SEVEN | Sea Borders between Domestic and International Definitions of Spaces

Italian-Libyan Cooperation on Border Management

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1. Introduction

This chapter examines the evolution of Italian-Libyan cooperation in border management and challenges the understanding of these practices exclusively in terms of externalization or crisis-led interventions. By looking at the partnerships between Italy and Libya since the early 2000s, the chapter argues that the two countries are engaged in multiple kinds of cooperation to produce a sea border that entails more than the externalization of border and migration control. Both countries have actively nurtured this cooperation and profit from the longer-term political consequences of such processes, including gaps in jurisdiction and power vacuums. An investigation based on the space of the sea between the two countries makes it possible to unravel the complex processes behind such relationships and borderwork. For the past two decades, Italian authorities have sought cooperation with Libyan authorities and engaged with the European Union's sponsored programs of border management with little (if any) compliance with international legal regimes, especially in terms of human rights principles, while leaving Italian authorities enough room to negotiate flexible and more fruitful economic cooperation with Libyan authorities. In turn, Gaddhafi's

regime profited from the cooperation to reinforce both legitimacy and authoritarian governance on the domestic front. After the regime's downfall in 2011, it has been common practice for EU institutions and Italian authorities to resort to soft law and legally nonbinding instruments with Libya, which the postrevolutionary Libyan authorities have not explicitly opposed. How does one account for the construction of this border system and lack of a political and legal framework for sea borders between Italy and Libya? Which processes, features, and techniques formed such a specific border space? This chapter claims that an exclusive focus on the externalization of migration and border control in Italian-Libyan relations is misleading because it fails to grasp the implications and complexity of the long-term history of relations between the two countries. The chapter is based on the idea that the specific forms of governance and practices over border management occurring in the "space of the sea" (Cuttitta 2017) between Italy and Libya after 2011 are not invented but build on preexisting practices that enable their consolidation under the international cooperation agreements signed after 2011. The focus on their evolution and historical dimension sheds some light on the borderwork and the rationales behind the current cooperation (Bialasiewicz 2012), stressing that migration control is not the only issue at stake. While legal accounts agree on the idea that bordering practices between Italy and Libya can be defined as "shifting the burden of border and migration control" (Palm 2017), this perspective does not take into account the implications of the interaction between the actors. By looking at the interaction of the two countries in a historical perspective, the chapter highlights that the juridical-political indistinction is the cornerstone of the borderwork being performed and establishes a sea border that ultimately allows both parties to escape legal constraints while strengthening their partnership in the long run.

Europe's borders have become places of suffering and death (Pallister-Wilkins 2017): in 2016 alone, almost 4,000 people are known to have lost their lives in the Mediterranean Sea (IOM 2016). Scholars agree on the shift from a humanitarian mission of search-and-rescue operations to a more securitized response to boat migration and an increase in militarization, legal gray zones (Meier 2020), and a lack of transparency (Pallister-Wilkins 2017; Ghezelbash et al. 2018). Agreeing with Sassen that while the "nation-state remains the prevalent organizational source of authority and to variable extents the dominant one. But . . . critical components of authority deployed in the making of the territorial state are shifting toward becoming strong capabilities for detaching that authority from its exclusive territory and onto multiple bordering

systems" (Sassen 2006, 419), the chapter will show how the bordering system that emerged between the two countries before 2011 and was reinforced during the so-called 2015 migration crisis aims to rescale border control and identify sea borders as "spatial." Between the expectations of European member states hoping for operational solutions to security problems and the crisis of European solidarity among member states in managing migration and external borders (Cusumano 2019), the result is a "complex, networked border" (Rumford 2006) in which legal safeguards for humanitarian principles and international law cannot be adequately applied nor reinforced. To this end, the chapter will deal with the specific kind of border system that developed between Italy and Libya by focusing on which actors are participating in the countries' sea border space, how they are doing this, and how this has affected the context in which breaches of fundamental rights can emerge. In so doing, the chapter adds to this collection's theoretical contribution regarding the interconnection between space and power. In particular, this investigation wishes to stress that sea borders can be considered one of the incomplete spaces that are always under construction, but not because of a neutral character (Massey 2005). Sea borders indeed represent a space in which to understand the complex convergence of international legal norms, sovereignty concerns, and cooperation practices. Moreover, it offers a generative site for political science and geography to reflect on and analyze the complex relationships between democratic and nondemocratic regimes that co-produce the sea borders, as well as the consequent redefinition of politics and conceptualization of spaces.

The chapter is structured as follows: Section 2 discusses the scholarship scrutinizing the space of the sea between Italy and Libya and connects it with the literature focused on migration and border studies beyond legal scholarship. Section 3 focuses on the signature of the 2008 Treaty on Friendship, Partnership and Cooperation between Italy and Libya, as well as the formalization of previous agreements. Section 4 presents the 2017 Memorandum of Understanding, along with some practical examples of cooperation and how international human rights principles are circumvented. The conclusion summarizes the chapter's main findings.

2. Studying the Space between Italy and Libya

In the context of political science, geography, and critical border studies, cooperation between Italy and Libya has been the subject of increasing scholarly attention. As discussed below, a growing body of work has

engaged with different aspects of the two countries' relations. Above all, the scholarship on migration policies and practices has focused on the EU's and Italy's relationships with Libya, mostly to unravel and highlight processes of externalizing and outsourcing migration control to third countries with the aim of preventing third-country nationals from reaching the shores of European member states (Paoletti 2010; Gammeltoft-Hansen 2011; McNamara 2013; Baldwin-Edwards Lutterbeck 2019). While this chapter does not contradict these works' arguments, it shows that they fail to explain the diachronic processes of space construction and the specific border spaces produced between the two countries. By looking at the sea border produced through Italian-Libyan partnerships since the early 2000s, the chapter showcases the "use of the space" in politics and supports the other theoretical contributions included in the present volume. In particular, it provides input to the discussion of the vector from politics to space by discussing how stakeholders from political systems and institutions can use, exploit, and transform the space when dealing with political issues and, in this case, border management cooperation (see the introduction to this volume).

In the redefinition of analytical tools to analyze borders in an international studies perspective, Balibar emphasizes the need to rethink borders in a more creative fashion in order to make sense of what is happening in global politics: "Borders . . . are no longer at the border, an institutionalized site that could be materialized on the ground and inscribed on the map, where one sovereignty ends, and another begins" (Balibar 1998, 217–18). More recently, while relying on this elaboration, international relations scholars like Vaughan-Williams and Rumford have refocused attention on the "borderwork" (Rumford 2008) and the "generalized biopolitical border" (Vaughan-Williams 2009) to scrutinize the "global archipelago of zones of juridical-political indistinction" that makes it possible to untie the analysis of sovereign powers from the nations' territorial confines and relocate it in the context of a global biopolitical terrain that spans "domestic" and "international" space (Vaughan-Williams 2011, 195). In particular, there is an acknowledgment of the mismatch between the political territory of "Europe" and the political space defined by the borders of the EU. According to Mezzadra and Neilson (2013, 3), reconfiguring borders is a strategic tool in the network of global flows, and the lines of geographical mapping do not overlap with the component of the bordering practices and separation between nation-states, regardless of whether they are "legal, cultural, social [or] economic.'

On top of these accounts of the international reconfiguring of borders, scholars have reflected on practical outcomes of EU law and of "European infrastructures," since "'Europe' as an important geographical and conceptual marker [is also] unclear, respectively, about either physical extent or meaning" (Schipper and Schot 2011, 246). While the 1985 Schengen Agreement provided for the lifting of internal border controls, it also introduced an infrastructure of data gathering for the Schengen Information System, along with new security rationales. The latter created a form of networked and dispersed borders across the internal European space that, by registering practices, reflected external borders within the European space in the form of hotel registers or social security data far beyond airports and ports (Vaughan-Williams 2016). Borders are political technologies reflecting a particular politics in a specific context (Bigo 1998). Elspeth Guild's work on the shifting relationship between domestic and international law in the EU outlines that, within this small "globalized world," it is not borders and law but the economic resources available to migrants, especially third-country nationals, that shape the outcome of their mobility projects (Guild 2005). The redefinition of borders' reality and the blurring of the "inside/outside" is reflected in Bigo's analysis of the interweaving of the internal and external realms of European security (Bigo 2006), albeit with a privileged focus on the internal projection of EU border control.

To sustain the investigation of borderwork between Italy and Libya, especially after 2015, and show how this is not invented and does not appear on a blank canvas but builds on and consolidates preexisting practices, this chapter starts from the insights of Bialasiewicz, who takes into consideration that the border must be separated from its territorial trap (2012, 843). Bialasiewicz highlights that, already back in 2009, Italy-Libya relations brought about "off-shore blackholes where European norms, standards, and regulations simply do not apply, legitimized through bi-lateral agreements" (2012, 861).

What is largely scrutinized is the implication of this blurring between the "internal" and the "external" and of these new border systems when it comes to maritime border space. One of the main problems in dealing with maritime governance—and, to a larger extent, maritime borders—is understanding who is doing what (Arstsad 2017). Nowadays, international law applied to the governance of the sea includes a number of nonpublic actors that shape practices and current systems of operations. Therefore, it is no longer possible to account for what happens at sea borders by relying on the instruments of hard law and

legal accounts. Against this background, existing scholarship on maritime governance has acknowledged that, in the maritime domain, some soft-law instruments introduce uncertainties that affect the rights and obligations of states and individuals, creating opportunities for different responses (Ghezelbash et al. 2018). From the perspective of the literature on governance, "who governs" makes it possible to move beyond hard-law accounts and to grasp which actors have the power to play a role in maritime governance (Arstsad 2017).

The work of Cuttitta (2017) is particularly relevant for the theoretical conceptualization of the creation of the particular sea border between Italy and Libya and the territorial organization of borders far beyond the capitals. Cuttitta investigated the production of "space of the sea" through the categories of "inclusion" and "exclusion," and the work outlines the role of both states and nonstate actors at sea. By adopting the point of view of human beings moving inside the space, the work advances the idea that the space of the sea between Italy and Libya is enacted by a plethora of actors, all engaging in practices of inclusion and exclusion, which results in a fragmented, unpredictable, jagged space. Another relevant study is that of Cusumano (2019), who introduces the concept of "organized hypocrisy" in the EU-sponsored operations off the coast of Libya to highlight mismatches between official discourse based on humanitarianism, the practical operation of border control, and, ultimately, the securitization of migration. By looking at the specific actors involved in the activities, the author asserts that official commitments do not align with actions because "rhetoric is used as a surrogate for the lack of consistent action" (Cusumano 2019, 16). These accounts prove that policy-oriented frameworks and legal accounts alone cannot tackle the transformations in the space of the sea between Italy and Libya. As the present chapter also proposes, it is of the utmost importance to critically reassess the links between policy formulation, legal aspects, and actual practices on the ground and at sea. As a matter of fact, from a legal perspective, the situation of governing the sea borders between Italy and Libya has been labeled a picture "of dispersed authority and a grossly imperfect regime complex," with a lack of a political will to unite all divergent actors operating at sea (Ollick 2018, 289). A remarkable exception is the work by Müller and Slominski (2021), who rather than speak of a mere "externalization" utilize different theoretical tools to problematize the cooperation between Italy and Libya. The authors claim that the EU is advancing not only by externalization but mostly by "orchestration strategies" in which the political actors involved resort to enroll-

ing third parties and engaging in indirect orchestration via the Libyan authorities: the orchestrators enlist intermediaries on a voluntary basis to achieve the goal of border management and migration control while evading legal constraints (Müller and Slominski 2021). Yet this scholarly work does not problematize the diachronic trajectory of the relationship between the two countries. This process of redefining sea borders in the present case reveals the nature of such spatial dimensions when all the actors involved (and their correlated practices) modify the sea border, shape it according to their interests and political strategies, and generate new political scenarios, including power vacuums—jurisdictional gaps from which all actors may profit. Indeed, the sea border between Libya and Italy embodies and gives expression to Massey's conception of space as "the sphere of the possibility of the existence of multiplicity in the sense of contemporaneous plurality; as the sphere in which distinct trajectories coexist; as the sphere therefore of coexisting heterogeneity" (2005, 9).

3. Geopolitics of Monitoring the Sea Border between Italy and Libya: Laws and Actors

By using a historical perspective, this section will focus on the most important aspects of cooperation on border management that have emerged between Italy and Libya. The specific context and the content of the Treaty on Friendship signed in 2008, as well as earlier cooperation agreements, shed some light on the Italian authorities and their Libyan counterparts' particular stylings of governance of the space of the sea since 2011. Ambiguity regarding international legal regimes and more operational cooperation on migration is at the core of the treaty, which is officially portrayed as reparations for Italian colonial occupation, while it formalizes and ensures mutually beneficial cooperation with the Libyan authorities.

On 30 August 2008, the Treaty on Friendship, Partnership and Cooperation signed between Berlusconi and Gaddhafi laid out a broad framework of cooperation, including cultural, economic, and defense affairs, the core contents of which can be found in the 1998 joint communiqué signed by Italian minister of foreign affairs Lamberto Dini and Umar Mustafa al-Muntasir, secretary of the General People's Committee for Foreign Liaison and International Cooperation (Libyan foreign minister) (Lombardi 2011, 37). In particular, Prime Minister Silvio Berlusconi pledged $5 billion in compensation for abuses committed during the

period of Italian rule in Libya between 1911 and 1943. Italian authorities had never before admitted to colonial crimes, including using illegal weapons (i.e., mustard gas), deporting and putting civilians in concentration camps, or engaging in mass executions (Morone 2018, 118). However, once back in Rome after signing the treaty in Benghazi, Berlusconi declared that the treaty meant "fewer illegal immigrants as well as more gas and oil" (Di Caro 2008). Indeed, after ratification by parliament in January 2009, Italy obtained full collaboration from the Libyan Coast Guard to jointly patrol the Central Mediterranean Sea and push illegal migrants back to the shores of Libya (Morone 2017). Under the terms of the agreement, the Italian government committed to an investment of $200 million per annum over a 25-year period to help fund the development of critical infrastructure in Libya. In return, besides winning contracts for Italian companies, the deal provided for the offshoring and outsourcing of Italy's borders to Libya. Berlusconi's initial apology was not followed by any "precise and specific historical reference" to colonial crimes that could inform the public opinion about the Italians' earlier rule in Africa (Borgogni 2015, 26). Italy's contribution to Libya as reparations for colonial acts was transformed into new opportunities for ENI and other private Italian companies working in the infrastructure sector, such as Finmeccanica, to expand their activities in Libya and establish joint ventures with the Libya Africa Investment Portfolio. In parallel, the treaty appropriated funds to fight illegal immigration in the form of sea and land border management in Article 19. The treaty states that Italy's provision of mixed crews on boats to patrol approximately 2,000 kilometers of Libya's coastline and a satellite detection system for southern land borders will be jointly financed by Italy and the EU and provided by Finmeccanica (Ronzitti 2009).

From a historical point of view, it becomes evident that the official discourse on colonial reparations was more the result of Italian authorities' efforts to engage with Libyan authorities in successful and mutually beneficial cooperation, including migration control and economic partnerships, with little room for compliance with international legal regimes. The treaty did not draw on a blank canvas but on a long history of signed agreements and informal cooperation, and it set a precedent that reemerged in the years of the so-called 2015 migration crisis. It confirmed and expanded the number of bilateral agreements, paving the way for the normalization of Italian-Libyan relations regarding migration, in which the way toward the indefinite regulation of human mobility was more than evident, and it outlined various Italian governments'

ambiguous attitudes toward international human rights standards. Previous agreements had been signed in December 2000 to deal with the fight against terrorism, organized crime, and illegal immigration and came into force in December 2002. In 2003 and 2004, additional bilateral agreements were signed, and significant measures of cooperation were introduced during the presidency of Silvio Berlusconi. Italian and Libyan authorities oversaw a program of charter flights financed by Italy to remove undocumented migrants to their home countries. The Italian government provided equipment and training programs to control Libya's borders, including patrol boats and fingerprinting kits (European Commission 2004). In 2003, Italy also financed the first construction of a camp for undocumented migrants in Gharyan, close to Tripoli. Additional camps were financed in later years, for example, in Kufra and Sebah (Andrijasevic 2006, 9).

Since the early 2000s, Italy has primarily conducted joint operations by placing Italian officers on Libyan patrol vessels. In this context, informality and secrecy surrounding the agreements have characterized the cooperation between Italy and Libya. As documented by researchers, no detailed contents of the July 2003 agreement, which regulates the practical cooperation between the security forces of the two countries, or of several informal agreements, are publicly available (Cuttitta 2006; Klepp 2010).

Italian administrative bodies responsible for the implementation of these agreements and of the 2008 treaty were situated within the Ministry of the Interior. Italian law explicitly conceives of control over irregular migration by sea as a multiagency task whose leadership is assigned to the Ministry of the Interior. The latter has the duty to promote coordination between the relevant Italian authorities and EU agencies and, in coordination with the Ministry of Foreign Affairs, to promote agreements with countries of origin and/or transit aimed at fostering "cooperation in the fight against illegal immigration."[1] In 2002, a new Central Direction for Immigration and Border Police was established under the Department of Public Security at the Ministry of the Interior, which was entrusted with the overall coordination of border control policies. The Ministry of the Interior coordinates the operational activity of various law enforcement and security agencies, in particular the State Police, Guardia di Finanza (Italian Custom Border Guards), and the Italian Navy, in addition to the Italian Coast Guard, which is a specialized branch of the Italian Navy acting under the authority of the Ministry of Transport and responsible for the Italian Maritime Rescue Coordination Centre (Campesi 2020).

The mutual benefit of the Italy-Libya partnerships is detectable not only in the details of border patrols and private companies' engagement. The Treaty on Friendship was of the utmost importance to Gaddhafi, who obtained Italy's decisive sponsorship to lift the international embargo against Libya and provide support for the resumption of US diplomatic relations with the country (Morone 2018, 119). Moreover, as Bialasiewicz outlines, the ambiguity that characterized Italy-Libya relations is reflected in Libya's relations with international organizations such as the UNHCR, as well as the EU itself. The EU lifted its embargo against Libya in 2004 on the condition that, among others, it would ratify the 1951 Geneva Convention. But this never happened. On the contrary, 15 years later, the same Libyan authorities have stuck to the line that all migrants in Libya are economic migrants and that the question of asylum policy is a "European obsession" (Bialasiewicz 2012, 858) and a European problem. What differs is that at that time, Libya preferred to interact with the UNHCR mission on an ad hoc basis (Bialasiewicz 2012).

After Italy donated patrol vessels to Libya, its officers were allowed to accompany Libyan patrols, where they fulfilled a liaison function. In 2009, Italy began intercepting migrants on the high seas on barges and returning them to Libya. Libya and Italy announced the launch of joint naval patrols in Libyan territorial waters, although it was unclear whether and how they worked (HRW 2009).

This situation had a negative impact on compliance with international human rights standards. A case in point is the well-known 2012 judgment of the European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*,[2] which concerns the maritime interception and pushback to Libya of 11 Somalians and 13 Eritreans by the Italian Financial Police and the coast guard. On 6 May 2009, for the first time since the 2008 treaty had been finalized, Italy ordered its coast guard and naval vessels to push back forcibly and return a migrant boat on the high seas to its country of origin without screening it to determine whether it contained passengers who could apply for asylum or required special protection. Boats with 200 people onboard departed from Libya with the aim of reaching the Italian coast; when they were 35 miles south of Lampedusa, they were approached by navy forces from the Italian Guardia di Finanza. Immediately, people were transferred onto the Italian boats and sent back to Tripoli. Once they reached Libyan territory, the migrants were handed over to the Libyan authorities. The court stated that the nonrefoulement principle must be applied extraterritorially and constrain interdictions that can obstruct access to protection or expose migrants to any risk of

harm or torture (Biondi 2012). Although Italian border control authorities are legally bound to respect the international laws concerned, not least because their activities have a functional territorial reference and, thus, relate to sovereign territory (Biondi 2012), this was not they did, and their actions translated into pushbacks.

In this context, the fragmented EU law has contributed to a deregulated situation in the governance of sea borders. A standard set of rules to coordinate the EU member states' search-and-rescue (SAR) and disembarkation activities is lacking, except for those activities carried out in the context of Frontex-led joint operations at sea (Carrera and den Hertog 2015), which are covered by Regulation 656/2014 (European Parliament and the Council of the European Union 2014) and Regulation (EU) 2016/399, also called the Schengen Borders Code. Regulation 656/2014 applies to all Frontex-coordinated maritime border surveillance operations and includes a set of SAR and disembarkation obligations for "participating units' (i.e., law enforcement vessels of participating member states). In the case of disembarkation following an SAR operation, Article 10 Regulation 656/2014 establishes that the member state hosting the operation and other participating member states must cooperate with the responsible Rescue Coordinating Centre to identify a place of safety and ensure that the disembarkation of rescued persons is carried out. If it is not possible to arrange for a unit participating in the SAR operation to be relieved of its obligation to render assistance to persons in distress at sea as soon as reasonably practicable, that unit must be authorized to disembark the rescued persons in the member state hosting the operation (Art. 10(1)) (Carrera and Cortinovis 2020). In addition, Article 4 (Regulation 656/2014) also introduces provisions on the protection of fundamental rights and nonrefoulement, which apply to all cases of disembarkation in the context of sea operations conducted by the Frontex agency. In line with the verdict of the ECtHR *Hirsi* case, the regulation lays out a set of procedural steps to be followed when considering the disembarkation of rescued migrants in a third country.

4. Consolidation of Italy-Libya Cooperation after Gaddhafi's Downfall: The February 2017 Memorandum of Understanding

This section will examine the current migration control arrangements that emerged from the 2017 Memorandum of Understanding (MoU). It will discuss how the memorandum relates to the previous cooperation agreements and the 2008 treaty and how it circumvents Italy's responsi-

bilities toward international human rights regimes. By focusing on examples of such cooperation, the section will discuss the implications of soft and deregulated instruments of cooperation and how they allow for a situation of uncertainty that encourages flexible and ad hoc negotiation with Libyan authorities.

After the 2011 Arab upheavals, many actors operated in the Mediterranean Sea. With reference to institutional actors, states, and institutions, these include the coast guards and navies of the countries on the coast, Operation Themis of the EU border agency Frontex, the EU Common Security and Defence Policy mission EUNAVFOR Med Sophia since June 2015, and commercial vessels that are accidentally involved (Heller and Pezzani 2018). In addition, humanitarian NGOs voluntarily participating in SAR operations are also part of the governance of sea borders. The Italian Navy carries out autonomous patrolling activities only within the small operation called "Mare Sicuro." Previously, it managed the large-scale military-humanitarian operation Mare Nostrum, launched in October 2013, which ended in December 2014 (Cuttitta 2017, 79). Frontex has coordinated joint operations in the Strait of Sicily for over a decade, and the current Operation Themis has replaced Triton. The EU CSDP missions engaged with Libyan authorities in training and cooperation and sometimes instrumentally neglected vetting procedures in the case of alleged smugglers among the targets of EU programs (as happened with the CSPD mission EUNAVFOR Med Sophia training) (Loschi et al. 2018).

In the shaping of border practices between Italy and Libya, the smuggling economy falls within the cracks of these cooperations. Migrant smuggling is a practice that partially evades state control and requires multilayered and complex interventions. The governance of smuggling, in this regard, outsteps migration management by states and international institutions and instead aligns with the broader issue of governing unruly conduct and populations (Garelli and Tazzioli 2018).

After 2011 and the downfall of the Gaddhafi regime, the Tripoli-based government was the Libyan counterpart in international cooperation partnerships, recognized by the international community (UN and EU member states). Under UN-led mediation in December 2015, the Government of National Accord (GNA) was established in Tripoli in early 2016, thereby cutting the eastern authorities in Tobruk and Benghazi off from international support (Toaldo and Fitzgerald 2017). Post-2011 Libyan authorities under the Ministries of Interior and Defense, along with the Libyan Coast Guard, became the focus of Italian and EU support for border management and security sector reform (Loschi and Russo

2021). The EU's emphasis on migration management and collaboration with detention centers eventually empowered the Ministry of the Interior to deal with migrants and collaborate with the international organizations that visit detention centers without changing the way the sector is governed (Loschi and Russo 2021, 17). As post-2011 authorities have not reformed asylum or *non refoulement* rights under Libyan law, this resulted in a complex, uncontrolled scenario over human rights principles.

As the so-called 2015 refugee crisis highlighted and exacerbated longer-term shortcomings in the Common European Asylum System and lack of solidarity among member states, the relationship between Italy and Libya regarding the (control of the) flows of migrants became a pivotal instrument in the multilateral bordering practices. On 2 February 2017, Italy signed the MoU with the GNA led by Fayez al Serraj to establish cooperation in the field of development, fight against illegal immigration, trafficking in human beings and smuggling, and enhance border security.[3] The key commitment of the partnership was to "resume the cooperation between Italy and Libya on security and irregular migration according to past bilateral agreements" (i.e., the 2008 Treaty on Friendship). In addition, in the summer of 2017, the Italian parliament authorized the "Mare Sicuro" naval mission to provide technical support to the Libyan Coast Guard.

The 2017 MoU was the outcome of, among others, the Libyan regime's dismissal of the 2012 *Hirsi* judgment, which had forcefully recognized the correlation between the humanitarian dimension of SAR activities and human rights obligations (Ghezelbash et al. 2018, 323). In particular, the Hirsi case confirmed that the assessments of a state's human rights obligations could not be circumvented by other legal regimes, and the international obligations arising from other international regimes (e.g., the law of the sea, especially regarding SAR operations) do not relieve them of their obligations under the 1951 Geneva Convention Relating to the Status of Refugees, which Italy had ratified (Pijnenburg 2018, 400).

The 2008 treaty is regarded as having been suspended following the downfall of the Gaddhafi regime. Nevertheless, the 2017 MoU is a soft-law instrument that stands in an ambiguous position vis-à-vis the previous treaty: the MoU includes cooperation as also foreseen in Article 19 of the 2008 treaty (Pijnenburg 2018, 402). It is not ratified by the Italian parliament and is closely related to the informal Italian diplomacy and informal cooperation with Libyan Government of National Agreement under the interior minister of the time. Against the backdrop of migrants' flow from Libya and the migration crisis in 2015, it added much confusion to

a multilayering of legal and semilegal instruments that created opportunities for black holes in bordering practices.

The cooperation around the MoU empowered the Libyan authorities to pull migrants back to Libya. In this scenario, Italy provided technical support to "circumvent the prohibition unequivocally affirmed by the ECtHR Hirsi Judgement" (Liguori 2019, 12) and implemented what scholars define as a "refoulement by proxy" (D'Argent and Kuritzky 2017; Heller and Pezzani 2018). In this sense, what was launched with the 2017 MoU is an engagement by both Italian and Libyan authorities regarding bordering practices that "legally are situated outside of the EU, but which functionally lie inside its strategic zone of interest" (Germond and Smith 2009, 579).

To circumvent the prohibition on refoulement, a Libyan SAR area had to be declared and put into effect. This has also been presented at the EU level as a solution to the migration crisis—at least, to end the uncontrolled flows of migrants to the EU's external borders. At the informal summit held at La Valletta the day after signature of the Italian-Libyan MoU, the Council of the European Union used the Malta Declaration to further endorse cooperation with and assistance to Libyan authorities and prioritized training, equipment, and giving support to the Libyan Coast Guard and agencies (EU Council 2017). Subsequently, in its action plan of 4 July, the EU Commission pledged €46 million for a project to be developed with Italy as part of the EU Trust Fund for Africa and to support the establishment of a fully operational Maritime Rescue and Coordination Centre in Libya (European Commission 2017).

The most relevant outcome of the process launched with the 2017 MoU is Libya's notification of an SAR zone to the International Maritime Organization (IMO), a specialized United Nations agency.[4] The declaratory procedure for establishing an SAR area acknowledged by the IMO allows states to claim such a zone unless other state parties object. On 13 September 2017, Libyan authorities declared their first SAR zone, but the announcement was signed by two lieutenants from the Italian Coast Guard. Based on its own investigation, the IMO did not accept the declaration. A new declaration was proposed on 14 December 2017, as also confirmed in the last SAR report of the Italian Coast Guard, which the IMO again refused (Facchini 2018). At the end of June 2018, Libyan authorities submitted a declaration a third time, which was then accepted and ratified by the IMO (Spaggiari 2018).

This was the result of long-standing support from Italian authorities. Since May 2017, the Italian Coast Guard has coordinated the Libyan

Maritime Rescue Coordination Center (LMRCC) project managed by Italy and financed by the European Commission at a cost of €1.8 million. In August 2017, within the Italian "Mare Sicuro" mission, the Italian Navy provided a boat, the *Mare Capri*, moored in Abu Sitta in the port of Tripoli. The mission includes the establishment of the LMRCC for the management of the SAR area through the Italian Port Authority (Senato della Repubblica 2019, 126). In December 2017, Italy and Libya created a Joint Rescue Coordination Centre (JRCC).

At the time of this writing,[5] the Maritime Rescue Coordination Centre (MRCC) was not yet fully operational, although a MRCC is mandatory for a formal SAR zone, as it is charged with the coordination of SAR operations, so that the Italian MRCC is often involved and the JRCC functions as a provisional coordination facility. Moreover, even before the start of the third civil war in April 2019, authorities from the Libyan Coast Guard were not adequately equipped or trained to carry out and coordinate the SAR area effectively. In March 2019, the coordination of disembarkations from the *Mare Jonio* in Lampedusa was managed by the Italian MRCC, along with the Tripoli-based JRCC Tripoli, where officers hardly spoke any English, despite international conventions to the contrary, and the coast guard officer resorted to an Arab-speaking translator to communicate with Tripoli (Scavo 2019).

In this scenario, when a sea rescue by both the (few) NGOs and Libyan Coast Guard boats is underway, the Italian Maritime Coordination Center gives explicit "on-scene command" to the Libyan Coast Guard (Liguori 2019, 45). Nevertheless, the Libyan declaration of a SAR zone is just a reenactment of the preexistent collaboration between the two countries, which legally hands oversight to Libyan authorities when the rescue has to take place in Libyan international and territorial waters with the justification of ensuring Libyan sovereignty. This most recent form of cooperation, however, had an unregulated character that adds a great deal of confusion and leaves much room for interpretation by the stakeholders and the actors involved. Another nonlegal instrument that adds fuel to the fire is the Code of Conduct drafted by the Italian government in July 2017 (Statewatch 2017), which applies to NGOs present at sea. Under the code, NGOs are banned from entering Libyan waters to rescue migrants and obligated to accept the deployment of Italian vessels with armed police onboard to investigate, in cooperation with the Libyan authorities, trafficking of people in Libyan waters. NGO vessels are thus not permitted to transfer people who have been rescued to other vessels at sea, and rescue crews are required to return to port

for disembarkation. In parallel with the support provided to the Libyan SAR team and its activities, as well as the growing general criticism of the activities carried out by the NGOs, which are accused of being an "incentive for human smugglers to arrange departures" (Senato della Repubblica 2017, 9), Italy's interior minister imposed limitations on NGOs' rescue activities involving migrants, epitomized by the Code of Conduct that has to be signed by maritime NGOs. The main aspects advanced by the code are, first, NGO vessels are prohibited from entering Libyan territorial waters except in exceptional circumstances and in compliance with the previous authorization; second, NGOs should not interfere with vessel satellite tracking devices, which is problematic as the presence of an NGO vessel activates the obligation to an SAR operation; third, NGOs should also commit "not to make communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants."[6] As migrant boats have no navigation lights, dinghies departing from Libya at night can only be spotted in the darkness by means of spotlights aboard rescue vessels (Cusumano 2019).

The first example of cooperation in such an unregulated legal framework dates to 10 May 2017, before the declaration of the Libyan SAR area. The Libyan Coast Guard interrupted a rescue operation by Sea-Watch and returned nearly 500 people from international waters to Libya (Elumami 2017). The Libyan intervention was coordinated by the Italian MRCC, which instructed the NGO vessel to let the Libyan boat take the lead in the SAR operation. This incident marked a turning point, with the Italian MRCC turning from an actor of inclusion to one of exclusion by giving explicit indications to the Libyan Coast Guard. Importantly, this happened at a time when the Italian judiciary had also taken the first steps in the same direction by opening up investigations against SAR NGOs regarding the facilitation of illegal immigration (Cuttitta 2017).

The second event took place in parallel with the first failed attempt for Libya to declare an SAR zone in December 2017. In March 2018, the Proactiva Open Arms boat rescued two vessels in distress despite threats from the Libyan Coast Guard, which, as reported by a Spanish journalist on the boat, approached the vessel and threatened to shoot the NGOs boat's crew if they did not release the migrants. This happened in Libyan international waters, and the Libyan Coast Guard, which was the first to reach the NGO's boat, claimed authority over them. In this case, the NGO claimed that the Italian maritime rescue center did not grant enough time to Libyan authorities.

The unregulated framework for border activities privileges SAR activ-

ities and operations led solely by either the Italian or the Libyan Coast Guard. This does not mean that SAR operations are not carried out by private or NGOs vessels, but it rules out almost entirely the legal commitment related to the detection of a vessel in distress or greatly limits external eyes on such operations. At the same time, involvement is more than evident at the informal level of Italian authorities, which would confirm the jurisdiction and obligations of Italy under international human rights. The sea border is not only the creation of a new territorial fix but a space of deregulation in which the rationales of institutions and agencies representing the two countries coexist and deflect accountability vis-à-vis international norms by means of informal and practical cooperation.

5. Conclusion

This chapter investigated the borderwork emerging in the space of the sea between Italy and Libya. By adopting a diachronic perspective, it focused on cooperation agreements and practices between Italy and Libya since the early 2000s and claims that an exclusive focus on the externalization of migration and border control in Libya-Italy relations can be misleading. The cooperation strategies that have emerged between the two countries since 2011 are not invented but build on preexisting practices and enable their consolidation. The focus on their evolution and historical dimension sheds some light on the borderwork and the rationales behind the current cooperation, stressing that migration control is not the only issue at stake and that the juridical-political indistinction arising from such a scenario allows both parties to escape legal constraints and reinforce cooperation in the long run.

Since the early 2000s, Italian authorities have sought cooperation with Libyan authorities and engaged with EU-sponsored programs of border management with little if any compliance with international legal regimes. The cooperation between Italy and Libya before 2011 was reinforced through soft law and an unregulated framework after 2015 by ruling out judicial obligations. Cooperation at sea created not only a case of shifting borders but a real scenario in which the borders do not overlap with the physical borders and sovereignty concerns but allow for the creation of buffer zones (Meier 2020)—areas that are doomed by juridical-political indistinction in which legal accountability for maritime operations is limited.

As the analysis outlines, the agreements signed between Italy and Libya since the turn of the century follow a coherent pattern of coopera-

tion to counter illegal migration and patrol the sea borders. The analysis outlines that, despite the downfall of the Gaddhafi regime in 2011, the same rationales continue to apply. The 2008 Treaty on Friendship, Partnership and Cooperation ensured the legalization of cooperation on migration control with little room for international legal regime obligations, which was challenged by the *Hirsi* judgment in 2012. Nevertheless, the kind of cooperation and borderwork sketched out in that treaty persisted even after 2011 because of the soft-law instruments that allowed for the circumvention of legal obligations.

On the one hand, the argument of ensuring Libyan sovereignty and developing sea patrols to protect the migrants' lives and secure borders by military actors has given rise to a series of jurisdictional voids around bordering practices. The overlapping of sovereignties through national institutions and agencies' ambiguous practices foster this gray area of competence and responsibility, including patrols and rescues that put sea borders under the microscope without establishing a legal and political definition. On the other hand, this body of soft-law agreements and MoU has proliferated and allowed the two states to delay and, to date, avoid any commitments to protect human rights and adopt a stronger convention that would require time and political will from the actors involved.

In this context, the involvement of Italian authorities at the informal level is more than evident, which appears to confirm the obligations of Italy under international human rights norms. The sea border is not only the creation of a new territorial fix with its own complexities but a space of deregulation and reformulation where the main stakeholders rely on informal and practical cooperation. As a result, the worrisome gray legal zones increase in which accountability and control mechanisms are highly dispersed and difficult to establish.

Notes

1. Article 11-bis, Legislative Decree No. 286/1998.

2. *Hirsi Jamaa and Others v. Italy* [GC] App no. 27765/09 (ECtHR, 23 February 2012).

3. For an unofficial translation of the memorandum, see the Odysseus Network blog, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf. Accessed 24 September 2021.

4. The IMO is the UN's global standard-setting authority for the safety, security, and environmental performance of international shipping. See https://www.imo.org/en/About/Pages/Default.aspx. Accessed 24 September 2021.

5. The chapter was last revised on 4 November 2021.
6. Code of conduct for NGOs undertaking activities in migrants' rescue operations at sea. https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf. Accessed 4 November 2021.

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