



The Control of Immigration in the Maritime Spaces of the EU

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International law has never raised the existence of a right to emigration,

- Therefore, the foreigner has no right to reside in a state that is not his own

- Within the framework of the European Union, we wanted to go much further. Therefore, one of the most important and successful objectives of the European Union has been the creation of an area of freedom, security and justice. To achieve these objectives, the TFEU (Articles 67-89) establishes European border control, asylum and immigration policies and judicial and police cooperation.

- There is no European regional law that forces people who have fled their countries because their life, security or freedom has been threatened by widespread violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances that have severely disturbed public order.

- The EU common asylum system has a set of rules which includes refugees and "beneficiaries of subsidiary protection". Refugee status will be granted to persons, individually registered, who have well-founded fears of persecution for the 5 reasons set out in the Geneva Convention on Refugee Status of 1951, i.e. reasons of race, religion, nationality, belonging to a particular group social or political opinions.

- The status of beneficiary of subsidiary protection should be granted to people who do not meet the conditions for obtaining refugee status, even individually, but who give justified reasons for believing that if they return to their country of origin, they would face a real risk of suffering one of the three serious damages contemplated (death penalty or execution; torture or inhuman or degrading treatment or punishment; or indiscriminate violence in situations of international or internal armed conflict).

- When we talk about borders, in general, we refer to land borders, traditionally easier to defend, both from the existence of geographical accidents, from the creation of border posts, and from the existence of police officers who control access.
- However, the sea is an environment where control is much more complex. Firstly, because the powers that the State can exercise are much more limited and, secondly, because the legal regulation depends on the different marine areas in which the State operates.

Maritime borders in relation to immigration control

- In the context of the Law of the Sea, we can find two spaces in which all the powers of the State, including those deriving from the control of immigration, can be exercised, with the limitations established by the Law of the Sea itself. On the one hand, the internal waters and on the other hand, the territorial sea.

INTERNAL WATERS



- Within these internal waters, the State can fully exercise its legal powers, which can be exercised exclusively (the State exercises its functions and activities exclusively without giving the possibility to another State that can exercise its control without prior consent) and inviolably (the other states have the obligation to respect their sovereignty and territorial integrity).

TERRITORIAL SEA

- In relation to the territorial sea, Article 2 of the United Nations Convention on the Law of the Sea (UNCLOS) establishes the maximum distance of 12 miles, although this distance may be less, counting from the imaginary line where internal waters end.
- It is a principle of general international law, opposable *erga omnes*.
- Therefore, coastal states fully exercise their sovereign rights with one exception, the right of innocent passage



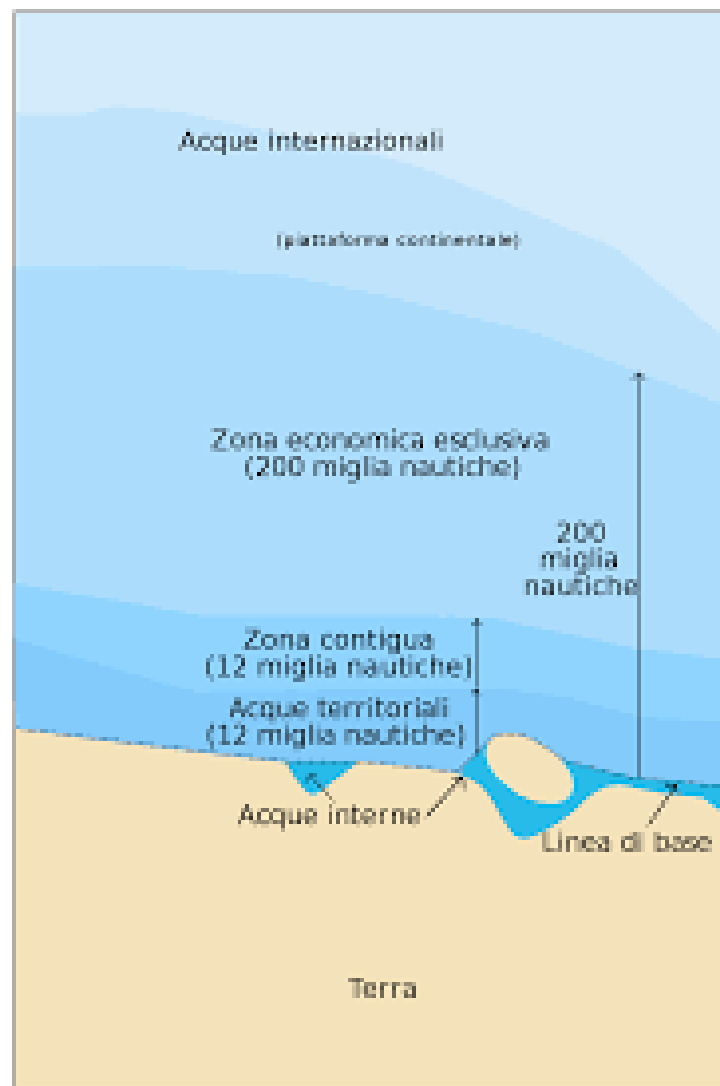
The right to innocent passage consists exclusively of rapid and continuous navigation, although Article 18 of the UNCLOS logically states that:

"passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".

- As regards immigration problems, the UNCLOS establishes in art. 19, that:
 - "1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
 - 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
 - (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
 - (l) any other activity not having a direct bearing on passage”.
- As we can see, considerations about what is not innocent include boarding and disembarking people in violation of immigration law and regulations.

- Since the passage of foreign ships, whatever their cabotage or the flag State, through the territorial sea established by each State, with a maximum limit of 12 miles must be, as I said, innocent, that "it is not prejudicial to the peace, good order or security of the coastal State", there are a series of activities which, if carried out by these ships, their passage is not innocent, and therefore the state can and should prevent their passage.
- Therefore, all these activities can make lose the innocence of the passage in the territorial sea.

CONTIGUOUS ZONE



- Beyond the 12 miles of territorial sea, the first space that must be taken into consideration for the analysis of immigration cases is an adjacent area, called the contiguous zone, according to art. 33 of the Convention
- "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 - (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
 - (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
- 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".
- Therefore, one of the most important aspects of this contiguous zone is immigration control. In this way it is possible to configure the desired controls in the territorial sea, as well as the controls allowed by the Convention on the Law of the Sea, in the contiguous zone.

- There are also some international agreements within the universal framework of the United Nations, such as the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Repress and Punish Trafficking in Human Beings, in particular women and children and the Protocol against smuggling of migrants by land, sea and air whose application would require certain controls in waters adjacent to coastal states, as we will see later.
- Point 7 of art. 8 of the Protocol against the smuggling of migrants by land, sea and air, states in this regard that States Parties which have reasonable grounds to suspect that a ship is involved in the smuggling of migrants by sea and have no nationality or pretend to be a ship without nationality it is possible to visit and register the ship. If evidence is found to confirm the suspicion, the State Party will take appropriate measures in accordance with national and international law.

HIGH SEAS



- On the high seas, which is a maritime space governed by the principle of freedom, there are multiple limitations. Consequently, no state can exercise more powers in this area than those authorized by international law, such as exclusive jurisdiction over ships flying its flag, unless otherwise provided for under international law.
- In relation to what interests us, that is to say the illegal trafficking of people, we could talk about the right to persecution. However, the first rule is that this must be “done hot” and when the ship in question comes from internal waters, from the territorial sea or from the contiguous zone of the coastal pursuit state. The persecution will cease when the ship is in the territorial waters of another state or in the waters of the state of its flag.

UNCLOS has not established rules similar to piracy or the slave trade in this type of trafficking (not even in the traffic of drugs or psychotropic substances). Article 108 only includes the obligation to cooperate in this struggle, but this obligation is not an obligation of result, but of behavior and, therefore, very weak.

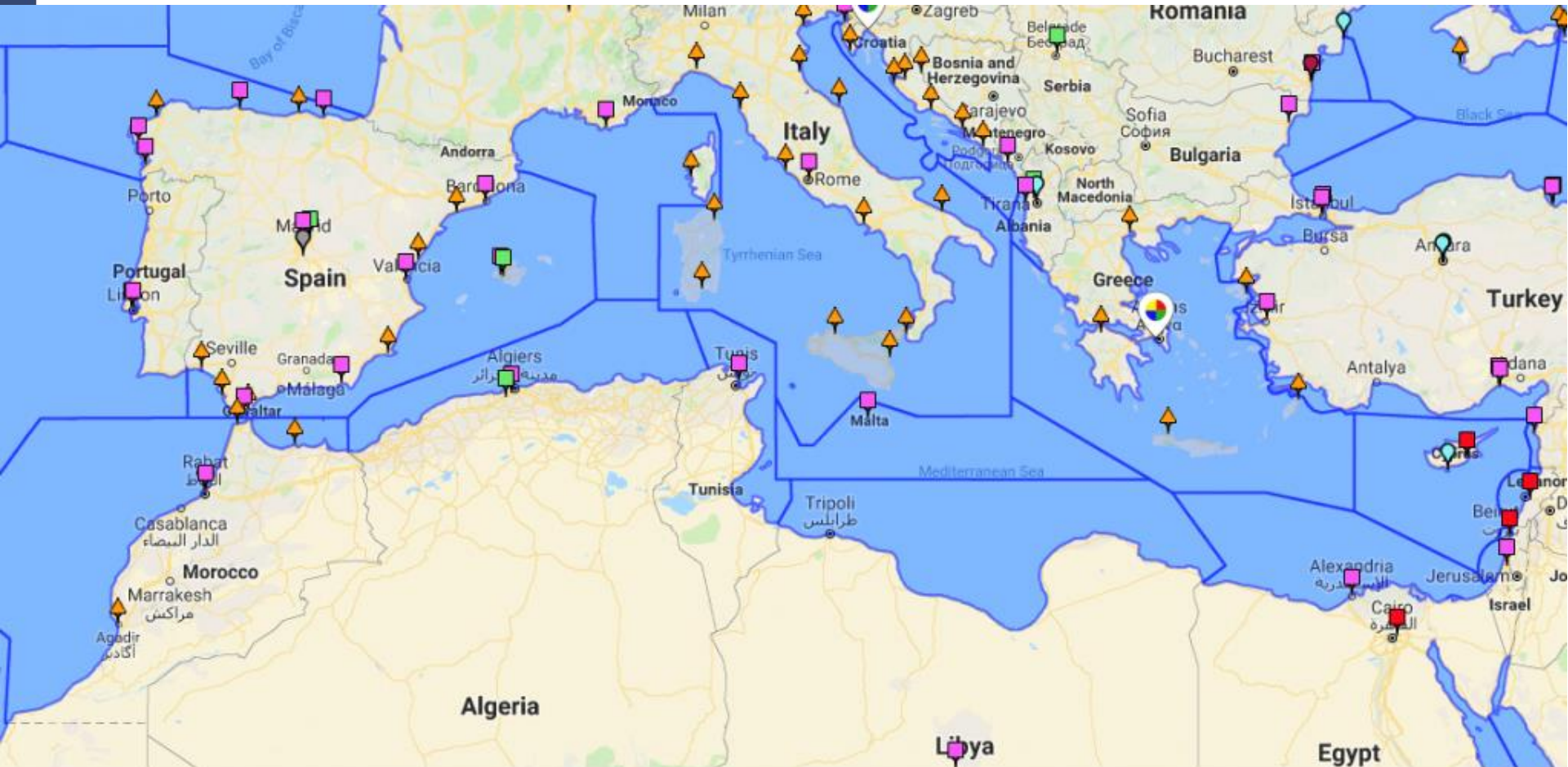
Consequently, in this regard, it should seek the consent of the flag State to inspect, arrest or punish a foreign ship on the high seas for illegal traffic.

Nowadays, as I said, only hot research on the high seas is possible, with the exceptions that will be explained later.

The obligations of states (and everyone) regarding the rescue of shipwrecks at sea

- The first priority duty of the state is to proceed with the rescue of the shipwreck. In this regard, the United Nations has stated that the fact that some security issues focus on the suppression of criminal activities should not lead law enforcement officers to lose sight of the obligation, under the protection of the Law of the Sea and the maritime tradition of saving those in danger at sea.
- This protection begins with the International Convention for the Safety of Human Life at Sea (hereinafter SOLAS), 1974, and continues with the International Convention on Search and Rescue (SAR), 1979.

- For the purposes of our analysis, the European coastal states of the Mediterranean (and all ships sailing in the area), as well as, in particular, the States parties to this Convention, must come to the aid of ships in difficulty.
- All European states have demarcated the search and rescue regions for which they are responsible.
- The body responsible for monitoring these problems is the International Maritime Organization, which is the specialized agency of the United Nations responsible for maritime safety and shipping safety.
- The SAR (SEARCH AND RESCUE) Convention has been modified in relation to people in danger at sea. These amendments were adopted in May 2004 and entered into force on 1 July 2006.





Article 98 of the United Nations Convention on the Law of the Sea UNCLOS establishes the obligation to provide relief:

- “1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
- 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”.

- There can be no distinction in this rescue task. Therefore, it is independent of the place where the boat to be rescued is located, where the wrecks come from, whether or not it has a flag, or if the ship is in danger or if the crew or wrecks lack nationality, etc.
- What is important, therefore, is the duty to save them for humanitarian reasons.



Should it be in the nearest port or a port of nationality of the ship to the rescue?

- One of the closest examples of this situation was seen recently when a Spanish ship, the tugboat Montfalcó, rescued 26 sub-Saharan Africans in the Mediterranean Sea. Due to Malta's refusal and Libya's refusal to take care of the victims of the wreck, the maritime rescue ship Clara Campoamor collected them in Southern Sardinia to land them in Tarragona (Spain)
- The problem lies in the interpretation of the norm. Are we facing the obligation of Malta and Libya to care for victims of a shipwreck or if the flag state of the rescue ship has to deal with it? So who will have to take responsibility for them if they are to be treated as illegal immigrants, that is, if possible, to return them or issue an expulsion order, etc.?
- The answer is not easy, even if in practice it is the behavior normally followed. The coastal states of the high seas, where shipwrecks are rescued, have no obligation to receive them, unless their life or physical integrity is at risk. In my opinion, it would be different if their life or integrity were endangered due to illness, accident, trauma, etc. In this case, the nearest port must accept them.

The right of individuals and the obligations of states to respect migrants, regardless of the legal status to which they are entitled

The problem of immigrant access to Europe's maritime borders is not individual access, but mass flow. Now, the first difficulty we will have is the difficult definition of mass flow. These terms were present on the Italian island of Lampedusa or on the fences of Ceuta and Melilla. Also what we have seen with the access of hundreds of immigrants to our shores in boats or rafts.

Remember the massive influx of people during the so-called Arab spring or the Syrian displaced persons, etc.

We will emphasize that mass flow is a more restrictive concept than the massive influx of immigrants, which is not exactly the same problem, but you must have the same treatment before the law.

- Mass flow can be caused by armed conflict or by a massive violation of human rights or other causes. Therefore, they may respond to the application of various rights and duties.
- The mass exodus is not produced only by armed conflict. It is when a human tide reaches some borders, for any type of cause (climatic, natural or industrial disasters, etc.)
- The receiving State has no other choice that allow mass arrival for humanitarian reasons and provide, prima facie, general protection to all who arrive, guaranteeing basic human rights, given that individual identification is impractical

- Asylum seekers in a mass exodus seeking refuge in a state, near or not, must be admitted, at least temporarily, and provide protection according to the principles of the refugee law, in particular without any discrimination and without returning them to their place of origin in which they can suffer persecution (non-refoulement) and, moreover, in the European framework, temporary protection until the resolution of individual cases.
- In the context of mass influx, following armed conflict or widespread violence at the place of origin, states have the right to disarm those who are armed, uniform or otherwise, and to separate them at first sight to avoid dangers to the civilian population. But they have an obligation not to bring them back to a place where their life or integrity could be in danger. This is a very important element since there has been a lot of talk about the infiltration of elements, if not armed, if with intentions of destabilization, among the seekers of refugees.

- On the other hand, imagine that it is a massive influx of people fleeing the violence generated in their territory towards a neighboring state, which is not warlike in the conflict. Therefore, there is at least one transit country, such as Turkey. The source of the obligations in this case is different, but the basis is the same, the humanitarian and civil character of the refugees.
- In any case, an international custom provide for to give refuge to these people who arrive in huge flows, apart from the inability to identify each of the people who arrive one by one, due to the reality and apparent circumstances of the country of origin. In this way, a human group from Afghanistan, Syria or Iraq, at this moment, fleeing the bombing and harsh circumstances of a country at war, is objectively "forced to displace" and deserves, from the international community , protection and assistance. That's why they are people included in the mandate of UNHCR.

- Is this what happened in the so-called Syrian refugee crisis? Are all those arriving Syrians? Are they asylum seekers under the 1951 Geneva Convention? What is the European Union doing?
- On the other hand, the EU not only addresses the problem of the massive influx of Syrians, Afghans and Iraqis displaced on the coasts of Greece, but simultaneously addresses the problem of the huge influx of immigrants, usually from Libya, where they have it came from areas of central Africa, on almost all occasions, following the trafficking of people.
- How to deal with these problems with humanity that the situation requires.

The EU's precarious responses to the massive influx of displaced persons into the Mediterranean Sea following armed conflicts

- After the great sinking crisis of 19 April 2015, where the Syrian case was studied in particular in relation to the massive influx of refugees into Turkey (which received 1.7 million displaced persons), Jordan, Lebanon (1.8 million) and Iraq, the EU has focused on giving some answers.

- For them, there are humanitarian responses, based on international law. Indeed, there are refugee law rules, human rights, international humanitarian law and elementary considerations about humanity that would apply.

What would be the rights and obligations of the protective state as a territory of asylum?

- For the moment, being the mass migration flow, the State in question will have the minimum obligation to pay humanitarian attention, with the help of the various humanitarian agencies in the world, primarily the UNHCR, and temporary protection until individual cases will not be resolved.
- However, Greece and Italy (probably any EU member state) are physically incapacitated. The differences between some states and others are frightening, the statutes granted are also different in each state.
- In order to solve, in part, the problems deriving from the inability to identify and process the individual requests of people arriving on the Greek or Italian coasts, resettlement programs have been set up, through the so-called intra-community solidarity.

The European Council adopted the European Agenda for Migration, recognizing the failure of European responses to the massive influx of refugees, mainly from Syria.

The immediate measures taken were the following:

- i) operational measures;
- ii) budget support
- iii) application of Union law and external actions, for example,
 - 1. Triple the capacity and resources of the Frontex joint operations (Tritón and Poseidón), in 2015 and 2016;
 - 2. Activate the emergency system in accordance with Article 78 (3) of the Treaty to better distribute asylum seekers in Europe;
 - 3. Create "hot spots", coordinated by the Commission, in which the European Asylum Support Agency (EASO), Frontex and Europol, can work in the field to identify, register and take over the fingerprints of migrants as soon as possible possible, in addition to coordinating the return;
 - 4. Further mobilize € 60 million to finance urgent needs;
 - 5. a resettlement program with a budget of 50 million euros, intended to transfer 20,000 people to safe and legal Europe;

- 6. Allocation of 30 million euros for regional development and protection programs starting from North Africa and the Horn of Africa in 2015 and 2016;
- 7. Collect information through the collaboration of Europol with other European agencies to dismantle criminal networks;
- 8. Establish European operations in the Mediterranean with the capture and destruction of ships and include migratory components in the international crisis management operations already deployed in Niger and Mali;
- 9. Establish a multifunctional pilot center in Niger, in collaboration with IOM and UNHCR;
- 10. Distribute European immigration agents to EU delegations in major transit countries

Even so, it has proved ineffective, because states have worried more about their public opinion or electoral processes than their state obligations.

- The EU had specific regulation for mass influx cases, based on the precedent of the Balkan crisis. The consequences of the conflict in the former Yugoslavia were the triggers of this interest of the European Union.
- This temporary protection is not only an international customary norm, but it already has more positive grades because it has been incorporated into the law of the European Union and into the legal system of its Member States (Temporary Protection Directive in OJ L 212 (2001)).

- All this because refugee law in Europe does not respond to the social reality of our day and when it responds technically, it does not respond in practice. Of the over 60 million forced displaced persons in the world, Europe, together with the United States, supports only 10%, with the least developed countries being the ones with the greatest burden. Therefore, their contribution to the refugee problem is negligible compared to the generosity of the least developed countries.

- Why wasn't it launched? In the opinion of the Prof^a. ARENA This Directive does not establish criteria for the allocation of persons who are finally at the mercy of the reception capacity of each State. If we add to this problem, which includes a rather broad concept of beneficiaries of temporary protection, the fact that the groups defined by the European Union as beneficiaries of international protection would be surpassed today and that the State offers sufficient guarantees based on a subjected to dual service: voluntary (by the will of the host Member State and the consent of the beneficiary), it is not surprising that this tool has never been used

- No EU Member State has requested it, nor the European Commission has formally verified a massive flow requiring temporary protection. In political terms, it can be explained because the Temporary Protection Directive is very "generous". It requires the reception of people in a territory (almost everyone wants to settle in Germany or in the Northern European states, for their protection system). On the other hand, due to the effects of the application of the temporary protection directive, because it authorizes its beneficiaries to reside legally, to be able to carry out a paid activity, to access adequate accommodation, to receive assistance and social assistance, to access the education system, family reunification and even apply for asylum individually.
- Similarly, deadlines for voluntary return aid, limited conditions for forced return, etc. explain, although they do not justify, that states did not want to activate the system.

On the contrary, the EU has activated the emergency system established by the Lisbon Treaty. Article 78.3 TFEU States that:

"In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

- This was the legal activated on the European Commission proposed for the displaced persons quotas or temporary relocation mechanisms.
- The European Council has decided to redistribute 40,000 refugees until 17 September 2017, subsequently extended to 120,000. Despite this, Hungary, the Czech Republic, Slovenia and Romania voted against the European Council Decision (Finland abstained), which is binding on Council Decision 2015/1523 of 14 September 2015 for all Member states
- Distribution is weighted on the basis of certain variables such as the gross domestic product (GDP) of each state, the average number of asylum applications processed in the previous five years, the unemployment rate, etc.

Massive flow for causes other than armed conflict

- As for the massive influx of immigrants on the Italian coast, mainly from Libya, the legal situation differs but humanitarian treatment and respect for human rights remain its essential element.
- This migratory flow is mainly due to the organization of the mafias that transit with human beings, initially with immigrants, although in many cases also for the purpose of sexual exploitation.
- The Council of Ministers of Justice and Home Affairs of 25 and 26 April 2002 adopted conclusions on illegal immigration and trafficking in persons by sea, which led to the same Council, at its meeting of 13 June 2002, to approve conclusions on " Measures to prevent and combat illegal immigration and trafficking in human beings by sea and in particular measures against third States which are unwilling to cooperate with the EU in the fight against illegal immigration ".

- a) Operational measures
 - Systematic cooperation between Member States and possible joint operations to control maritime borders and ships suspected of illegally transporting human beings.
 - Increase in the activity of liaison officers in the countries of embarkation, departure or transit of irregular immigrants.
 - Rapid improvement of the alert system.
 - Greater participation of Europol.
 - Creation of joint research groups.
 - The use of appropriate measures to identify ships in risk areas.
 - Examination of joint or individual maritime surveillance operations from the air.
 - Actions for illegal entry, transit and residence.

- b) Preventive measures

- Signing, ratification and application of the United Nations Convention against Transnational Organized Crime of December 2000, the Protocol for preventing, repressing and punishing trafficking in persons and the Protocol against the illicit trafficking of migrants by land, sea and air and other instruments relevant international.
- Criminalize human trafficking in national legislation, including the confiscation of ships used in this traffic.
- impose criminal conduct with penalties for falsification and fraudulent use of travel documents.
- Promote or facilitate the implementation of information campaigns, which will be financed by the EU or its Member States.

- Increase control of the maritime borders of ships suspected of trafficking in human beings, supplemented by police control within the national territory.
- Strengthening border control measures to prevent the entry of persons who wish to use the territory of an illegal transit to EU Member States, including any adaptations to their visa systems.
- Cooperation with the border services of the EU states for the exchange of information on ships suspected of illicit trafficking in persons.
- Express the will to the countries of origin or transit of immigrants who enter the EU by sea and whose production can be adequately demonstrated that they are accepted by the readmission obligations imposed.
- Urgently define and clarify the maritime areas that each country must exercise its search and rescue capabilities

The most spectacular measure of European cooperation in the fight against trafficking and trafficking in immigrants was the creation of a European Agency for the management of operational cooperation at external borders (FRONTEX)

- The problem does not arise with regard to the criminal persons responsible for trafficking in persons, such as traffickers, but for the victims. Traditionally, as we have seen, they are treated as irregular immigrants even if they have not entered a state illegally.
- However, if this can be relatively easy to solve, in particular and isolated cases, it is much more complex when there is a criminal system that have benefited economically and left them on a plastic or overcrowded raft in an old plastic boat or in an old fishing boat, with little petrol and subject to the oscillations of a sea almost always unknown to the victims.
- And when the coasts they come from are not only poorly protected, but ungovernable, the situation becomes much more difficult.

This is the case of Libya, from where thousands of immigrants are thrown overboard, without the slightest scruple.

- The European Union had to carry out an operation which had, at least a double character, to alter the criminal model of human trafficking and help reduce the loss of life. To this end, the Council of the EU adopted the Council Decision on Common Foreign and Security Policy (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Central and Southern Mediterranean (EUNAVFOR MED), known as Operation Sophia

This operation Sophia had three phases

- The first phase took place between 22 June and 6 October 2015 to support the detection and monitoring of migration networks by collecting information and patrols on the high seas in accordance with international law.
- The second phase (from 7 October 2015) would have the mission to visit, register, seize and divert offshore ships suspected of being used for illicit trafficking or trafficking in human beings, under conditions established by applicable international law.

- In phase 3, even in the event of resolution of the Security Council or authorization of the territorial sovereign, he will take all necessary measures, including the elimination or disabling, against a ship and the related means suspected of being used for illicit traffic or for dealing with human beings, within the territory of that State, under the conditions established in that resolution or consent.
- This was possible because the United Nations Security Council adopted Resolution 2240 (2015) of 9 October 2015, which allows ships to be caught offshore, off the coast of Libya, provided that are suspected of trafficking in persons . Later, this surveillance and prison will be expanded, with the aim also of monitoring the arms embargo intended or originating in Libya.

In conclusion , we cannot say that the main task of the SOPHIA operation is to rescue the victims of human trafficking but, without a doubt, it has contributed significantly to reducing the loss of life in the central Mediterranean.

THE PHENOMENON OF IRREGULAR IMMIGRATION TOWARDS EUROPE: ROUTES AND CAUSES





Africa



THE END

Thank you