein, N., & Opeskin, B. (2018). Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia. *International & Comparative Law Quarterly*, *67*(2), 315-351.

[198] See for instance the Memorandum of Understanding between Libya and Italy. Available: https://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf or the Joint declaration on comprehensive partnership between Australia and the Republic of Indonesia. Available: www.aphref.aph.gov.au_house_committee_jsct_6december2006_treaties_indonesia_nia.pdf

[199] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624

[200] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 26.

borders. Salvini initiated a policy of 'closed ports' that as Cusumano and Gombeer (2018) point out is not illegal *per se* but has severe consequences from a humanitarian point of view.[201] Moreover, the opposition of the Italian government to the rescue activities of NGOs became even more significant. By doing so, NGOs activities were subject to many measures that intentionally created the conditions for illegality for rescue and disembarkation operations in Italy conducted by NGOs.[202] Thus, in Salvini's policies an even more exclusionary assemblage materializes. In fact, Borders are regarded as an obstacle to access and thus to the protection of human rights. Moreover, it is not enough to come under the direct control of the Italian coastguard to activate human rights protection as the *Diciotti* case shows.[203] Indeed, the humanitarian consequences of such policies are significant and if in Minniti policies the legal protection depended from establishing direct presence inside a state this is not sufficient in the outright exclusion pursued by Salvini.

To sum up, borders are complex institutions that can be either an obstacle or an access for migrants. The materialization of borders on the European frontiers has been intense in the last years[204] and has gave raise to both inclusion, exclusion and outright exclusion border management.[205] On the one hand, in the inclusive strategy the border is considered not as a limit to the entrance of the migrant but as a point that if its reach triggers the protection of the host state. On the other hand, for the exclusive strategy the border permits the entrance only to those individuals that comply with the formal conditions set out by the state. The exclusive management is brought further in the

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[201] Cusumano, E., & Gombeer, K. (2018). In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers. *Mediterranean Politics*, 1-9.

[202] See: Decree Law N. 113 of 4 October 2018, https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg; Decree Law N. 53 of 14 June 2019, https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg [last visited: 27 July 2019]. For further elaborations see, Cusumano, E., & Pattison, J. (2018). The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility. *Cambridge Review of International Affairs*, *31*(1), 53-75.

[203] For a detailed account of the case see, Massimo Frigo, 'The Kafkaesque "Diciotti" Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?' (OpinioJuris, 28 August 2018)

[204] Mezzadra, S., & Neilson, B. (2013). *Border as Method, or, the Multiplication of Labor*. Duke University Press. P. 3.

[205] Cuttitta, P. (2018b*)*. Inclusion and Exclusion in the Fragmented Space of the Sea. Actors, Territories and Legal Regimes between Libya and Italy. In Burroughs, E., & Williams, K., (2018). *Contemporary Boat Migration: Data, Geopolitics and Discourses, 75-94.*

outright exclusive policies in which the border does not permit the entrance of migrants also if those are in the hands of state agents such as the coastguard. Hence, borders can assume specific normative structures that may contribute to theorize borders as a circulation of inclusive, exclusive and outright exclusive migration management policies.

4.2. Territory

Territory is an indefinite term or concept that usually refers to a section of space occupied by individuals, social groups or institutions.[206] Other elements that emerge in the process of space occupation according to Hassner (1997) are material elements such as land, functional elements such as the control of space, and symbolic dimensions like social identity.[207] Indeed, these elements do represent what for political geographers as always been territory: the concurrent expression of the connections between space, power and knowledge.[208] Nonetheless, in other elaborations of the concept there is a significant link with the concept of sovereignty as the last authority that institutionalizes and maintains territory.[209] The role of the state is critical however, it is important to underline that territory is a dynamic concept that is in a constant process of negotiations between the institutionalized and non-institutionalized actors. As suggested by Knight (1982), ''territory is not; it becomes, for territory itself is passive and its human beliefs and actions that give territory a meaning''.[210] These processes of territory formations are part of what Paasi (1991, 1996) calls 'the institutionalization of territories' meaning ''the process during which territorial units emerge as part of the socio-spatial system and become established and identified in social action and social consciousness''.[211]

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[206] Agnew, J. (2000). Territory. In Gregory, D., Johnston, R., Pratt, G., Watts, M., & Whatmore, S. (Eds.). (2011). *The dictionary of human geography*. John Wiley & Sons.

[207] Hassner, P. (1997). Obstinate and obsolete: Non-territorial transnational forces versus the European territorial state. *Geopolitics in post-wall Europe: Security, territory and identity*, *16*, 45. P. 57.

[208] Agnew, J. (1994). The territorial trap: the geographical assumptions of international relations theory. *Review of international political economy*, *1*(1), 53-80; Paasi, A. (2003). Territory. In Agnew, J. A., Mitchell, K., & Toal, G. (Eds.). (2003). *A companion to political geography*. John Wiley & Sons.

[209] Flint, C., & Taylor, P. J. (2007). *Political geography: World-economy, nation-state, and locality*. Pearson Education. P. 156.

[210] Knight, D. B. (1982). Identity and territory: geographical perspectives on nationalism and regionalism. *Annals of the Association of American Geographers*, *72*(4), 514-531. P. 517.

[211] Paasi, A. (2003). Territory. In Agnew, J. A., Mitchell, K., & Toal, G. (Eds.). (2003). *A companion to political geography*. John Wiley & Sons. P. 4.

The concept of territory has been under investigated due to its volatile nature.[212] Gottman (1975) presents one of the first investigation in the concept of territory and its relation with state authority, he argues that, ''The concept of territory, with its material and psychological components, is a psychosomatic expedient necessary to preserve freedom and the variety of separated communities in an interdependent and accessible space''.[213] The two components of territory are identified as material and psychological forces that emerge at the individual level. It seems therefore that in this first elaboration of territory there is limited reference to the nation state. Indeed, the construction and in particular the control of a territory needs a constant process of exchange as Sack (1986) puts it ''they are the results of strategies to affect, influence, and control people, phenomena, and relationship''.[214] It follows that territory as a component is used strategically in order to influence but more importantly to control people. Brought to its conclusion such elaboration of territory prefigures an inside/outside dichotomy[215] that can trigger exclusion and closed border strategies.

The dynamics that shape territory in geographical and political dimensions should not be understood as a-historical because in doing so there is a risk of missing its complexities.[216] Moreover, as argued by Foucault (2007) ''territory is no doubt a geographical notion, but it's first of all a juridico-political one: the area controlled by a certain kind of power''.[217] In fact, the only institutional actor with the power to design territory as a juridico-political category is the nation state. Yet it is crucial to recognize the complexity of territory as a concept otherwise as Sassen (2013) points out, ''In much scholarly writing, territory as largely ceased to work analytically because it has been

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[212] Elden, S. (2013). *The birth of territory*. University of Chicago Press. P. 3; Banai, A., Moore, M., Miller, D., Nine, C., & Dietrich, F. (2014). Symposium 'theories of territory beyond Westphalia'. *International Theory*, *6*(1), 98-104. P. 99.

[213] Gottmann, J. (1975). The evolution of the concept of territory. *Information (International Social Science Council)*, *14*(3), 29-47. P. 45. See also: Gottmann, J. (1973). *The significance of territory*. Univ of Virginia Press.

[214] Sack, R. D. (1986). *Human territoriality: its theory and history* (Vol. 7). CUP Archive. P. 19.

[215] Vaughan-Williams, N. (2008). Borders, territory, law. *International Political Sociology*, *2*(4), 322-338. P. 336; Basaran, T. (2008). Security, law, borders: spaces of exclusion. *International Political Sociology*, 2(4), 339-354.

[216] Elden, S. (2013). *The birth of territory*. University of Chicago Press. P. 6.

[217] Foucault, M. (2007). Questions on geography. *Space, knowledge and power: Foucault and geography*, 173-182. P. 176.

reduced to a singular meaning - nation state territory''.[218] Thus, to overcome what Agnew (1994) called the 'territorial trap'[219], it is necessary to go beyond the linear correlation nation state/ territory in order to shed light on the multitude of actors and forces that do shape territory as a dynamic and performative concept. To do so, it is important to identify these complex dynamics operating in completely different realms from global economic governance[220] to international migration management.

It follows from the above that the concept of territory assumes different and at times contrasting characteristics. Yet what is important here is to investigate on the changes that affected the conceptualization of territory in relation to the multitude of formal and informal actors that shape the meaning of territory in migration management. In this scenario, for some scholars it appear evident that in the last decades we moved beyond the Westphalia system based on state territoriality.[221] In this movement away from such a system it became popular the idea of 'the end of territories'.[222] Yet for others, Westphalia territoriality is still present nowadays.[223] Nonetheless, what we are witnessing is not exactly an 'end of territories' but a constant process of territorial reconfiguration along lines of economic and political space[224] that are able to shape the construction of territoriality.[225] In fact, the construction of territoriality from a legal perspective is still conceptualized at national level that successively is projected at an international level. It follows thus that the nation states despite being supported by other multilateral institutions maintains the legal capacity to project an idea of territory and successively to

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[218] Sassen, S. (2013). When territory deborders territoriality. *Territory, Politics, Governance*, *1*(1), 21-45. P. 22.

[219] Agnew, J. (1994). The territorial trap: the geographical assumptions of international relations theory. *Review of international political economy*, *1*(1), 53-80.

[220] For a critical legal account of global governance see: Zumbansen, P. (2012). Defining the space of transnational law: legal theory, global governance, and legal pluralism. *Transnat'l L. & Contemp. Probs.*, *21*, 305.

[221] Banai, A., Moore, M., Miller, D., Nine, C., & Dietrich, F. (2014). Symposium 'theories of territory beyond Westphalia'. *International Theory*, *6*(1), 98-104.

[222] Badie, B. (1996). La fin des territoires westphaliens. *Géographie et cultures, 20*, 113-118.

[223] Khan, D. E. (2012). Territory and boundaries. In *The Oxford Handbook of the History of International Law*.

[224] Brenner, N., & Elden, S. (2009). Henri Lefebvre on state, space, territory. *International Political Sociology*, *3*(4), 353-377. P. 374.

[225] It is important to carefully distinguish between territoriality and territory. Territoriality entails a certain level of spatial enclosure (Sack, 1986). While territory is at best conceived as a historically and geographically specific form of political organization (Elden, 2013).

construct territoriality.

Instances of these dynamics can be recognized in the 'territoriality law-making' of different nation states.[226] However, the instruments used differ in relation to the different legal tradition of the nation state examined. For instance, the USA uses mostly private law and avoids international law while Germany constructs territoriality mostly by public law and international law making.[227] Other instances following from migration management show the use of executive soft law instruments in order to securitize border control like in the Libya-Italy memorandum of understanding.[228] Further, also at EU level territoriality is designed with soft law instruments like in the EU-Turkey statement.[229] Following Sassen (2012), these instances show that territoriality, as a legal construct is not a direct relation with territory because it can go beyond territory itself. In so doing, the meaning of territory transcends its meaning by encapsulating the capacity to design ''territorial informal jurisdiction''.[230] Here the theoretical point emphasized by Sassen (2012) that opens up new theoretical perspectives is the idea that these complex spaces emerge as ''distinct territories inside national-state territory itself''.[231]

In other words, territory and territoriality are concepts instrumental to the construction of the idea of state exclusivist authority over a territory. Yet to move beyond these constructions of jurisdiction it is important to explore law ''as a territorial and territorializing device'' as suggested by Brighenti (2010).[232] In this scenario, the law can assume both a territorializing and de-territorializing effect depending from the state economic and political objectives. Indeed, as I showed above, the legal instruments to

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[226] For a general overview of the different classifications of territory in the history of International Law see, Mickelson, K. (2014). The Maps of International Law: Perceptions of Nature in the Classification of Territory. *Leiden Journal of International Law*, *27*(3), 621-639.

[227] Buxbaum, H. L. (2009). Territory, territoriality, and the resolution of jurisdictional conflict. *The American Journal of Comparative Law*, *57*(3), 631-676.

[228] The Libya-Italy Memorandum of Understanding. Available: https://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf

[229] The EU-Turkey Statement. Available: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

[230] Sassen, S. (2013). When territory deborders territoriality. *Territory, Politics, Governance*, *1*(1), 21-45. P. 23.

[231] Ibid.

[232] Brighenti, A. M. (2010). Lines, barred lines. Movement, territory and the law. *International Journal of Law in Context*, *6*(3), 217-227. P. 225.

construct or deconstruct territory are several and differ in relation to the legal culture. Nevertheless, here it is suggested that the instances of these reconfiguration of territory along economic and political spaces are clearly visible in migration management strategies. As Benhabib (2020) suggests, '' [..] states are increasingly implementing deterritorialization tactics to avoid triggering international human rights obligations including excising land in an attempt to shrink territorial jurisdiction''.[233]

At a general level, these strategies assume a different conceptualization of territory in order to design an inclusive, exclusive and outright exclusive strategy based on the decision of the European courts. In some cases, presented in the next chapters, it emerges that states to design a specific elaboration of territory use soft law instruments that due to their characteristics - fluidity and hyper-simplified form of adoption - are able to address the state migration management priorities.[234] This is done by designing bilateral agreements, in form of soft law, to achieve what Benhabib (2020) calls ''extra-territorialization of refuge control''.[235] In these exercises territory control its exercised by state agents on migrants that di dot reach yet the territory of the destination state. In doing so, third state agents exercise a direct control on migrants by blocking them from getting to the territory of the destination state.

Once we have clarified the different conceptualizations of territory and territoriality it is important to briefly elaborate more on the concept of territorial rights in relation to inclusion and exclusion in migration management practices. According to Miller (2012), territorial rights are a bundle of rights composed by three main yet separate rights: (1) jurisdiction, the right to enforce law within a territory; (2) resources, the right to control and use resources in a given territory; (3) border control, the right to control the movement of people and goods across the border of the territory.[236] Indeed, these rights are complementary and interdependent nonetheless I am interested in the right to

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[233] Benhabib, S. (2020). The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights. *Jus Cogens*, *2*(1), 75-100. P. 78.

[234] Terpan, F. (2015). Soft Law in the European Union: The Changing Nature of EU Law. *The European Law Journal, 21 (1),* 68-96; Algostino, A. (2017). *L'esternalizzazione soft delle frontiere e il naufragio della Costituzione*, in Costituzionalismo.it, (1), 2017, 139-182.

[235] Benhabib, S. (2020). The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights. *Jus Cogens*, *2*(1), 75-100. P. 88.

[236] Miller, D. (2012). Territorial rights: Concept and justification. *Political Studies*, *60*(2), 252-268. P. 253; Stilz, A. (2011). Nations, states, and territory. *Ethics*, *121*(3), 572-601. P. 573; Nine, C. (2012). *Global justice and territory*. Oxford University Press. In particular chapter 1.

border control as a right to exclusion. Many political theories on territorial rights agree that the state as the authority to exclude outsiders, however these recognize that this exclusion should be compatible with limitations imposed by other important values. Unfortunately, identifying the 'other important values' is problematic both theoretically and legally. Some interesting reflections are suggested in many cosmopolitan theories of global justice.[237] Nevertheless, as Ypi (2013) suggests these theories have not yet been connected systematically with territorial rights.[238]

It follows that the identification of the conditions that can limit the state right to exclude outsiders from its territory represents a challenge both theoretically and legally.[239] It is crucial to come up with some theoretical justifications for the inclusion of outsiders. For instance, Stilz (2011) theorizes the justifications for a right of occupancy suggesting something relevant for migrant territorial inclusion. In fact, Stilz indicates that a type of occupancy right emerges when a person manifests ''his connection to that particular territory was formed through no fault of his own''.[240] Sandelind (2015) has further elaborated this perspective claiming that territorial rights ''are based on individuals fundamental interests in stable occupancy and of being subject to a state that effectively can establish just rule of law and protect basic human rights''.[241] Yet this last definition appears problematic in migration management because it refers to 'stable occupancy' that is difficult to assess due to the fluidity of migration flows and to the bureaucratic deficiencies of many country of arrival. In light of this, I propose to define territorial rights as an individual fundamental legal entitlement to occupy momentously a piece of territory and being subject to a state that can effectively guarantee inclusion and human rights protection.

A more radical elaboration of the concept of territorial rights and the right to exclusion is presented by philosopher Di Cesare. Di Cesare (2017) suggests that to unpack

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[237] Beitz, C. R. (1999). *Political theory and international relations*. Princeton University Press; Pogge, T. (2000). *World poverty and human rights*. Cambridge: Polity; Caney, S. (2006). *Justice beyond borders: A global political theory*. Oxford University Press.

[238] Ypi, L. (2013). Territorial rights and exclusion. *Philosophy compass*, *8*(3), 241-253. P. 251.

[239] Scott, J. C. (2020) [1998]. *Seeing like a state: How certain schemes to improve the human condition have failed*. Veritas Paperbacks.

[240] Stilz, A. (2011). Nations, states, and territory. *Ethics*, *121*(3), 572-601. P. 585.

[241] Sandelind, C. (2015). Territorial rights and open borders. *Critical review of international social and political philosophy*, *18*(5), 487-507. P. 492.

the so-called 'Migration Crisis' it is necessary to discuss the relationship between the state and migration.[242] In fact, this tension encompasses a number of philosophical and legal problems that needs to be detected and analyzed to offer an alternative conceptualization. To do so, it is crucial to develop an alternative understanding of territory from a closed space to a semi-open one. Indeed, the idea that justice applies only within the territory and to the citizen of the state, as suggested by Rawls appears 'outdated'.[243] Are the migrants in fact that with their flows across territories put into question the concept of territorial rights and more decisively fundamental rights.[244] Indeed, the state emerges as the only legitimate actor to exclude outsiders from its territory or in certain cases include outsiders. Yet the role of the state is put into question because nowadays the state is not an ethnic-national homogenous community.[245] In this scenario the state must identify the instruments to reconcile fundamental rights and state sovereignty because as suggested by Habermas (1992), ''Western societies are, for many reasons, morally obliged to adopt a liberal immigration policy ''.[246]

The difficulties in imagining a *ius migrandi* are significant because to migrate is a *political* act that opens up cultural, religious, and economic clashes. As Di Cesare puts it ''The ius migrandi is the human rights of the new century […] and it will require an effort similar to the one required for the slavery abolition''.[247] Indeed, the path towards the recognition of a universal human right to migrate is a significant challenge. However, while designing such a principle it may be possible to develop the idea of Immanuel Kant about the right to hospitality that goes further than the right to occupancy. Nevertheless, despite cosmopolitan in its formulations Kant developed a philosophy that excludes a priori any migration movement.[248] In doing so, such a conceptualization has been used

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[242] Di Cesare, D. (2017). *Stranieri residenti: una filosofia della migrazione*. Torino: Bollati Boringhieri.

[243] Beitz, C. R. (1999). *Political theory and international relations*. Princeton University Press. PP. 129-36.

[244] Di Cesare, D. (2017). *Stranieri residenti: una filosofia della migrazione*. Torino: Bollati Boringhieri. P. 20.

[245] Ibid. P. 70.

[246]Habermas, J. (1992). Cittadinanza politica e identità nazionale. Riflessioni sul futuro dell'Europa. *Morale, diritto, politica*, 105-38.

[247] Di Cesare, D. (2017). *Stranieri residenti: una filosofia della migrazione*. Torino: Bollati Boringhieri. P. 93.

[248] Ibid. P. 30.

by policy makers to justify a selective and restrictive policy of entrance.[249]

Nonetheless, it appears significantly difficult to develop a right to entrance and a duty to hospitality in a world in which only ten percent favours open borders.[250] It follows that to design such a principle it is necessary to reconsider the principle of territorial rights in relation to human rights protection and hospitality. Indeed, such an effort is not an easy one since it presupposes in its theoretical elaboration a denaturalization of movement restrictions.[251] In light of this, territory shall be conceptualized as an open space in which justice and human rights protection are *not* circumscribed to the nation state.[252] Thus, the nation state has to discuss - in light of the challenges posed by international migration - the concept of territory to reinforce the idea that the simple access to the territory triggers human rights protection, and thus justice. Yet the issue here is that migrants are not able to get in proximity to the territory because those are stopped before reaching the country of destination that in doing so avoids any obligation of non-refoulement.

By considering the concept of territory as both a legal and political manifestation, it is possible to identify some of the dynamics that characterize the theorization of territory in contemporary migration management practices. Nowadays migration management strategies around the world have as main objective the decrease of migrants' arrivals. Indeed, these governments are influenced by the rise of antimigrant' sentiment in right parties and civic society. In Europe, for instance, the statistics collected by Eurobarometer show an increase of negative sentiment towards migrants in many member states.[253] In order to secure the electoral support governments of both center-right and center-left have attempted to design policies that were able to maintain security within its territories. To sustain such policies government developed a system in which the concept of territory played an important role. Nevertheless, it is not very clear if these policies manipulated the concept of territory consciously or unconsciously. Yet the

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[249] Ibid. P. 89.

[250] Coleman, M., Heynen, N., Doshi, S., Burridge, A., Heller, C., Huemer, M., ... & Nail, T. (2019). *Open Borders: In Defense of Free Movement*. University of Georgia Press. P. 2.

[251] Ibid. p. 8.

[252] Di Cesare, D. (2017). *Stranieri residenti: una filosofia della migrazione*. Torino: Bollati Boringhieri. P. 86.

[253] Special Eurobarometer presented by the European Commission (2018) ''Integration of Migrants in the European Union''. Available from: file:///C:/Users/marrevig/Downloads/ebs_469_en.pdf

outcome from this policy exercise was the emergence of system of migration management conceptualized around the concept of territory.

Territory has a critical relation with jurisdiction at the border. Territory in fact should be regarded as a geographical domain in which people, through institutions, exercise jurisdiction over a group of people.[254] In particular, for the policies exercised by a state at the border the relation between a specific conceptualization of territory and jurisdiction are visible in the application of migration management practices. As we pointed out before migration management policies can be assembled as inclusive or exclusive. This assemblage depends from the different conceptualization of territory in relation to jurisdiction, proximity and presence. Moreover, this conceptualization is based on the compromise developed by the courts and quasi-judicial institutions that transformed the human rights application[255] to what Paz (2017) calls 'access' meaning the ability to establish territorial presence (open territoriality), or to enter the territory (strong territoriality) or to come within the control of the state or its agents (neo-territoriality).[256] Therefore, affluent states were able to design a system of management that is significantly linked to the concept of territory and in fact its conceptualization can achieve an inclusive of exclusive management policy.[257]

Let me briefly examine the characteristics of these three distinct but at times complementary management policies. While designing an inclusive migration management strategy states have to conceptualize territory in relation to access, jurisdiction, and proximity in the following ways. First, human rights protection is not dependent from the 'access' to territory of would be migrants but to the simple proximity to the territory. In doing so, states reinforce the concept developed by the ECtHR in Jamaa

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[254] Moore, M. (2015). *A political theory of territory*. Oxford University Press. PP. 26-27.

[255] For a detailed account of the case law that prefigured such a compromise see: Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L., 34, 1*; Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[256] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624. PP. 602-603.

[257] Cuttitta, P. (2017). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*: *A Radical Journal of Geography;* Cuttitta, P., Burroughs, E., & Williams, K. (2018*). Inclusion and Exclusion in the Fragmented Space of the Sea. Actors, Territories and Legal Regimes between Libya and Italy. *Contemporary Boat Migration: Data, Geopolitics and Discourses, 75-94.*

vs. Italy that maintains that human rights jurisdiction is ''essentially territorial''[258] and is aligned with physicality and proximity.[259]

Thus, in this case territory is conceptualized as an open point of access for migrants. Further, territory represents a space not only dominated by the law of the state but also as a space of humanitarianism in which the 'right of escape'[260] is defended independently from the compliance the rule of the state. In so doing, territory becomes an inclusive concept that reinforces the idea that the simple territorial presence (open territoriality) triggers human rights protection going beyond the statist vision of the concept of territory. In fact, human rights protection applies extraterritorially meaning independently from would be migrants' access to state territory. It follows that state assume an extended view of human rights that if brought to the extreme can became an open borders policy that sees no territorial limitation to human right protection.[261]

Indeed, the concept of humanitarianism in relation to migration requires some general considerations. Generally, humanitarian policies are based on benevolence and grace presenting the act of rescue as a form of justice based on exceptionalism. In fact, there is no systematic and regular humanitarian policing during the migration management activities.[262] Instances of such behaviors are visible in the Mare Nostrum operation that indeed was set up as an exceptional operation based on emotional narratives.[263] Thus, the access to territory also from a legal perspective is accessed only through the state of exception designed by the institutional structures of the sovereign power. This state of exception should be understood as something within the juristic order[264] and as Agamben (2005) suggests the state of exception is a juridical measure that

[258] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 71.

[259] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L., 34, 1*. P. 26.

[260] Di Cesare, D. (2017). *Stranieri residenti. Una filosofia della migrazione*. Editore Bollati.

[261] Ibid. P. 28. See also: Coleman, M., Heynen, N., Doshi, S., Burridge, A., Heller, C., Huemer, M., & Nail, T. (2019). *Open Borders: In Defense of Free Movement*. University of Georgia Press.

[262] Ticktin, M. (2005). Policing and humanitarianism in France: Immigration and the turn to law as state of exception. *Interventions*, *7*(3), 346-368. P. 359.

[263] Musarò, P. (2017). Mare Nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28.

[264] Schmitt, C. (2005). *Political theology: Four chapters on the concept of sovereignty*. University of Chicago Press. P. 6.

cannot be comprehended in legal terms.[265] It follows that also in humanitarian migration management policies the inclusion is rooted on a humanitarian logic and is recognized only in exceptional cases.[266]

By contrast, designing an exclusive migration management strategy brought to the extreme can became a closed borders policy. To do so, it is first necessary to recognize human rights jurisdiction as linked to access to territory because would be migrants have to enter the territory (strong territoriality) and to come under direct control of the state (neo-territoriality).[267] Thus, in this approach jurisdiction is rooted in strong territoriality meaning that human rights obligations are strictly territorial.[268] Second, state jurisdiction and thus state responsibilities will manifest themselves only if there is a direct access to the territory of the destination state. Yet this means that would-be migrants have to get close enough to the border to be considered for state protection. In conceptualizing territory as some states pursue policies that make it more difficult for would be migrants to reach the territory of the state. For instance, states externalize sea search and rescue operations to third states in order to avoid international responsibilities.[269]

While, in the development of an outright exclusive migration management as the Salvini's one the concept of territory assumes a specific elaboration. The concept of territory is also brought further in exclusion in fact for migrants is not sufficient to enter the territory and to come under direct control of the state. In Salvini's assemblage jurisdiction is not territorial, yet it seems to be enacted only upon direct decision of the minister of Interior through an executive order without any respect for the concept of territory and of international law. Indeed, the humanitarian consequences of such policies are significant and if in Minniti policies the legal protection depended on establishing

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[265] Agamben, G. (2005). *State of Exception*. University of Chicago Press. P. 1.

[266] Lochak, D. (2000). L'humanitaire, perversion de l'Etat de droit. *Sciences sociales et santé*, *19*(4), 35-42; Ticktin, M. (2005). Policing and humanitarianism in France: Immigration and the turn to law as state of exception. *Interventions*, *7*(3), 346-368.

[267] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624. P. 603.

[268] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L., 34, 1.* P. 31.

[269] See for instance the Memorandum of Understanding between Libya and Italy. Available: https://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf or the Joint declaration on comprehensive partnership between Australia and the Republic of Indonesia. Available: www.aphref.aph.gov.au_house_committee_jsct_6december2006_treaties_indonesia_nia.pdf

direct presence inside a state this is not sufficient in the outright exclusion pursued by Salvini.

To sum up, territory is a critical concept that can assume different disciplinary articulations. First, in 'mainstream' migration management territory is a direct representation of state sovereignty which is the sole authority able to set the conditions of passage or entry in the state. In this scenario, states adopt policies to control the territory from distance by implementing extraterritorial *non-entrée* policies.[270] Nowadays this is a common or 'mainstream' practice used by affluent states. Second, in 'humanitarian' migration management territory in some exceptional circumstances may become an open category in which the right of transit and entry is always protected independently from the satisfaction of the formal conditions prefigured by states. In doing so, brought to the extreme it can become a 'open borders' policy that admits migrants that are in proximity of the state territory. Third, in 'exclusive and outright exclusive' migration management territory is designed to exclude migrants by developing a legal framework that makes it more difficult to access or more simply to get in proximity of state territory. Thus, states intensify extraterritorial *non-entrée* policies and complement them with the use of cooperative *non-entrée* policies with third states[271] promoting contactless control.[272]

4.3. Human Rights

The human rights movements in the last decades have provided the globe with ''emancipatory vocabulary and institutional machineries for people across the globe'' able to design an international legal system which promotes a specific idea of justice.[273] In other words, as Macklem (2015) suggests, 'Human rights are the vocabulary of justice

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[270] Hathaway, J. (1992). 'The Emerging Politics of Non-Entre'. *Refugees* 91: 40. For a further elaboration of the concept see, Hathaway, J. C. (2005). *The rights of refugees under international law*. Cambridge University Press.

[271] Dastyari, A., & Hirsch, A. (2019). The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy. *Human Rights Law Review*, *19*(3), 435-465; Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, *32*(4), 715-740.

[272] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

[273] Kennedy, D. (2002). International Human Rights Movement: Part of the Problem?. *Harv. Hum. Rts. J.*, *15*, 101.

for our globalized world.[274] Nonetheless, these elaborations of human rights as promoters of justice worldwide cannot be regarded solely as a positive and dynamic force. In fact, while human rights in theory were instruments to promote justice, they also possess some critical features that make them problematic to accept tout court.[275] First, human rights have not always complied with the aspiration of justice in part for the dominance of a moral understanding of human rights.[276] Second, to design a system in which the search of justice is the primary objective, it is necessary to conceptualize human rights as international legal entitlement able in theory to mitigate injustice across the world.[277]

From a strictly legal point of view, human rights are international law norms. It appears from Macklem's argument that human rights have a relation with the international legal order in at least three ways. First, human rights monitor the structural dynamics of the international legal order.[278] Second, they mitigate the negative consequences from the way in which the international legal order is designed. And third, the human rights framework, by controlling and mitigating, confers legitimacy to the international order. Indeed, these argumentations unfold in the language of human rights.[279] However, in order to shed light on the construction of human rights as an agenda able to promote justice across the world, it is worth to spend a few words, answering the question: what are human rights?

The literature is vast and compelling yet some general remarks can be done.[280] It is possible to identify four traditional families of human rights theories: (1) human rights as legal norms; (2) human rights as moral norms; (3) human rights as social norms, and (4) human rights as thought experiments.[281] First, human rights as legal norms are

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[274] Macklem, P. (2015). *The sovereignty of human rights*. Oxford University Press, USA.

[275] Frankenberg, G. (2014). Human rights and the belief in a just world. *International Journal of Constitutional Law*, 12, 1.

[276] Macklem, P. (2015). *The sovereignty of human rights*. Oxford University Press, USA.

[277] Ibid.

[278] Lorca, A. B. (2017). Human rights in international law? The forgotten origins of human rights in Latin America. *University of Toronto Law Journal*, *67*(4), 465-495.

[279] Ibid.

[280] Among the philosophers theorizing human rights see among others the works by William Talbott, Henry Shue, James Nickel, James Griffin, John Tasioulas, Joseph Raz, Ronald Dworkin, Charles Beitz, David Miller, Allen Buchanan, Carl Wellman, Christopher Wellman, and Andrew Altman.

[281] Mann, I. (2017). Human Rights as Thought Experiments. *J. Int'l L & Int'l Rel.*, *13*, 20.

designed on positive law making in the form of treaties and declarations.[282] This system in principle strong is problematic in its institutionalization due to the weakness of international institutions.[283] Second, human rights as moral norms have as ultimate goal the development of a vocabulary for global justice.[284] Third, human rights as social norms articulate a wide shared of decent human behavior that is common to ordinary people. Yet member of the community confronting with human rights often do not care about human rights.[285] Fourth, human rights as thought experiment or as existential commitments prefigure the protection of human rights as a personal choice to realize a duty to other people.[286] Nonetheless, to comprehend human rights different theorization it is important to consider that these theories are mutually interdependent but maintain some degree of specificity. To unveil some of the dynamics that characterize the human rights discourse it is crucial to identify what the ideological premises of such an enterprise are.

The pervasive relationship between human rights and the history of capitalism is acknowledged by Badiou (2010) who argues that human rights involve a ''cult of freedom (including, of course, freedom of enterprise, the freedom to own property and to grow rich that is the material guarantee of all other freedoms)''.[287] Another criticism of the human rights enterprise is suggested by Agamben (1998) who argues that human rights are used, "for the sake of the supposed representation and protection of a bare life that is more and more driven to the margins of nation-states, ultimately to be recodified into a new national identity".[288] Yet how it is possible to radically change human rights politics? Marks (2009) offers an important point, she warns that "rather, there exist some 'necessary factors', in the shape of limits and pressures which orient change without actually predetermining it".[289] In other words, a project of mobilising human rights for

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[282] Ibid. P. 20.

[283] Buchanan, A. (2013). *The heart of human rights*. Oxford University Press. P. 80.

[284] For this type of approach see: Pogge, T. W. (2008). *World poverty and human rights*. Polity.

[285] Mann, I. (2017). Human Rights as Thought Experiments. *J. Int'l L & Int'l Rel.*, *13*, 20. P. 21.

[286] Ibid. P. 24.

[287] Badiou, A. (2010). *The communist hypothesis*. London: Verso. P. 2.

[288] Agamben, G. (1998). *Homo Sacer: sovereign power and bare life*. Stanford: Stanford University Press. P. 133.

[289] Marks, S. (2009). False contingency. *Current Legal Problems*, *62*(1), 1. P. 9.

radical democratic purposes now faces some very significant challenges and restrictions following from recent history of neoliberal capitalism. [290]

Many scholars seem to agree that the human rights project was developed from the 1970s. Yet some like Klein (2007) suggest that the human rights movement developed in relation with the neoliberal project, and thus to understand human rights ideology we should concentrate on its relationship with the history of capitalism.[291] Others like Moyn (2012, 2014) do accept the preposition that human rights emerged in the 1970s; however, they do not recognize the direct causal relation between the human rights project and neoliberalism.[292] In fact, Moyn (2014) argues that human rights and neoliberalism were developed in the same years and share some characteristics. Nonetheless, they still remain two parallel but separate projects.[293] Thus, indeed there is a critical relationship between neoliberalism and the human rights enterprise. Nevertheless, it is rather difficult to argue about a direct causal relation.

Another important element of the human rights project as pointed out by Marks (2013) is the idea developed by some scholars such as Raz (2010) and Moyn (2012) of the 'myth of presumptive universality' of human rights.[294] While the universality of human rights can be challenged, it is important to consider the difficulties posed by the human rights application. According to Raz (2010), the human rights project faces two problems: first, only limited practices exist to monitor and enforce the international protection of human rights; second, some claims of human rights are culturally biased and imposed by the West across the world.[295] Hence, for some the human rights movement can be regarded as a-political and a-ideological language aimed at enhancing global justice. However, the implementation of such a project is problematic, as

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[290] McLoughlin D. (2016). Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière. *Law and Critique*, vol. 27, pp. 303 – 321. P. 17.

[291] Klein, N. (2007). *The shock doctrine: The rise of disaster capitalism*. Macmillan. See also: O'Connell, P. (2007). On reconciling irreconcilables: Neo-liberal globalisation and human rights. *Human Rights Law Review*, 7(3), 483-509.

[292] Moyn, S. (2012). *The last utopia*. Harvard University Press; Moyn, S. (2014). A powerless companion: Human rights in the age of neoliberalism. *Law & Contemp. Probs., 77, 147.*

[293] Ibid.

[294] Marks, S. (2012). Four human rights myths. In Kinley, D., Sadurski, W., & Walton, K. (Eds.). (2012). *Human rights: old problems, new possibilities*. Edward Elgar Publishing. See also, Marks, S. (2011). Human rights and root causes. *The Modern Law Review*, 74(1), 57-78.

[295] Raz, J. (2010). Human rights in the emerging world order. *Transnational Legal Theory*, 1(1), 31-47.

Koskenniemi (2010) points out ''Because there are no authoritative lists of prelegislative rights, political actors are always able to dress their claims in rights language''.[296] In other words, human rights projects to maintain their ideological and political 'independence' should not be committed to a specific theory of economic development, security or any other 'ideological' constraint.[297]

In light of this, it is important to move away from such an understanding of the human rights project is what Perugini and Gordon (2015) suggest being the role of human rights in 'the ethical, legal and practical construction of practices of domination around the world'.[298] Perugini and Gordon's book *The Human Right to Dominate* offers some interesting and critical reflections that merit some attention. First, human rights and violence are not antithetical but coexist in the unfolding of human rights enterprises. Second, they present historical instances that show the relation between human rights and domination. Third, they identify human rights as a language that frames events on legal and moral grounds in order to secure political legitimacy.[299] Thus, according to the authors, human rights ''constitute a highly flexible political discourse with the capacity to be constantly appropriated, translated, performed, and retooled in different political arenas''.[300] In so doing, it is important to recognize the flexibility and performativity of human rights discourses and to do a further effort to detect the invisible relations between governments, international organizations and NGOs in pursuing global justice or domination.

It is indeed difficult to agree with one of the two positions, but a useful exercise can be to present some features of the human rights language that are common to both streams. First, the power of human rights lies in the capacity to articulate moral or ethical convictions in legal international terms and successively to support them by naming and shaming.[301] Many actors participate in this complex exercise: governments, diplomacies,

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[296] Koskenniemi, M. (2010). Human rights mainstreaming as a strategy for institutional power. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, *1*(1), 47-58. P. 49.

[297] Ibid. P. 54.

[298] Perugini, N., & Gordon, N. (2015). *The human right to dominate*. Oxford University Press.

[299] Ibid.

[300] Ibid.

[301] Murdie, A. M., & Davis, D. R. (2012). Shaming and blaming: Using events data to assess the impact of human rights INGOs. *International Studies Quarterly*, *56*(1), 1-16.

international organizations, NGOs, among others. Second, these articulations are presented to the public opinion as neutral and apolitical. In doing so, a 'joint project' is enabled between different actors to engage in the effort of bringing global justice or domination around the world. Third, human rights tend to be presented as universal legal entitlement in order to reinforce their moral and political legitimacy. Fourth, a crucial role in promoting human rights narratives is played by activists.[302]

Human rights narratives cannot avoid the ontological construction developed from the end of the Cold War.[303] On the one hand, a modern understanding of human rights that considers human rights an instrument of exclusion. On the other hand, a contemporary understanding of human rights that contemplates human rights as an instrument of inclusion.[304] The thesis suggests that this dichotomy is displayed in international migration management policies. In fact, while states pursue an exclusive migration management policy, they assume a modern understanding of human rights namely one that excludes migrants. By contrast, states pursuing migration management policies can assume a contemporary inclusive reading of human rights that includes migrants independently from the satisfaction of the formal requirement set out by the state.

In the application of inclusive border management policies, a specific elaboration of the concept of human rights materialises. First, human rights are considered as inherent to the individual independently from the individual compliance with formal conditions set by migration management policies.[305] In doing so, human rights protection is initiated by the simple encounter between the state agents and migrants.[306] Second, by following such a reading of human rights, state agents consider human rights as universal independently from the physical presence inside the territory of the destination country.[307]

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[302] Klein, N. (2007). *The shock doctrine: The rise of disaster capitalism*. Macmillan.

[303] Baxi, U. (2007). *The future of human rights*. Oxford University Press; Falk, R. (2008). *Achieving human rights*. Routledge.

[304] Baxi, U. (2006). Politics of reading human rights: Inclusion and exclusion within the production of human rights. *The legalization of human rights: multidisciplinary perspectives on human rights and human rights law*, 182-200.

[305] Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty? *Melb. J. Int'l L.*, *14*, 392.

[306] Mann, I. (2017). Human Rights as Thought Experiments. *J. Int'l L & Int'l Rel.*, *13*, 20.

[307] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

Therefore, in the application of inclusive strategies, human rights jurisdiction is grounded in proximity to the border without any formal restriction of access to the territory.

In the exclusionary strategy, human rights are grounded in physicality thus establishing territorial presence in the destination state or coming under the jurisdiction control of the state agents.[308] Moreover, proximity does not entail any legal obligation for the state because jurisdiction is aligned with territory.[309] In fact, the legal protection depends on the establishment of a direct presence inside a state.[310] The main outcome for such an understanding of human rights is that states externalize interdiction thereby avoiding any direct fingerprint that would activate jurisdiction and human rights obligations.[311] In particular, these externalization practices aim at reinforcing the notion of contactless control by promoting the contactless responsibility and contactless jurisdiction raising significant concerns for the ones in need of international protection.[312] Moreover, from several instances of multi actors contactless migration management it emerges a tension between international responsibilities and jurisdiction.[313]

The latter developments are brought even further in the outright exclusive migration management strategy discussed in Chapter 4. In Salvini's management strategies it is not enough to come under the direct control of the Italian coastguard to activate human rights protection as the *Diciotti* case will show. Moreover, jurisdiction is not territorial, yet it seems to be enacted only upon direct decision of the minister of Interior through an executive order without any respect for the concept of territory and of

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[308] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[309] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[310] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[311] Zaiotti, R. (Ed.). (2016). *Externalizing Migration Management: Europe, North America and the spread of'remote management'practices*. Routledge; Frelick, B., Kysel, I. M., & Podkul, J. (2016). The impact of externalization of migration controls on the rights of asylum seekers and other migrants. *J. on Migration & Hum. Sec.*, *4*, 190; Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[312] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

[313] Moreno-Lax, V. (2020). The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, SS and Others v. Italy, and the "Operational Model". *German Law Journal*, *21*(3), 385-416.

international law. Indeed, the humanitarian consequences of such policies are significant and if in Minniti policies the legal protection depended from establishing direct presence inside a state this is not sufficient in the outright exclusion pursued by Salvini.

To summarise, it seems that the theoretical concepts that composed what has been known as international migration management are often based on simplistic dichotomies. On the one hand, we see a statist, excluding and closed category of human rights. On the other hand, we see a universalist, inclusive and open category of human rights. Yet the core argument here is that human rights as framed so far are able to dominate and exclude migrants. Indeed, the positive power of human rights here is recognized. However, in a world dominated by affluent states the positive discourse around human rights is strong and visible. In light of this, it is important to shed light on the negative impact of human rights: exclusion of human beings based on ideological grounds that are persecuted through highly specialized infrastructure of knowledge and power.

4.4. Conclusion

The Chapter has explored the several articulations of three critical concepts in migration management: borders, territory and human rights. On the one hand, it suggests that the three concepts can be assembled in migration management to design inclusive, exclusive and outright exclusive policies. On the other hand, it is important to stress that these assemblages are interdependent but maintain a level of specificity. I want to clarify that assemblage is used as a descriptor able to explore complex structures by combining heterogenous elements aimed at explaining social processes.[314] Moreover, the concept of assemblage should be used as a tool not as a simple result.[315] In fact, the strengths of the concept of assemblage is the ability to encompass the several concepts that compose migration management policies by shedding lights on the intersection of these concepts. In doing so, the assemblage offers a critical lens that can be useful to identify some trajectories that in some instances may collide yet in other instances may not. Therefore, some migration management policies display a more causal and coherent assemblage such as Mare Nostrum, while the other two policies display less consistent assemblages.

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[314] Sassen, S. (2008). Territory, Authority, Rights: From Medieval to Global Assemblages. Princeton: Princeton University Press. P. 5.
[315] Aneesh, A. (2017). 'Relocating Global Assemblages': An Interview with Saskia Sassen. *Science, Technology and Society*, *22*(1), 128-134. P. 129.

Nonetheless, independently from the level of performance, the assemblage is a fertile concept able to explore systems characterized by complexity, fluidity and dynamicity.

Borders are in constant transformations; they are the representation of social struggles to open or to close borders. In these dynamics different institutional and quasi-institutional actors, with different methods and instruments, aim at controlling borders from distance to avoid any legal responsibility.[316] The outcome of such a strategy is the violation of human rights obligations by state and quasi-state agents at the terrestrial[317] and maritime borders.[318] This particular policy to control borders wants to reestablish the primacy of state agents in controlling their borders. To do so, states have developed a sophisticated apparatus of control whose priority is to diminish the arrivals of migrants in affluent states by externalizing to third state the control operation at the terrestrial and maritime borders. Thus, borders became spaces of conflict between state agents and migrants controlled from distance by affluent states in order to avoid any direct legal responsibility. In this scenario, for migrants it becomes way more difficult to access the border and thus to receive human rights protection when in proximity of the border as prefigured by international law.

The concept of territory despite its volatile nature represents a fundamental concept in migration management policies. To fully understand territory, it is necessary to move beyond the 'mainstream' state sovereignty and to recognize the multitude of actors that shape territory and the successive projections of territoriality. Nowadays, affluent states implement policies to control the territory from distance by implementing extraterritorial *non-entrée* policies.[319] In some exceptional cases of 'humanitarian' migration management territory may become an open category in which the right of transit and access is always protected for migrants that are in proximity of the state

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[316] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[317] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[318] Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection'Paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140; Mann, I. (2018). Maritime legal black holes: Migration and rightlessness in international law. *European Journal of International Law*, *29*(2), 347-372; Mann, I. (2020). The Right to Perform Rescue at Sea: Jurisprudence and Drowning. *German Law Journal*, *21*(3), 598-619.

[319] Hathaway, J. (1992). 'The Emerging Politics of Non-Entre'. *Refugees* 91: 40. For a further elaboration of the concept see, Hathaway, J. C. (2005). *The rights of refugees under international law*. Cambridge University Press.

territory. Finally, in 'exclusive and outright exclusive' migration is more difficult to access or more simply to get in proximity of state territory. In fact, affluent states pursue extraterritorial *non-entrée* policies together with the use of cooperative *non-entrée* policies with third states[320] supporting contactless control.[321] It follows that the concept of territory is complex and volatile and in migration management policies can contribute to exclusion, exclusion and outright exclusion.

Human rights are a critical concept. For some they have represented the emancipatory vocabulary of the modern world. Yet for others they have been mobilized under a specific ideology namely neoliberalism to promote a specific westerner idea of justice. In migration management it is possible to identity to competing narrative of human rights. On the one hand, an inclusive one that considers human rights as universal and that should be always protected independently from the compliance with formal conditions set out by states. On the other hand, an exclusive understanding of human rights that are protected only of the formal conditions set out by states are satisfied. These dichotomy between a universalist and statist understanding of human rights is visible – as will be showed – in some migration management pursued by Italy in the Central Southern Mediterranean Sea.

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[320] Dastyari, A., & Hirsch, A. (2019). The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy. *Human Rights Law Review*, *19*(3), 435-465; Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, *32*(4), 715-740.

[321] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

Chapter 5

Libya and Italy a 'Sui Generis' Relation

5. Libya and Italy

The history of Italy in the Mediterranean traces back long ago and its critical relationship with Libya has represented in different historical instances a 'sui generis' relationship.[322] In the past the relationship alternated periods of cultural and commercial exchanges to periods of colonial domination and Libyan resistance. Yet from the 1990s in this 'sui generis' relationship saw the emergence of migration as the one of the most important traits of Italy-Libya rapport.[323] In particular, from the 2011 till 2019 the migrants arrived in Italy from Libya were around 745.000.[324] In fact, migration dominated the diplomatic relations between the two countries and in many cases has been used as a political leverage for both countries. On the one hand, Libya through the control of the migration routes was able to put pressure on the Italian government under the threat of opening the corridors and letting the departure of a significant number of migrants. On the other hand, Italy needed to reassure its public opinion worried of the mass migration from Libya by contributing financially and with equipment to the control and securitization of the Central Southern Mediterranean.

In this vein, it is important to briefly present the development of the migration issue between Libya and Italy from the 1990s till today. The first agreement that directly addressed migration was the Memorandum of Intent in signed in December 2000 that concentrated on drug trafficking, terrorism, organised crime and undocumented migration (Memorandum of Intent, 2000). Until 2007 no other formal agreement was adopted, yet the two countries developed a more informal cooperation based upon on the exchange of information on migrant flows and the provision to Libya of specific equipment to control sea and land borders (Parlamento Italiano, 2003). Further, on 28 December 2007, Italy and Libya signed a formal agreement that aimed a securitizing the Central Southern Mediterranean by a joint patrolling of coasts and ports of northern Libya (Ministero

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[322] Labanca, N. (2010). The Embarrassment of Libya. History, Memory, and Politics in Contemporary Italy. *California Italian Studies*, *1*(1).

[323] Paoletti, E. (2011). Power relations and international migration: the case of Italy and Libya. *Political studies*, *59*(2), 269-289.

[324] Villa, M. (2020). Migrazioni nel Mediterraneo: tutti i numeri. ISPI. Available from https://www.ispionline.it/it/pubblicazione/migrazioni-nel-mediterraneo-tutti-i-numeri-24892

dell'Interno, 2007). To do so, Italy provided six patrol boats and allocated over 6 millions of euro to execute the agreement (Senato della Repubblica, 2008).[325]

Lastly, in 2009, they signed a 'Protocol of Execution' that established that the Italian and Libyan vessels would control the borders in order to reinforce the capacity to contrast the irregular migration phenomena.[326] These series of agreements were strongly criticised by the Italian public opinion because those prefigured refoulement operations toward a country that was not considered safe for migrants.[327] The European Court of Human Rights confirmed these violations in the famous Hirsi Jamaa and others v. Italy judgement.[328]

5.1. Libya: a Complex Environment

The situation in Libya changed substantially after the killing of Muammar Gaddafi and the subsequent civil war started in 2011.[329] The complexity of the internal tribal configurations in the Libyan territories makes difficult a peaceful resolution of the conflict.[330] After six years, the internal situation of Libya did not improve in particular in relation to the migrant trafficking toward Italy that increased significantly in these years of civil war. Discussions on migration between Italy and Libya started off in the 1990s and brought further till the killing of Gaddafi. Yet until the killing and the successive civil war the discussion on migration were conducted by Gaddafi that was the able to guarantee the representation of the many different tribes that compose the variegated ethnic division of Libya. In the aftermath of the civil war, it became evident that the, perhaps apparent unity of Libya, was now collapsing under the tribe's internal division and search for more power and wealth.[331] In other words, what was happening in Libya was the reorganization

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[325]Ronzitti, N. (2009). The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?. *Bulletin of Italian Politics* 1, no. 1, p. 125–33.

[326]Paoletti, E. (2010). The Migration of Power and North-South Inequalities: The Case of Italy and Libya. Springer. P. 133.

[327] Guttry, A., Capone F., and Sommario, E. (2017). Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements Between Italy and Libya. *International Migration,* 56, no. 3,44–60. P. 54.

[328] Moreno-Lax, V. (2012). Hirsi Jamaa and Others v Italy or the Strasbourg Court Versus Extraterritorial Migration Management?. *Human Rights Law Review,* 12, no. 3, p. 574–98.

[329]Paoletti, E. (2011). Libya: Roots of a Civil Conflict. *Mediterranean Politics*, 16, no. 2, p. 313–19.

[330] For more information on Libya's ethnic divisions see, Vandewalle, D. (2012*). A History of Modern Libya.* Cambridge University Press. In particular Chapter 7.

[331] Sawani, Y. M. (2020). Gaddafi's Legacy, Institutional Development, and National Reconciliation in Libya. *Contemporary Arab Affairs*, *13*(1), 46-68. P. 47.

of the balance of power between different tribes, factions, and landlords that at least until Gaddafi killing maintained a certain level of cooperation and unity. Yet now the political vacuum created by the Western military intervention[332] and by the internal societal configurations opened the way for the development of a 'fragile country' at the hedges of Europe.[333]

Indeed, the process of reconstruction of Libya was extremely difficult and with substantial tribal, economic, and religious clashes undermining cooperation and unity. In this vein, many new institutions were developed to support existing actors or new agenda that were emerging in the aftermath of the civil war.[334] Post-2011 leaders, on 17 December 2015, made the first attempt to overcome the political stalemate. Libyans signed the Libyan Political Agreement (LPA), sponsored by the United Nations Support Mission to Libya (UNSMIL). The outcome of this agreement was appointment of an internationally recognized Government of National Accord (GNA) with president Fajez al-Serraj based in Tripoli, as well as the elected House of Representatives (HoR) headquartered in Tobruk, in the Cyrenaica region in the eastern part of the country. Yet these were opposed by the powerful General Khalifa Belqasim Haftar, head of the so-called Libyan National Army (LNA) controlling the Cyrenaica region.[335] The fragmentation became immediately visible in the following months. In fact, on the one hand, there was an internationally recognized government without internal support; on the other hand, an internally recognised government without international legitimacy.[336]

5.2. Border Management in the Central Southern Mediterranean

This 'sui generis' relationship represents an important case studies in international migration and border management. In fact, many of the dynamics that characterize the relationship between the transit and the destination country can be recognized in other

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[332] Adler-Nissen, R., & Pouliot, V. (2014). Power in practice: Negotiating the international intervention in Libya. *European journal of international relations*, *20*(4), 889-911.

[333] Cheikh, N. (2013). Stories behind the western-led humanitarian intervention in Libya: A critical analysis. *African Journal of Political Science and International Relations*, *7*(3), 154-163; Kuperman, A. J. (2015). Obama's Libya debacle: how a well-meaning intervention ended in failure. *Foreign Affairs*, *94*(2), 66-77; Romanet Perroux, J. L. (2019). The Deep Roots of Libya's Security Fragmentation. *Middle Eastern Studies*, *55*(2), 200-224.

[334] Sawani, Y. M. (2020). Gaddafi's Legacy, Institutional Development, and National Reconciliation in Libya. *Contemporary Arab Affairs*, *13*(1), 46-68. P. 47.

[335] Nicola Missaglia (2017). Chaos in Libya: A Background. ISPI. Available from https://www.ispionline.it/it/pubblicazione/chaos-libya-background-17108

[336] Bagnoli, L. (2019). Libia: il groviglio della terza guerra civile e la conquista di Tripoli. Osservatorio Diritti. Available from https://www.osservatoriodiritti.it/2019/04/16/libia-guerra-situazione-oggi-haftar/

parts of the world. For instance, the Indonesia and Australia migration control presents important similarities to the Libya-Italy case.[337] Moreover, the in the management of the EU-Turkey border it is possible to recognize some similarities in relation to how the border is securitized and controlled in order to prevent people from reaching it but also by preventing direct involvement of the destination country. Overall, what emerges from these three border zones is the clear aim of the destination country: externalizing the control of the borders and in doing so evading any direct responsibility as foreseen by international law. These border management cases offer an important perspective for international migration because share legal techniques e political discourses that aim at constructing and maintaining a securitized border to contain 'boat migration' in the Central Southern Mediterranean.[338]

The pillars of which these border and migration strategies are based are: (1) international soft law agreements that provide financial and equipment to third states; (2) externalization of search and rescue operations and detention of migrants; (3) further fragmentation of international law[339] due to the intersection of law enforcement under the law of the sea; search and rescue requirements; refugee law principles; and human rights.[340] It follows that destination states take of a fragmented system of international law to ''select which body of international law applies, or prevails, in responding to individual situations on account (only) of security or other national concerns''.[341] This approach is indeed visible in the context of the Italy-Libya relationship making it a relevant case studies to explore further to identify the general dynamics described above.

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[337] Dastyari, A., & Hirsch, A. (2019). The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy. *Human Rights Law Review*, *19*(3), 435-465; Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, *32*(4), 715-740.

[338] V. Moreno-Lax and E. Papastavridis (eds). (2016). *Boat Refugees' and Migrants at Sea: A Comprehensive Approach*. Brill.

[339] For discussion of the problems of fragmentation, see International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi, (2006) A/CN.4/L.682.

[340] Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, *32*(4), 715-740. P. 718.

[341] Ibid. P. 739.

Chapter 6

Assembling Migration Management Policies in Italy

6. Introduction

The migration management policies that unfolded in Italy from 2013 to 2019 are the representation of complex and multidimensional phenomena that characterize migration governance. In these complex dynamics of power, it is possible to recognize a multitude of actors that compete for power and visibility. In particular, the external dimension of migration management poses important challenges for the EU members states. Italy, for its geographical position, emerged as one of the most involved member states in migration management in the central southern Mediterranean.

During this time, three different policy assemblages[342] were developed to contain migration flows. These assemblages were composed of different normative frameworks that aimed at securitizing the borders of Europe. The combination of different instruments was able to preserve the political priority: decreasing the level of landings. The three set of policies examined below in some cases do present interdependence like the Minniti and Salvini's one. Yet in others, like the Mare Nostrum policies they display an important level of exceptionality. In the former, there is a continuation in the political decisions that aim at curbing migration by criminalizing migration and solidarity. In the latter, the operation was an exceptional measure to mitigate the so-called 'Migration Crisis'.

Moreover, from these assemblages it is possible to identify the array of actors that coexist in migration governance. In the Mare Nostrum case there is the direct presence of the EU institutions to set up the operation logistically and financially. In the Minniti policies, Libya represented a key actor for the development of exclusionary policies. Further, also the tension between the Italian government and NGOs emerged. In the Salvini policies, there is a rise of instruments to monitor and detect practices of solidarity. For instance, the 'war' launched against NGOs operating in the Central Southern Mediterranean Sea. In sum, while assembling migration policies it is important to understand that these assemblages are useful as a broad descriptor of a variety of independent, and sometimes interdependent dynamics.

6.1. Mare Nostrum Policies

In a letter published on the Italian newspaper *Avvenire* the former Prime Minister Enrico Letta, whose government introduced the Mare Nostrum operation, reasserted that:

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[342] Savage, G. C. (2020). What is policy assemblage?. *Territory, Politics, Governance*, *8*(3), 319-335.

''For hundreds of people, and thousands of families, Italy has become synonymous with life, not in abstract or rhetorical terms; thanks to Italy those people, those women and those children are alive and not dead''.[343]

From these words it emerges clearly how the Italian government represented the Mare Nostrum operation as a humanitarian operation aimed at saving people at rest in the Central Southern Mediterranean. Yet what does not emerge from these words is the second aim of the operation that was fighting illegal smugglers. It seems thus that the military character of the operation was put aside in order to emphasize mostly the humanitarian character of the operation. Mare Nostrum was a set of policies with a strong humanitarian character and some military prerogatives.

To understand the motives behind the launch of Mare Nostrum it is necessary to put the operation into historical perspective. In fact, after many years characterized by a high number of victims in the Central Southern Mediterranean, in which we witnessed moments of high visibility and others of 'practices of removal'.[344] In such a scenario, it appeared necessary in particular for Italy, to reframe that space of the sea as a ''space of rescue''.[345] Furthermore, in this space the Italian military forces performed not only a border control task but more importantly, for the narratives of Mare Nostrum, they were in charge of humanitarian performances. In so doing, the policy was designed with military forces performing a humanitarian task.[346] The main objective, as the Italian government stressed, was to guarantee ''the presence of security forces on the high sea for the safety of life at sea and humanitarian assistance''.[347]

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[343] Letta, E. (2014). Io difendo «Mare Nostrum», sinonimo di vita e di civiltà. Available from: https://www.avvenire.it/opinioni/pagine/io-difendo-mare-nostrum-sinonimo-di-vita-e-di-civilt-

[344] Cuttitta, P. (2014). 'Borderizing'the Island Setting and Narratives of the Lampedusa'Border Play'. *ACME: An International E-Journal for Critical Geographies*, *13*(2); Pezzani, L. (2014) 'The Two Lives of Cap Anamur', in Weizman, E. (ed). *Forensis. The Architecture of Public Truth*, pp. 684–92. New York: Stenberg Press; Tazzioli, M. (2016). Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton. *Migration Studies*, *4*(1), 1-19.

[345] Tazzioli, M. (2016). Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton. *Migration Studies*, *4*(1), 1-19. P. 2.

[346] Ibid. P. 3.

[347] Ministero per i rapporti con il Parlamento 2015, 89.

Further, the former EU commissioner for Home Affairs Cecilia Malmstrom during a visit to Lampedusa after the tragedy reasserted that,

> ''We also need a change of approach towards migration. The recent events have shown that this restrictive approach is not a sustainable one and that it is now time to move towards more openness and solidarity.''[348]

Thus, the Lampedusa tragedy called upon the EU institutions to develop a new approach to manage migration flows. This new approach aimed at overcoming the 'restrictive' approach towards openness and solidarity. This approach is in line with what the Italian government was proposing: maintaining a significant presence of security forces in the Mediterranean to save lives and provide humanitarian assistance. In this scenario, the role of the EU was fundamental in order to create the conditions for collaboration and solidarity among member states to address these challenges. As former President of the European Commission Miguel Barroso maintained during his visit to Lampedusa ''To find answers to these common challenges, we all need to work together, in a spirit of solidarity and responsibility''.[349] As happened in several other occasions, the EU bureaucrats are always very brilliant in setting the agenda of the EU. Yet what they do not recognize publicly is the lack of solidarity among EU member states that in particular in relation to migration management policies firmly defend their borders and thus national interests.

In doing so, the Mare Nostrum policies were developed by the Italian government with the support of EU institutions but with less enthusiasm by the other member states. In fact, Mare Nostrum was a unique set of policies pursued by the Italian government with the financial support of the EU.[350] The financial support coming from the EU was part of a wider policy of control of the external border of the EU. These funds were

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[348] European Commission Cecilia Malmström EU Commissioner for Home Affairs Commissioner Malmström's intervention during the press conference in Lampedusa on the 9th of October 2013. Available from, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_799

[349] European Commission José Manuel Durão Barroso President of the European Commission Statement by President Barroso following his visit to Lampedusa on the 9th of October 2013. Available from, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_792

[350] Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing.

prefigured for the member states directly involved in the control of the EU borders. Yet, according to the decision of the European Parliament and the Council, there are not prefigured a kind of conditionality for the funds allocated. In the Central Southern Mediterranean, many issues in relation to the role of the Libyan coastguard and the respect of migrant's fundamental rights emerged. Once again it seemed that the main objective of the Italian policies under an EU umbrella went into the direction of deterrence and control from distance.

Mare Nostrum was launched directly after the Lampedusa tragedy of 3 October 2013, when 366 people drowned only half a mile before reaching the island.[351] After this tragedy, the Italian government thought to design a specific policy to manage its borders and the space of the sea in the Central Southern Mediterranean. To do so, Mare Nostrum was set up as a kind of humanitarian/military policy[352] that aimed principally to saving lives and to making sure that any other tragedy would not happen. By this time, the policies were supported by the principal Italian political parties and by the public opinion that contributed to present the as an act of human grace towards migrants departing from North Africa.[353]

The Italian government initiated the Mare Nostrum policies with to aims: first, saving lives in the central Mediterranean Sea; and second, to fight against illegal smugglers. The policies lasted from 18 October 2013 to 31 December 2014 several vessels, helicopters, aeroplanes, drones and personnel of the Italian Navy, Army, Air Force, Carabinieri, Guardia di Finanza, Coast Guard and Police incessantly patrolled the international waters of the Strait of Sicily, looking for migrants at rest and for traffickers, within the Mare Nostrum framework.[354] Such an important mission prefigured an important budget and participation of the Italian forces. The decision to deploy military

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[351] Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

[352] Tazzioli, M. (2016). Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton. *Migration Studies*, *4*(1), 1-19.

[353] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28; Tazzioli, M. (2016). Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton. *Migration Studies*, *4*(1), 1-19; Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

[354] For a brief description of the policies see: http://www.marina.difesa.it/cosa-facciamo/operazioni-concluse/Pagine/mare-nostrum.aspx [last visited: 6 May 2019]

navies showed the other priority of Italy namely combatting traffickers. The size and equipment of the naval units assigned to the operation indicated not only a humanitarian use. It is evident that missile-launching frigates of 3,300 tons, like this like an 8,000 amphibious assault ship, they're not the most suitable units (also in terms of cost) to perform pure rescue tasks while for a possible deterrent role against small merchant ships or 'mother ships' managed by human traffickers, the 76 mm guns of the patrol boats are more than enough.[355]

In the following table are summarised the navies and cost per day or hour of their operations:

FREGATE MAESTRALE	60.000 euro/day
LPD SAN MARCO	45.000 euro/day
PATTUGLIATORI	12/15.000 euro/day
TRASPORTO COSTIERO	4.000 euro/day
ELICOTTERI AB 212	4.000 euro/flight hour
ELICOTTERI EH 101	7.000 euro/flight hour
PATTUGLIATORI P-180	2.000 euro/flight hour
DRONI PREDATOR	3.000 euro/flight hour
PATTUGLIATORI ATLANTIC	13.000 euro/flight hour

Source: Marina Militare e Aeronautica Militare

According to the Italian Minister of Defense, Mare Nostrum was financed with 9.3 million Euros per month, of which 7 for the operation and maintenance of the vehicles and 2.3 for the costs related to staff allowances, and was financed with additional EU resources of 1.8 million from the EU External Borders Fund for Emergency Activities.[356] Further, according to the Italian minister of Interior, the

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[355] Gaiani, G. (2013). Mare nostrum: pro e contro della missione militare dell'Italia. *Commentary, Istituto Affari Iinternazionali*.

[356] Dossier del Senato della Repubblica Italiana, legislatura 17a – dossier n. 210. Available from, https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/912705/index.html?part=dossier_dossier1-sezione_sezione11-table_table7#n-w1aaab2ac60b1ab6b2

overall total cost of Mare Nostrum amounted to 114 million[357], amount that in the long run was unsustainable for the Italian government.

The results of the Mare Nostrum operation were summarized by the Minister of the Interior during a hearing (19 November 2014) at the Parliamentary Audit Committee on the implementation of the Schengen Agreement, to supervise Europol's work, to immigration control and surveillance: ''101,000 migrants were rescued as part of the 563 interventions, including 12,000 unaccompanied minors; 499 corpses were found, while the missing, based on the testimony of the survivors, could be more than 1,800; 728 smugglers were arrested and eight boats seized''.[358] Once again the Italian government underlined the dual character of the operation and showed with the numbers how the operation succeeded in saving life and combatting human smugglers.

To understand the Mare Nostrum policies, it is important to spend some words on the communication strategies pursued by the Italian institutions. Indeed, the communication strategies developed by the Italian government represent an important instrument able to reinforce the humanitarian rhetoric of Mare Nostrum. In particular, despite Italy participated in many search and rescue operations before Mare Nostrum it never initiated a communication campaign with photograph and videos that depicted a narrative of rescue and of humanitarianism.[359] To do so, the Italian Navy during this year of Mare Nostrum produced press releases, images, videos and films on the search and rescue operation on the high sea.[360] The aim of this humanitarian narrative was to present the policies as a humanitarian effort that depicted the military personnel more as benevolent and humanitarian than highly skilled military personnel interested in

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[357] Hearing of the Minister of Interior on 31th October 2014. Available from, https://www.interno.gov.it/it/notizie/conclude-mare-nostrum-triton
[358]

[359] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28. P. 4; Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.
[360] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28. P. 4.

securitizing the Italian borders.[361] In doing so, these images reinforced such a narrative by presenting the 'border spectacle' not as a military operation but as an issue of humanitarian alarm.[362]

Moreover, the organization of Mare Nostrum was built upon the coexistence of the Italian Navy and military personnel and humanitarian actors such as the Fondazione Rava, the emergency services Corps of the Order of Malta, the Italian Red Cross military Corps and Nurses and Save the Children.[363] By doing so, military and humanitarian actors participated in what Musarò (2018) calls ''the cosmopolitan spectacle of rescue and salvation''.[364] In fact, on the media it was mostly underlined the humanitarian character of these policies leaving aside the second aim of Mare Nostrum that was the fight against illegal smugglers. Thus, it seems that the Mare Nostrum policies that were formally aimed at saving lives and fighting smugglers were presented to the public opinion as humanitarian policies. In doing so, the Italian government, supported by a humanitarian communication narrative, was able to frame Mare Nostrum as a humanitarian effort of which every Italian citizen should be proud of.

During these policies, the Italian government often anticipated its compliance with human rights obligations in time and space in order to save migrants at sea by allowing access to its territory.[365] From a legal perspective, the policies have been designed on the cases decided by human rights courts and quasi-judicial bodies. In fact, in the case of Mare Nostrum Italy as followed a universal/inclusive framework that considers human rights as integral to the individual independently from the compliance with formal conditions set by migration management policies.[366] In doing so, the Italian government

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[361] Campesi, G. (2018). Italy and the Militarisation of Euro-Mediterranean Border Control Policies. In Burroughs, E., & Williams, K., (2018). *Contemporary Boat Migration: Data, Geopolitics, and Discourses*, 51-74.

[362] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28. P. 10.

[363] See, http://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-concluse/Pagine/mare-nostrum.aspx

[364] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28. P. 6.

[365] Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

[366] Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392. P. 412; Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 6.

has followed a kind of Universalist approach to migration management going beyond the formal obligations set up by international law.

Yet while saving lives - thus having a specific humanitarian character - the policies intensified the fight against human being smugglers by increasing the military policies in the Central Southern Mediterranean Sea. Thus, the policies as underlined by several scholars had a dual nature. On the one hand, it represented an act of grace of the Italian government that constructed a strong humanitarian rhetoric. On the other hand, it increased the military policies also during the search and rescue operations in order to identify the smugglers at time present on the boats.[367]

However, here the thesis does not want to stress the dual nature of the Mare Nostrum policies as done by others.[368] The aim instead is to discuss how the assemblage of the concepts of borders, territory, and human rights was instrumental to the political aims illustrated in the Mare Nostrum policies. As the *Capo di Stato* Maggiore of the *Marina Militare*, Giuseppe De Giorgi maintained,

> ''It is not the Mare Nostrum operation that increases the arrival of migrants on our shores. It is not and cannot be. The reason for the increase it must be sought in factors of global strength, such as the breakup of some countries, such as Eritrea, Syria, and Libya. The flows of arrivals to our country they had started to grow clearly before the start of the operation, in the period in which the tragedy of 3 occurred October''.[369]

It follows that the operation was never a pull factor despite the media discourse depicted as so.

Next sections present the migration management assemblage of borders, territory and human rights that created the conditions for an inclusive or differential inclusive policy.

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[367] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28; Tazzioli, M. (2016). Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton. *Migration Studies*, *4*(1), 1-19; Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

[368] Ibid.

[369] Parole del Capo di Stato Maggiore della Marina Militare, Ammiraglio Giuseppe De Giorgi, durante l'audizione in Commissione Diritti Umani del Senato del 9 dicembre 2014.

6.1.2. Assembling Inclusion

The concept of border can be conceptualized in different and at times contrasting ways. Bordering represents an important strategy to ascertain control on the borders and thus on human mobility. On the one hand, the borders can obstruct human mobility by limiting the access by prefiguring strict conditions for the access to the border and thus to human rights protection. On the other hand, the borders can materialise as the point of access for human rights protection independently for the compliance with the conditions set out by the destination state. This exclusion/inclusion dichotomy represents two competing tradition of political philosophy: a statist vs. a universalist tradition. Indeed, the tradition followed in the Mare Nostrum policies represents an instance of migration management policy in which human rights protection is guaranteed independently from the direct access to the border. In so doing, Mare Nostrum was framed as a humanitarian-military policy yet on a media discourse was specifically elaborated as a humanitarian effort.

Borders are recognized as articulators of human mobility that can assume different elaborations depending from the political objective pursued.[370] In the Mare Nostrum policies, borders are regarded as point of access to the protection of human rights.[371] In fact, for migrants to activate the protection is sufficient to be in *proximity* of the border thus jurisdiction is aligned with physicality and grounded in proximity.[372] These types of borders elaboration can be recognized in what Walters (2011) calls 'humanitarian border' meaning a specific type of border that emerges in specific setting such as the Mare Nostrum humanitarian search and rescue operations.[373] Certainly, the humanitarian border represents a governmental strategy that purposes to design a humanitarian narrative at the border.[374] Hence, in the Mare Nostrum policies the concept of border assumes a critical relation with the statist or exclusive idea that sees the border as a

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[370] Bigo, D. (2002). Security and immigration: Toward a critique of the governmentality of unease. *Alternatives*, *27*(1_suppl), 63-92.

[371] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[372] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[373] Walters, W. (2011). Foucault and frontiers. Notes on the birth of the humanitarian border. In U Bröckling, S Krasmann and T Lemke (eds) *Governmentality: Current Issues and Future Challenges*. Routledge.

[374] Cuttitta, P. (2018a). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803.

physical and legal barrier to entrance and thus to humanitarian protection.

Yet it shall be stressed that the second objective of Mare Nostrum was the fight against illegal smugglers. In fact, from these policies it emerges that border control is not only about security but is more about following and selecting mobility.[375] Thus, what emerges is a system of control and rescue characterized by two distinct ''patrimony of dispositions'': the military–strategic field and the internal security field.[376] These two distinct fields of knowledge seem to coexist in the Mare Nostrum political narrative. The military-strategic field considers migration as a phenomenon that has to be contained in order to defend the nation state borders.

While the internal security field aims at governing migration through practices of filtering and separating the legal from the illegal in order to manage migration. Indeed, these fields have different approaches and priorities in relation to human movement. However, in the Mare Nostrum operation it is possible to identify an effort to present the entire operation as a humanitarian enterprise. In fact, we notice a strong media campaign on the Italian media that depicts the military personnel more as humanitarian agents rather than containment agents.[377]

Border control in the Mare Nostrum operation seem to be constructed as inclusive; yet border control oscillates between containment and filtering under an overall humanitarian umbrella. It is therefore more precise to describe these practices as differential inclusion. In this effort, the humanitarian and inclusive narrative materializes in the number of people saved at rest. Indeed, statistics are important and do show the Italian government narrative of saving life's at rest. Nevertheless, there is clearly less media attention to the fight against illegal smugglers and to the filtering of people done on board of the Italian military navies operating in the Central Southern Mediterranean that represent the other priority of these policies. Thus, indeed in the Mare Nostrum policies the Italian government has followed a universalist approach with regard to human

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[375] Squire, V. (ed.) (2010). *The Contested Politics of Mobility: Borderzones and Irregularity*. London: Routledge.

[376] Bigo, D. (2014). The (in) securitization practices of the three universes of EU border control: Military/Navy–border guards/police–database analysts. *Security Dialogue*, *45*(3), 209-225. P. 211.

[377] Musarò, P. (2017). Mare nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28.

rights protection. However, it has also conducted military operation that aimed at arresting smugglers that operated on the Central Southern Mediterranean route.

While designing an inclusive migration management policy such as Mare Nostrum the Italian government conceptualized territory in relation to access, jurisdiction, and proximity in the following ways. First, human rights protection was not based upon the 'access' to territory of migrants but to the simple proximity to the territory. In doing so, Italy brought to its conclusion the concept developed by the ECtHR in Jamaa vs. Italy that suggests that human rights jurisdiction is 'essentially territorial'[378] and is aligned with physicality and proximity.[379] Second, human rights protection applied extraterritorially meaning independently from would be migrants' access to Italy's territory. Therefore, Italy assumed an extended view of human rights that if brought to the extreme can became an open borders policy that identifies no territorial limitation to human right protection.[380]

What we are observing is not exactly an 'end of territories' but a constant process of territorial reconfiguration along lines of economic and political space[381] that are able to shape the construction of territoriality.[382] In fact, the construction of territoriality from a legal perspective is still theorized at national level that successively is projected at an international level. It follows thus that the nation state despite being supported by other multilateral institutions maintains the legal capacity to project a knowledge of territory and successively to construct territoriality.

In this setting, the law can assume both a territorializing and de-territorializing effect contingent from the state economic and political objectives. Certainly, as I showed in Chapter 4, the legal instruments to construct or deconstruct territory are several and differ in relation to the legal culture. Nonetheless, in the Mare Nostrum operation territory is reconfigured along economic and political spaces. In particular, in the processes of

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[378] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 71.

[379] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[380] Ibid

[381] Brenner, N., & Elden, S. (2009). Henri Lefebvre on state, space, territory. *International Political Sociology*, *3*(4), 353-377. P. 374.

[382] It is important to carefully distinguish between territoriality and territory. Territoriality entails a certain level of spatial enclosure (Sack, 1986). While territory is at best conceived as a historically and geographically specific form of political organization (Elden, 2013).

territorialization and deterritorialization of the space of the sea[383] it is possible to recognize the power of laws in the creation of a space in which proximity to the territory triggers human rights protection. Thus, territory emerges as a volatile concept that migration management policies can transform in a universal and humanitarian understanding of territory and human rights.

The Mare Nostrum policies were based on a specific elaboration of the concept of human rights. First, in the search and rescue operations human rights are considered as inherent to the individual independently from the individual compliance with formal conditions set by migration management policies.[384] In doing so, the Italian government followed a universalist reading of human rights without any formal restriction for migrants to enjoy protection. Second, in following a universal reading of human rights Italy anticipate the compliance with formal requirements by defending human rights independently from the physical presence inside the Italian territory.[385] Thus, Mare Nostrum was conceptualized as an inclusive strategy in which human rights jurisdiction is grounded to proximity to the border without any formal restriction of access to the territory.

In the migration management assemblage human rights are conceptualised as following. First, human rights protection is not dependent from the 'access' to territory of migrants but to the simple proximity to the territory. In doing so, states strengthen the concept developed by the ECtHR in Jamaa vs. Italy that maintains that human rights jurisdiction is ''essentially territorial''[386] and is aligned with physicality and proximity.[387] In fact, human rights protection applies extraterritorially meaning independently from migrants' access to state territory. It follows that state assume an extensive view of human rights that if brought to the extreme can develop an humanitarian open borders policy that

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[383] Benhabib, S. (2020). The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights. *Jus Cogens*, *2*(1), 75-100. P. 78.

[384] Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392. P. 412; Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[385] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[386] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 71.

[387] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L., 34, 1*. P. 26.

sees no territorial restriction to human rights defense.[388]

Usually, humanitarian policies are based on benevolence and grace presenting the act of rescue as a form of justice based on exceptionalism. In fact, there is no systematic and regular humanitarian policing during the migration management activities.[389] Instances of such behaviors are visible in the Mare Nostrum operation that indeed was set up as an exceptional operation based on emotional narratives.[390] Thus, the access to territory also from a legal perspective is accessed only through the state of exception designed by the institutional structures of the sovereign power. This state of exception should be assumed as something within the juristic order[391] and as Agamben (2005) suggests the state of exception is a juridical measure that cannot be grasped in legal terms.[392] It follows that also in humanitarian migration management strategies the inclusion is entrenched on a humanitarian logic and is acknowledged only in exceptional circumstances.[393]

The Mare Nostrum policies ended in late 2014 and were replaced by the Frontex operation Triton that continued to rescue and disembark migrants in Italy. The operation was supported by 15 member states that provided technical equipment and border guards, yet the monthly budget allocated to Triton (2.9 million Euro) is less than a third of the budget of Mare Nostrum.[394] Further, the Frontex operation had no humanitarian character in fact was designed as a mission supporting the Italian authorities in patrolling the border and collecting intelligence information's.[395] Moreover, the Triton operation was supported by the Common Security and Defence Policy operation EUNAVFOR Med

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[388] Ibid. P. 28. See also: Coleman, M., Heynen, N., Doshi, S., Burridge, A., Heller, C., Huemer, M., & Nail, T. (2019). *Open Borders: In Defense of Free Movement*. University of Georgia Press.

[389] Ticktin, M. (2005). Policing and humanitarianism in France: Immigration and the turn to law as state of exception. *Interventions*, *7*(3), 346-368. P. 359.

[390] Musarò, P. (2017). Mare Nostrum: the visual politics of a military-humanitarian operation in the Mediterranean Sea. *Media, Culture & Society*, *39*(1), 11-28.

[391] Schmitt, C. (2005). *Political theology: Four chapters on the concept of sovereignty*. University of Chicago Press. P. 6.

[392] Agamben, G. (2005). *State of Exception*. University of Chicago Press. P. 1.

[393] Lochak, D. (2000). L'humanitaire, perversion de l'Etat de droit. *Sciences sociales et santé*, *19*(4), 35-42; Ticktin, M. (2005). Policing and humanitarianism in France: Immigration and the turn to law as state of exception. *Interventions*, *7*(3), 346-368.

[394] Cuttitta, P. (2014). Borderizing'the island setting and narratives of the Lampedusa 'border play. *ACME: An International Journal for Critical Geographies*, *13*(2), 196-219.

[395] Ibid.

'Sophia'. The two operations that replaced Mare Nostrum represented a shift from humanitarianism to securitarianism and therefore from inclusion to differential inclusion. This shift is shown by the number of people rescued under the two operations were less than 7.000 in contrast to the 160.000 of Mare Nostrum.[396]

In such a scenario the Central Southern Mediterranean was emerging as a place of differential inclusion. There was in fact a gap in the rescue activities of the two new operations. Luckily, this gap was filled up by civil society that organized several NGOs ready to rescue migrants at sea and to disembark them in the ports indicated by the Italian Maritime Rescue Coordination Centre. In so doing, NGOs to a certain extent replaced state responsibility[397] and designed an alternative assemblage of borders, territory, and human rights. Yet here the assemblage illustrated by NGOs rescue activities is not discussed. Suffice is to pinpoint to it as an alternative non-state migration management assemblage that proved to be indispensable for enabling migrant's inclusion.[398]

By contrast, with time such activities of NGOs were identified a part of the Italian public opinion as actor for migrants and smugglers. In other words, NGOs operating in Libyan waters represented a pull factor for smugglers that will organize journeys knowing about the presence of NGOs in the Central Southern Mediterranean Sea. It shall be noted that this pull factor was never confirmed.[399] However, represented one of the *casus belli* for the shift in migration management policies initiated by Interior minister Marco Minniti.

6.2. The Minniti Policies

The Minniti policies are a specific series of migration management policies initiated by the Italian centre-left government, designed by the former minister of the Interior Marco

[396] For a more information see: https://www.ednh.news/it/da-mare-nostrum-a-triton-il-profilo-delle-missioni-di-salvataggio-tra-italia-e-ue/ [last visited: 20 January 2019]

[397] Cusumano, E., & Pattison, J. (2018). The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility. *Cambridge Review of International Affairs*, *31*(1), 53-75.

[398] Cuttitta, P. (2018). Repoliticization through search and rescue? Humanitarian NGOs and migration management in the Central Mediterranean. *Geopolitics*, *23*(3), 632-660.

[399]Villa, M. (2020). Migrazioni nel Mediterraneo: tutti i numeri. ISPI. Available from https://www.ispionline.it/it/pubblicazione/migrazioni-nel-mediterraneo-tutti-i-numeri-24892; Cusumano, E., & Villa, M. (2020). From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy. *European journal on criminal policy and research*, 1-18.

Minniti.[400] The policies were a response to the significant pressure of right political parties and public opinion following the increase of migrants' arrivals on the Italian shores in 2016.[401] The approach developed by Minniti is well summarized in an interview of 2017 where he argues,

> ''For some time, I have had an idea: to dispel the taboo that security policies are par excellence of the right. It is true that a security impulse in society and in public opinion often produces a shift to the right of the electorate, but I have always been convinced that security is bread for the left''.[402]

In Minniti approach to migration management migrants were considered as the main factor of insecurity and disorder. When he took office on 12 December 2016, he intensified the expulsions of irregular migrants, to be encouraged through an increase in the number of special centers. This approach to migration management was based on two pillars: security and order.[403]

In his narrative Minniti presented the idea that governing with a security and order approach was something of the left. Moreover, he insisted that ''governing the flows of migrants'' was important because ''it increased the sense of security and reduce the one of fear''.[404] Attempting to reduce the insecurity of citizens is without doubt positive. Yet the instruments to achieve this policy objective are different and are analyzed in the next sections.

To respond to this pressure the Italian government decided to pursue externalizing migration management policies in order to externalize to Libya the search and rescue

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[400] Gargiulo, E. (2018). Una filosofia della sicurezza e dell'ordine. Il governo dell'immigrazione secondo Marco Minniti. *Meridiana*, (91), 151-173.

[401] According to the figures presented by the Italian minister of the Interior the migrants' arrivals in 2016 were 181.436, almost 18% of the previous year. While after the signature of the memorandum, the migrants' arrivals decreased more than 33 % according to the Italian minister of Interior. For more information see: https://www.ilsole24ore.com/art/notizie/2017-01-05/migranti-2016-record-sbarchi-e-accoglienza 162035.shtml?uuid=ADdVMwQC; http://www.interno.gov.it/it/notizie/meno-33-sbarchi-nel-2017 [last visited: 27 April 2020]

[402] Http://espresso.repubblica.it/palazzo/2017/01/05/news/marco-minniti-sicurezza-e- parola-di-sinistra-1.292979.

[403] Gargiulo, E. (2018). Una filosofia della sicurezza e dell'ordine. Il governo dell'immigrazione secondo Marco Minniti. *Meridiana*, (91), 151-173.

[404] Http://www.repubblica.it/cronaca/2017/08/15/news/ministro_interno_marco_minniti_conferenza_stampa_ferragosto_viminale-173093451/.

operations in the Central Southern Mediterranean Sea.[405] This externalizing policy was formalized by the signature of a memorandum of understanding between Libya and Italy (2017) that prefigured the provision of equipment and training to the Libyan coastguard, an important financial support and the establishment of detention centres in Libya managed exclusively by the Libyan minister of Interior.[406] In doing so, Minniti aimed at presenting the Libyan coastguard as a able to organize as a migrant interception force in the Central Southern Mediterranean. Yet from many investigations it emerged the collusion between the Libyan coastguard and the Libyan militias operating in migrant smuggling.

Moreover, Minniti adopted a Code of Conduct regulating migrants rescue by NGOs and in doing so paved the way for a criminalization of NGOs because those were accused of representing a pull factor and a promoter of human smuggling across the Central Southern Mediterranean.[407] As stressed many times by the Italian Ministry of Interior the failure to comply with the code may prefigure serious consequences, among these the refusal to authorize the disembarkation of migrants.[408] The code is analysed in detail by Cusumano (2019). Here I only want to stress that the first provision of the code prefigures that NGOs should not enter Libyan territorial waters except in special circumstances and under previous authorization. According to Italy this was done to respect the sovereignty of Libya.[409] Nevertheless, since the migrants would be brought back in the Libyan detention centres this provision appears as an *escamotage* to externalise to the Libyan coastguard the search and rescue operations.

This approach to migration management goes in the direction of 'contactless

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[405] De Guttry, A., Capone, F., and Sommario, E. (2018). Dealing with migrants in the central Mediterranean route: A legal analysis of recent bilateral agreements between Italy and Libya. *International Migration* 56(3), 44-60; Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[406] De Guttry, A., Capone, F., and Sommario, E. (2018). Dealing with migrants in the central Mediterranean route: A legal analysis of recent bilateral agreements between Italy and Libya. *International Migration* 56(3), 44-60; Reviglio, M. (2019). Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy. *Global Jurist*, 20(1).

[407] Cusumano, E. (2019). Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control. *Cooperation and Conflict*, 54(1), 3-24.

[408] Cusumano, E. (2019). Straightjacketing migrant rescuers? The code of conduct on maritime NGOs. *Mediterranean Politics*, 24(1), 106-114.

[409] Ibid.

responsibility' to evade any obligation enshrined in maritime and international law.[410] This type of migration management policy is part of a wider European strategy that goes in the direction 'remote control'[411] or 'control from distance'.[412] To secure this type of management strategy countries adopt bilateral or multilateral soft law agreements in order to externalize the management activities putting in place instruments to construct a securitized border through 'securitizing practices'.[413]

From both the memorandum and the code it follows a specific migration management assemblage that has as ultimate priority the containment of migration flows by developing a an exclusive policy modelled on the concepts of borders, territory, and human rights.

6.2.1. Assembling Exclusion

In the exclusive policies pursued by Ministry of interior Marco Minniti borders assume a specific and instrumental elaborations. These elaborations transform the border in a space controlled from distance in which legal obligations and responsibilities are blurred. In so doing, borders became spaces of contactless responsibility. To avoid such responsibilities, as pointed out above, the Ministry of Interior developed two specific policies that aimed at an exclusive assemblage based on the cases of the European Court of human rights

As in the case of the memorandum between Libya and Italy the design of a securitized border displays two characteristics: first, it makes easier the containment of migration flows; second, it enables an externalization of search and rescue activities to third countries as in the Libyan case. Thus, for the exclusive policy the border permits the entrance only to those individuals that comply with the formal conditions set out by the state. However, in some cases countries put in place instruments to make more difficult

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[410] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward

[411] Guiraudon, V., & Lahav, G. (2000). A reappraisal of the state sovereignty debate: The case of migration control. *Comparative political studies*, *33*(2), 163-195.

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

[413] Campesi, G. (2014). Frontex, the Euro-Mediterranean border and the paradoxes of humanitarian rhetoric. *South East European Journal of Political Science*, *2*(3), 126-134; Campesi, G. (2018). Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221.

to reach the border as in the case of the memorandum where the search and rescue activities are externalized to the Libyan coastguard for Italy to avoid any direct international responsibilities.[414] In other words, in the Minniti policy borders are regarded as an obstacle to access and thus to the protection of human rights. In fact, for migrants to trigger the protection is not sufficient to be in proximity of the border but it must *access* the border to trigger state protection.[415]

Against this backdrop, also NGO's activities in the Central Southern Mediterranean that before Minniti represented one of the only rescue forces in that space of the sea. After the adoption of the code, the activities of NGO's were significantly limited, and their search and rescue operation made way more difficult for the direct presence of the Libyan coastguard. In fact, from several investigation it emerged a disturbing picture in which NGO's and migrants during the rescue were often under the violent 'control' of the Libyan coastguard. Thus, despite NGOs represented for some time the humanitarian rescuer in that space of the sea, now with the code, they saw their prerogatives of humanitarianism limited. Moreover, it is important to emphasize that the accusation toward NGO's of representing a pull factor for migrants and traffickers were never confirmed.[416]

Territory represents a critical concept while designing an exclusive migration management policy.[417] The Minniti policies brought to the extreme can become a closed borders policy because puts in place a series of instruments aimed at both blocking the arrivals and externalising the search and rescue activities. While pursuing such a policy Italy had first to recognize human rights jurisdiction as linked to access to territory because migrants have to enter the territory (strong territoriality) and to come under direct

[414] Moreno-Lax, V. (2018). The EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/rescue-without-protection'paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140.

[415] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1; Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[416] Cusumano, E., & Villa, M. (2020). From "Angels" to "Vice Smugglers": the Criminalization of Sea Rescue NGOs in Italy. *European journal on criminal policy and research*, 1-18.

[417] Cuttitta, P. (2018). Delocalization, humanitarianism, and human rights: The Mediterranean border between exclusion and inclusion. *Antipode*, *50*(3), 783-803; Cuttitta, P. (2018). Repoliticization through search and rescue? Humanitarian NGOs and migration management in the Central Mediterranean. *Geopolitics*, *23*(3), 632-660.

control of the state (neo-territoriality).[418] It follows from this approach that jurisdiction is rooted in strong territoriality meaning that human rights obligations are strictly territorial.[419] Second, for Italy state jurisdiction and thus state responsibilities will manifest themselves only if there is a direct access to the territory of the destination state. Yet this practice is made more difficult because Italy externalizes or outsources the search and rescue operations to the Libya coastguard.

Therefore, Italy externalizes or outsources interdiction thereby avoiding any direct fingerprint that would trigger jurisdiction and human rights obligations. In doing so, affluent states like Italy reinforce their exclusive practices by adopting externalizing migration policies.[420] Yet it shall be noted that the policies pursued by Minniti despite externalizing the border and criminalizing NGOs did not completely relinquish responsibility for rescue operations.[421] In fact, the complete evasion of responsibility in search and rescue operations emerged with the policies enacted by Matteo Salvini.

The Minniti policies brought to the extreme can become a closed borders policy because they put in place a series of instruments aimed at blocking the arrivals and at externalizing the search and rescue activities to third countries. While pursuing such a policy, Italy had first to recognize human rights jurisdiction as associated to access to territory because migrants must enter state territory or to come under the jurisdiction of the state agents.[422] It emerges from this approach that jurisdiction is rooted in strong territoriality, meaning that human rights obligations are strictly territorial.[423] Second, for Italy, state jurisdiction and thus state responsibilities will manifest themselves only if there is a direct access to the territory of the destination state.

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[418] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[419] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[420] Zaiotti, R. (Ed.). (2016). *Externalizing Migration Management: Europe, North America and the spread of 'remote control' practices*. Routledge; Frelick, B., Kysel, I. M., & Podkul, J. (2016). The impact of externalization of migration controls on the rights of asylum seekers and other migrants. *Journal on Migration and Human Security*, *4*(4), 190-220; Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56 (1).

[421] Cusumano, E. (2019). Straightjacketing migrant rescuers? The code of conduct on maritime NGOs. *Mediterranean Politics*, *24*(1), 106-114.

[422] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[423] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1

In the design of this externalizing migration practices Italy represents the sole authority able to give access to its territory and to set the legal conditions to access to human rights protection in doing so it follows the statist reading.[424] In the Minniti policies, human rights are grounded in 'physicality' hence establishing territorial presence in the host state (jurisdiction grounded in territory) or coming within the effective control of the state or its agents (jurisdiction grounded in contact). Further, by recognizing human rights grounded in territory proximity does not entail any legal obligation for Italy because jurisdiction is aligned with territory.[425] It follows that the legal protection depends on establishing direct presence inside a state.[426]

In following a statist understanding of human rights Minniti made clear that migrants had to comply with the formal conditions set out by the state to access the Italian territory. In doing so, the ministry of Interior intended human rights protection not as an open category that includes human rights independently from the formal condition of the migrants. This securitarian approach to human rights is in line with Minniti's idea of security and order. On the one hand, the security component was pursued by rendering more difficult for the migrant to reach the Italian shores. On the other hand, the order component was practiced by criminalizing NGO's search and rescue activities. In Minniti idea of migration management the application of a security and order paradigm ''increased the sense of security and reduce the one of fear''.[427]

Yet in increasing the sense of security of Italian citizens the Italian government was supporting activities that have been described by many reports as degrading and human treatment. First, the case that has had the most extensive media coverage is that of Sea Watch of 6 November 2017 that during a rescue operation it was joined by a patrol boat of the Libyan coastguard that has hampered the rescue pulling objects towards the

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[424] Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392.

[425] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1

[426] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[427] Http://www.repubblica.it/cronaca/2017/08/15/news/ministro_interno_marco_minni-ti_conferenza_stampa_ferragosto_viminale-173093451/.

operators of NGOs and beating with thick ropes and sticks migrants remained on patrol.[428] This episode is not new. There are, in fact, several testimonies of rescues by the Libyan coastguard in which serious violence is committed towards migrants.[429] Sad to remember that the Italian government a few months earlier had donated the Libyan patrol boat.[430]

Second, in the detention centres, according to testimonies, there are serious violations of human rights. In particular, migrants are repeatedly tortured as long as the family does not decide to pay the ransom demanded by the guards. There are also episodes of sexual violence, without neglecting the general conditions of poor nutrition and poor hygiene present in official and unofficial detention centres.[431] It seems therefore that the offshored migrant's detention centres there is *de facto* a situation of rightlessness.[432]

6.3. Salvini's Migration Politics

The politics of migration pursued by Marco Minniti ended in 2019 leaving a situation in which a 'soft' criminalization of migration and solidarity was unfolding. In this setting, the new prime minister Giuseppe Conte formed the new government. The government was the representation of a compromise between Movimento Cinque Stelle (M5S) and Lega Nord. The government M5S and Lega Nord was constructed around a 'contract' composed of different priorities further divided equally between the two parties. The government pursued left policies (basic income) and right ones (criminalization of migration and solidarity). Matteo Salvini has been the ministry of Interior of the Italian government from June 2018 and September 2019.

Despite recognizing such a 'sui generis' relationship it is possible to identify a number of key developments. First, the presentation of immigration as a crucial public issue, ensuing from the politicisation of irregular arrivals by sea and framing of migration

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[428] Amnesty International. Libya's Dark Web of Collusion, 2018. P. 36. Available: https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF; Francesco Viviano and Alessandra Ziniti, Non lasciamoli soli (Chiarelettere Editore, 2018). P. 124.

[429] More information: https://www.avvenire.it/attualita/pagine/le-vite-abbandonate-di-chi-muore-in-mare.

[430] Amnesty International. Libya's Dark Web of Collusion. 2018. P. 36. Available: https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF

[431] UN High Commissioner for Refugees (UNHCR), UNHCR Position on Returns to Libya – Update II, September 2018. P. 13. Available: http://www.refworld.org/docid/5b8d02314.html; Viviano, F., Ziniti, A. (2018). *Non lasciamoli soli*. Chiarelettere Editore. P. 112.

[432] Mann, I. (2018). Maritime legal black holes: Migration and rightlessness in international law. *European Journal of International Law*, *29*(2), 347-372.

into Italy as irregular, illegal and abusive. Second, the domestic imposition while in government between 2019 by the Lega of considerably more repressive migration policies. Outright exclusion was initiated by Matteo Salvini from June 2018. This new phase of outright exclusionary policies became the cornerstone of Italy's migration management policies.

Salvini introduced measures that reinforced significantly both external and internal controls. In November 2018, the 'Decree-Law on Immigration and Security' – also known as the 'Salvini decree' – was approved. It contained 42 articles. Among the measures the decree abolished humanitarian protection status for migrants, reduced barriers to stripping migrants of Italian citizenship, extended the naturalisation process, stopped asylum seekers from accessing reception centres and introduced a fast-track expulsion system for 'dangerous' asylum seekers.[433]

In June 2019, a new so called security decrees entered into force targeting NGOs by prefiguring fines of up to €1 million for ships 'ignoring bans and limitations' on accessing Italian waters, with seizure of the ships of reiteration offenders. According to Borelli (2020), the measure directly and clearly contravened the Convention on the Law of the Sea.[434] Further, the measure led to a war of words between the UN and the Italian government representing a ''non-conciliatory policy approach of the period, aimed directly at public opinion''.[435]

In such an exercise, a new assemblage of borders, territory and human rights characterized by outright exclusion emerged. Indeed, the exclusionary policies were initiated by Minniti but Salvini added some significant measures that created a situation of outright exclusion. In particular, Salvini initiated a policy of 'closed ports' that as Cusumano and Gombeer (2018) point out is not illegal *per se* but has severe consequences from a humanitarian point of view.[436] Moreover, the opposition of the Italian government to the rescue activities of NGOs became even more significant. By doing so, NGOs

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[433] Dennison, J., & Geddes, A. (2021). The centre no longer holds: the Lega, Matteo Salvini and the remaking of Italian immigration politics. *Journal of Ethnic and Migration Studies*, 1-20.
[434] Borelli, Silvia. (2020). Pushing Back Against Push-Backs: A Right of Entry for Asylum Seekers Unlawfully Prevented from Reaching Italian Territory. *Diritti Umani e Diritto Internazionale*, no. 1/2020.
[435] Dennison, J., & Geddes, A. (2021). The centre no longer holds: the Lega, Matteo Salvini and the remaking of Italian immigration politics. *Journal of Ethnic and Migration Studies*, 1-20.
[436] Cusumano, E., & Gombeer, K. (2020). In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers. *Mediterranean Politics*, *25*(2), 245-253.

activities were subject to many measures that intentionally created the conditions for illegality for rescue and disembarkation operations.[437]

6.3.2 Assembling Outright Exclusion

Salvini's policies brought exclusion even further. The policies assumed a clear statist reading of human rights. In fact, the state represents the sole authority able to give access to borders and territory and thus to human rights protection. Moreover, this authority is displaced through executive orders emanated directly by the ministry of Interior. This configuration of authority concentrates in the hand of the ministry of Interior a pervasive power that reverberates on migrants' human rights. It can be thus said that in Salvini's policies a statist understanding of human rights protection becomes even more robust than in the Minniti exclusionary assemblage.

In Salvini's policies an even more exclusionary assemblage materializes. Borders are regarded as an obstacle to access and thus to the protection of human rights. Moreover, it is not enough to come under the direct control of the Italian coast guard to trigger human rights protection as the *Diciotti* case shows.[438] The concept of territory is also brought further in exclusion in fact for migrants is not sufficient to enter the territory and to come under direct control of the state.[439] In Salvini's policies jurisdiction is not territorial but seems to be enacted only upon direct decision of the ministry of Interior. Thus, with an executive order without any respect for the concept of territory and of international law. Indeed, the humanitarian consequences of such policies are significant.[440] If in Minniti policies the legal protection depended on establishing direct presence inside a state[441] this is not sufficient in the outright exclusion pursued by Salvini.

In this setting, exclusion is brought further with significant humanitarian consequences for migrants crossing the Central Southern Mediterranean. Yet Salvini's

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[437] See: Decree Law N. 113 of 4 October 2018, https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg; Decree Law N. 53 of 14 June 2019, https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg [last visited: 27 July 2020]

[438] See for a detailed account of the case: http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/ [last visited: 27 July 2020]

[439] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[440] Cusumano, E., & Gombeer, K. (2020). In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers. *Mediterranean Politics*, *25*(2), 245-253.

[441] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

policies of outright exclusion do need further studies to identify its exclusionary power and humanitarian consequences. In particular, it is crucial to assess the legal validity of such measures in relation to international law, the law of the sea and human rights law.

6.4. Conclusion

The migration assemblages discussed above are an important instance in which the concept of assemblage can be used to identify non-linear dynamics that characterize migration governance. It is important to stress that the components assembled in the polices (1) are interdependent but maintain a level of specificity; (2) have variable levels of performance. In fact, to fully grasp the concept of assemblage it needs to be elaborated as a descriptor for phenomena characterized by complexity and heterogeneity. Thus, it is suggested that the concept of assemblage can be fruitful for migration studies only if intended as a container for complex social and political phenomena such as the control of the European borders.

The EU and its member states overlooking the Mediterranean Sea in the last decades have developed a system of migration management that is based on the decisions of European courts and quasi-judicial bodies that decide between two competing tradition of political philosophy. The first is a universal/inclusive framework that considers human rights as integral to the individual independently from the compliance with formal conditions set by immigration management policies. The second tradition is a statist/exclusive one that sees the state as the sole authority able to give access to its territory and to set the legal conditions to access to human rights protection.[442] The compromise developed by the courts has reinforced the inclusion vs. exclusion dichotomy that is nowadays displayed in some recent migration management policies designed by Italy. This trend in migration management policies is part of a European approach to migration management that goes in the direction of 'remote control' and 'control from distance' in order to externalize to third states the search and rescue activities and the detention of migrants.

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[442]Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392. P. 412; Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1. P. 6.

In this scenario, the Chapter has analysed the migration management policies designed by Italy and Europe between 2013 and 2019. In particular, it has focused on three policies developed to overcome the so called 'migration crisis': The Mare Nostrum policies, the Minniti policies, and the Salvini policies. The main argument of the is that these policies are based on the instrumental assemblage of three components: borders, territory, and human rights. In fact, these migration management assemblages emerge as a policy to either include or exclude migrants from the destination country.

Indeed, the narratives of the two competing migration management discourses represent two completely different perspectives on migration. First, the Mare Nostrum policies were presented as a humanitarian/securitarian mission that had as priority saving lives at sea. Second, the Minniti policies aimed at limiting the arrivals of migrants by externalizing to the Libyan forces the search and rescue policies and the detention of migrants in Libya. And third, the Salvini policies considered jurisdiction as a flexible instrument that could be enacted only upon direct decision of the ministry of Interior. To do so, these policies followed by the Italian government assembled borders, territory and human rights in order to justify their 'momentaneous' political objectives: open borders/inclusion vs. closed borders/exclusion-outright exclusion.

To sum up, the Chapter has discussed these three migration management policies to show that in designing these policies states build upon the compromise between inclusion and exclusion developed by European courts. Moreover, in the elaboration of these policies, states assemble instrumentally borders, territory and human rights to justify their political objectives. Thus, it is important to shed light on these assemblages in order to identify new horizons for migration management policies because the so called 'Migration Crisis' will continue to unfold in the next decades.

PART TWO

EXCLUSIVE AND OUTRIGHT EXCLUSIVE

MIGRATION MANAGEMENT: INTERSECTION

BETWEEN INTERNATIONAL AND EU LAW

Chapter 7

Italy's and European Border Management: Going Soft Again?

7. Introduction

The European external border management exemplifies the complexity of the governance of migration in Europe. In chapter 3, I discussed some of the instruments that are used in migration management to enhance contactless responsibility. Moreover, I showed how the political priorities and its achievement can sometimes hamper the concept of legal validity. What emerges is a system that has to operate promptly without following the slow procedures of modern parliamentary democracies to be politically efficient.

This chapter explores two migration management 'agreements' that display some of the tension that I have described in Chapter 3. These are the memorandum of understanding between Libya and Italy and the so-called EU-Turkey statement. From the discussion of these 'agreements' it follows first that soft law instruments are critical for the protection of human rights of migrants. Second, that often the political priorities such as decreasing the arrivals in Europe are more important that the formal legal procedure that is put aside in name of the realpolitik. Overall, despite recognizing the differences between the two cases, I claim that there are some contiguities that show a specific trajectory of the European new governance of migration.

7.1. Memorandum of Understanding between Libya and Italy

Memorandums on migration agreements have characteristics that make them fit in the sphere of soft law.[443] First, they are stipulated in the form of bilateral or multilateral agreements in a hyper-simplified form, since the normal procedures established by law are not followed. Precisely thanks to the soft form of this agreement it is possible, on the one hand, to avoid the control of the parliament *ex ante*;[444] on the other hand, it makes it more difficult the political and judicial control *ex post*.[445] In addition, doing so avoids the parliamentary debate that would probably detect some vices, both formal and substantial

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[443] de Witte, B., & Smulders, B. (2018). Sources of European Union law. In P.J. Kuijper et al. (eds.), *The Law of the European Union.* Kluwer Law International.

[444] Algostino, A. (2017). L'esternalizzazione soft delle frontiere e il naufragio della Costituzione. 1 *Costituzionalismo.it* 139.

[445] Cardwell, P. J. (2018). Tackling Europe's migration 'crisis' through law and 'new governance'. *Global Policy*, *9*(1), 67-75; Scott, J., & Sturm, S. (2006). Courts as catalysts: re-thinking the judicial role in new governance. *Colum. J. Eur. L.*, *13*, 565

of the memorandum itself.[446]

In the second place, memorandums often lack a predefined form, typical of a passage from legislative power, as a source of control over its validity. One can therefore speak of a model of governance and not of government since the legislative power is ousted from the soft law procedure.[447] This dispossessing of the parliament control raises essential questions concerning the legal validity of the same memorandum as pointed out in the recent judgment of the Tribunal of Trapani.[448] In fact, if you had used a standard legislative procedure with substantial clauses that envisaged a proactive monitoring of the agreement, most likely the atrocities committed in the Libyan detention centres would emerge. Furthermore, a parliamentary passage could also shed light on the role of the Libyan coastguard and its relations with the smugglers of migrants,[449] which have emerged from some journalistic investigations.[450] In other words, it seems that the agreement in soft form has been done to make less difficult its substantial implementation, which had the sole objective of diminishing the arrivals of migrants in Italy and thus in Europe.

The characteristics of the soft law acts, such as the memorandum, may thus have objective and impassable limits that affect the effectiveness of the agreement. As we have seen, the lack of a parliamentary passage diminishes the possibility of control of the legislative bodies, and leaving to the executive power an impressive, but illegitimate,

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[446] De Guttry, A., Capone, F., & Sommario, E. (2018). Dealing with migrants in the central Mediterranean route: A legal analysis of recent bilateral agreements between Italy and Libya. *International Migration*, *56*(3), 44-60.

[447] Algostino, A. (2016). La soft law comunitaria e il diritto statale: conflitto fra ordinamenti o fine del conflitto democratico? 3 *Constitutionalismo.it* 255

[448] Judgment of the Tribunal of Trapani published on May 23, 2019. Available: https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf

[449] For a detailed investigation on smugglers networks in Libya see Campana, P. (2018). Out of Africa: The organization of migrant smuggling across the Mediterranean. *European Journal of Criminology*, *15*(4), 481-502.

[450] For more information see: Patrick Wintour, "UN Accuses Libyan Linked to EU-Funded Coastguard of People Trafficking," in The Guardian, June 8, 2018. Available: https://www.theguardian.com/world/2018/jun/08/un-accuses-libyan-linked-to-eu-funded- coastguard-of-people-trafficking; Diego Fassini, "Migranti. Scacco ai trafficanti, risoluzione Onu per sei scafisti," in Avvenire, June 8, 2018. Available: https://www.avvenire.it/attualita/pagine/migranti-raid-onu-6-trafficanti; Annalisa Camilli, "Perché l'accordo tra l'Italia e la Libia è sotto accusa," in Internazionale, November 29, 2017. Available: https://www.internazionale.it/notizie/annalisa- camilli/2017/11/29/italia-libia-migranti-accordo.

maneuvering capacity.[451] In fact, the executive adopting acts of soft law in hyper-simplified form tends to widen its field of action to make its provisions more streamlined and timelier. In this case, the political effectiveness of the agreement is not scrutinised, which had as its primary objective the reduction of migrants' landings,[452] but its material effectiveness is disputable, in particular with regard to respect for human rights, both in Libyan detention centres and in the Libyan coastguard rescue operations at sea.[453]

The memorandum of understanding between Libya and Italy, given its slender nature, does not contain detailed rules to make the agreement effective, but limits itself to indicating general lines, often leaving free space to the Libyan counterpart.[454] The memorandum consists of 8 articles.[455] Article 1 prefigures that Italy is committed in two ways: on the one hand provides an economical support for the development of Libyan regions affected by migration; on the other hand, provides technical and technological support to Libyan organisms to fight illegal immigration. Further, are parts of these organisms the border guards and the coastguards of the ministry of Defence, and the organs and departments of the ministry of Interior. In short, it follows from these indications how there is a significant fragmentation of the Libyan bodies that will manage the borders and the detention centres. Indeed, this fragmentation will make more difficult the monitoring of the agreement application as provided by article 3.

Article 2 specifies the method to finance, provide medical assistance, and train the people who will administer the detention centres. Yet the article does not specify who will oversee the administration of detention centres. To identify the managers of the centres we must go back to the preamble of the memorandum which maintains that will be managed exclusively by the Libyan ministry of Interior. This strategy incorporates the European one followed in the EU-Turkey statement with the creation of hot spots in

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[451] Lagoutte, S., Gammeltoft-Hansen, T., & Cerone, J. (Eds.). (2016). *Tracing the roles of soft law in human rights*. Oxford University Press.

[452] Palm, A. (2017). The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?. *EU Immigration and Asylum Law and Policy*, 2.

[453] Judgment of the Tribunal of Trapani published on May 23, 2019. Available: https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf

[454] Reviglio, M. (2019). Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy. *Global Jurist*, *20*(1).

[455] Memorandum of Understanding between Libya and Italy, 2017.

transit countries.[456] However, as noted by Guttry et al. (2017), unlike Turkey, Libya is in the middle of a civil war, without a stable government in control of the entire territory. In addition, Libya is a transit country, due to mixed flows of asylum seekers and economic migrants, while in Turkey most of them are asylum seekers from Syria.[457]

Article 3 refers to the monitoring of the agreement conducted by a joint committee of Italians and Libyans. Yet, to date, despite repeated complaints of non-observance of human rights in detention centres reported by international institutions and NGOs and by the behaviour of the Libyan coastguard against NGOs during the rescue operations of migrants[458], the committee did not question the implementation of the memorandum. It is referred to the respect of human rights and international agreements at article 5 that reads, ''The Parties undertake to interpret and apply this Memorandum in accordance with international obligations and human rights agreements to which the two Countries are part''.[459] Libya, however, is not among the signatories of the Geneva Convention that protects refugees[460] and, in particular, as regards the violations of human rights that are perpetuated in Libyan detention centres, the Libyan organs of the ministry of Interior have the power to prevent control of detention camps by international organizations. From this it is evident that there are no formal guarantees of respect for human rights in Libya and that the Italian government probably knew about it at the time of signing the memorandum as documented by many reports[461] and by the recent judgment of the

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[456]The so-called hotspot approach is part of the European Migration Agenda even though the European Commission does not have a precise definition of hot spots. They do refer to a hot spot approach that would see the participation of the European Asylum Office, Frontex and Europol will work in the field with member countries to identify, register and take impressions of migrants.

[457] De Guttry, A., Capone, F., & Sommario, E. (2018). Dealing with migrants in the central Mediterranean route: A legal analysis of recent bilateral agreements between Italy and Libya. *International Migration*, *56*(3), 44-60.

[458] Ziniti, A. *Libyans against NGOs the Naval Battle While 50 Migrants die at Sea*, in La Repubblica, November 10, 2017, https://palermo.repubblica.it/cronaca/2017/11/10/news/libici_contro_ong_la_battaglia_navale_mentre_50_migranti_muoiono_in_mare-180706019/.

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

[460] Andrijasevic, R. (2010). DEPORTED: The Right to Asylum at EU's External Border of Italy and Libya 1. *International Migration*, *48*(1), 148-174.

[461] Office of the High Commissioner for Human Rights and United Nations Support Mission in Libya, *Detained and dehumanised*, Report on human rights abuses against migrants in Libya, December 13, 2016, https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf.

Tribunal of Trapani[462], but preferred to pretend not to know.

In article 7, the agreement provides that the memorandum may be amended at the request of one of the parties. To date, however, despite repeated complaints about the conditions of migrants in Libya, the Italian government, as we have already noted, has not undertaken any formal act to request clarifications from the Libyan government on the conditions of detention centres.[463] Finally, article 8 provides that the memorandum will be valid for three years and will be tacitly renewed for the next three years. In fact, the memorandum has been renovated by the current Italian government on the 2 November 2019 without any substantial change in the content and scope of the agreement.[464]

In doing so, the Italian government has not received the necessary guarantees on the proper protection of human rights in detention centres. The Italian government has preferred to keep a soft address to maintain the political effectiveness of the memorandum, without providing for serious guarantees that would keep the material effectiveness of the memorandum intact. Moreover, it should be underlined that in this scenario also the EU failed to act as a valid monitoring body. In fact, it is continuing to provide consistent financial aid to Libya without imposing some degree of conditionality.

7.2. The EU-Turkey Statement

Soft law instruments have been pursued also at EU level to address the so-called 'migration crisis'. Among those the EU-Turkey statement represents the most controversial. This agreement was presented on 18 March 2016 in the form of a joint statement composed of nine action points aimed to decrease smuggling and irregular migration from Turkey to the EU.[465] Gatti and Ott (2019) suggest that the statement must be ascribed to the EU – and not to the Member States, as the EU General Court established

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[462] Tribunal of Trapani, judgment of 23 May 2019.

[463] Viviano, F. and Ziniti, A. (2018) *Non Lasciamoli Soli*. Milano: Chiarelettere Editore.

[464] Mannocchi, F. Memorandum Italia-Libia: l'accordo della vergogna che continua a condannare a morte, 2020, https://espresso.repubblica.it/attualita/2020/07/06/news/memorandum-italia-libia-l-accordo-della-vergogna-che-continua-a-condannare-a-morte-1.350743

[465] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. Regarding this "agreement" see Costello, C. (2016). It need not be like this. *Forced Migration Review*, (51), 12; Peers, S. (2016). The final EU/Turkey refugee deal: a legal assessment. *EU Law Analysis*, *18*, 2016.

in the joined cases NF, NG, and NM.[466]

The first objective of the statement was to reduce the number of migrants entering from Turkey to Greece. Once this decrease in numbers was achieved the agreement prefigured a voluntary humanitarian admission scheme with Turkey.[467] The return of migrants from Greece to Turkey presents several legal issues. First, it is difficult to consider Turkey a first country of asylum or safe third country. Moreover, as Arribas (2016) points out '' [..] the return of refugees from Greece to Turkey could entail a breach of the Procedures Directive as well as the breach of principle of non-refoulement; both directly, because Turkey cannot be considered a safe country for refuges, and indirectly, because Turkey could return refugees to Syria''.[468]

The use of soft law instruments to address EU-External relations is not a new phenomenon.[469] Yet these kinds of instruments present some problems: the absence of procedural rules for the adoption of the agreement; and the absence of judicial control over the material validity and consequences of the agreement. Indeed, in the literature it is possible to find several reasons for using such instruments. According to Garcià Andrade (2016) among the reasons there is ''the need to increase the efficiency of external action, to allow greater smoothness in negotiation and conclusion of the instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments''.[470] In doing so, such instruments are more tuned with the rapid changes of contemporary democracies that need rapid decisions, usually informal, but with significant political consequences. In particular, in migration management such instruments are becoming key tools to address migration management challenges.

The migration agreement between the EU and Turkey has been adopted by a

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[466]Gatti, M., & Ott, A. (2019). The EU-Turkey statement: legal nature and compatibility with EU institutional law. In *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis*. Edward Elgar Publishing.

[467] Arribas, G. F. (2016). The EU-Turkey agreement: a controversial attempt at patching up a major problem. *European Papers*, *1*(3).

[468] Ibid.

[469] See recently for instance, Ott, A. (2021). Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges. *Yearbook of European Law*, *39*, 569-601; Among others see, Terpan, F. (2015). Soft Law in the European Union—The Changing Nature of EU Law. *European Law Journal*, *21*(1), 68-96; Saurugger, S. (2015). Studying resistance to EU norms in foreign and security policy. *European Foreign Affairs Review*, *20*(Special).

[470] García Andrade, P. (2016). The distribution of powers between EU Institutions for conducting external affairs through non-binding instruments. *European Papers* 1(1) 115-125.

statement of the European Council in the form of a press release[471] without following the ordinary procedure as provided by article 77 and 78 of the TFEU. In fact, by adopting this soft law instrument the European Council as limited the prerogatives of the European Parliament that represents an organ of control that has to participate in the procedure as provided by article 218 of the TFEU. The agreement contains provision for the reallocation of migrants to Turkey and a significant transfer of funds from the EU to Turkey. Despite its content, the agreement does not have binding legal efficacy due to its soft nature but possesses concrete legal effects.[472] Thus, the agreement presents significant characteristics that make it a soft law agreement because of its fluidity and informality. Moreover, more importantly this form of agreement represents an example of 'new governance' in EU migration policy.[473]

This new governance in EU migration policy can represent an important strategy followed by executive powers to avoid the formal and long processes of negotiation prefigured by member states constitutions and by EU treaties to act promptly and decisively to address concrete and incumbent challenges. By doing so, executive powers underline that under some specific condition's executives are interested more in the political effeciency rather than the legal validity of the norm or quasi-norm produced. However, this new governance opens up the way for new power relations between power of the state that is some case, as the one presented, are ousted out from the negotiation of the agreement and also their role of gatekeepers are put into question. Moreover, many have criticised the way the Union by-passed regular procedures calling it "an abusive use of soft law"[474] by concluding a statement which clearly used committing language.[475]

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[471] EU-Turkey statement, March 28, 2016. Available: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey- statement/pdf.

[472] Algostino, A. (2016). La soft law comunitaria e il diritto statale: conflitto fra ordinamenti o fine del conflitto democratico? 3 *Constitutionalismo.it* 255

[473] Cardwell, P. J. (2018). Tackling Europe's migration 'crisis' through law and 'new governance'. *Global Policy*, *9*(1), 67-75

[474] García Andrade, P. (2018). The role of the European Parliament in the adoption of non-legally binding agreements with third countries. In J. Santos Vara and S.R. Sánchez-Tabernero (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018.

[475] See for the debate for instance: Spijkerboer, T. (2016). Minimalist reflections on Europe, refugees and law. *European Papers* (2), 533-558; Arribas, G. F. (2016). The EU-Turkey agreement: a controversial attempt at patching up a major problem. *European Papers*, *1*(3); Poon, J. (2016). EU-Turkey Deal: Violation of, or consistency with, international law? *European Papers*, *1*(3); Cannizzaro, E. (2017). Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European

7.3. Border Management between Legal Validity and Political Efficiency

From a political point of view, the Italian government, with the memorandum, has obtained the results it sought. There was, in fact, a very significant decrease in landings on Italian shores.[476] Despite these political results, the Italian government is proving to be legally responsible of the inhumane treatments that are reserved to migrants in Libyan detention centres as confirmed in the recent judgment of the Tribunal of Trapani.[477] According to the reports of international organizations and NGOs operating in Libya, a disturbing reality emerges, made up of torture, sexual violence, blackmail and very difficult living conditions.[478]

According to the article 80 of the Italian Constitution "The Parliament shall authorize by law the ratification of such international treaties if have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".[479] Clearly, the article prefigures it the participation of the Parliament in ordinary law procedures to exercise its protective function over the executive. In fact, the two powers must share the negotiation and stipulation of the international acts. On the one hand, the intervention of the Parliament, evokes popular sovereignty (article 1 of the Constitution) exercised through the mediation of representation. On the other hand, a fundamental principle of constitutionalism, such as the separation of powers. Thus, a failure to comply with the provisions of article 80 of the Italian Constitution represents a violation which directly reverberates on article 1 of the Italian Constitution.[480]

Similar dynamics emerge from the reading and implementation of the EU-Turkey statement that has a first objective to close the European borders to the flows of migrants

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Council. *European Papers*, *2*(1); Peers, S. (2016). The draft EU/Turkey deal on migration and refugees: is it legal? *EU Law Analysis*, *16*.

[476] Italian Minister of Interior, *Sbarchi e accoglienza dei migranti tutti i dati,* September 10, 2018, http://www.interno.gov.it/sites/default/files/cruscotto_giornaliero_10-09-2018.pdf

[477] Tribunal of Trapani, 2019.

[478] United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, December 18, 2018, https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf; Amnesty International, *Libya's Dark Web of Collusion*, 2018, https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF

[479] Article 80 of the Italian Constitution

[480] A. Algostino, *L'esternalizzazione soft delle frontiere e il naufragio della Costituzione*, in *Costituzionalismo.it*, 2017, p. 139 *et seq*.

coming from Turkey. The political result was obtained, but it come with some legal ambiguities due to the nature of informal soft law instruments. First, it needs to be examined how far these informal soft law measures have to follow the constitutional principles of conferral, institutional balance, transparency, and the overall rule of law.481 Second, to maintain and respect the institutional balance, the European parliament needs to follow its treaty prerogatives by monitoring and contributing to the overall coherence and consistency of EU external relations.[482] Thus, despite having significant political effects the Statement does not comply with many principles of EU and international law. Moreover, the incapacity of the EU to act as a valid monitor body to assess the correct applications of the Statement and of the conditions of refugees trapped in Turkey either in reception centres that were transformed in removal centres[483] or in very low-paid jobs in the Turkish garment and manufactory industries.[484]

In light of what has been said, various elements emerge that may call into question the material effectiveness of the two informal 'agreements'. It shall be clear that to assess the legal validity and the material effectiveness of soft law instruments is difficult. The informality of the procedures prefigured for these kinds of significantly complicates the exercise. Further, the lack of monitoring prefigured in these agreement paves the way for abuses and situations of rightlessness.[485] When I do refer to material effectiveness, I intend the material observance of the norm or in this case the norms contained in the 'agreements'. As Hans Kelsen (1957) maintained, positive law "must be effective, that is, actually applied and observed" both "within a circumscribed territorial context, such as state law", and "above any territorial boundary, such as law international".[486]

Therefore, in the case of the memorandum its "spatial and temporal validity"[487] is

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[481] A. Peters, *Soft law as a new mode of governance*, in U. Deidrichs, W. Reiners and W. Wessels (eds), *The Dynamics of Change in EU Governance*. Cheltenham: Edward Elgar, 2011.

[482] A. Ott, *Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenger*, in *Yearbook of European Law*, 2020.

[483] Asylum Information Database, *Turkey: Country*, https://www.asylumineurope.org/reports/country/turkey

[484] Business Human Rights, *Syrian Workers in Turkey's Garment Industry: Looking Back, Moving Forward*, https://www.business-humanrights.org/sites/default/files/documents/turkey%20report.pdf

[485] Mann, I. (2018). Maritime legal black holes: Migration and rightlessness in international law. *European Journal of International Law*, *29*(2), 347-372.

[486] Kelsen, H. (1957). Il fondamento della validità del diritto. *Rivista di Diritto Internazionale*.

[487] Kelsen, H. (1967). *Pure Theory of Law.* Berkeley: University of California Press.

difficult to trace because for example, the treatment conditions in Libyan detention centres are not recognised. In fact, if for validity of the memorandum we mean its legitimacy, we have two problems. The first concerns the production of the law and thus the procedure followed in the simplified form in the form of soft law. The second concerns the application and observance of the rules contained in the memorandum that according to reports by international organizations and NGOs presented above demonstrate how it is a material ineffectiveness of the memorandum.[488] In other words, the norm must have real significance to have the possibility of realizing oneself in social phenomena.

Moreover, in the case of the statement it is difficult to assess the validity of an instrument that it's not binding and does not prefigures any guarantee for the migrants involved in the pushback from Greece to Turkey. In this light, also from Turkey, it emerges a disturbing picture in which the EU finances Turkey that is not a 'safe country', given its largely dysfunctional asylum system and the existing inequalities in access to protection.[489] For instance, Amnesty International recently reported that Turkey forcibly returned around 30 Afghans, after having forced them to sign "voluntary return" papers.[490] The statement does not mitigate the concern for the protection of refugees, notably because it does not put in place effective monitoring of Turkish commitments in the asylum field and in the reception of refugee and migrants.[491]

7.5. Conclusion

Soft law instruments emerged as fundamental tolls to address the challenges posed by the so-called 'migration crisis'. These instruments, is argued, are more adaptable to rapid changes of contemporary democracies and can address migration management issues in a more rapid and decisive way. However, the implementation of soft law instruments brings about some problems in relation to the production of the law and to the political

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[488] Tribunal of Trapani, 2019.

[489] Peers, S., & Roman, E. (2016). The EU, Turkey and the Refugee Crisis: What could possibly go wrong?. *EU Law Analysis*, *5*.

[490] Amnesty International, *Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal*, https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/

[491] Peers, S. (2016). The final EU/Turkey refugee deal: a legal assessment. *EU Law Analysis*, *18*, 2016.

and judicial monitoring of its implementation. It seems that the political efficiency of the measure represents a more important criterion than the legal validity of the production and implementation of the measure. The government of such complex phenomena through ordinary legislative procedures is too static and slow. Instead, governance instruments in the form of soft law are more streamlined with the political objective: namely the decrease of arrivals in Europe. This tension between legal validity and political efficiency materializes in two recent migration management: the memorandum between Libya and Italy (2017) and the EU-Turkey statement (2016) that are the outcome of an overall European approach to migration developed after the Valletta summit in 2015.

Indeed, the human rights violations in Libya are reported by numerous reports. Yet Italy continuous to be responsible for financing detention centres and search and rescue operation to the Libyan coastguard by consciously ignoring the consequences for the migrants that are brought back to detention centres in Libya.[492] In doing so, the conditions set out in the memorandum in particular the protection of human rights of migrants are materially not effective. In fact, as pointed out by the recent judgment of the Tribunal of Trapani, Italy by handing to the Libyan coastguard the migrants are in practice committing a collective pushback of migrants in a state that is not considered safe by most international organizations. As a result, it can be said that the memorandum is in violation of non-refoulment, of the Hamburg Convention and of customary international law. One can therefore speak, reasonably, of an occurrence of material non-effectivity and of complicity for the participation in another state wrongful act by providing aid and assistance to Libya.[493]

The case of the EU-Turkey statement is more complex. There are good reasons to suggest that the statement presents procedural problems due to is soft law form that

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[492] Cusumano, E., & Pattison, J. (2018). The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility. *Cambridge Review of International Affairs*, *31*(1), 53-75.

[493] Dastyari, A., & Hirsch, A. (2019). The ring of steel: Extraterritorial migration controls in Indonesia and Libya and the complicity of Australia and Italy. *Human Rights Law Review*, *19*(3), 435-465; De Vittor, F. (2018). Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione. *Diritti umani e diritto internazionale*, (1), 5-28.

creates the condition for contactless responsibility.[494] Moreover, some of the conditions for the implementation of the statement do not guarantee protection on the migrants. In fact, EU funds a country that is not a 'safe', given its largely dysfunctional asylum system and the existing inequalities in access to protection. These conditions worsen the protection of refugees, there the statement does not prefigure an effective monitoring of Turkish commitments in the asylum field and in the reception of refugee and migrants. Yet overall, the statement achieved the results it sought: the block of arrivals in Europe. Thus, its political efficiency remained intact. Nonetheless, its legal validity is more difficult to assess both for the procedure of adoption of the statement but also for the lack of a substantial monitoring of the conditions of the migrants in Turkey detention centres.

From both cases presented in the Chapter it emerges that their political efficiency, at least of a certain vision of migration management policy, which had as its main objective the reduction of irregular migration flows to Europe, remains intact. Yet some deficiencies of the two instruments have been indicated and are emerging. In the case of Italy, a manifestation of material non-effectivity and of complicity for the participation in another state wrongful act by providing aid and assistance to Libya. In the case of the EU similar reasonability's may follow in the future. In any case it is important to reflect on how legal forms are manipulated to guarantee political efficiency by retuning border management from political efficiency towards legal validity.

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[494] Moreno-Lax, V., & Giuffré, M. (2017). The Rise of consensual containment: from 'Contactless Control'to 'Contactless Responsibility' for forced migration flows. In *Research Handbook on International Refugee Law.* Edward Elgar.

CHAPTER 8

Criminalising Solidarity: between EU and National Law

8. Introduction

The so-called 'Migration Crisis' has represented for European politics a very critical and complex issue to address. In the last years, in many European member states we register a significant raise of populist parties and movements that sustain aggressive politics towards foreigners and migrants. Populist parties represent migration as a threat to sovereignty, public welfare, and national security. To respond to these challenges some populist, but also mainstream, European politicians are designing policies that aim at reinforcing the control apparatus by criminalising migrants and volunteers. In fact, the aim of these policies is to detect, to punish and to detain criminalized migrants and volunteers. These policies indeed pose serious challenges to the rule of law and to the protection of fundamental rights.

In these complex dynamics of power, the European Union (EU) emerges has an important actor able to impose limits to the power of member states to adopt national legislation in this field. In particular, the intersection of EU criminal and migration law has exercised a 'protective' function against the criminalisation laws enacted at national level. The protective function materialises in a complex intersection of EU criminal, human rights and migration law. From a critical reading of the EU Returns Directive it can be suggested that in EU legislation irregular entry and stay are not criminalised. Nevertheless, the criminalisation of migration based upon prevention and not on a tangible offence challenges some fundamental principles of criminal law but also the enforcement of the return of irregular migrants.

This contradiction developed in some cases where the Court of Justice of the European Union (CJEU) was called upon to rule on the compatibility of national law criminalizing irregular entry and stay with the EU Returns Directive. From these cases the protective function emerges in two ways: (1) EU law on immigration enforcement must be interpreted in accordance with fundamental principles of EU law; (2) by linking member states criminalisation of irregular stay with the implementation of the Return directive. This legal framework seeks to pose some limits to the member states policies that criminalise irregular migration.

Furthermore, in relation to the criminalisation of solidarity the EU has adopted the so called 'Facilitators Package' that however does not mention the word solidarity. From the EU documents there is the reference to ''humanitarian assistance'' that implies that EU member states can choose not to sanction acts of assistance to non-nationals seeking to enter or transit across the state's territory when these acts are driven by humanitarian aims. Thus, the member state does have the power to sanction the practises of solidarity. Nonetheless, the implementation of the Facilitation Directive is critical with the EU's founding values enshrined in Article 2 TEU, the EU's Fundamental Rights Charter, and its commitment to secure and protect humanitarian actors outside the EU as prefigured by Article 214 TEU.

In the last years Italy's politics of migration have constructed an anti-immigration rhetoric around two notions: criminal populism and criminalization of solidarity. These two notions are interrelated because it is through the laws enacted by populist parties that the criminalization of solidarity materialises in migration politics. The chapter analysis the Minniti and Salvini migration policies as the first instance in which this kind of approach was followed. The approach included the signature of the memorandum of understanding with Libya and the application of the code of conduct for NGOs operating in the Central Southern Mediterranean. The former was signed with the only aim of decreasing the arrivals without any preoccupation for the destiny of the migrants tortured in the Libyan detention centres; the latter questioned the authenticity of NGOs solidarity discourses. In doing so, Minniti and Salvini policies present some characteristic of both criminal populism and criminalization of solidarity that are part of an anti-immigration rhetoric.

8.1 Populism and Crimmigration

''There can no longer be any doubt that we are going through a populist moment'' as Mounk (2018) bluntly suggests.[495] In this 'populist moment' criminal law emerged as a crucial instrument for populist parties across Europe to manage the so called ''migration crisis''.[496] Referring to populist parties in Europe as such is a clear simplification because

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[495] Mounk, Y. (2018). *The people vs. democracy: Why our freedom is in danger and how to save it.* Harvard University Press.
[496] Among others see Jeandesboz, J., & Pallister-Wilkins, P. (2016). Crisis, routine, consolidation: The politics of the Mediterranean migration crisis. *Mediterranean Politics*, *21*(2), 316-320; Campesi, G. (2018).

the distinctive character of populist parties is its heterogeneity. It is really difficult to pinpoint some features of each party but what they share are two sentiments: a strong anti-establishment rhetoric and strong Euroscepticism.[497] Yet it is important to stress that also the so called mainstream parties in specific policy issues such as the management of migration adopt a populist rhetoric to attract populist voters.[498]

Independently from the political affiliation, from the literature it emerges that Populism can be conceptualised as a rhetoric or as an ideology. Populism as a political rhetoric stresses "the power of the common people in order to challenge the legitimacy of the current political establishment".[499] While Populism as an ideology ''considers society to be ultimately separated in two homogeneous and antagonistic groups: 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volontée general* of the people".[500] It can be said that these populist discourses emerge in the political debate as mixture of rhetoric's and ideologies, that use the web as their main instrument to spread their message.[501]

The point made here is not to offer an assessment of the different populist parties in Europe. The aim instead is to identify some dynamics shared by these parties that used criminal law tools to manage migration in Europe. In the last twenty years, the rates of migration towards Europe increased significantly. To 'manage' such high numbers of irregular migrants many European states have used criminal law instruments to detect,

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Crisis, migration and the consolidation of the EU border control regime. *International Journal of Migration and Border Studies*, *4*(3), 196-221.

[497] Lazaridis, G., & Campani, G. (Eds.). (2016). *Understanding the populist shift: Othering in a Europe in crisis*. Taylor & Francis. See in particular the Introduction.

[498] An instance of such a behaviour can be found in the Italian Partito Democratico which on the one hand, supported migration management policies that criminalized migrants; on the other hand, postponed the adoption of a Law on the citizenship to foreign born because of the imminent elections versus right wing populist parties.

[499] Abts, K., & Rummens, S. (2007). Populism versus democracy. *Political studies*, *55*(2), 405-424; Mounk, Y. (2018). *The people vs. democracy: Why our freedom is in danger and how to save it*. Harvard University Press.

[500] Mudde, C. (2007). *Populist radical right parties in Europe*. Cambridge University Press.

[501] For more information on Populism and rule of Law see, Urbinati, N. (2014). *Democracy Disfigured: Opinion, Truth and the People*. Harvard University Press; Ackerman, B. (2015). Three Paths to Constitutionalism-and the Crisis of the European Union. *British Journal of Political Science*, 705-714; Mounk, Y. (2018). *The people vs. democracy: Why our freedom is in danger and how to save it*. Harvard University Press.

control, and criminalize migrants.[502] In doing so, these member states have used mass incarceration and deportation of migrants as last resort to manage the unwanted flows of migrants.[503] According to Mitsilegas (2014) the criminalisation of migration materialises as a threefold process ''[..] with the adoption of substantive criminal law, via recourse to traditional criminal law enforcement mechanism including surveillance and detention, as well as via the development of mechanism of prevention and pre-emption''.[504]

To manage irregular migration member states have framed irregular migration as a criminal problem. In fact, criminal law tools are combined with administrative ones in what has been called crimmigration.[505] In this vein, criminal law is used to deal with irregular migration as a criminal issue instead of an administrative one.[506] Yet it should be stressed that the use of the term crimmigration is controversial and even its critical use by scholars is still debated. The use of criminal law to manage irregular migration is visible in populist policies to manage migration. Populist parties depict irregular migrants as a threat to the community and thus criminalize irregular migrants. In doing so, these parties represent migration as a threat to sovereignty, public welfare, and national security.[507]

Such a criminalization permits to populist parties to frame migration in criminal populist discourses. In so doing, as argued by Ferrajoli (2019), criminal populism becomes a distinctive character of securitarian policies pursued by Populist parties.[508] The

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[502] Aliverti, A. (2012). Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology*, *16*(4), 417-434.

[503] Marin, L., and Spena, A. (2016). Introduction: the criminalization of migration and European (dis) integration. *European Journal of Migration and Law*, *18*(2), 147-156.

[504] Mitsilegas, V. (2014). *The criminalisation of migration in Europe: challenges for human rights and the rule of law*. Springer.

[505] Stumpf, J. (2006). The the crimmigration crisis: Immigrants, crime, and sovereign power. *Am. UL Rev.*, *56*, 367; Stumpf, J. P. (2012). The justice of crimmigration law and the security of home. In Hudson, B. and Ugelvik, S. *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law*. Routledge; Stumpf, J. (2013). The process is the punishment in crimmigration law. In Aas, K. F. and Bosworth, M. *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*. Oxford University Press.

[506] Marin, L., and Spena, A. (2016). Introduction: the criminalization of migration and European (dis) integration. *European Journal of Migration and Law*, *18*(2), 147-156.

[507] Atak, I., & Simeon, J. C. (2018). *The Criminalization of Migration: Context and Consequences*. McGill-Queen's Press-MQUP.

[508] Ferrajoli, L. (2019). Il populismo penale nell'età dei populismi politici. *Questione Giustizia* 1/2019.

aim of these policies is to detect, to punish and to detain criminalized migrants.[509] These practices of social control are utilized by a range of institutional actors such as police, detention guards and courts; but also in quasi-institutional sites particularly at the border such as airports, ports and military and private security firms.[510] In the literature it is possible to refer to this set of practices of social control as ''crimmigration control system''.[511] Moreover, this system favours what Packer (1964) called 'crime control' or 'efficiency' over the 'due process' or 'freedom' model.[512]

The so called crimmigration control system represents a political answer to the increasing insecurities perceived by citizens of affluent countries. To respond to such insecurity's political parties, develop measures that want to control and to manage irregular migration in an efficient way.[513] These discourses are also the representation of a neoliberal discourse that aims at governing complex phenomena in a technical, efficient and predictable way.[514] This pragmatic use of criminal law practice to solve practical problems has been described by Sklanski (2012) as ''ad hoc instrumentalism'', stressing thus the instrumental use of criminal law to manage migration.[515] In pursuing this strategy states often put aside justice and fundamental rights by excluding irregular migrants from a fully enjoyment of rights.

According to Marin and Spena (2016) these crimmigration practises exclude irregular migrants in three ways. First, excluding migrants from their territorial space with the last aim of deporting or expelling them from the state. Second, excluding them from

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[509]Aas, K. F., & Bosworth, M. (2013). *The borders of punishment: Migration, citizenship, and social exclusion.* Oxford University Press; Bosworth, M., Franko, K., & Pickering, S. (2018). Punishment, globalization and migration control: 'Get them the hell out of here'. *Punishment & Society*, *20*(1), 34-53.

[510] Bowling, B. and Westenra, S. (2020). A really hostile environment: Adiaphorization, global policing and the crimmigration control system. *Theoretical Criminology 24(2).*

[511] Bowling, B. (2013). Epilogue: The borders of punishment; towards a criminology of mobility. In Aas, K. F. and Bosworth, M. *The Borders of Punishment: Migration, Citizenship, and Social Exclusion.* Oxford University Press.

[512] Packer, H. L. (1964). Two models of the criminal process. *U. Pa. L. Rev.*, *113*, 1.

[513] Bowling, B. and Westenra, S. (2020). A really hostile environment: Adiaphorization, global policing and the crimmigration control system. *Theoretical Criminology 24(2).*

[514] Golash-Boza, T. M. (2015). *Deported: Immigrant policing, disposable labor and global capitalism.* NYU Press; Lacey, N. (2019). Populism and the Rule of Law. *Annual Review of Law and Social Science*, 15, 79-96.

[515] Sklansky, D. A. (2012). Crime, immigration, and ad hoc instrumentalism. *New Criminal Law Review*, *15*(2), 157-223.

the polity through citizenship deprivation and residence permit revocation. And third, excluding migrants from guarantees prefigured in most Western criminal justice systems.[516] Thus, it seems that crimmigration has a significant exclusionary nature because deprives migrants of fundamental rights they are entitled.[517] It aims in fact at constructing quasi-subjects of law by depriving them of fundamental guarantees prefigured by Western constitutional and criminal law.

In this scenario, detention represents the main instrument to deter irregular migration. Indeed, detention systems vary throughout Europe[518], yet these share some characteristics.[519] This social control system by detention represents the combination of several state actors and quasi-state that concur in the design and implementation of a crimmigration system of detention. Indeed, detention is not unlawful *per se* but is modelled as an administrative and technocratic process that aims at assessing in the most efficient way the right to stay of the irregular migrant. In so doing, usually the detention has not a fixed period but depends on the procedure that in some countries can take months. In this setting, irregular migrants are thus unlawfully detained for a period needed to enforce repatriation or deportation orders. Despite detention centres are often renamed and reorganized, they still represent spaces in which a criminal use of administrative law materialises as an efficient policy of exclusion. Yet exclusionary practices emerge not only in detention centres but also in several practices developed by the police and bureaucratic infrastructures of affluent states.

An important development in migration management policies has been the transformation of administrative crimes into immigration crimes. By framing administrative offences by irregular migrants as immigration crimes, affluent states design *ad hoc* bureaucratic infrastructures that have the priority of detecting, controlling, and managing irregular migrants. Among the immigration crimes there are unlawful

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[516] Marin, L., and Spena, A. (2016). Introduction: the criminalization of migration and European (dis) integration. *European Journal of Migration and Law*, *18*(2), 147-156.

[517] Ibid.

[518] Parkin, J. (20123). *The criminalisation of migration in Europe*. CEPS Centre for European Policy Studies. For a comparative study of detention practices in Europe see Cornelisse, G. (2010) *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Martinus Nijhoff Publishers.

[519] Guild, E. (2005). *"A Typology of Different Types of Centres in Europe",* Report for the European Parliament, Directorate-General Internal Policies of the Union, IP/C/LIBE/FWC/2005-22.

entry, arriving without documents, breaching visa conditions, or overstaying.[520] These are all conditions instrumental for the crimmigration narrative followed by populist parties across Europe. These narratives, as showed in the two case studies presented in the chapter, also criminalize people who offer help to migrants that are thus criminalized themselves.[521] In doing so, it emerges a populist narrative that aims at criminalizing the people who manifest solidarity toward migrants.

This complex structure of migration management aims at managing migration pursuing a hybrid system of crimmigration[522]. Indeed, the instruments adopted by EU member states differ in type and structures of power. Yet, as Bowling and Westenra (2018) suggest ''Crimmigration law continues to be a site of legal creativity, expansion and exploitation''.[523] In these different 'institutional assemblages'[524] migrants are excluded from the territory of the destination country, from the polity, and from the fundamental rights they are entitled.[525] In doing so, states and many other actors concur in strengthening a ''global system of policing, punishment and control''[526] to defend the 'fortresses of Europe'.

8.2. Criminalization of Solidarity

In recent years to respond to the criminalisation of migration going on throughout Europe, we witnessed the multiplication of actively engaged citizens and communities citizens

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[520] Bowling, B. and Westenra, S. (2020). A really hostile environment: Adiaphorization, global policing and the crimmigration control system. *Theoretical Criminology 24(2).* For a European overview of these practices among others see, Di Martino, A. et al. (2013). *The Criminalization of Irregular Immigration: Law and Practice in Italy.* Pisa University Press; Brouwer, J., van der Woude, M., & Van der Leun, J. (2017). Framing migration and the process of crimmigration: A systematic analysis of the media representation of unauthorized immigrants in the Netherlands. *European Journal of Criminology*, *14*(1), 100-119; Wonders, N. A. (2017). Sitting on the fence–Spain's delicate balance: Bordering, multiscalar challenges, and crimmigration. *European Journal of Criminology*, *14*(1), 7-26; Thorleifsson, C. (2017). Disposable strangers: Far-right securitisation of forced migration in Hungary. *Social Anthropology*, *25*(3), 318-334.

[521] Bowling, B. and Westenra, S. (2020). A really hostile environment: Adiaphorization, global policing and the crimmigration control system. *Theoretical Criminology 24(2).*

[522] Ibid.

[523] Ibid.

[524] Ibid.

[525] Marin, L., and Spena, A. (2016). Introduction: the criminalization of migration and European (dis) integration. *European Journal of Migration and Law*, *18*(2), 147-156.

[526] Bowling, B. and Westenra, S. (2020). A really hostile environment: Adiaphorization, global policing and the crimmigration control system. *Theoretical Criminology 24(2).*

initiatives and networks that mobilize in the name of migrants solidarity.[527] Within EU politics the term solidarity has been often invoked as a cornerstone of 'refuge burden' policies.[528] Nevertheless, some of the migration management policies pursued by the EU, as suggested by Thielemann (2018), ''continue to undermine burden-sharing efforts and instead legitimize burden-shifting practices''.[529] The concept of solidarity represents a contested concept in fact, as Tazzioli and Walters (2019) suggest, ''on an EU level the notion of solidarity has been fundamentally mobilised according to a state-based logic and not directly towards migrants''.[530] In the politics of solidarity in the EU it may be possible to identify three levels of solidarity. First, an institutional level between member states aimed at sharing or shifting the burden of migration. From this form of solidarity is articulated by European politicians ''as a bordering notion''.[531] Second, a well-established quasi-institutional level of NGOs and IGOs practices aimed at a humanitarian solidarity.[532] And third, a level characterized by unstable commonning[533] between common people and migrants aimed at developing strong relational networks[534] of non-

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[527] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190; Carrera, S. et al. (2019). *Policing humanitarianism: EU policies against human smuggling and their impact on civil society*. Bloomsbury Publishing.

[528] Lemberg-Pedersen, M. (2011). Solidarity (in) action?. *Politik*, *14*(4). For a conceptualization of burden sharing see Thielemann, E. R. (2003). Between interests and norms: Explaining burden-sharing in the European Union. *Journal of refugee studies*, *16*(3), 253-273.

[529] Thielemann, E. (2018). Why refugee burden-sharing initiatives fail: Public goods, free-riding and symbolic solidarity in the EU. *JCMS: Journal of Common Market Studies*, *56*(1), 63-82.
 See also Bauböck, R. (2018). Refugee protection and burden-sharing in the European Union. *JCMS: Journal of Common Market Studies*, *56*(1), 141-156.

[530] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190.

[531] Ibid.

[532] For an analysis of humanitarianism see among others, Pallister-Wilkins, P. (2018). Médecins Avec Frontières and the making of a humanitarian borderscape. *Environment and Planning D: Society and Space*, *36*(1), 114-138; Pallister-Wilkins, P. (2019). Im/mobility and humanitarian triage. In *Handbook on Critical Geographies of Migration*. Edward Elgar Publishing; Squire, V. (2014). Desert 'trash': Posthumanism, border struggles, and humanitarian politics. *Political Geography*, *39*, 11-21.

[533] Linebaugh, P. (2009). *The Magna Carta manifesto: Liberties and commons for all*. Univ of California Press. Cited in Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190.

[534] Networks formed by actively engaged citizen and legal communities. See Capra, F., & Mattei, U. (2015). *The ecology of law: Toward a legal system in tune with nature and community*. Berrett-Koehler Publishers.

institutionalised solidarity.[535]

Thus, solidarity emerges in the EU political discourse as a multifaceted concept that can be conceptualised in different and at times contrasting terms. The institutional solidarity between member states looks as solidarity as a label for its policies aimed at containing migration. In such a case, solidarity is used a bureaucratic and top-down signifier that does not include migrant's agency. Again, also the quasi-institutional solidarity is framed by many NGOs as a humanitarian[536] problem to be solved in the most pragmatic way. In these solidarities exercises the migrant is taken into consideration but with a humanitarian sentiment aimed at securitising migration.[537] Instead, in autonomous networks that arise from bottom up it is possible to recognize a solidarity based on reciprocity without any policy objective. In other words, these networks represent the other side of 'institutional solidarity' because are non-hierarchical, apolitical, and non-institutionalised. Hence, on the one hand there are institutional types of solidarity based on institutional infrastructures framed in solidarity or humanitarian terms. On the other hand, the autonomous efforts of common people and migrants are often depicted by mainstream politicians and media as 'crimes of solidarity' that are facilitating irregular migration.[538]

What is interesting for the purpose of the Chapter is the use of instruments of crimmigration by populist parties and mainstream parties to identify and punish the 'crimes of solidarity'. The term criminalization of solidarity describes the member state practices that prevent common citizens and non-state actors from exercising direct solidarity with immigrants in distress. To do so, criminal law instruments are designed to detect and punish practices of solidarity with the final objective of protecting European borders. In fact, member states and EU institutions put in place instruments aimed at

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[535] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190.

[536] For a critical account of NGOs humanitarianism discourse see: Cuttitta, P. (2018). Repoliticization through search and rescue? Humanitarian NGOs and migration management in the Central Mediterranean. *Geopolitics*, *23*(3), 632-660; Stierl, M. (2018). A fleet of Mediterranean border humanitarians. *Antipode*, *50*(3), 704-724.

[537] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190.

[538] Fekete, L. at al. (2017). *Humanitarianism: the unacceptable face of solidarity.* London: The Institute of Race Relations.

criminalizing who moves and who helps. The migrant and the person who shows solidarity are becoming object of crimmigration practices.[539] In this state practices we see the combination of two discourses: on the one hand, a criminalisation of migration; and on the other hand, a criminalization of solidarity.[540] In both cases criminalising emerges as the main trait of member states and EU institutions migration management policies as a materialization of the 'crimmigration control system'.

In the literature it is possible to recognize studies aimed at recognizing these practices of crimmigration control developed to criminalise solidarity practices that emerge in European borders[541], cities[542], and islands[543]. These autonomous practices of solidarity toward migrants can emerge in really different spaces and power relations. What is indeed interesting is the capacity of non-institutionalised networks and quasi-institutionalised NGOs to challenge 'state-led humanitarianism'.[544] In such a confrontation, activists and volunteers are accused not only for their gestures of solidarity but for organising autonomous networks of resistance that are independent from state-led

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[539]Carrère, V., & Baudet, V. (2004). Délit de solidarité. *Plein droit*, (1), 14-17; Fekete, L. (2009). Europe: crimes of solidarity. *Race & Class*, *50*(4), 83-97; Heller, C., & Pezzani, L. (2019). Contentious Crossings: Struggles and Alliances for Freedom of Movement across the Mediterranean Sea. *South Atlantic Quarterly*, *118*(3), 644-653.

[541]Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190; Rygiel, K. (2011). Bordering solidarities: Migrant activism and the politics of movement and camps at Calais. *Citizenship studies*, *15*(01), 1-19; Reggiardo, A. (2019). Distrust and Stigmatization of NGOS and Volunteers at the Time of the European Migrant" Crisis". Conflict and implications on social solidarity. *Partecipazione e conflitto*, *12*(2), 460-486; Obradovic-Wochnik, J., and Bird, G. (2020). The everyday at the border: Examining visual, material and spatial intersections of international politics along the 'Balkan Route'. *Cooperation and Conflict*, *55*(1), 41-65.

[542] Nur, N., and Sethman, A. (2016). Migration and mobilization for the right to housing in Rome. *Migration, Squatting and Radical Autonomy: Resistance and Destabilization of Racist Regulatory Policies and B/Ordering Mechanisms*, 78; Martínez, M. (2016). Beyond solidarity: Migrants and squatters in Madrid. In *Migration, squatting and radical autonomy* (pp. 189-206). Routledge; Montagna, N., & Grazioli, M. (2019). Urban commons and freedom of movement. The housing struggles of recently arrived migrants in Rome. *Citizenship Studies*, *23*(6), 577-592.

[543] Zamponi, L. (2018). From border to border: refugee solidarity activism in Italy across space, time, and practices. In *Solidarity Mobilizations in the 'Refugee Crisis'* (pp. 99-123). Palgrave Macmillan; Evangelinidis, A. (2016). The Greek States Response to the Refugee Crisis and the Solidarity Movement. *Contemporary Southeastern Europe*, *3*(1), 32-36; Mitchell, K., & Sparke, M. (2020). Hotspot geopolitics versus geosocial solidarity: Contending constructions of safe space for migrants in Europe. *Environment and Planning D: Society and Space*, *38*(6), 1046-1066.

[544] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190

humanitarianism.[545] In this scenario, both movements and NGOs gestures of solidarity are criminalised as unlawful or politically oriented in order to diminish the strength of the discourses of these autonomous and often precarious networks of solidarity.

8.3. EU Law Intersection with the Criminalization of Solidarity

The criminalization of solidarity is emerging as an important set of practices used by populist parties across Europe to persecute non-governmental organizations (NGOs), autonomous networks and citizens that assist irregular migrants. To do so, member states deploy criminal law instruments that are able to detect, prevent and punish direct acts of solidarity.[546] It follows that acts that were regarded as humanitarian assistance by the EU are now for political reasons regarded as subversive and criminal.[547] Yet it is important to notice that the criminalization of solidarity punishes only specific types of assistance such giving migrants shelter or a lift, saving people from drowning in the Mediterranean Sea, or simply distributing food and water at detention centres or refugee camps.[548] In light of these developments it is worth to analyse the intersection between member states national legislation that criminalises solidarity and the EU legal framework.

The EU law that addresses the issues illustrated above is the so-called 'Facilitators Package' adopted in 2002, which includes the Council Directive, 2002/90/EC and the Framework Decision, 2002/946/JHA. In these pieces of legislation, the word 'solidarity' is never directly mentioned. Moreover, also other EU documents on these issues such as the EU Action Plan against migrant smuggling (COM(2015)285 final) and the Council conclusions on migrant smuggling ((2016)6995/16), do not mention the word 'solidarity'

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[545] Ibid.

[546]Buckler, L. (2018) "The Crime of Solidarity: Criminalising Love." Help Refugees, 3 April, https://helprefugees.org/news/the-crime-of-solidarity/; Hayes, B. and Barat, F. (2017) "Europe's Quiet Offensive against People Helping Refugees." Euractiv, 31 October, https://www.euractiv.com/section/global-europe/opinion/ europes-quiet-offensive-against-people-helping-refugees/; Phipps, M. (2018) "The Criminalisation of Solidarity." Labour Briefing, 30 November, https://labourbriefing.squarespace.com/blog/2018/11/30/the-criminalisation-of-solidarity?rq=cr iminalising%20solidarity.

[547] Wilkins, P. P. (2018). "Criminalising Assistance and Solidarity: The ERCI Case and Beyond." Observatory of the Refugee and Migrant Crisis in the Aegean, 14 September, https://refugeeobservatory.aegean.gr/en/criminalising-%CE%B1ssistance-and-solidarityerci-case-and-beyond

[548] Carrera, S. et al. (2019). *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society*. Hart Publishing.

either.[549] In fact, what is included in the EU documents - in particular in the Council Directive 2002/90/EC - is the reference to ''humanitarian assistance'' that implies that EU member states can decide not to sanction acts of assistance to non-nationals seeking to enter or transit across the state's territory when these acts are motivated by humanitarian aims.[550] However, in this setting the member states have the power to decide if persecuting the people or NGOs that provide humanitarian assistance. Moreover, this has led to important variation in how Member States have transposed the Facilitators Package in national legislation and in administrative practices.[551]

Thus, it emerges an important character: the 'facilitators' of illegal immigration. More precisely the facilitators of illegal immigration are defined as someone who intentionally assists an illegal immigrant in entering or transiting across the territory of a Member State. It includes those who for financial reasons intentionally help an illegal immigrant to reside within the territory of a member state.[552] Further, this applies when this assistance relates to the "unauthorised crossing of the border" and when it is done with the aim of "sustaining networks which exploit human beings".[553] Nevertheless, from the perspective of the facilitator is never so clear if the migrant is irregular or a refugee. The assessment of the position of the irregular migrant is something that is done in a later stage not during the crossing of a border or when providing shelter. These kind of policies that follow from the implementation of the Facilitation Directive are critical with the EU's founding values enshrined in Article 2 TEU, the EU's Fundamental Rights Charter, and its commitment to secure and protect humanitarian actors outside the EU – as noted in the Article 214 TEU.[554]

This tension emerges in important studies that point out that the criminalisation of solidarity can have significant negative consequences on democracy, rule of law,

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[549] Duarte, M. (2020). The Ethical Consequences of Criminalizing Solidarity in the EU. *Theoria*, *86*(1), 28-53.

[550] Council Directive, 2002/90/EC Art. 1:2

[551] Carrera, S. and Guild, E. (2016). *Irregular Migration, Trafficking and Smuggling of Human Beings. Policy Dilemmas in the EU.* Brussel: Centre for European Policy Studies; Fekete, L., Webber, F. and Edmond-Pettitt, A. (2017). *Humanitarianism: the unacceptable face of solidarity.* London: The Institute of Race Relations.

[552] Duarte, M. (2020). The Ethical Consequences of Criminalizing Solidarity in the EU. *Theoria*, *86*(1), 28-53.

[553] Council Directive, 2002/90/ EC, art. 1(a)(b) and Preamble 3.

[554] TEU

fundamental rights and social trust.[555] In the academic literature many researches that investigate the negative effects of this system of policing have appeared. These studies suggest that member states legislation and EU law are exercising a preventive function by implementing crimmigration instruments. Interesting to notice that at EU level there were some efforts to 'institutionalise' the practices of solidarity emerging throughout Europe. This was done in 2016 when the European Commission launched the European Solidarity Corps as an initiative to offer young people opportunities to work and volunteer in projects across Europe. Yet this initiative has been criticised as ''an attempt to appropriate, control, limit and even brand what forms of relationship, and what forms of affiliation are to count as solidarity, and what are to be negated and suppressed as something else''.[556]

In light of these developments it seems that there is a tension between EU law and the criminalisation of solidarity. On the one hand, the Facilitators Package prefigures a legal framework that undermines human rights protection because considers all migrants as irregular and thus any type of humanitarian assistance can be punished as a criminal offence. On the other hand, some EU initiatives are trying to institutionalise humanitarian assistance to make it more streamlined with the EU priorities. Yet these initiatives undermine the autonomous networks of solidarity that emerge within migration politics. In doing so, EU institutions are developing a framework that persecutes certain practices of solidarity because these pursue solidarity outside the EU institutional framework. These developments indeed pose significant challenges to the civic society actors that want to maintain their freedom to decide what type of acts and which instruments are the best to pursue their humanitarian or solidarity priorities.

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[555]Carrera, S. et al. (2018). *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update* (Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 608.838, 21 December 2018; Carrera, S. (2019). *Policing Humanitarianism: EU Policies against Human Smuggling and their Impact on Civil Society*. Hart Publishing.

[556] Tazzioli, M. and Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190. For more information see also Pallister-Wilkins, P. (2020). Hotspots and the geographies of humanitarianism. *Environment and Planning D: Society and Space*, *38*(6), 991-1008.

8.4. EU Law Intersection with the Criminalisation of Migration

The overall EU approach to migration management seems based on prevention. There has been a shift from the penal state to the preventive state.[557] In order to prevent migrants flow some member states adopt legislation that criminalise migration, humanitarianism, and solidarity. According to Mitsilegas (2016) '' […] the exercise of state power to prevent future acts which are deemed to constitute security threats''.[558] In so doing, criminal law instruments are transformed into preventive measures that are intended not to prosecute the migrant for a committed crime but to prevent that he/she will commit crimes in the future. Overall, these trends visible in some member states legislation pose substantial challenges to human rights law and the rule of law.[559]

Against this backdrop, EU law emerged has an important instrument able to impose limits to the power of member states to adopt national legislation in this field. In particular, the intersection of EU criminal and migration law has exercised a 'protective' function against the criminalisation laws enacted at national level.[560] Yet it is problematic to assess the intersection of EU criminal and migration law with EU member states legislation. In fact, in several EU member states irregular entry and stay are treated as criminal offences.[561] Moreover, irregular entry is addressed as a wrong of a public kind to implement a sort of 'precautionary criminalisation'.[562]

Nonetheless, let me briefly set out the EU legislation in this field. In EU legislation irregular entry and stay are not criminalised.[563] However, the criminalisation of migration based upon prevention and not on a concrete offence challenges some fundamental principles of criminal law but also the enforcement of the return of irregular migrants.

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[557] Campesi, G. (2020). Genealogies of Immigration Detention: Migration Control and the Shifting Boundaries Between the 'Penal' and the 'Preventive' State. *Social & Legal Studies*, *29*(4), 527-548.

[558] Mitsilegas, V. (2016). *EU criminal law after Lisbon: rights, trust and the transformation of justice in Europe*. Bloomsbury Publishing.

[559] Ibid. P. 85.

[560] Mitsilegas, V. (2012). The changing landscape of the criminalisation of migration in Europe: The protective function of European Union law. In Maria João, G. and van der Leun, J. *Social control and justice: Crimmigration in the age of fear*. Eleven International Publishing.

[561] Ibid.

[562] Spena, A. (2014). Iniuria migrandi: Criminalization of immigrants and the basic principles of the criminal law. *Criminal Law and Philosophy*, *8*(3), 635-657.

[563] Mitsilegas, V. (2015). *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Springer. See chapter 3.

This contradiction emerged in some cases where the Court of Justice of the European Union (CJEU) was called upon to rule on the compatibility of national law criminalizing irregular entry and stay with the EU Returns Directive.[564] The return Directive has initiated an important level of harmonization of national legal systems in relation to return procedures, conditions and deadlines.[565]

Moreover, the CJEU in a number of rulings has introduced some limits to the member states criminalisation irregular entry and stay in order to preserve the effectiveness of EU law and in particular for migration criminalisation with the Return Directive.[566] The cases that set some limits to national laws that criminalise irregular migration are *El Dridi*, *Achughbabian,* and *Sagor*.[567] Yet in a more recent case *Celaj* the Court has limited the scope of previous rulings.[568]

It follows from the above that EU law has developed a legal system able to pose limits to the capacity of member states of criminalising irregular entry and stay. For this reason EU law has exercised a 'protective function' in relation to member states legislation that criminalises irregular migration.[569] According to Mitsilegas (2012) the protective function emerges in two ways: first, that EU law on immigration enforcement must be interpreted in accordance with fundamental principles of EU law; second, by linking member states criminalisation of irregular stay with the implementation of the

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[564] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 (Return Directive). For an overview of the Returns Directive see among others Arcarazo, D. A. (2011). The Returns Directive: Possible Limits and Interpretation. In Zwaan, K. *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2011); Acosta, D. (2009). The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly?(The adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law*, *11*(1), 19-39; Baldaccini, A. (2009). The return and removal of irregular migrants under EU law: An analysis of the returns directive. *European Journal of Migration and Law*, *11*(1), 1-17.

[565] For an overview of the case law of the EU Court of Justice on criminalization, see Vavoula, N. (2016). The Interplay between EU Immigration Law and National Criminal Law – The Case of the Return Directive. In Mitsilegas, V., Bergstrom, M. and Konstantinides, T. *Research Handbook on EU Criminal Law.* Hart.

[566] Ibid.

[567] See cases *El Dridi* (C-61/11 (2011) in ECR I-03015), *Achughbabian* (C-329/11 (2011) in ECR I-12695), and *Sagor* (C-430/11 (2012) nyr).

[568] *Celaj* (Case C-290/14, *Celaj*, Judgment of 1 October 2015, nyr).

[569] Mitsilegas, V. (2012). The changing landscape of the criminalisation of migration in Europe: The protective function of European Union law. In Maria João, G. and van der Leun, J. *Social control and justice: Crimmigration in the age of fear*. Eleven International Publishing.

Return directive.[570] In doing so, the EU has designed a legal framework that seeks to pose some limitation to the criminalisation migration management policies enacted by EU member states. Yet, as showed further in the chapter, the preventive function exercised by EU law is not always capable of guaranteeing fundamental rights due to the complexity of the overall EU and national legal framework.

8.5. The Italian Case and EU Law

Italy's migration management practices developed in the last years have significantly reinforced the criminal offences and administrative sanctions to criminalise migration and solidarity. In the first phase, the former interior minister Marco Minniti designed a number of laws that aimed first at securitizing Italian borders; and second, aimed at tightening the state policing on NGOs and individuals' practices of solidarity. The Minniti policies are a specific series of migration management policies initiated by the Italian centre-left government.[571] The policies were a response to the significant pressure of right-wing political parties and public opinion following the increase of migrants' arrivals on the Italian shores in 2016.[572]

To respond to this pressure, the Italian government decided to pursue the strategy of externalizing to the Libyan Coast Guard the search and rescue operations in the Central Southern Mediterranean Sea.[573] This externalization policy was formalized by the signature of a memorandum of understanding between Libya and Italy (2017). The memorandum prefigured among others: the provision of equipment and training for the Libyan Coast Guard; an important financial support; and the establishment of detention

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[570] Ibid.

[571] Gargiulo, E. (2018). Una filosofia della sicurezza e dell'ordine. Il governo dell'immigrazione secondo Marco Minniti. *Meridiana*, (91), 151-173; Cusumano, E. (2019). Straightjacketing migrant rescuers? The code of conduct on maritime NGOs. *Mediterranean Politics*, *24*(1), 106-114.

[572] According to the figures presented by the Italian minister of Interior migrants' arrivals in 2016 were 181.436, almost 18% of the previous year. While after the signature of the memorandum, migrants' arrivals decreased more than 33 % according to the Italian minister of Interior. For more information see: https://www.ilsole24ore.com/art/notizie/2017-01-05/migranti-2016-record-sbarchi-e-accoglienza162035.shtml?uuid=ADdVMwQC; http://www.interno.gov.it/it/notizie/meno-33-sbarchi-nel-2017 [last visited: 27 April 2019]

[573] Moreno-Lax, V. and Lemberg-Petersen, M. (2019). Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization. *Questions of International Law,* 56(1); Moreno-Lax, V., Ghezelbash, D., and Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*.

centres in Libya managed exclusively by the Libyan Minister of Interior.[574]

Moreover, Minniti adopted a Code of Conduct regulating the rescue of migrants by NGOs and in doing so paved the way for the criminalization of NGOs because they were accused of representing a pull factor and a promoter of human smuggling across the Central Southern Mediterranean.[575] The Code was drafted by officials of the Italian Minister of Interior with the support of the EU commission officials. One of the priorities of the drafters was to achieve ''greater rescuing effectiveness''.[576]

Cusumano (2019) analyses the content of the code in detail. Here I only seek to identify the parts of the code that directly or indirectly create the conditions for the criminalization of NGOs activities and thus of the criminalization of NGOs solidarity practices. First, to reinforce the externalizing policies pursued by Minniti the code prefigures that NGOs should not enter Libyan territorial waters unless previously authorized. In doing so, the Italian government backed by the EU commission, wanted to present the EU-trained Libyan Coast Guard as ''a migrant interdiction force''.[577] Second, the code prefigures that NGOs should declare their sources of finance to the flag state and to the Italian authorities. Yet most NGOs already comply with the request contained in the code. In fact, the aim of the measure is more political: presenting to the public opinion a picture in which NGOs lack transparency and are guided by obscure political aims.[578]

In the second phase, the former interior minister Matteo Salvini maintained the entire system of control of Minniti. Indeed, the exclusionary policies were initiated by Minniti nonetheless Salvini implemented some substantial measures that created a situation of outright exclusion. Salvini initiated a policy of 'closed ports' that as Cusumano and Gombeer (2018) point out is not illegal *per se* but has severe consequences from a humanitarian point of view. By doing so, NGOs´ activities were subject to many measures that intentionally created the conditions for illegality for rescue and

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[574]De Guttry, A., Capone, F., & Sommario, E. (2018). Dealing with migrants in the central Mediterranean route: A legal analysis of recent bilateral agreements between Italy and Libya. *International Migration*, *56*(3), 44-60; Reviglio, M. (2019). Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy. *Global Jurist*, *20*(1).

[575] Cusumano, E. (2019). Straightjacketing migrant rescuers? The code of conduct on maritime NGOs. *Mediterranean Politics*, *24*(1), 106-114. P. 106.

[576] Ibid. P. 108.

[577] Ibid.

[578] Ibid. P. 110.

disembarkation operations in Italy conducted by NGOs.[579]

From Salvini's policies it emerges a disturbing picture in which the criminalisation of migration and solidarity is brought further. On the one hand, migrants are not disembarked but are kept on the vessel for several days for the only reason that they arrived irregularly on the Italian shores. In doing so, migrants are criminalised even before being rescued and among them women and children that suffer very difficult health, psychological conditions on the vessel. On the other hand, NGOs crews are criminalised because they provide assistance to migrants at rest in the Central Southern Mediterranean that in the view of cynical politicians shall be brought back to Libya where they suffer inhumane conditions.

The Chapter focuses on two cases that represent an important instance of migration management policies in which an intersection between national law, EU human rights law and EU criminal law materialises. The two cases explored are the *Diciotti* case and the *Sea Watch 3*. In the former the Italian government activities are evaluated in light of EU human rights law; and in the latter the government decisions are assessed in light of international and EU law. In such an exercise the Chapter assesses if the EU legal framework can preserve its preventive function against national law that breaches human right obligations by criminalising migration and solidarity.

The *Diciotti* case started off in August 2018 when a vessel of the Italian Coast Guard (the *Diciotti*) saved 177 migrants rescued in the Central Southern Mediterranean Sea. Only after five-day wait off the coast of Lampedusa island the vessel was authorised to dock in the Sicilian port of Catania. Yet the migrants were not allowed to disembark for more two more days, in the case of 27 unaccompanied minors, and five more days for all the others.[580] The *Diciotti* case represents a migration management policy that should be assessed in light of the overall Italian approach to migration. In fact, the Italian governments have designed migration policies that are able to evade human rights

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[579] See: Decree Law N. 113 of 4 October 2018,
https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg; Decree Law N. 53 of 14 June 2019,
https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg [last visited: 27 march 2021]
[580] Rossi, P. (2020). The role of national courts for the international rule of law: insights from the field of migration. *European journal of legal studies*, *12*, 195-230.

obligation's by externalising to the Libyan coast guards the search and rescue operations in the Central Southern Mediterranean Sea.[581]

The *Diciotti* affair has to be analysed in light of EU human rights law. In this respect the most significant provision is Article 5 of the European Convention on Human Rights (ECHR), which prefigures the prohibition of arbitrary deprivation of liberty. In order to be lawful a deprivation of liberty must: (i) fall within one of the admissible grounds listed at para.1;[582] (ii) be prescribed by law;[583] and (iii) be subject to prompt and speedy judicial review.[584] In the case of the Diciotti it is important to assess the above standards in light of Article 5(1)(f), which provides for a lawful ground of deprivation of liberty in the case of ''the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition''.

In the *Khlaifia v Italy* case, the ECtHR applied this principle to the detention of irregular migrants in a reception center and on a ship.[585] Yet the *Diciotti* case presents some differences to the Khlaifia case, in fact the migrants were already present on Italian territory and were awaiting deportation from the country. By being on the Italian territory as provided by Article 5(1)(f), states have a right to control aliens' entry into their territory also if they are asylum seekers.[586] Thus, it is not possible to call for a violation of Article 5 only because the migrants were detained for some time.[587]

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[581] Mancini, M. (2018). Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya without Regard for Their Human Rights. *The Italian Yearbook of International Law Online*, *27*(1), 259-28; Reviglio, M. (2019). Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy. *Global Jurist*, *20*(1).

[582] Article 5(1)(a)-(f) of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR). The list is exhaustive and the exceptions must be interpreted restrictively: see S, V and A v Denmark, App Nos 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018) para 73. On Article 5 ECHR, Schabas, W. A. (2015). The European Convention on Human Rights: A Commentary. Oxford University Press. PP. 219-263.

[583] Article 5(1) ECHR.

[584] Article 5(3)-(4) ECHR.

[585] *Khlaifia and Others v Italy*, App No 16483/12 (ECtHR, 15 December 2016). Mauro, M. R. (2016). Detention and expulsion of migrants: the Khlaifia v. Italy case. *The Italian Yearbook of International Law Online*, *25*(1), 85-107.

[586] See e.g. Amuur v France, App No 19776/92 (ECtHR, 25 June 1996) para 41; Saadi v United Kingdom, App No 13229/03 (ECtHR, 29 January 2008).

[587] Rossi, P. (2020). The role of national courts for the international rule of law: insights from the field of migration. *European journal of legal studies*, *12*, 195-230.

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According to Rossi (2020) what is relevant in the *Diciotti* case are some specific features of the detention that are incompatible with the Convention for three reasons. First, the confinement of the migrants on the *Diciotti* was an act of arbitrariness because it was neither prefigured by national law nor it followed any preestablished procedure.[588] Second, there was a breach of Article 5(2) ECHR since the migrants were not informed properly about the motives of their detention.[589] Third, the migrants confinement on the *Diciotti* was not brought to any form of judicial review.[590] It follows that Italy most luckily breached Article 5 ECHR.[591] Moreover, the conduct of the Italian government may constitute a violation of Article 3 ECHR. Yet to assess if there was a violation of Article 3 and a ''minimum level of severity''[592] during the containment it necessary a detailed assessment of the general conditions on the Diciotti and of the individual conditions of each migrants.[593]

The second case discussed here is the one of the German captain of Sea Watch 3, In summary, the Sea Watch 3 ship, flying the Dutch flag and owned by the German NGO Sea Watch, had rescued fifty migrants in the Libyan SAR area on 12 June 2019. Once the recovery operations were completed, the commander had requested the assignment of a place of safety (POS) to various maritime authorities, receiving a response from the Libyan ones who had indicated that they were going to the port of Tripoli. Rackete however replied that Libya could not qualify as a safe harbour and asked for an alternative POS; in the meantime, she had headed north towards the nearest safe ports, namely the Italian and Maltese ones, reiterating the docking request.

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[588] As noted by Francesca Cancellaro and Stefano Zirulia, 'Controlling Migration through De Facto Detention: The Case of the "Diciotti" Italian Ship' (Border Criminologies, 22 October 2018) accessed 19 April 2020, Italian law prescribes that migrants can be detained for the sole purposes of executing a deportation order, and only within 'deportation centers': see Art.13-14 of Legislative Decree n. 286 of 1998. The arbitrariness of the detention from the standpoint of domestic law is further confirmed by the fact that no formal administrative act forbidding disembarkation was issued during the stand-off: see 'Accesso civico ai Ministeri dell'interno e dei Trasporti: nessun provvedimento formale di chiusura dei porti' (ASGI, 10 January 2019).

[589] As was the case in Saadi v United Kingdom, App No 13229/03 (ECtHR, 29 January 2008).

[590] Rossi, P. (2020). The role of national courts for the international rule of law: insights from the field of migration. *European journal of legal studies*, *12*, 195-230.

[591] See Massimo Frigo, 'The Kafkaesque "Diciotti" Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?' (OpinioJuris, 28 August 2018)

[592] Khlaifia and Others v Italy (n 59) para 159.

[593] Rossi, P. (2020). The role of national courts for the international rule of law: insights from the field of migration. *European journal of legal studies*, *12*, 195-230.

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On June 26, the Sea Watch had entered Italian waters and had headed for Lampedusa, disregarding the patrol boats of the *Guardia di Finanza* and invoking the state of need; she had therefore stopped near the port awaiting orders. This further stalemate had lasted for a few days, during which the ship had been searched by the border police. On the night of June 29 - it was found that a political solution was slow to arrive, that the appeals made before the Administrative Court of Lazio and the European Court of Human Rights had not been successful[594], and that one of the doctors on board he said that the reactions of the people were no longer predictable - the commander had started the engines and had headed for the commercial quay of the port of Lampedusa, where she had finally docked, bumping, in the manoeuvre, a patrol boat of the *Guardia di Finanza*.

Carola Rackete, whom was arrested for manoeuvring the ship carrying 40 migrants into a port in Lampedusa without permission – 60 hours after having declared a state of emergency.[595] Rackete had been accused of assisting human smugglers for having challenged the right-wing interior minister Salvini's "close-ports" policy.[596] In fact, on June 15, the Italian Interior Minister had ordered the first entry ban against Sea Watch 3 in implementation of the so-called security decree-bis, just entered into force.[597] Moreover, for her action Rackete had been arrested on charges of resistance to public officials (art. 337 of the criminal code), as well as resistance and violence against

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[594] Zirulia, S. and Cancellaro, F. (2019). *Caso Sea Watch: cosa ha detto e cosa non ha detto la Corte di Strasburgo nella decisione sulle misure provvisorie. Dir. pen. cont.*, 26 giugno 2019.

[595] Al Jazeera (2019a) "Sea-Watch Enters Lampedusa, Captain Carola Rackete Arrested." News/Italy, Al Jazeera, 29 June, https://www.aljazeera.com/news/2019/06/sea-watch-enterslampedusa-captain-carola-rackete-arrested-190629050255767.html.

[596] Cusumano, E., & Gombeer, K. (2020). In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers. *Mediterranean Politics*, *25*(2), 245-253.

[597] Legislative Decree n. 53 of 2019 introduced two fundamental changes in the Immigration Consolidation Act. First of all, by introducing paragraph 1-ter in art. 11, conferred on the Minister of the Interior - in consultation with the Ministers of Defense and Transport, and informed the President of the Council - the power to issue measures aimed at prohibiting or limiting the entry, transit or stay in territorial waters ships (excluding military or non-commercial government service), in the presence of two alternative conditions: i) "reasons of public order and safety"; ii) realization of the conditions referred to in art. 19, paragraph 2, lett. g) of the UNCLOS Convention, a rule which in turn identifies, as the hypothesis of a non-harmless (or "injurious") passage of a foreign ship in territorial waters, the case in which that ship carries out "the loading or unloading of [...] people in violation of the immigration laws in force in the coastal state ". The second change is the introduction of paragraph 6-bis in art. 12 Immigration Consolidation Act, which provides, in case of violation of the ban on entry into territorial waters, an administrative sanction of 10,000 to 50,000 euros, as well as the confiscation of the boat in case of repeated conduct. The decree conversion law (law 8 August 2019, n.77) significantly increased the sanction (which now ranges from € 150,000 to 1 million) and provided that the confiscation will be applied following the first violation, with immediate seizure.

warships (art. 1100 of the naval code), in particular for having repeatedly rejected the order to stop the route to the port and finally hit, in the docking maneuver, a patrol boat of the *Guardia di Finanza*.

The Corte di Cassazione examined the case and developed a judgement in which it is possible to recognize an intersection between national, EU and international law. This complex framework of legislation is thus able to exercise a preventive function on the criminalization policies enacted by Salvini. It is worth to consider in detail some passages of the Court judgment. First, there are an important international law instruments that indicate that it is not sufficient to rescue the migrants in fact those shall be taken in a place of safety.[598] In fact, as the Italian judges conclude ''Therefore a ship at sea which, in addition to being at the mercy of adverse weather events, does not allow respect for the fundamental rights of the rescued people, cannot be qualified as a safe place''.[599]

Second, the Court recalls the Resolution of the Parliamentary Assembly of 21 June 2011, according to which ''the notion of 'safe place' cannot be limited to protection only physics of people but necessarily includes respect for their fundamental rights''; in fact, this instrument, ''although not a direct source of law, constitutes an essential interpretative criterion of the concept of 'safe place' in international law''.[600] Moreover, these arguments are in line with the Recommendations issued in 2019 by the Commissioner for Human Rights of the Council of Europe.[601]

8.6. Conclusion

In the last twenty years, the rates of migration towards Europe increased significantly. To 'manage' such high numbers of irregular migrants many European states have used criminal law instruments to detect, control, and criminalize migration and solidarity.[602]

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[598] See, *SOLAS Convention*; *SAR* Convention; *UNCLOS* Convention.

[599] Judgement of the Corte Penale di Cassazione sez. III, 16 january 2020, n. 6626, Pres. Lapalorcia, Est. Gai, ric. Rackete. Available from, https://archiviodpc.dirittopenaleuomo.org/upload/9218-gip-agrigento-2-luglio-2019-sea-watch.pdf

[600] Resolution of the Parliamentary Assembly of the Council of Europe n. 1821 of 21 June 2011. Available from, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18006&lang=en

[601]Recommendations issued in 2019 by the Commissioner for Human Rights of the Council of Europe according to which it is up to the commander himself - in the face of the inertia of the authorities, or the indication of unsafe landing places (such as Libya) - to decide where to land the people rescued, based on their professional evaluation of the overall situation considered. Available from, https://archiviodpc.dirittopenaleuomo.org/upload/9457-mediterranean-paper-en-web.pdf.pdf

[602] Aliverti, A. (2012). Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology*, *16*(4), 417-434.

To do so, criminal law instruments are designed to detect and punish practices of solidarity with the final objective of protecting European borders. In fact, member states and EU institutions put in place instruments aimed at criminalizing who moves and who helps. The migrant and the person who shows solidarity are becoming object of crimmigration practices.[603]Against this backdrop, the EU has designed a legal framework that seeks to pose some limitation to the criminalisation migration management policies enacted by EU member states. Yet, as showed in the Chapter, the preventive function exercised by EU law is not always capable of guaranteeing fundamental rights due to the complexity of the overall EU and national legal framework.

Nonetheless, in the Italian cases of the *Diciotti* and Sea Watch 3 the EU legal framework in its intersection with Italian legislation and courts was able to preserve its protective function in line with EU fundamental principles and the rule of law. In doing so, the negative effects of the policies enacted by Minniti and Salvini were mitigated. The ex-post precautionary prevention represented the dialogue between EU law, international law, and Italian legal system.

Yet problems remain for the exclusionary assemblage followed by Salvini's politics. Borders are regarded as an obstacle to access and thus to the protection of human rights. Moreover, it is not enough to come under the direct control of the Italian Coast Guard to activate human rights protection as the *Diciotti* and the Sea Watch 3 case show.[604] Thus, as exemplified by the *Diciotti* case, in Salvini's policies for migrants is not sufficient to enter the territory and to come under direct control of the state to enjoy human rights protection.[605] In Salvini's policies, jurisdiction is not territorial, yet it seems to be enacted only upon direct decision of the Minister of Interior through an executive order without any respect for the concept of territory and of international law. Indeed, as noted by Cusumano and Gombeer (2018), the humanitarian consequences of such

[603]Carrère, V., & Baudet, V. (2004). Délit de solidarité. *Plein droit*, (1), 14-17; Fekete, L. (2009). Europe: crimes of solidarity. *Race & Class*, *50*(4), 83-97; Heller, C. and Pezzani, L. (2019). Contentious Crossings: Struggles and Alliances for Freedom of Movement across the Mediterranean Sea. South Atlantic Quarterly, 118(3), 644-653.

[604] See for a detailed account of the case: http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/ [last visited: 27 July 2020]

[605] Paz, M. (2017). The Law of Walls. *European Journal of International Law, 28(2),* 601-624.

policies are significant. In fact, in Salvini's outright exclusionary policies is not sufficient for migrants to establish direct presence inside the state to activate human rights protection.

Thus, the assemblage designed by Salvini emerged as a cornerstone of Italy's migration management policies. In this setting, exclusion is brought further with significant humanitarian consequences for migrants and 'facilitators' crossing the Central Southern Mediterranean Sea. In particular, it is crucial to assess the legal validity of such measures in relation to international law, the law of the sea and human rights law. In light of these developments the concept of solidarity represents a fundamental concept to understand the intersection of EU, international, and national law that can mitigate the effects of the implementation of a crimmigration system to control migration movements.

CHAPTER 9

General Conclusion

9. General Conclusion

To understand the dynamics and the complexity of migration studies it is necessary to adopt a multi and inter-disciplinary perspective. The thesis has followed this approach by combining different disciplines in order to shed light on some of the dynamics that are often missing in monodisciplinary studies on migration. In doing so, the thesis has offered a study in which law, political science, geography and philosophy are combined together to present the complexities of migration management. In particular, the European multilevel migration governance characterised by complexity requires an encompassing approach able to identify the different and at times competing forces that shape the governance of migration.

As showed by the case study of Italy – discussed in first part of the thesis – it is impossible to analyse national migration policies in isolation from the EU context. In fact, there is a normative path-dependency between national and EU norms. This dependency is both normative and political; in other words, national migration management policies do not operate in a political vacuum but are the representation of a complex multi-level governance. To explore the complexity of the EU migration governance the thesis has introduced the concept of policy assemblage to analyse how borders, territory and human rights are assembled in migration management policies

Chapter 3 has explored the several articulations of three critical concepts in migration management: borders, territory and human rights. It is important to underline that these assemblages are interdependent but maintain a level of specificity. Assemblage has been used as a descriptor able to explore complex structures by combining heterogenous elements aimed at explaining social processes.[606] Furthermore, the concept of assemblage should be used as a tool not as a simple result.[607] In fact, the power of the concept of assemblage is the power to incorporate the different concepts that compose migration management policies by showing the intersection of these concepts. In doing so, the assemblage can be useful to identify some trajectories that in some instances may

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[606] Sassen, S. (2008). *Territory, Authority, Rights: From Medieval to Global Assemblages.* Princeton: Princeton University Press. P. 5.

[607] Aneesh, A. (2017). 'Relocating Global Assemblages': An Interview with Saskia Sassen. *Science, Technology and Society*, *22*(1), 128-134. P. 129.

collide yet in other instances may not. Therefore, some migration management policies display a more causal and coherent assemblage such as Mare Nostrum, while the other two policies display less consistent assemblages. Nonetheless, independently from the level of performance, the assemblage is a fertile concept able to explore systems characterized by complexity, fluidity and dynamicity.

Borders are in constant transformations; they are the representation of social struggles to open or to close borders. In these dynamics different institutional and quasi-institutional actors, with different methods and instruments, aim at controlling borders from distance to avoid any legal responsibility.[608] The outcome of such a strategy is the violation of human rights obligations by state and quasi-state agents at the terrestrial[609] and maritime borders.[610] This particular policy to control borders wants to re-establish the primacy of state agents in controlling their borders. To do so, states have developed a sophisticated apparatus of control whose priority is to diminish the arrivals of migrants in affluent states by externalizing to third state the control operation at the terrestrial and maritime borders. Thus, borders became spaces of conflict between state agents and migrants controlled from distance by affluent states in order to avoid any direct legal responsibility. In this scenario, for migrants it becomes way more difficult to access the border and thus to receive human rights protection when in proximity of the border as prefigured by international law.

The concept of territory despite its volatile nature represents a fundamental concept in migration management policies. To fully understand territory, it is necessary to move beyond the 'mainstream' state sovereignty and to recognize the multitude of actors that shape territory and the successive projections of territoriality. Nowadays, affluent states implement policies to control the territory from distance by implementing

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[608] Moreno-Lax, V. & Lemberg-Petersen, M. (2019) 'Border-induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization'. *Questions of International Law,* 56(1); 5-33.

[609] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, 28(2), 601-624.

[610] Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm. *JCMS: Journal of Common Market Studies*, *56*(1), 119-140; Mann, I. (2018). Maritime legal black holes: Migration and rightlessness in international law. *European Journal of International Law*, 29(2), 347-372; Mann, I. (2020). The Right to Perform Rescue at Sea: Jurisprudence and Drowning. *German Law Journal*, *21*(3), 598-619.

extraterritorial *non-entrée* policies.[611] In some exceptional cases of 'humanitarian' migration management territory may become an open category in which the right of transit and access is always protected for migrants that are in proximity of the state territory. Yet, in 'exclusive and outright exclusive' migration is more difficult to access or more simply to get in proximity of state territory. In fact, affluent states pursue extraterritorial *non-entrée* policies together with the use of cooperative *non-entrée* policies with third states[612] supporting contactless responsibility.[613] It follows that the concept of territory is complex and volatile and in migration management policies can contribute to exclusion, exclusion and outright exclusion.

The thesis has focused on the Italian case because it offers several insights about the dynamics that characterize migration management policies in Europe. The migration management policies pursued by the Italian governments between 2013 and 2018 oscillated between inclusion, exclusion and outright exclusion. The Mare Nostrum policy emerged as a response to the significant increase of landings on the Italian shores in 2013. To respond to such challenge the Italian government designed a policy that aimed at saving life at sea and at combatting illegal smugglers. The policy was accompanied by a strong media campaign that depicted the Italian government efforts as an act of grace and benevolence. From a legal perspective Italy anticipated its compliance with human rights obligation in time and space. In fact, in many cases migrants were rescued outside the SAR zone of Italy that in those cases adopted an inclusive understanding of human rights protection independently from the compliance with the formal conditions set out by migration law.

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[611] Hathaway, J. (1992). 'The Emerging Politics of Non-Entre'. *Refugees* 91: 40. For a further elaboration of the concept see, Hathaway, J. C. (2005). *The rights of refugees under international law*. Cambridge University Press.

[612] Dastyari, A., & Hirsch, A. (2019). The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy. *Human Rights Law Review*, *19*(3), 435-465; Moreno-Lax, V., Ghezelbash, D., & Klein, N. (2019). Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia. *Leiden Journal of International Law*, *32*(4), 715-740.

[613] Giuffré, M., & Moreno-Lax, V. (2019). The rise of consensual containment: from contactless control to contactless responsibility for migratory flows. In *Research handbook on international refugee law*. Edward Elgar Publishing.

In the Mare Nostrum policies, borders are regarded as point of access to the protection of human rights.[614] In fact, for migrants to trigger protection is sufficient to be in *proximity* of the border thus jurisdiction is associated with physicality and based on proximity.[615] In these dynamics it emerges the 'humanitarian border' meaning a specific type of border that emerges in specific setting such as the Mare Nostrum humanitarian search and rescue operations.[616]

While designing an inclusive migration management policy such as Mare Nostrum the Italian government theorised territory in relation to access, jurisdiction, and proximity in the following ways. First, human rights protection was not based upon the 'access' to territory of migrants but to the simple proximity to the territory. In doing so, Italy brought to its conclusion the concept developed by the ECtHR in Jamaa vs. Italy that suggests that human rights jurisdiction is 'essentially territorial'[617] and is associated with physicality and proximity.[618] Second, human rights protection applied extraterritorially meaning independently from migrants' access to Italy's territory. Hence, Italy assumed an extended view of human rights that if taken to the extreme can became an open borders policy that recognises no territorial limitation to human right protection.[619]

In the exclusive policies pursued by Ministry of interior Marco Minniti the concepts of borders, territory and human rights are assembled to design a securitized border and to avoid any direct responsibility as prefigured by international law and the law of the sea. This exclusionary policy excludes the migrants from the borders and the territory of the destination state by externalising to the Libyan coastguard the search and rescue operations in the Central Southern Mediterranean. To do so, the Italian government

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[614] Paz, M. (2017). The Law of Walls. *European Journal of International Law*, *28*(2), 601-624.

[615] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[616] Walters, W. (2011). Foucault and frontiers. Notes on the birth of the humanitarian border. In U Bröckling, S Krasmann and T Lemke (eds) *Governmentality: Current Issues and Future Challenges*. Routledge.

[617] Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, ¶ 71.

[618] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[619] Ibid.

designs an exclusionary policy assemblage based on a specific elaboration of borders, territory and human rights.

Borders assume a specific and instrumental elaborations. The border is transformed in a space controlled from distance in which legal obligations and responsibilities are fuzzy. In so doing, borders became spaces of contactless responsibility. In the application of this exclusive policy the border permits the entrance only to those individuals that comply with the formal conditions set out by the state. Moreover, borders are regarded as an obstacle to access and thus to the defence of human rights. In fact, for migrants to trigger the protection is not sufficient to be in proximity of the border but those must *access* the border to trigger state protection.[620]

The Minniti policies brought to the extreme can become a closed borders policy because puts in place a number of instruments aimed at both blocking the arrivals and externalising the search and rescue activities. While pursuing such a policy Italy had first to recognize human rights jurisdiction as linked to access to territory because migrants have to enter the territory (strong territoriality) and to come under direct control of the state (neo-territoriality).[621] It follows from this approach that jurisdiction is rooted in strong territoriality meaning that human rights obligations are strictly territorial.[622] Second, for Italy state jurisdiction and thus state responsibilities will manifest themselves only if there is a direct access to the territory of the destination state.

In the design of these externalizing migration practices Italy represents the sole authority able to give access to its territory and to set the legal conditions to access to human rights protection in doing so it follows the statist reading.[623] In the Minniti policies, human rights are grounded in 'physicality' hence ascertaining territorial presence in the host state (jurisdiction grounded in territory) or coming within the effective control of the state or its agents (jurisdiction grounded in contact). Further, by recognizing human rights grounded in territory proximity does not entail any legal obligation for Italy because

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[620] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1; Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[621] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[622] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1.

[623] Thomas, C. (2013). What Does the Emerging International Law of Migration Mean for Sovereignty. *Melb. J. Int'l L.*, *14*, 392.

jurisdiction is aligned with territory.[624] It follows that the legal protection depends on establishing direct presence inside a state.[625]

Indeed, the exclusionary policies were initiated by Minniti but Matteo Salvini added some significant measures that created a situation of outright exclusion. In particular, Salvini introduced a policy of 'closed ports' that is not illegal *per se* but has significant consequences from a humanitarian perspective.[626] Moreover, the opposition of the Italian government to the rescue activities of NGOs became even more significant. By doing so, NGOs activities were subject to many procedures that intentionally crafted the conditions for illegality for rescue and disembarkation operations.[627]

Salvini's policies brought exclusion even further. The policies assumed a clear statist reading of human rights. In fact, the state represents the sole authority able to give access to borders and territory and thus to human rights protection. Moreover, this authority is displaced through executive orders derived directly by the ministry of Interior. This structure of authority concentrates in the hand of the ministry of Interior an extensive power that resonates on migrants' human rights. It can be thus said that in Salvini's policies a Statist understanding of human rights protection becomes even more robust than in the Minniti exclusionary assemblage.

In Salvini's policies an even more exclusionary assemblage occurs. Borders are viewed as an obstacle to access and thus to the protection of human rights. Furthermore, it is not enough to come under the direct control of the Italian coast guard to trigger human rights protection as the *Diciotti* case shows.[628] The concept of territory is also brought further in exclusion in fact for migrants is not sufficient to enter the territory and to come under the jurisdiction of the state.[629] In Salvini's policies jurisdiction is not territorial but

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[624] Paz, M. (2016). Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls. *Berkeley J. Int'l L.*, *34*, 1

[625] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

[626] Cusumano, E., & Gombeer, K. (2020). In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers. *Mediterranean Politics*, *25*(2), 245-253.

[627] See: Decree Law N. 113 of 4 October 2018, https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg; Decree Law N. 53 of 14 June 2019, https://www.gazzettaufficiale.it/eli/id/2019/06/14/19G00063/sg [last visited: 27 July 2020]

[628] See for a detailed account of the case: http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/ [last visited: 27 July 2020]

[629] Paz, M. (2017). The law of walls. *European Journal of International Law*, *28*(2), 601-624.

seems to be authorised only upon direct decision of the ministry of Interior. Thus, with an executive order without any respect for the concept of territory and of international law.

In the second part of the thesis I explored some general dynamics that emerged in Italy's migration management policies. In particular, I focused on the intersection of EU and international law in the unfolding of migration management in Europe. To do so, I have first explored the role of informal soft law instruments in the management of migration. I showed how these are becoming important instruments to externalise migration management to third countries without human rights guarantees. In particular, the legal form of these agreements permits to overcome some of the institutional prefiguration's of our parliamentary democracies such as principles of conferral, institutional balance, transparency, and the overall rule of law.

From both the memorandum Libya-Italy and the EU-Turkey statement it follows that to decrease the number of migrants arriving in Europe destination countries decide for soft law instruments because those are informal and politically efficient. In other words, the principle of legal validity (form, adoption, parliamentary passage) is replaced by the principle of political efficiency. To assess the legal validity and the material effectiveness of soft law instruments is problematic. The informality of the procedures prefigured for these kinds of significantly complicates the exercise. Further, the lack of monitoring prefigured in these agreement paves the way for abuses and situations of rightlessness.[630]

Yet there are several 'pragmatic' reasons for the use of soft law instruments. First, the hyper-simplified form of adoption that overcomes the slow processes of parliamentary democracy. Second, often transit countries are not willing to accept more structural commitments. And third, soft law instruments are more flexible and thus represent the best instrument to address the new migration governance in Europe. This new governance in EU migration policy can represent an essential strategy followed by executive powers to avoid the formal and long processes of negotiation prefigured by member states Constitutions and by EU treaties to act promptly and decisively to address current and

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[630] Mann, I. (2018). Maritime legal black holes: Migration and rightlessness in international law. *European Journal of International Law*, *29*(2), 347-372.

concrete challenges.

It follows from the above that European countries and institutions are developing a new governance of migration characterised by the use of soft law instruments and by the strong cooperation with transit countries. These strategies of migration management have some pros such as the decrease of landings on the European shores. Yet, as stated in Chapter 8, present several procedural problems that shall be addressed in order to respect human rights obligations prefigured by international law.

These policies of exclusion have been reinforced by the emergence of populist parties in Italy. In fact, these parties have designed policies that aimed at strengthening the control apparatus by criminalising migrants and volunteer's solidarity. To do so, they employ instruments of criminal law to detect, punish and detain migrants and volunteers. The concept of solidarity emerges in this context as a multifaceted concept that can be developed in different and sometimes conflicting ways. First, an institutional solidarity among member states that aimed at sharing the burden of migration. Second, a quasi-institutional solidarity designed around a specific idea of humanitarianism. And third, a non-institutional solidarity that materialises in direct acts of solidarity towards migrants in distress. In particular, the non-institutional solidarity is becoming object of crimmigration practices that pose serious challenges to the rule of law and to the protection of fundamental rights.

Nonetheless, in this setting where there is an intersection of criminal and migration law the EU exercises a protective function against the laws enacted at national level that criminalise solidarity. The protective function emerges in a complex intersection of EU criminal, human rights and migration law. The protective function materialises in two modes: (1) EU law on immigration enforcement must be interpreted in accord with fundamental principles of EU law; (2) by linking member states criminalisation of irregular stay with the implementation of the Return directive. This legal framework seeks to pose some limits to the member states policies that criminalise irregular migration.

To conclude the thesis has analysed a set of dynamics that emerged in Italy in the management of migration from an international and EU law perspective. By using the concept of assemblage - to identify the social factors that contribute to the design of such policies - has showed how policies are socially constructed. In fact, law shall be

understood as a social artefact that successively is transformed in different forms of legal language. Moreover, the thesis contends that law cannot be explained without an account of its practice in society. To do so, it is important to adopt a multidisciplinary perspective comprehending sociology and political science among others to shed light on specific political and societal dynamics that influence the performativity of law.

The Italian case is relevant because it shows the complexity and heterogeneity of migration management processes. An important number of actors compete for power and visibility to influence the design and the implementation of migration policies. This is showed by the Italian case that demonstrates the multilevel governance of migration management in Europe.[631] In fact, the tension between national, European and international institutions is visible in the policies discussed in the thesis. What Italy and some others EU member states are doing is to reinforce the control on borders by developing a regime that excludes migrants from the borders, territory and human rights protection. The design of such a regime is possible due to the fragmentation of migration governance that created the condition for a contactless responsibility.

Another aspect of this new form of governance is the informalization of the negotiations and legal procedures with third countries. Thus, this governance characterized by a highly political understanding of migration undermines the concept of legal validity in name of political efficiency. By doing so, it becomes important the immediate political result instead of the legal procedure that is often put aside in the name of realpolitik. This pattern is demonstrated in both the EU-Turkey statement and the Libya-Italy memorandum of understanding. Overall, it emerges a migration management system in which destination states finance third countries to 'keep away' undesirable migrants directed in the global north to avoid any direct responsibility and thus accountability.

The principle of accountability is indeed complex to assess for the fragmentation and soft nature of the normative framework that characterizes migration governance. Moreover, migration management is mostly extraterritorial, while human rights

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[631] Pécoud, A. (2021). Philosophies of migration governance in a globalizing world. *Globalizations*, *18*(1), 103-119.

protection applies within the state jurisdiction.[632] Human rights obligation arise only if the migrant enters the territory of the destination state thus accountability becomes very difficult to assess. In particular, in the Central Southern Mediterranean we assisted at an even more substantial adoption of contactless responsibility to avoid human right obligations.

To conclude, the dynamics that I have just outlined call for further studies that should approach law in a holistic way. Only by unpacking what is behind the law it might be possible to overcome the problems that characterize the new governance of migration in Europe. To do so, it is necessary to adopt a inter and multi-disciplinary understanding of migration to identify not only the normative frameworks but also the social and political dimensions of the policies pursued in Europe. Against this backdrop, it will be important to assess the responsibilities of state and non-state actors involved in migration management through new form of political and legal contestation on the instance of the work of the Global Legal Action Network (GLAN).[633]

The Central Southern Mediterranean has been the stage of crimes against humanity that are still unfolding at the time of writing.[634] Change is possible only with resistance; yet to change the current legal discourse surrounding migration management it is necessary first a political paradigm shift. This is an open challenge to reconsider the fundamental question of the relationship of law to society. In this contest, borders have to be understood not as lines of division and exclusion but as spaces of contamination and inclusiveness. It needs to be developed an *ius migrandi* as a human right principle to challenge the nation state politics of exclusion. However, in a world in which only a small minority is for open borders such a change becomes very difficult to realize.

For instance, the recent European Commission New Pact for Migration and Asylum - despite its political resonance - continues to follow what Moreno Lax (2018)

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[632] Costello, C., & Mann, I. (2020). Border Justice: Migration and Accountability for Human Rights Violations. *German Law Journal*, *21*(3), 311-334.

[633] GLAN is an independent organisation made up of legal practitioners, investigative journalists and academics. They identify and pursue legal actions that promote accountability for human rights violations occurring overseas by working in partnership with other international and local grassroots organisations. GLAN provides the necessary platform to explore and develop legal strategies by combining legal and investigatory expertise.

[634] Libya: Evidence crimes against humanity and war crimes committed since 2016, UN report finds (2021). Available from, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27595&LangID=E

called the ''rescue-through-interdiction/rescue-without-protection paradigm'' that as developed since 2006.[635] By doing so, EU law and policy have been characterized by a tension between commitment to protection and deflection of protection of migrants in their home and transit countries.[636] The deflection of protection is obtained through externalization by soft law as showed in the EU-Turkey statement and the Libya-Italy memorandum of understanding.

Moreover, the EU continues to consider the Mediterranean ''as a space of conflict and even of threat within a 'clash of civilizations' rhetoric between irreconcilables cultures'' as pointed by Zapata-Barrero (2020).[637] Thus, the Eurocentric approach that characterizes EU politics of migration should be reconsidered in a more encompassing Mediterranean approach that overcomes the perpetual crisis narrative developed in the last years. Italy and the EU institutions should develop a more consistent system of legal routes to counterbalance the years of deflection through externalization that characterize the European migration governance. The Mediterranean has a long and complex history, yet it as always represented the bridge between different cultures. Nevertheless, in the last decade it became a mass gravy for many human beings.

Goods and services move freely in this space of the sea while human beings are kept seized in concentration camps or die during the journey. This has become a permanent state of exception in which legal responsibilities and human rights obligation are blurred. To change this state of affairs politicians, bureaucrats, lawyers and scholars have to conceptualize the concept of solidarity as the duty to rescue. Rescue is a moral and ethic standard that should always be respected at least in principle. Instead, to defend the fortresses of Europe, the EU and its member states have created through the manipulation of legal language the conditions for the emergence of a 'wall' in the Central Southern Mediterranean. The only plausible way to deter such an invisible wall is the

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[635] Moreno-Lax, V. (2018). The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection'Paradigm. *JCMS: Journal of Common Market Studies*, 56(1), 119-140.

[636] Tsourdi, L., & Costello, C. (2020). The Evolution of EU Law on Refugees and Asylum. Forthcoming in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law.* Oxford University Press.

[637] Zapata-Barrero, R. (2020). "Mediterranean thinking" for mapping a Mediterranean migration research agenda. *Comparative Migration Studies,* 1-18.

transformation of the legal discourse. In other words, law should be at the service of the humanity at sea; not of the wall builders around Europe.

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