

# Punishing solidarity. The crime of solidarity at the land and sea borders of the European Union.

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**Abstract:** This article analyzes how judicial prosecution for “solidarity crimes” has been exercised against different civil society actors. The analysis is based on three cases studied ethnographically: the cases of Cedric Herrou, of Bastien (of the so-called “Three of Briançon”) and of the sea rescue NGO PROEM-AID. Throughout the article, the differentiated application of prosecution is shown in the context of land borders (between France and Italy) and maritime borders (Aegean Sea). It is argued that the practices of judicial prosecution can be analyzed from the paradigm of the spectacle, understanding prosecution as a concrete technique within the broader processes of the “politics of exhaustion”.

**Keywords:** Solidarity crime; borders; humanitarian aid; civil society; criminalization

## 1. Introduction.

The development of a humanitarian logic in the border governance of the European Union (EU) has consolidated in the last ten years. The discourses on the need to “save lives” and the need to protect “vulnerable migrants” has become institutionalized<sup>1</sup>. Interception procedures in the Mediterranean Sea are now counted by rescued persons. Migrants intercepted by the Libyan Coast Guard are counted in European statistics as rescued migrants<sup>2</sup>, even after the UN Security Council's condemnation of Abd Al Rahman Al-Milad, leader of the regional unit of the Zawiya Coast Guard that had been trained by Frontex and funded by the EU, for smuggling persons and sinking boats of migrants in the Mediterranean<sup>3</sup>.

Humanitarian borders<sup>4</sup> have developed rapidly in the EU during the so-

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<sup>1</sup> European Union, A European Agenda On Migration, Com(2015) 240 final. (2015). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485255362454&uri=CELEX:52015DC0240>

<sup>2</sup> European Commission, Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, Brussels, 2018, retrieved from [https://eeas.europa.eu/headquarters/headquarters-homepage\\_fr/31673/Fifth\\_Progress\\_Report\\_on\\_the\\_Partnership\\_Framework\\_with\\_third\\_countries\\_under\\_the\\_European\\_Agenda\\_on\\_Migration](https://eeas.europa.eu/headquarters/headquarters-homepage_fr/31673/Fifth_Progress_Report_on_the_Partnership_Framework_with_third_countries_under_the_European_Agenda_on_Migration).

<sup>3</sup> United Nations Security Council, *Summary L.Yi.026 Abd Al Rahman Al-Milad*, 2018. Retrieved from [www.un.org/securitycouncil/node/34191](http://www.un.org/securitycouncil/node/34191).

<sup>4</sup> W. Walters, *Foucault and Frontiers: Notes on the Birth of the Humanitarian Border*, in U. Bröckling, S. Krasmann, T. Lemke (Eds), *Governmentality: Current Issues and Future Challenges*, New York, 2011, 138-164.

called “refugee crisis”. The political reorganization of the borders as zones of humanitarian governance has consolidated with the construction of new geographies of “emergency”, new forms of knowledge about migratory movements towards the EU, and in close relation with other political logics that operate in the construction of the EU borders, especially the logics of resistance (the “counter conducts” or “undergrounds”<sup>5</sup>) and the prevailing logic of security in European states and supranational institutions. The intimate relationship between the humanitarian and securitarian dimensions in the construction of the EU border regime has crystallized in the current “War on Smuggling” of migrants<sup>6</sup>.

The paradox of humanitarianism as a particular governmental strategy materializes in the concept of “crime of solidarity”, and is embodied by the actors of humanitarian assistance. The “crime of solidarity” is the expression with which civil society has defined the prosecution of humanitarian actors by European governments. The existence of this type of judicial process, in which humanitarian actors are prosecuted by European States, is paradoxical for three reasons: (1) As a general rule, humanitarian practices carried out by civil society are tolerated and even promoted by European governments, who understand them as a social innovation<sup>7</sup>. (2) Activities that have been prosecuted as crimes of solidarity are carried out in the same contexts and in the same time frames of the humanitarian activities tolerated and/or promoted by governments. (3) The crime of solidarity has not been charged exclusively to humanitarian actors or volunteer-based organizations (those representing “volunteer humanitarianism”<sup>8</sup>) but also to bona fide services providers or individuals<sup>9</sup>. In this sense, the configuration of the border landscapes, as a *milieu*<sup>10</sup>, is what determines what type of actors have been prosecuted. Therefore, the present analysis differentiates between the prosecution of humanitarian actors in European territory and the prosecution of actors operating in the Mediterranean.

In this article it is argued that the prosecution of “solidarity crimes” should be analyzed in relation to the forms of spectacularization of migration control<sup>11</sup> in border landscapes, and in relation to other forms of “politics of exhaustion”<sup>12</sup> that jointly impact on migrants and the support networks that have been created in the

<sup>5</sup> L. Queirolo Palmas & F. Rahola, *Underground Europe. Lungo le rotte migrant*, Milano, 2020.

<sup>6</sup> M. Albahari, *From Right to Permission: Asylum, Mediterranean Migrations, and Europe’s War on Smuggling*, in 6 *Journal on Migration and Human Security* 2, 126 (2018).

<sup>7</sup> E. Swyngedouw, *Governance innovation and the citizen: The Janus face of governance-beyond-the-state*, in 42 *Urban Studies*, 11 (2005).

<sup>8</sup> E. Sandri, *‘Volunteer humanitarianism’: Volunteers and humanitarian aid in the jungle refugee camp of Calais*, in 44 *Journal of Ethnic and Migration Studies* 1, 65–80 (2018).

<sup>9</sup> M. Stierl, *A Fleet of Mediterranean Border Humanitarians*, in 50 *Antipode* 3, 704–724 (2018).

<sup>10</sup> M. Foucault, *Security, Territory, Population. Lectures at the Collège de France*, New York, 2009, 20.

<sup>11</sup> N. De Genova, *Spectacles of migrant ‘illegality’: the scene of exclusion, the obscene of inclusion*, in 36 *Ethnic and Racial Studies* 7, 1180–1198 (2013).

<sup>12</sup> L. Ansems de Vries, E. Guild, *Seeking refuge in Europe: spaces of transit and the violence of migration management*, in 0 *Journal of Ethnic and Migration Studies* 0, 1–11 (2018).

European civil society. Solidarity crimes are analyzed as a governance technique in which judicial prosecution is instrumentalized to disrupt the dynamics of social interaction between migrants and civil society; a strategy to block the dynamics of autonomy of migration<sup>13</sup> and acts of citizenship<sup>14</sup>. Thus, these judicial practices are analyzed as part of a broader socio-political process.

The analysis is based on a multi-site ethnographic fieldwork along the European border landscapes carried out between 2015 and 2019. During this fieldwork, the author met humanitarian actors who were being prosecuted for a “crime of solidarity”. A qualitative methodology is applied for the ethnographic analysis. The author starts from an intersubjective description of the prosecution for crimes of solidarity. The presentation of the cases is based on the protagonists’ self-representation of the facts. In presenting each case, this article does not intend to reproduce the discourse of the protagonists, who will be quoted; the description included in the article is the author’s selection of the issues considered fundamental to understand, through the analysis of the concrete cases, the dynamics and strategies of governance that are at the basis of the European border regime. Starting from this analysis, the documentary *Solidarity Crime: the borders of democracy*<sup>15</sup>, currently in the selection process of different international festivals, was born.

This article will present a comparative analysis based on three cases that are part of the author’s ethnography. The first is the case of Cedric Herrou, a French farmer living in the Roya valley, who has become a symbol of social mobilizations in France for the defense of the rights of migrants. The ethnographic data on Cedric's case are based on the fieldwork carried out at the French-Italian border between October and December 2017, where he was interviewed at his farm. Interviews and participant observation were also conducted with other members of the “Roya Citoyenne” organization. Cedric's case will be compared with the second case, which focuses on the proceedings of the so-called “Three of Briançon”, three young activists (Eleonora, Theo and Bastien) of different nationalities (Italian and Swiss) who have been prosecuted for their participation in a demonstration. Bastien, one of the accused, was interviewed in his native Geneva in March 2018. On the other hand, this article will analyze the case of the charges brought upon three members of the organization PROEM-AID, an NGO that carries out maritime rescue in the Mediterranean Sea. This organization was born among the firefighters of the fire station of Mairena del Aljarafe (Seville, Spain). Its proximity to the author’s study centre allowed for a close observation of their prosecution process since the beginning, including through meeting with several

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<sup>13</sup> S. Mezzadra, B. Neilson, *Border as Method, or, the Multiplication of Labour*, Durham and London, 2013.

<sup>14</sup> C. Aradau, J.E.F. Huysmans, V. Squire, *Acts of European Citizenship: A Political Sociology of Mobility*, in 48 *Journal of Common Market Studies* 4, 945–965 (2010).

<sup>15</sup> The documentary was directed by the author, together with the filmmaker Nicolás Braguinsky Cascini. The trailer and several interviews to some of its protagonists are available to watch on the *Youtube* channel of the Project: [www.youtube.com/channel/UCJkP0dKYjE6UoNIKIMa1sLg](http://www.youtube.com/channel/UCJkP0dKYjE6UoNIKIMa1sLg)

of its members and participating in public events promoted by the organization since its early creation.

## 2. Legal bases and governmental modes of implementation.

“Solidarity crime” is a term used to refer to the judicial prosecution of volunteers, activists and members of the civil society who exercise an activity of selfless assistance and are accused of a crime for facilitating the entry, transit or stay of irregular migrants. It has been used by civil society to refer more generally to the repression by security forces of humanitarian activities or other support for groups of migrants. In the working paper “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update”<sup>16</sup>, requested by the LIBE committee and Policy Department for Citizens’ Rights and Constitutional Affairs of the European Parliament, the authors configured the concept of “policing humanitarianism” to refer broadly to government techniques based on “intimidation, harassment and disciplining” of civil society actors involved in assisting migrant groups in the EU. The author chose to maintain a narrow definition of solidarity crime in the present article in order to show the relationship between the judicialization of certain concrete cases and the general government dynamics that are included within the “policing humanitarianism”. It is argued that there is an unexplored heuristic potential in the analysis of the “solidarity crime”, narrowly interpreted as judicial prosecution, and understood as a particular form of spectacularization of the punitive dimension of border regimens and as a technique used in the creation of “politics of exhaustion”, which finds its strength not the judicial process itself nor in its result, but in the immediate spectacle effect.

The legal basis for the criminal prosecution of humanitarian actions is to be found in European law, in particular in the “Facilitators Package”, established by the European Union in 2002, which includes the “Facilitation Directive” (Directive 2002/90 /EC) and the related “Framework Decision 2002/946 /JHA on the Strengthening of the Penal Framework to prevent the facilitation of Unauthorized Entry, Transit and Residence”. In contrast with the definition of the crime of “smuggling” that can be found in Article 6 of the “UN Protocol against the Smuggling of Migrants” (2000), in the “Facilitation Directive” the crime of “intentionally assist[ing] a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens” does not contemplate the element of “financial or other material benefit” as a requirement necessary for the imposition of sanctions (Article 1(1)(a) of the EU Facilitation Directive). The element of “financial gain” is only required for the intentional facilitation of

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<sup>16</sup> S. Carrera, L. Vosyliute, J. Allsopp, G. Sanchez, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*. Retrieved from [www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf).

residence of an irregular migrant (Article 1(1)(b) of the EU Facilitation Directive). Nor the EU Directive provides for the exceptions to avoid the criminalization of migrants themselves, including the exception for people helping their relatives in an irregular situation.

However, in relation to the conduct described in Article 1(1)(a), the Facilitation Directive provides member States with the discretionary possibility to exclude from prosecution the individuals helping the entry or transit of migrants “where the aim of the behaviour is to provide humanitarian assistance to the person concerned” (Article 1(2) of the EU Facilitation Directive). Nevertheless, most of the EU States have not included this exemption in their domestic laws: “Legislation in 26 EU Member States does not require financial gain or profit for it to be a punishable offence”<sup>17</sup>. Prosecutions based on the Facilitation Directive have developed in very different ways across EU member States. Even among the countries that have subsequently included clauses exempting humanitarian actors from prosecution (the so-called “humanitarian clause”), in 2018 “out of seven EU Member States that have exempted humanitarian actors, prosecutions of CSAs were reported in at least five of them – Belgium, Greece, Italy, Malta and the UK”<sup>18</sup>.

The configuration of the Facilitation Directive was based on the humanitarian ideal of “protecting the vulnerable”; in the construction of the European border regime the Facilitation Directive has become a cornerstone through which to impose criminal sanctions on civil society actors. The instrumentalisation of the Facilitation Directive is based both on the text of the law (and its literal interpretation) as well as on other types of situational choices. The fact that even in cases where the humanitarian clause has been transposed, this Directive has been used as basis to prosecute civil society actors and organisations, illustrates the situationally and discretion with which it has been instrumentalised by EU member States.

The application of the Facilitation Directive is related to the spectacularisation of the prosecution of civil society actors, although other non-judicial techniques have been preminent in the control and expulsion of these actors. Judicial prosecution has been used only in particular cases, as a spectacle on the criminality of certain civil society actors, and as part of a broader strategy. Through this spectacular representation the main techniques of control, which are non-judicial, were legitimated.

The prosecution of civil society actors for “solidarity crime” is an outstanding technique within the application of the “politics of exhaustions”. Judicial proceedings cause a significant burden to be born both by the prosecuted individuals and by the civil society movements that work with them and/or

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<sup>17</sup> FRA, E. U. A. for F.R., *Criminalisation of migrants in an irregular situation and of persons engaging with them*, Vienna, 2016, 9. Retrieved from <https://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

<sup>18</sup> S. Carrera, L. Vosyliute, J. Allsopp, G. Sanchez, *op.cit.*, 31.

support them before and during the process. In certain cases (such as that of C. Herrou), the solidarity of the civil society for the accused also involves an economic support to cover the costs of the defence, and all the expenses related to the long legal and administrative processes. The wear and tear are physical, social and symbolic. These processes have a considerable emotional impact on the accused as well as on the organizations to which they belong: the inevitable alteration of the associative practices to support the proceedings, the rupture of the interactions with the migrant community, the need to fight against the social appreciation of criminality that is imposed on them in a spectacular way, are namely elements that can lead to the exhaustion sought with this technique.

In this sense, it is interesting to link these prosecution practices with the development of what J. Stumpf<sup>19</sup> called *crimmigration*, the “fusion” of the legal systems concerning immigration and criminal law. The author wanted to show how laws regulating the government of migration have increasingly incorporated penalties, such as detention and deportation: the “violations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than ever before”<sup>20</sup> (2006: 382). The prosecution of the crime of solidarity, as a common practice at European level, can be analyzed in relation to the expansion of these dynamics.

### **3. The solidarity crime in the construction of land borders: Cedric Herrou and the Three of Briançon.**

Cédric Herrou is a French farmer living in the Roya Valley, in the municipality of Breil-sur-Roya. It was in this municipality that Cédric, together with several friends, reactivated the “Roya Citoyenne” Association and then founded the “Collectif Roya Solidaire”, in order to create an entity that would bring together all citizens who wanted to participate in one way or another in helping and collaborating with migrant groups. Since 2015, this municipality had been particularly affected by the re-establishment of border controls between France and Italy: the quiet valley of the “Alpes Maritimes” became a central node in the route of irregular migrants. The re-establishment of border controls was justified on the need to carry out anti-terrorist security controls, a position that consolidated in November 2015 after the attacks in Paris and the declaration of the “État d'urgence”. However, the main activity carried out by the police forces and the army troops deployed to the border between France and Italy was migration control.

This process had a very recent history. The border with Ventimiglia, the nearest Italian city to the border, had already been closed in 2011 to contain migrants exiled from the conflicts known as “Arab Springs”. This had important

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<sup>19</sup> J.P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *American University Law Review* 2, 367-419 (2006).

<sup>20</sup> *Ivi*, 382.



consequences at the European level: S. Hess & B. Kasperek<sup>21</sup> points out that the re-establishment of border controls within the Schengen area by France on its border with Ventimiglia was the trigger for a political process that would eventually result in the modification of the Schengen Border Code.

In early 2016 Cédric met a family walking along the road between Ventimiglia and Breil-sur-Roya, took them home and accompanied them to the train station a few days later. On their journey to Nice, the family was arrested by the French authorities and deported to Italy; it is the usual procedure of the French authorities for migrants in an irregular situation who are detained on trains and stations between Italy and France, as far along the border as Marseilles. It was then when Cédric began the activity that would make him famous among migrants' communities, among the French authorities and later the international community. When Cédric found out what had happened, he decided to drive to Ventimiglia, pick up the family who had just been deported and bring them home. From the beginning of 2016 to the end of October 2016, Cédric helped families, women (alone or with their children), and minors to cross the border. Periodically he went to the "Sant'Antonio delle Gianchette" church in Ventimiglia, which served as an improvised reception centre on the initiative of the local parish priest. Little by little, as the reception practice became known among the groups of migrants, they began to autonomously reach Cédric's house.

Cédric and the group of citizens from the Roya Valley who worked with him sought ways to help the migrants they received to apply for asylum in France. They first went to the authorities, sent correspondence to the prefecture of Nice to request an appointment for the asylum seekers hosted. The standard practice of the government was the detention and deportation of irregularized migrants from France to Italy, without allowing them to apply for asylum or taking into account reasons of vulnerability such as being an unaccompanied minor. Amnesty International France submitted a report gathering testimonies and evidence on these practices<sup>22</sup> as well as other organizations like Anafé<sup>23</sup>. To address this violation of the rights of migrants, Cédric and his colleagues devised a political action with an Eritrean family they had hosted in Cédric's house. They would go to Nice, having informed by email the authorities of their identity and that they were going to seek asylum. They knew that they would be detained, and they knew that they would be deported to Italy. So it was. Cédric picked them up again in Ventimiglia and brought them back to his house. To Cedric this is a crucial

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<sup>21</sup> S. Hess, B. Kasperek, *De- and Restabilising Schengen*, in *The European Border Regime After the Summer of Migration. Cuadernos Europeos de Deusto* 56, 47–78 (2017).

<sup>22</sup> Amnesty International, *Des controles aux confins du droit. Violations des droits humains à la frontière avec l'Italie*, 2017, retrieved from <https://www.amnesty.fr/refugies-et-migrants/actualites/frontiere-franco-italienne-des-controles-aux-frontieres>.

<sup>23</sup> Association Nationale d'Assistance aux Frontières pour les Étrangers (Anafé), *Persona Non Grata - Conséquences des politiques sécuritaires et migratoires à la frontière franco-italienne*, Paris, 2009, retrieved from [https://drive.google.com/file/d/15HEFqA01\\_aSkKgw05g\\_vfrcP1SpmDAtV/view](https://drive.google.com/file/d/15HEFqA01_aSkKgw05g_vfrcP1SpmDAtV/view).

moment, because he decided “to help migrants in an irregular situation because of their irregular situation, to do things that can be illegal because it is important to do it”.

At the same time, legal proceedings were initiated against the prefect of the Maritime Alps for violation of the right to asylum. The court condemned the prefect for a “serious violation” on the fundamental right to asylum<sup>24</sup>. It was the second time in less than six months that Cédric and his group had obtained a conviction against the prefect Georges-François Leclerc for the same reasons, being the first in April 2017<sup>25</sup>. However, this second occasion had much more media coverage, because of the indignation provoked in part of the society by the reiterated violations of law in the government dynamics. As Cédric points out:

*“We didn't do it to prove anything; we did it to help the people. But by helping those people, we have demonstrated many things. We have shown that the (French) State can use the police and give them illegal orders. We have shown that borders cannot close; perhaps they can be controlled but cannot be closed. And unfortunately we have shown that democracy in France is limited.”*

From this moment on, police forces and military forces were established in the Roya Valley, and people who participated in any activity supporting migrant associations were criminalized<sup>26</sup>. The judicial prosecution against Cédric intensified. He had already been detained on several occasions and subsequently released, but in August 2017 the Appeal Court confirmed the conviction of the first instance. In July 2017, two weeks before this sentence, during a police raid in Canne, Cédric had been arrested with two hundred migrants while he was accompanying them by train to request asylum. A huge media spectacle followed, focusing on Cédric's arrest and prosecution.

The spectacular arrest and prosecution of Cédric Herrou was a message to all groups involved in the assistance of migrant groups. However, it did not bring about a significant change in the dynamics of the border regime. The fundamental objective was to show the criminality of Cédric's actions, intimidate other citizens and break social dynamics of self-organization in defence of the fundamental rights of migrants.

As M. Cervera-Marzal points out, the French State, through the police forces, is in direct contact with thousands of citizens who are involved in actions of support (humanitarian and other) to migrant communities<sup>27</sup>. And yet the State

<sup>24</sup> R. Lecadre, *Le préfet des Alpes-Maritimes de nouveau condamné pour violation du droit d'asile*, in *Libération*, 2017, retrieved from [https://www.liberation.fr/france/2017/09/04/le-prefet-des-alpes-maritimes-de-nouveau-condamne-pour-violation-du-droit-d-asile\\_1594111](https://www.liberation.fr/france/2017/09/04/le-prefet-des-alpes-maritimes-de-nouveau-condamne-pour-violation-du-droit-d-asile_1594111).

<sup>25</sup> L. Fessard, *Le préfet des Alpes-Maritimes condamné pour «atteinte grave au droit d'asile»*, in *Mediapart*, 2017, from <https://www.mediapart.fr/journal/france/050417/le-prefet-des-alpes-maritimes-condamne-pour-atteinte-grave-au-droit-d-asile?onglet=full>.

<sup>26</sup> L. Giliberti, *La criminalizzazione della solidarietà ai migranti in Val Roja: note dal campo*, in *Mondi Migranti* 3, 161–181 (2018).

<sup>27</sup> M. Cervera-Marzal, «Cédric Herrou a été condamné plus pour la visibilité de ses idées que pour l'illégalité de son action», in *Le Monde Tribune*, 2017, retrieved from [https://www.lemonde.fr/idees/article/2017/08/10/cedric-herrou-a-ete-condamne-pour-la-visibilite-de-ses-idees-plus-que-pour-l-illegalite-de-son-action\\_5170926\\_3232.html#8fc38olIMXyzKeA2.99](https://www.lemonde.fr/idees/article/2017/08/10/cedric-herrou-a-ete-condamne-pour-la-visibilite-de-ses-idees-plus-que-pour-l-illegalite-de-son-action_5170926_3232.html#8fc38olIMXyzKeA2.99).



has only exceptionally prosecuted volunteers or activists. The paradigm of spectacularization is analytically useful to understand this exceptional use of prosecution of solidarity crimes within the dynamics of the border regime. Following De Genova the spectacularity of border control has a paramount importance in the socio-cognitive realm since it makes self-evident a social distinction that is purely artificial, solely legal<sup>28</sup>. The demonstration by Cédric and his colleagues on the violation of laws and fundamental rights by the State posed a threat to the border regime. It was a disruption of the social imagination of reality<sup>29</sup>, and it endangered the naturalization of the processes of differential inclusion and exclusion. Judicial prosecution is a response to this threat, that imposes the stigma of criminality on the members of the civil society who mobilize in defence of migrants. This is self-evident in the case of its most prominent figures such as Cédric Herrou.

This is not a lineal process, but rather a struggle for the sense of legality and political legitimacy. This struggle moved into the legal sphere when the Constitutional Council<sup>30</sup> pronounced itself against the crime of solidarity in its decision n° 2018-717/718 QPC of 6 July 2018. In its decision the CC held that no humanitarian activity could be considered a crime on the basis of the constitutional principle of solidarity, however only applicable to persons present on French territory. Aiding to entry foreigners in an irregular situation was therefore still punishable. This judgment is ambivalent. On the one hand, it strengthens the position of humanitarian organisations operating within France. On the other hand, it legitimises an exclusionary border regime by stating that fraternity is not applicable as a principle to the aid of those “on the other side”. The core of selective humanitarianism of European humanitarian borders has not been hindered by such decision, which accentuates the spectacle of exclusion at the borders.

The comparison with the case of the “Trois de Briançon” (Three of Briançon) is relevant to our analysis because, although very different in factual term, it is a case with many conceptual similarities. Bastien is one of the first three young people prosecuted in the trial that was initially known as the accusation of the “3 de Briançon”, after the “3 + 4 de Briançon” and so on, as the French government progressively increased the number of people prosecuted for the events of April 22, 2018. Unlike Cédric, Bastien was a young man who was only temporarily on the Franco-Italian border. He had gone with his friend Theo from his native Switzerland, to take part in conferences and debates on the solidarity movements originated throughout history in the cross-border region of the Alpes.

On Saturday, April 21, while these conferences were taking place, a French xenophobic group called “Génération Identitaire” burst into the region to spectacularly close and fence the border line between France and Italy. They appeared with a helicopter; unfurled a giant banner on the slope of the mountain

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<sup>28</sup> N. De Genova, *Spectacles of migrant ‘illegality’: the scene of exclusion, the obscene of inclusion*, in *36 Ethnic and Racial Studies* 7, 1180–1198 (2013).

<sup>29</sup> M. Godelier, *The mental and the material: thought economy and society*, London 1986.

<sup>30</sup> Conseil Constitutionnel, déc. n. 2018-717/718 QPC du 6 juillet 2018.

to take aerial photos that were broadcasted on social media; installed a fence with a plastic net to take further aerial images on the mountain “Col de l'Échelle”; spent the day and left. The next day, the people participating in the forum, including Bastien, spontaneously decided to suspend the original programming and hold a demonstration. It was a symbolic response, for Bastien a solidarity response, to show the support of citizens and to oppose exclusion and borders. During the course of the demonstration, some migrants joined in. At the end of the demonstration in Briançon, on the other side of the border, Bastien, Theo and Eleonora were stopped by the police while returning for their car and were held in police custody for the following 36 hours. They were then transferred to the “Baumettes” prison in Marseille, where they spent over a week in pre-trial detention.

*“This march was born to show solidarity, and we realised that the repression we endured was a political response of the State, to show us that they ‘cannot allow this to happen’, and to repress as much as possible these movements of solidarity, so that they stop existing ... to frighten the people involved, those who engage in demonstrations.”* (Bastien)

At the end of May 2018 they had the first hearing of their proceeding, which was limited to an identification of the accused and the presentation of the charges by the prosecutor: they were accused of “aiding the entry of migrants in an irregular situation in an organized gang” for which the maximum penalty was 10 years in prison and a €750,000 fine. On 13 December 2018, the Court of Gap sentenced them guilty. Bastien’s sentence was the lowest, six months of suspended prison sentence as he had no criminal record; two among the other defendants were sentenced to 12 months in prison, and were deprived of their liberty for 4 months<sup>31</sup>.

The judicial process created a precedent that hindered the relationship and coordination of networks among civil society entities from different places and European countries. The nucleus of the solidarity movements of Briançon in France is composed of small groups of inhabitants of these rural areas, as well as of the neighbouring municipalities in Italy such as Bardonecchia; the same applies to the movements of the Roya valley where Cédric Herrou lives. Creating an imaginary that demobilises the support of other civil society groups is part of the politics of exhaustion. Moments of collective encounter such as those that gave rise to the demonstration, have great potential for the construction, articulation and revitalisation of links between the different networks of civil society. The spectacular nature of judicial prosecution distances many potential participants from these meetings and, above all, from the most innovative and powerful political actions.

The border governance is based on a complex arithmetic between the exhaustion of certain networks of civil society actors, the tolerance towards other

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<sup>31</sup> H. Lucas, *Condamnation des “sept de Briançon”*: “Nous continuerons à résister tant qu’il y aura des frontières qui tuent”, in *Libération*, 2018, retrieved from [https://www.liberation.fr/france/2018/12/13/condamnation-des-sept-de-briancon-nous-continuerons-a-resister-tant-qu-il-y-aura-des-frontieres-qui-\\_1697724](https://www.liberation.fr/france/2018/12/13/condamnation-des-sept-de-briancon-nous-continuerons-a-resister-tant-qu-il-y-aura-des-frontieres-qui-_1697724).

types of humanitarian actors (such as Catholic organizations in Ventimiglia), and the promotion of other actors (such as the Red Cross on both sides of the border). In the configuration of the milieu, the securitarian dynamics of the State sought support from the humanitarian dynamics that were mainly exercised through non-state organizations, to whom the State demanded collaboration. For years, at least since 2011, the border regime between France and Italy and the migration governance has endured these tensions thanks to the work of humanitarian organisations of all kinds (voluntary, professional and religious). It is only due to the daily activities of the humanitarian organisations that these two central EU States and their politicians have been able to maintain their humanitarian discourse on migration governance and represent themselves as responsible actors, overwhelmed by the “crisis” situation. Even when ad hoc legal provisions were created to criminalize humanitarian assistance, such as the ordinance of the local government of Ventimiglia prohibiting food distributions to migrants in public spaces<sup>32</sup>, these were not always applied and some humanitarian actors were tolerated. In this milieu, the prosecution for solidarity crimes has been intensified: *“If we look a Little at the jurisprudence of the past 10 years, we see that we have passed from simple fines to a few months of suspended prison sentences and then we have been the first to have an unconditional imprisonment sentence, preventive it’s true, but unconditional”* (Bastien).

#### **4. The solidarity crime in the construction of maritime borders: the fire-fighters of PROEM-AID.**

As its co-founder José Antonio Reina explains, the NGO PROEM-AID (Professional Emergency Aid) was born as a consequence of the spectacle, *“from a stimulus prompted by the media, from a visual stimulus. In 2015 you saw every day refugees suffering an ordeal”*. The photo of Aylan Kurdi, who was Onio’s son’s age, was something he will always remember. At the end of 2015, in the fire station of Mairena del Aljarafe (Seville), three fire-fighters decided to spend their holidays and days off work to go to the Greek islands as a rescue team and founded PROEM-AID. At the end of 2015 they had already a presence in Lesbos. The project which initially aimed at a single three-week mission, ended up involving more than 30 missions that lasted until the end of August 2016 and during which “the fire-fighters” (as they were known on the island and in Spain) have assisted 50,000 migrants arriving in Lesbos and have rescued 1,000 people shipwrecked in the 14-21 km separating the Turkish coast from the Greek island. However, when PROEM-AID started its activity in Lesbos in November 2015, the representation of arriving refugees was already transforming. As several authors point out, the initial welcoming speech quickly became a discourse of suspicion marked by the

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<sup>32</sup> J.P. Aris Escarcena, *La paradoja del taxista: Ventimiglia como frontera selectiva*, in *Mondi migranti* 2, 99–114, (2018).

prominence of the securitarian concern<sup>33</sup>; something that even affected the iconic figure of Aylan Kurdi<sup>34</sup>.

On 15 October 2015, the EU established its strategy of action together with Turkey to stop the arrival of migrants in Greece by blocking their departure. The EU-Turkey Joint Action Plan<sup>35</sup> was the beginning of a joint policy that involved the replacement of rescue NGOs by police and military forces in search and rescue functions. This substitution was made through the increased presence of Greek and Turkish police force ships, as well as of EU agency Frontex and of NATO military ships. The States and supranational authorities demanded exclusivity in their exercise of humanitarian work in the Aegean Sea, maintaining a double discourse as responsible actors, capable of facing the humanitarian consequences of the shipwrecks<sup>36</sup> and at the same time addressing the security challenges that migratory movements imply, due to their potential links with criminal networks<sup>37</sup>. This model of border regime, in which Frontex and NATO present themselves as the new actors in charge of humanitarian functions while maintaining their fundamental security objective, was born with the Joint Operation Poseidon (Frontex) and the participation of the Standing NATO Maritime Group 2 (SNMG2) in the Aegean area<sup>38</sup>. This model has become a reference and similar policies have been applied both in the Central Mediterranean<sup>39</sup> and in Central Europe, in the migration control projects of the Visegrad Four (V4) Member States<sup>40</sup>.

However, the process of militarization and securitization of the border regime in the Aegean did not lead to a voluntary withdrawal of NGOs and civil society organizations that had travelled to the Greek islands. Onio points out that:

<sup>33</sup> L. Chouliaraki, *Symbolic bordering: The self-representation of migrants and refugees in digital news*, in 15 *Popular Communication* 2, 78–94 (2017); B. Vollmer, e S. Karakayali, *The Volatility of the Discourse on Refugees in Germany*, in 16 *Journal of Immigrant & Refugee Studies* 1–2, 118–139 (2018).

<sup>34</sup> N. De Genova, *The “migrant crisis” as racial crisis: do Black Lives Matter in Europe?*, in 41 *Ethnic and Racial Studies* 10, 1765–1782 (2018).

<sup>35</sup> European Union, *EU-Turkey joint action plan*, 2015. Retrieved from [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_es.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_es.htm)

<sup>36</sup> Frontex- Focus: *The role of Frontex in Search and Rescue*, 2016. Retrieved from <https://frontex.europa.eu/media-centre/focus/the-role-of-frontex-in-search-and-rescue-EQYKeH>; NATO -Topic: *Assistance for the refugee and migrant crisis in the Aegean Sea*. Retrieved from [https://www.nato.int/cps/en/natohq/topics\\_128746.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/topics_128746.htm?selectedLocale=en).

<sup>37</sup> Frontex-Focus: *Joint Operation Poseidon (Greece)*, 2016. Retrieved March 18, 2019, from <https://frontex.europa.eu/media-centre/focus/joint-operation-poseidon-greece-3ImFxdNATO>

NATO - News: *NATO Defence Ministers Agree on NATO support to assist with the Refugee and Migrant Crisis*, 2016. Retrieved from [https://www.nato.int/cps/en/natohq/news\\_127981.htm](https://www.nato.int/cps/en/natohq/news_127981.htm)

<sup>38</sup> D. Ghezlbash, V. Moreno-Lax, V., N. Klein, B. Opeskin, *Securitization of Search and Rescue at sea: the response to boat migration in the Mediterranean and offshore Australia*, in 67 *International and Comparative Law Quarterly* 2, 315–351 (2018).

<sup>39</sup> NATO – Topic, *Operation Sea Guardian*. Retrieved from [https://www.nato.int/cps/en/natohq/topics\\_136233.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/topics_136233.htm?selectedLocale=en)

<sup>40</sup> B. Nemeth, *Militarisation of cooperation against mass migration – the Central European Defence Cooperation (CEDC)*, in *Defense and Security Analysis* 1, 1–19 (2018).

“so much expectation had been generated, so many consciences had been shaken up that hundreds of people moved to help. The only way they could stop the arrival of volunteers was by increasing police presence and control. The searches, the identification of people at every moment, along with the arrest of colleagues were measures to try to have fewer volunteers in the Greek islands.”

In January 2016, three members of PROEM-AID (Manuel, Julio and José) were arrested by the Greek authorities after having gone out in search of a ship that they never found. They were accused of “attempted human trafficking” and possession of weapons (the cable cutter pliers of their life jackets). They were released on bail and were finally prosecuted a year and a half later. A maximum sentence of 10 years’ imprisonment and a minimum fine of €20,000 were requested against them. They were found innocent and all charges were dropped at a time when there were no longer any rescue NGOs working in the Greek islands.

For M. Tazzioli<sup>41</sup> the Mediterranean, where criminalized actors carry out rescue operations, “has become the site of a sort of naval battle in which the obligation to rescue migrants in distress is no longer the priority”. M. Tazzioli points out that this context of criminalisation of NGOs occurs at the same time as new pacts are signed with Libya and as the role of the Libyan Coast Guard in rescue missions increases; “as a consequence of this agreement” she highlights, “being rescued means being captured and contained”<sup>42</sup>. The argument that the present article wishes to propose is that the criminalization of rescue NGOs is not the result of a change of phase. On the contrary, there are elements that suggest that the criminalization of rescue NGOs is a structural governmental technique used in the current configuration of the border regime in the Mediterranean.

First of all, because the criminalization of rescue operations at sea goes back a long time. The case of Cap Anamur<sup>43</sup> has been one of the most notorious in recent history, but can be compared with many cases of criminalization of fishermen, both Italian (e.g. Mazara del Vallo) and Tunisian<sup>44</sup>.

Secondly, the armed conflict in Libya has been an interlude in which migration control pacts have been disrupted. The humanitarian actors were able to work exclusively during this interval, while the humanitarian/security discourse of the current “War on Smuggling” was consolidated. The construction of the “refugee crisis” established an incentive for the development of rescue activities by NGOs, supported by civil society. In this context, rescue activities by

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<sup>41</sup> M. Tazzioli, *Crimes of solidarity. Migration and containment through rescue*, in 2 *Radical Philosophy* 1, 5 (2018).

<sup>42</sup> See also: V. Moreno-Lax, *The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue-Through-Interdiction/Rescue-Without-Protection’ Paradigm*, 56 *Journal of Common Market Studies* 1, 119–140 (2018).

<sup>43</sup> P. Cuttitta, *Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean*, 23 *Geopolitics* 3, 632–660 (2018); S. Mezzadra, B. Neilson, *op.cit.*

<sup>44</sup> S. Bellezza, T. Calandrino, *Criminalization of Flight and Escape Aid*. In Idem (Eds), *Borderline-Europe*, Hamburg, 2017, 59–66.



NGOs can be analysed as “Social Innovation” practices<sup>45</sup> and understood as a mercantile outsourcing of States’ rescue obligations.

My argumentation and that of M. Tazzioli are close. However, I believe that the analytical approach to this process at humanitarian borders should not be seen as a suppression of the humanitarian dimension and as a rise of militarisation. Arguably, a processual interpretation of the situational co-optation<sup>46</sup> of humanitarian activities carried out by NGOs on behalf of governments is more appropriate. This interpretation allows us to explain the judicial prosecution through the theoretical framework of the politics of exhaustion and spectacularity, emphasizing the symbolic dimension of these processes, seeing their interaction with the other exhaustion practices that ended up expelling civil society from the Greek islands and the Mediterranean.

Thus, the criminalisation of Mediterranean rescue NGOs through the “solidarity crime” has been a spectacular expulsion. It was carried out to represent the rescue, not carried out by the authorities, as a potentially criminal activity or as a practice in collusion with the main culprits of the “migration crisis” and of migrants’ vulnerability in the EU official discourse: the smuggling networks. It is interesting to draw parallels with developments in other contexts, such as the context of the USA-Mexico border, where the authorities began to criminally prosecute humanitarian organisations claiming for themselves the exclusive power to carry out humanitarian actions<sup>47</sup>.

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Little does it matter that the judicial process against the members of PROEM-AID ended with the dismissal of the charges and their acquittal; the spectacle of the judicial prosecution can be considered in itself a political objective and a technique of governance. This is corroborated by the comparison with the historical cases of Cap Anamur and the rescues carried out by the fishermen. In all the cases of judicial prosecution against the Italian and Tunisian fishermen, the courts ended up ruling in their favour and even compensating them for the damages derived from the seizure of their vessels and fishing permits; however, the impact of these spectacles has served as a deterrent for the community of fishermen who saw how to fulfil their rescue obligation at sea could bring them economic ruin and prosecution as criminals. For the rescue NGOs, this spectacle has represented them as suspicious before civil society. The political actors who were against migration could not attack these humanitarian organizations openly without exceeding the limit of political correctness, since humanitarian logic is a structural part of the migratory regime. However, the stigma of criminality has served to question and interrupt their work. The expulsion of NGOs and the resumption of rescue work by European States (through militarised operations

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<sup>45</sup> B. Jessop, F. Moulaert, L. Hulgård, L., A. Hamdouch, *Social innovation research: a new stage in innovation analysis?* In F. Moulaert, D. MacCallum, A. Mehmood, A. Hamdouch (Eds), *The International Handbook on Social Innovation Collective Action, Social Learning and Transdisciplinary Research*, Cheltenham, 2013, 110–130.

<sup>46</sup> W. Walters, *op.cit.*

<sup>47</sup> M.L. Cook, “Humanitarian Aid Is Never a Crime”: *Humanitarianism and Illegality*, in *Migrant Advocacy. Law & Society Review* (2011).

such as EUNAVFOR MED Sophia) is legitimised as a coherent response to the humanitarian demands to “save lives” and the security demands to “combat smuggling and irregular immigration”<sup>48</sup>.

The withdrawal of NGOs that carried out rescue operations in the Mediterranean (for example, the abandonment of the Aquarius by SOS Méditerranée in December 2018) shows how this type of judicial prosecutions, as spectacles, has an exhaustion effect on civil society organisations. In February 2019, when the socialist government of Spain blocked the ProActiva Open Arms NGO boats docked in Barcelona, for the first time in five years there was no NGO ship carrying out rescue work in the central Mediterranean<sup>49</sup>. This was justified by pointing out that the closing of ports in Italy and Malta created a threat to security and forced the government to reconsider its rescue strategy and its position on rescue NGOs.

The operations of rescue NGOs in the Mediterranean did not end because of the judicial proceedings for solidarity crimes; it was not a result of the accusation of aiding the entry of migrants in an irregular situation or of smuggling of migrants. As shown by the observation reports of the European Union Agency for Fundamental Rights<sup>50</sup>, the NGO vessels were released after the first investigation procedures and the crew was found innocent. The NGOs have been expelled through other non-judicial methods of persecution, such as the delay of administrative permits for the ships or their blocking (as in the case of PROEM-AID and ProActiva Open Arms blocked by the socialist government of Spain for national security reasons). This shows that judicial prosecution is not the main technique to achieve governments’ concrete objectives, but rather a symbolic technique whose main value is the spectacularization of criminality. The various European governments could have de facto ended the operations of the NGOs without resorting to judicial prosecution; but this prosecution was necessary as a symbolic act, because it undermined the legitimacy of the NGOs and allowed the persecution of these by other means without suffering a de-legitimization of the humanitarian strategies of the EU and its Member States.

In addition, although EU Member States may have decided to introduce the humanitarian clause in their national legislation to exempt civil society actors and NGOs involved in humanitarian activities from further persecution, a change at the implementation level has never occurred, despite the existence of favourable jurisprudence on the matter. Without a meaningful change, governments have

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<sup>48</sup> European Union. A European Agenda On Migration. Com(2015) 240 final, 2015. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485255362454&uri=CELEX:52015DC0240>

<sup>49</sup> L. Abellán, *La disputa de Fomento con las ONG deja el Mediterráneo central sin barcos de rescate*, in *El País*, 2019. Retrieved from [https://elpais.com/politica/2019/02/02/actualidad/1549133333\\_714516.html](https://elpais.com/politica/2019/02/02/actualidad/1549133333_714516.html)

<sup>50</sup> FRA, E. U. A. for F. R., *Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, 2018. Retrieved from <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>.

maintained recourse to judicial prosecution as a fundamentally symbolic technique.

### 5. Conclusions. Solidarity crime: a spectacle for the exhaustion.

Carrera, Allsopp, & Vosyliūtė have used the concept of “policing the mobility society” to explain how civil society organizations and NGOs who engage in humanitarian practices in relation to migrant communities are placed in situations of suspicion and illegality, “(which) might be implied, not necessarily replicating completely the logic of criminal law and penalties but through a wider set of practices”<sup>51</sup>. The cited authors set out three different modalities: (1) Intimidation and suspicion; (2) Disciplining; and (3) Formal criminalization. Within this latter modality, they include both prosecution and the imposition of fines and other related instruments. The present article focused on prosecution for solidarity crimes, which would be a more particular technique than the one outlined in modality number three. Arguably, this concrete technique has a central symbolic importance in the construction of the spectacle of illegality.

Prosecution has been applied differently in the context of humanitarian land borders (within the EU) and maritime borders (in the Aegean and the Mediterranean in general). The way in which it has been instrumentalised in the different contexts has been determined by its dynamic interaction with other techniques applied in the process of “policing the mobility society” or “politics of exhaustion”, as defined by L. A. de Vries & E. Guild<sup>52</sup>. As M. Stierl<sup>53</sup> says, “through its seemingly benevolent but selective border practices, humanitarianism is extended only to particular subjects within particular zones, enabling Europe to cloak its maritime militarisations with a politics of life”. Prosecution for solidarity crimes has become a fundamental technique to configure humanitarianism as a dominant strategy of the border regime. It has made possible to delegitimize actors who did not embody the selective nature that makes humanitarianism compatible with a migration regime based on the differential exclusion/inclusion of migrants.

The instrumentalization of judicial prosecution for solidarity crimes has been defined by the construction of the specific milieu of these humanitarian borders. They have been applied for their great symbolic load and their capacity to alter the social relations that took place in the border landscapes.

On the border between France and Italy, judicial prosecution has served to refute the discredit that the border regime’s policies had suffered from civil society actors such as Cédric Herrou. As an ad hominem fallacy, the French government has defended itself from accusations of the illegality of its border practices by applying on Cédric the stigma of criminality/illegality through spectacular

<sup>51</sup> S. Carrera, J. Allsopp, L. Vosyliūtė, *Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism*, in 4 *International Journal of Migration and Border Studies* 3, 261 (2018).

<sup>52</sup> L. Ansems de Vries, L., E. Guild, *op.cit.*

<sup>53</sup> M. Stierl, *op.cit.*, 708.

judicial prosecution. On this border, prosecution has also been used to spectacularize the criminality of autonomous forms of civil society organization, whose practices and existence based on networks of solidarity and mutual support posed a threat to the symbolic foundations of the border regime. This is the case of the activists of Brinçon.

Meanwhile, in the Aegean and the Mediterranean in general, judicial prosecution for solidarity crimes against rescue NGOs was carried out as a mechanism for co-opting humanitarian activities. The authorities of the different Member States and the EU have applied judicial prosecution as part of a strategy to delegitimize the activity of NGOs during a concrete historical process. The Mediterranean border regime was reconfigured under the monopoly of State authorities on humanitarian functions, which were included between the objectives of the operations of the military and police forces following the expulsion of NGOs in the Aegean and the Mediterranean. The symbolic stigmatisation was linked to the legitimisation of the regime and the current milieu. It was a concrete technique for the legitimisation of its “Rescue-Through-Interdiction/Rescue-Without-Protection” Paradigm<sup>54</sup> in which being rescued is synonymous with being arrested and returned to countries such as Turkey and Libya<sup>55</sup>, where the right to asylum is denied and human rights are violated.

The “solidarity crime” as a specific device of the dynamics of migration governance and border regimes is of great relevance, because it highlights the paradoxes of the security-humanitarian logic. Its interpretation from the paradigm of spectacle and the analysis of its instrumentalization in specific socio-historical contexts may have the heuristic potential to allow us to delve into the configuration of border regimes as forms of domination and into the interrelation of power strategies used to confront mobility strategies and resistance strategies in the border landscapes.

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<sup>54</sup> V. Moreno-Lax, *op.cit.*

<sup>55</sup> M. Tazzioli, *Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton*, in 4 *Migration Studies* 1, 1–19 (2016).

