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978-1-107-08785-9 - Migration in the Mediterranean: Mechanisms of International Cooperation

Edited by Francesca Ippolito and Seline Trevisanut

Excerpt

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## Introduction

FRANCESCA IPPOLITO AND SELINE TREVISANUT

The Mediterranean Sea has always been a route for migration. For centuries caravans have crossed its waters for the most diverse reasons: commerce, war, pilgrimage, cultural exchange, etc. In the last decades, these same waters have constituted the scenery of what appears as a never-ending tragedy, irregular migration and the thousands of related deaths. According to the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), 2014 has been so far the deadliest year for the Mediterranean, with nearly 1,900 migrants having lost their lives, compared to the 700 recorded in 2013 and about 500 recorded in 2012.<sup>1</sup>

In order to cope with the migratory phenomenon, Mediterranean States have slowly developed multilateral, bilateral and unilateral forms of cooperation. Pursuant to the emergence of a global approach to migration, as supported by the relevant international organizations and bodies (IOM, UNHCR, International Labour Organization (ILO), UNHR, etc.), and by the European Union (EU), this cooperation is today the main tool for managing migration.

This cooperation has, however, developed in several *fora* (e.g., international organizations, supranational bodies, domestic administrations), in different fields (e.g., migrant workers, asylum, irregular migration, security and anti-terrorism, economic development and trade), at different level of governance (national, bilateral, regional, multilateral, inter-institutional, sector-specific) and with the involvement of different actors (e.g., States, international organizations and specialized international bureaucracies, informal intergovernmental processes, NGOs). Since

<sup>1</sup> Record number of migrants die crossing the Mediterranean sea, 26 August 2014, available at: [www.unmultimedia.org/radio/english/2014/08/record-number-of-migrants-die-crossing-the-mediterranean-sea-2/#.VQGouUuhkbU](http://www.unmultimedia.org/radio/english/2014/08/record-number-of-migrants-die-crossing-the-mediterranean-sea-2/#.VQGouUuhkbU).

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these *fora* refer to different legal systems and have different rationales, they do not always show a coherent and coordinated framework.

The present volume uses the management and control of migration in the Mediterranean as a specific case study to critically analyse how the different actors act and interact with each other on the international scene in the prevention, control and management of migration.

### Multilevel Cooperation in the Mediterranean

The book analysis starts with a horizontal investigation of the institutional framework within which action in the Mediterranean takes place with the aim of tracing the lessons to be learnt from this multi-level cooperation, the main weaknesses and inconsistencies of the undertaken actions, and exploring the need for a more integrated cooperation. In detail, Ippolito's chapter sets the scene describing the Mediterranean North-South forms of a 'regional cooperation' combining a multilateral framework for economic cooperation with bilateral differentiated forms of such cooperation according to the specificities of each Mediterranean country. Starting from a first conceptualization of the migratory phenomenon in terms of 'root causes of migration' to be 'combated',<sup>2</sup> the chapter attempts to clarify a progressive de-securitization of Euro-Med cooperation on migration at the level of political discourse since Tampere.<sup>3</sup> To do so, it first explores the introduction of a migration-development nexus where development was essentially confined to a sub-means of achieving the goals of migration control. Next, the second shift in the European conceptualization of migration is examined, setting it in a social and human rights dimension. Methodologically, the analysis is based on a discourse analysis of the positions of the European institutions, and of the outcomes of the regional forms of dialogue launched with the Global Approach to Migration and Mobility,<sup>4</sup> including its parliamentary diplomacy dimension. But as the language is 'constitutive' of social reality,<sup>5</sup> the chapter then compares that construction of the social reality with the reality itself as resulting from the internal and

<sup>2</sup> Asylum and international protection was instead excluded from the core of the cooperation.

<sup>3</sup> Conclusions of the European Council Tampere (15–16 October 1999).

<sup>4</sup> European Commission, The Global Approach to Migration and Mobility, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2011) 743, 18 November 2011.

<sup>5</sup> Ludwig Wittgenstein, *Philosophical Investigations* (Oxford, UK: Blackwell 1967).

external implementation of such a political construct. Revealing a completely contrasting scenario, the chapter concludes by proposing an alternative model of cooperation which is what is emerging from the jurisprudence of the Court of Justice of the European Union that is becoming the real agent of a human-rights-based approach in Europe.

Kochenov and Bashenska's chapter looks at the development of the Southern Mediterranean dimension of the EU's foreign policy, but essentially in terms of its effectiveness for the management of migration, in particular, if sufficiently open to give Southern Mediterranean migrants a fair chance not to be thrown into the abyss of illegality. For so doing, the chapter splits into four parts. The first part introduces migration as a fundamental element of Euro-Mediterranean relations, also recalling the key values underlying the Mediterranean dimension of EU foreign policy. The second part focuses on a restatement of the Mediterranean policy's evolution – in line with Ippolito's contribution – and critiques this policy, demonstrating its inherent inconsistency, short-sightedness, problematic foundations and numerous duplications ruining its clarity and chances of success. The third part turns to migration again, looking at the failures of the policy from this specific angle, while the fourth part delves into the EU's fundamental failure to shape an effective Mediterranean policy. It outlines the key drawbacks concerned with the EU's inability to broker change in the countries concerned as well as with the EU's inability to adhere to its own values in regulating migration in the Mediterranean. The latter could be yet another facet of EU's justice deficit and the overwhelming securitization of migration flows. The conclusion draws attention to the most fundamental problems outlined in the context of this chapter's analysis: the EU's interest in the Southern Mediterranean's transformation is unquestionably half-hearted; its policies haphazard and illogical; and its adherence to the values of democracy, the rule of law and human rights merely rhetorical. Even on the strength of the most optimistic accounts, the EU and the Southern Mediterranean emerge as *frenemies*, undermining the possibilities for deepening cooperation and adherence to common values.

After a bi-dimensional analysis of the North side of the cooperation, chapters 3 and 4 are devoted to the analysis of the Southern mechanisms of cooperation formally realized within international organizations, thus on the role of the League of Arab States and of the African Union. On the one hand, Rishmawi and Rashmawi describe and examine in their chapter first the legal framework of the League of Arab States on migration. Then, they move to explore the relations between it and the European

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Union in both the development of an institutionalized bilateral dialogue, culminated in the Cairo Declaration, and the various agreements between the EU and individual Arab States south and east of the Mediterranean. These agreements aim to manage common interests such as migration, as well as other economic, social and political concerns. The final part of the analysis is then devoted to the evaluation of the emerging human rights perspective on the bilateral migration policies between Europe and the Arab world.

On the other hand, Welz looks at the role the African Union (AU, which comprises almost all fifty-four African countries except Morocco) has assumed in the management of migration. The AU has not only developed and implemented short-term strategies, but has in particular concentrated on long-term strategies and fought the root causes of migration, such as insecurity and poor governance. Although the chapter focuses on inter-continental migration, from Africa into Europe across the Mediterranean, it also touches on intra-African migration, in consideration of the fact that the root causes of inter-continental migration are often identical to those of the intra-African migration. As the bulk of migration between Africa and Europe is illegal and unauthorized, this chapter concentrates on this type of migration. The focus is on what the AU has been doing so far to tackle migration. The chapter proceeds in the following order: To better understand where the AU comes from and where it is headed, a brief overview of its history is provided first. This is followed by a brief discussion of the AU's institutional setting. The chapter then provides some background information on migration from Africa into Europe through the Mediterranean, before turning to the cooperation between the European Union and the AU. The last section explores the role of the AU in migration policy.

The last two chapters of the first section of the book are devoted to the role that two specialized institutions at the universal level – the IOM and the UNHCR – have played with the EU and southern partners for ensuring a better management of migration in the Mediterranean. Hence, Beqiraj's chapter describes and discusses the legal and operative framework, the reasons, and the outcomes of the cooperation between the EU and the IOM in the field of migration. This is done in light of the reviewed IOM strategy for the realization of its mandate and against the background of the 'Global Approach to Migration'<sup>6</sup> as well as of the new

<sup>6</sup> Council of the European Union, Global approach to migration: Priority actions focusing on Africa and the Mediterranean, Brussels, 13 December 2005.

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legal framework set out by the Lisbon Treaty in relation to EU competences and goals in the field of migration. The IOM-EU exchange of letters of July 2012<sup>7</sup> provides that cooperation will take place through exchange of information, representation in the respective meetings and through joint actions and project funding; it thus lays out a framework for going beyond fragmented bilateral approaches towards centralized solutions at the EU level. The chapter argues that cooperation is not only necessary for achieving deeper coherence and effectiveness but it additionally serves the purpose of fulfilling the legal obligations in the field of human rights of migrants and humanitarian assistance, to which the EU and its members are bound under EU law, international customary law and treaty law, and which are indirectly achieved through IOM's activities. However, such cooperative framework is still at its genesis and genuine equal partnership in meeting operational and policy challenges must address and overcome the problem of financial dependency on EU funds.

Paoletti and Eyster's chapter looks at the role of UNHCR in advocating a protection agenda in managing mixed migration flows with actors on both sides of the Mediterranean, with a specific focus on the protection space in Libya and Tunisia after the 'Arab Spring'. In particular, the chapter starts from exploring the notions of expanding protection space within mixed-migratory flows, and defines UNHCR's role therein. It then sketches the regional operational context in Libya and Tunisia, highlighting the changing migration trends across North Africa between 2011 and 2013. In the subsequent section, the authors review and compare the key actors with an important bearing on protection and mixed migration in Libya and Tunisia: civil society actors, transition governments and international partners such as EU and the IOM. Then they analyse UNHCR's activities in Libya and Tunisia between 2011 and 2013 probing UNHCR's leeway and scope of activities, through the humanitarian response during the Libya conflict in 2011, and technical assistance provided to transition governments and civil society actors to enhance protection in a mixed-migratory context. The conclusion is the existence of enduring challenges, despite important recent achievements, in expanding protection space in North Africa, not least as a result of the limited mechanisms and solutions for persons caught up in the mixed-migratory flows into and across this region.

<sup>7</sup> Exchange of letters between European Commission and Mr William Swing, Director General of IOM, 12 July 2012, HOME.02 RR/cd ARES(2012)577817.

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[More information](#)**Managing regular and irregular migration in the Mediterranean**

The second part of the book vertically analyses some substantial issues, selected for their relevance and topicality in the Mediterranean context. Each chapter tackles an issue focusing on the institution or cooperation mechanism primarily in charge, but also taking into consideration the interventions of other actors. On the basis of the relevant practice, each chapter assesses the consistency and compliance of the actions. The EU is the main actor in the Mediterranean area as far as cooperation in the migratory field is concerned. As the chapters of this part highlight, the EU has been setting the agenda of the cooperation mechanisms in relation to the management of both regular and irregular migration. The prevailing role of the EU has also been facilitated by the lack of cooperation among third Mediterranean countries.<sup>8</sup>

Section II starts discussing the effectiveness of EU-Mediterranean cooperation on labour migration by analysing EU labour migration tools specifically designed for the Mediterranean countries as well as the newly introduced general EU labour law instruments. Special attention is paid to the Euro-Mediterranean Association Agreements (EMAAs) and the right to equal treatment on social security for migrant workers contained therein. In spite of the existence of bilateral cooperation agreements with some Mediterranean countries since the late 1970s, there is little knowledge on the state of implementation and practical operability of such social security rights. Wiesbrock's chapter discusses not only the interpretation of social security rights contained in the EMAAs by the European Court of Justice, it also evaluates the (in)adequate implementation of EU social security rights at the national level and considers possible reasons for the lack of public discourse and awareness on such rights in the Member States. Furthermore, the chapter discusses the potential consequences of increasing EU cooperation in the area of labour migration, including the adoption of a directive on highly skilled migration<sup>9</sup> and on seasonal workers,<sup>10</sup> and the directive proposal on intra-corporate transferees,<sup>11</sup> for patterns of EU-Mediterranean migration. It analyses the possible effects of such cooperation on

<sup>8</sup> See in particular the contribution by Perrin in this volume.

<sup>9</sup> Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009.

<sup>10</sup> Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, 28.3.2014.

<sup>11</sup> Proposal for a Directive on intra-corporate transferees, COM (2010) 378 final.

migrants from the Mediterranean currently benefiting from possibly more advantageous national regimes, such as agreements on seasonal migration between Spain and France on the one hand and several North African countries on the other. It is argued that the combination of limited and weakly enforced EU measures specifically targeted at labour migrants from the Mediterranean, and the increasing adoption of general EU labour migration instruments threatens to undermine the rights of Mediterranean labour migrants and the special position accorded to this region in EU official discourse.

Contrasting with the Northern dimension, there is absolutely no cooperation among Maghreb States in the domain of regular migration. There are only some bilateral treaties concluded among them (not recently) that aim to facilitate mobility and migration. Also, there is no cooperation among them regarding irregular migration, rather there is a competition to shift the 'burden' (Algeria 'pushing' migrants to Morocco; Morocco bringing them back to the border; tensions at the Tunisia-Libya border). Perrin's chapter gave evidence of that and of the rapid shift of migration from a social reality to ease and *laissez-faire* into a national political issue to address and frame, a rapid shift which has mainly been due to external influence (EU, IOM, etc.) and not to a concerted policy. The multifaceted lack of preparation for such a challenge and the diplomatic importance of legislating have led to improvising a first set of normative production focused on enhancing criminalization of border crossing in a sort of 'emulation' of international and mostly EU foreign standards following the 2011 uprisings.

The main focus on 'fighting *against*' irregular migration is also the main concern of the EU External Border Policy. The external borders of the European Union are both its own borders and those of its Member States. Their legal regime is the product of competition between the domestic and supranational spheres of governance. While EU institutions strive for an integrated border management (IBM), Member States tend to resist such ambitions and seek to stay in charge of decision-making processes. At the same time they need mechanisms at the European level for a whole range of reasons, especially to remedy the repercussions of open internal borders as well as to shift and share the burdens of external border control. This tension pervades the politics, law and legal practice on the EU's external borders. Trevisanut's chapter analyses and comments on the legal framework regulating the activities of the European Agency for the Management of the Operative Cooperation at the External Borders of the Member States of European



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Union (in short, 'Frontex'), and focuses on Frontex practice in creating cooperation mechanisms with third Mediterranean countries. The author briefly describes EU policy for the management of the external borders from a historical and normative perspective and concentrates on Frontex composition and functions. This analysis highlights how Member States still control the decision-making process and the operative activities. The main features of Frontex cooperation with third countries, focusing on information exchange within the EU Border Surveillance System (Eurosur)<sup>12</sup> and operational cooperation within Frontex Jos at sea, are the highlights. The chapter ends with some reflections on how recent legislative development at the EU level might direct EU policy in the fields of irregular immigration and of external borders towards an enhanced compliance with international protection obligations and finally towards better governance of EU external borders.

Papastavridis' chapter considers the EU border management from the complementary perspective of the first and most significant human right, which applies to any counter-immigration operation, namely the principle of *non-refoulement*. The application of this principle was at the heart of the *Hirsi v. Italy* judgment of the European Court of Human Rights in 2012 concerning Italy's push-back operations to Libya.<sup>13</sup> The principle of *non-refoulement* is primarily enshrined in Article 33(1) of the Refugee Convention (1951), which prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment or torture. It is also a fundamental component of treaty as well as customary prohibition of torture, cruel, inhumane and degrading treatment or punishment (e.g. Article 3 of the Convention against Torture, Article 3 of the ECHR and Article 19.2 of the EU Charter of Fundamental Rights). The principle of *non-refoulement* in the human rights context is absolute and non-derogable, preventing extradition, expulsion or removal in any manner whatsoever. It bars not only the return of an individual to his or her country of origin, but also to other countries where there is a risk of onward movement to the country of origin (so-called indirect *refoulement*). Notwithstanding the unequivocal prohibition of *refoulement* under international law, States have not been in full accord with it when it comes to fighting irregular immigration. Papastavridis discusses in particular the legal contours of the principle of

<sup>12</sup> Regulation (EU) 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295/11, 6 November 2013.

<sup>13</sup> *Hirsi Jamaa ao v. Italy* App. no 27765/09 (ECtHR, Grand Chamber Judgment of 23 February 2012).



*non-refoulement* and its application in the everyday practice of the States in the Mediterranean Sea. The chapter argues that the principle of *non-refoulement* does bind the EU whenever it exercises its competences, *in casu*, even beyond the external borders of its Member States. More significantly, though, the chapter endeavours to address questions of international responsibility arising from violations of this principle, in particular questions concerning the allocation of responsibility between the EU and its Member States in Frontex operations.

In the framework of the bilateral cooperation on migration control between EU Member States and third countries, readmission agreements stand as key tools in the removal of unauthorized migrants, rejected refugees and asylum seekers supposed to undergo asylum procedures elsewhere. Giuffrè's chapter addresses the question whether general international law generates upon States an obligation to readmit their own and foreign nationals and, if so, how this obligation relates to readmission agreements. After an overview of these bilateral arrangements, the chapter attempts to reach an as precise and complete understanding as possible of the technical content of interstate and EU readmission agreements in order to increase knowledge about both the substance of these instruments and the role they play in the return of irregular migrants and asylum seekers to countries of origin or transit. Since under the Lisbon Treaty, competence in the 'Area of Freedom, Security and Justice' remains shared and the EU and Member States continue to pursue their readmission procedures in a parallel manner, this chapter concludes with an assessment of the relationship between the readmission policies of the EU and individual Member States.

Finally, Mallia's chapter deals with the preoccupying trend of smuggled migrants, victims of one of the fastest-growing transnational organized crimes today. The link to organized crime is highlighted by the fact that the first international regulation of migrant smuggling came in the form of a protocol to the United Nations Convention on Transnational Organized Crime (CATOC) in 2000 – the Migrant Smuggling Protocol.<sup>14</sup> Apart from creating a framework for legal and judicial cooperation while ensuring the protection of victims and respect for their inherent rights, the Smuggling Protocol is valuable in that it contains a section on migrant smuggling by sea. The Protocol provides

<sup>14</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 15 November 2000, entered into force 28 January 2004).

for the overriding duty to ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea’ – an obligation commonly reiterated in all instruments aimed at suppressing maritime crime. Mallia analyses the cooperative framework laid out in the Smuggling Protocol and focuses on the general rubric of permissible action at sea as laid out in Article 8. Through this framework, the supremacy of flag State jurisdiction remains intact while at the same time permitting enforcement action by non-flag State actors. In this way, the lacunae in the general rubric of the law of the sea as laid out in the UN Law of the Sea Convention 1982 are filled in a way which strengthens – rather than challenges – the current legal regime. Further, through the analysis of this framework, and a comparison of other models employed in other spheres such as maritime drug smuggling and terrorism, one may attempt to identify an emerging definition of the concept of cooperation in the area of combating contemporary threats to maritime security.

### Mechanisms of international cooperation

But is the plurality of actors involved in the relevant cooperation mechanisms in the Mediterranean – and analysed in the first part of the book – reciprocally functional and an element of consistency? Consistency and compliance are studied in Part I of the book against the background of the normative and institutional context of the analysed actions. Each action might serve diverse, even competing purposes. It emerges that the presence on both sides of the Mediterranean of international organizations with a ‘universal’ geographical mandate, such as the UNHCR, the IOM and the ILO, guarantees a minimum level of coherence in the migratory policies. In particular their involvement in cooperation mechanisms directed to the management of *both* irregular and regular migration allows drawing connections between the two phenomena, which are tightly linked.

The involvement of ‘universal’ international organization also guarantees a certain balance in setting the goals of cooperation mechanisms between a well-integrated regional organization, namely the EU, and third Mediterranean countries who lack any efficient coordination mechanism and therefore weaken their position at the negotiation table; as it emerges that is, in relation to readmissions agreements and border surveillance. However, such a positive balancing is more apparent than effective as the EU-Med relations show in this book. In particular,