

Calling for Compliance. Transnational Advocacy Networks in the Mediterranean Sea. A Case Study on Norm Compliance at Europe's Liquid Borders

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Résumé de l'article

L'article observe les théories de conformité sur les réseaux de plaidoyer transnationaux (en anglais Transnational Advocacy Networks (TAN)) en mer Méditerranée; une région frontalière multinationale largement considérée comme la « frontière la plus meurtrière » au monde. Cette situation a conduit à une considérable « ruée vers la mer » d'organisations qui appartiennent aux TAN ou se définissent comme « humanitaires ». Une partie de la théorie actuelle sur l'impact des réseaux de plaidoyer transnationaux est que l'engagement cohérent et continu des TAN conduit à un engagement accru aux normes et même au respect des normes dans les États dotés d'institutions solides. Cependant, après la mise en oeuvre d'un système de traités bilatéraux (Italie – Libye en 2017, Turquie – Union européenne (UE) en 2016) par l'UE, le nombre de voyageurs atteignant le sol de l'UE a considérablement diminué. En outre, l'évolution des circonstances politiques en Libye et les politiques internes des États membres de l'UE ont contribué à réduire le nombre d'arrivées.

CALLING FOR COMPLIANCE. TRANSNATIONAL ADVOCACY NETWORKS IN THE MEDITERRANEAN SEA

A CASE STUDY ON NORM COMPLIANCE AT EUROPE'S LIQUID BORDERS

*Julia Lindner**

The paper observes compliance theories on transnational advocacy networks in the Mediterranean Sea; a multinational border region being widely considered as the "deadliest border" in the world. This situation has led to a measurable "rush to the sea" of organisations which belong to Transnational Advocacy Networks (TAN) or define themselves as "humanitarians". Part of today's theory on the impact of transnational advocacy networks is that consistent and continuous engagement of TAN leads to increased norm commitment and even norm compliance in states with strong institutions. However, after the implementation of a system of bilateral treaties (2017 Italy - Libya, 2016 Turkey and European Union (EU))¹ by the EU, the number of travellers reaching EU soil has significantly decreased. Additionally, changing political circumstances in Libya and internal policies of EU member states have contributed to lowering the number of arrivals.

L'article observe les théories de conformité sur les réseaux de plaidoyer transnationaux (en anglais Transnational Advocacy Networks (TAN)) en mer Méditerranée; une région frontalière multinationale largement considérée comme la « frontière la plus meurtrière » au monde. Cette situation a conduit à une considérable « ruée vers la mer » d'organisations qui appartiennent aux TAN ou se définissent comme « humanitaires ». Une partie de la théorie actuelle sur l'impact des réseaux de plaidoyer transnationaux est que l'engagement cohérent et continu des TAN conduit à un engagement accru aux normes et même au respect des normes dans les États dotés d'institutions solides. Cependant, après la mise en œuvre d'un système de traités bilatéraux (Italie – Libye en 2017, Turquie – Union européenne (UE) en 2016) par l'UE, le nombre de voyageurs atteignant le sol de l'UE a considérablement diminué. En outre, l'évolution des circonstances politiques en Libye et les politiques internes des États membres de l'UE ont contribué à réduire le nombre d'arrivées.

El artículo observa las teorías sobre el cumplimiento de las redes transnacionales de defensa (en inglés Transnational Advocacy Networks (TAN)) en el Mar Mediterráneo; una región fronteriza multinacional que se considera ampliamente como la "frontera más mortífera" del mundo. Esta situación ha provocado una apreciable "carrera hacia el mar" de las organizaciones que pertenecen a las TAN o que se definen como "humanitarias". Parte de la teoría actual sobre el impacto de las redes transnacionales de defensa de los derechos es que el compromiso constante y continuo de las TAN conduce a un mayor compromiso con las normas e incluso a su cumplimiento en los Estados con instituciones fuertes. Sin embargo, tras la aplicación de un sistema de tratados bilaterales (Italia – Libia en 2017, Turquía – Unión Europea (UE) en 2016) por parte de la UE, el número de viajeros que llegan a suelo de la UE ha disminuido considerablemente. Además, las circunstancias políticas cambiantes en Libia y las políticas internas de los Estados miembros de la UE han contribuido a reducir el número de llegadas.

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¹ *Malta Declaration by the members of the European Council on the external aspects of migration : addressing the Central Mediterranean route*, by Press office - General Secretariat of the Council (2017); *EU-Turkey statement, 18 March 2016*, by Press office - General Secretariat of the Council, Press release 144/16 (Council of the European Union) [*EU-Turkey statement*]; *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, State of Libya and Italian Republic, 2 February 2017, online : <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> [*Libya-Italy cooperation*].

These circumstances question the applicability of constructivist theories, in particular the spiral model, in the Mediterranean case: an extreme amount of actors belonging to global civil society is advocating for norm compliance, but there is only a decreased norm compliance observable. This leads to the paper's research question: Do Transnational Advocacy Networks (TAN) actors contribute to norm compliance regarding the European Union's human rights obligations and international SAR²-obligations in the Mediterranean Sea? Subsequently, is the constructivist spiral model useful for analysing the situation at Europe's southern borders?

The paper observes transnational pressure for human rights of migrants. In the fields of International Migration Law and International Human Rights Law, lawyers intensively debated to what extent states owe individuals access to human rights. In general, states are bound to respect, protect and fulfil human rights if the individual is present within the state's jurisdiction. Only in exceptional cases, states owe the same standards to individuals outside their sovereign sphere, namely, if they established this obligation in the form of a treaty or by effectively controlling an extraterritorial area (*de jure* and *de facto* jurisdiction).³ States are bound to these obligations only if the individual passed a state's jurisdiction, either by entering its territory or in spheres in which a specific norm established jurisdiction⁴ or the state has exercised a sufficient level of control.⁵ This paper looks at the obligation to grant access to human rights for migrants instead of focussing on externalisation mechanisms.

After the introduction (I), the paper focuses on the specialties of the spiral model for the application in democratic regimes.⁶ It analyses the applicable phases of the model, such as the phase of repression and the presence of transnational-advocacy networks in the Mediterranean (II). These networks are pushing for sufficient access to international human rights norms and SAR-obligations — at the very least, a European approach for an end to drownings at the shores of the EU. It analyses the strategies used, the actors involved, and questions the effect that their activities have on norm compliance, before analysing the specialties of the given case and the counter-discourse. For this purpose, the paper looks at the period between 2014 and 2020, as at the beginning of this period, the EU was confronted with record numbers of arrivals and intensive campaigning and public attention on the issue of migrants' human rights.

² SAR refers to operations exercised to search and rescue persons or groups in distress or imminent danger.

³ See e.g. the jurisprudence of the European Court of Human Rights (ECHR) on acts in high seas: *Hirsi Jamaa and Others v Italy* [GC], No 27765/09, [2012] II ECHR 97 [*Hirsi*]; *Medvedyev and Others v France* [GC], No 3394/03 [2010] III ECHR 61 [*Medvedyev*]; also the pending *SS and Others v Italy*, ECHR will address this topic [*SS and Others*].

⁴ See e.g. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 91 [UNCLOS]. It establishes jurisdiction on board of vessels flying under the flag of a state.

⁵ *Medvedyev*, *supra* note 3; *Hirsi*, *supra* note 3; *SS and Others*, *supra* note 3.

⁶ The EU, as a supranational institution, is classified as a democratic regime for the purpose of this paper.

I. The Explanatory Power of the Spiral Model in the Mediterranean Case

The period after 1989 and the end of the twentieth century is often labelled as an era of optimism and euphoria towards the international human rights agenda. First and significant successes had been achieved in this period : the end of the Apartheid regime in South Africa, the fall of the iron curtain marking the end of a more than 40-years lasting war, the first applications of the concept of humanitarian interventions and an almost universal ratification rate of the six major human rights treaties.⁷ One might add the foundation of the European Community in 1993 to this list.

The academic debate has used these examples for an optimistic analysis of how human rights norms are included and implemented in societies and how norms are streamed into the binding set of rules determining states' behaviours. The theory of *The Power of Human Rights*,⁸ published in 1999, is placed centre stage in this paper because it provided the fundament for understanding crucial drivers for human rights compliance based on social constructivism and was updated and sophisticated in 2013 with *The Persistent Power of Human Rights*.⁹

A. The Role of Democratic Regimes in International Human Rights Norm Dynamics - Necessary Adaptations

The spiral model formulates assumptions for the socialisation of norms in the human rights context. The model assumes collective norms and values to master five major steps before real norm commitment, and compliance of the initial norm violating states is observable. After an initial phase of repression and the activation of activist networks (phase 1 : repression), human rights activists and transnational groups are gathering information on rights abuses and are sharing information with other relevant actors and creating a network with international non-governmental and international governmental organisations and states¹⁰ aligned with the international human rights agenda.

Through combined pressure from domestic and non-domestic actors, the norm-violating actor will refuse to comply with these shared norms and values, before making tactical concessions that require only superficial or low-cost expenses but only by strengthening the cause of the transnational advocacy network (phase 3 : tactical concessions). The continuous pressure of the transnational advocacy network leads

⁷ Eric A. Posner, *The Twilight of Human Rights Law* (New-York : Oxford University Press, 2014) at 22.

⁸ Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, *The Power of Human Rights : International Norms and Domestic Changes*, (Cambridge : Cambridge University Press, 1999) [Risse (1999)].

⁹ Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, *The Persistent Power of Human Rights : from commitment to compliance*, (Cambridge : Cambridge University Press, 2013) [Risse (2013)].

¹⁰ Theories on *The Power of Human Rights* use the terms "liberal" or "democratic" or "Western" states, which does not capture the exact meaning. This work avoids this terminology to avoid simplifications and to highlight the term "liberal" states refers to states supporting the mainstreaming of the human rights regime on the international level.

subsequently to norm commitment and, afterwards, a prescriptive fourth phase. International human rights norms reached a prescriptive status (phase 4); human rights treaties have been ratified, the state is committed to these norms and debates on the scope and interpretation of these norms are a legitimate topic for public debate. The final, and most likely hypothetical fifth stage, is that of rule-consistent behaviour.¹¹

This “original” spiral model is based on a tripartite international human rights environment consisting of domestic opposition, international non-governmental human rights organisations and Western powers, on one side, and a norm-violating state, on the other side. The latter is supposed to be mobilised by transnational advocacy networks who gained crucial information on norm violations from domestic opposition groups.¹²

In 2013, Sikkink adapted the 1999 spiral model in consideration of the US and their approach towards torture and ill-treatment.¹³ She observed the weakness of the spiral model concerning rights violations by Western states or democratic regimes due to the lack of combined international pressure by transnational advocacy networks, domestic opposition and Western states. The behaviour of the US included norm-violating actions and alienation of international norms prohibiting torture.

Comparable to the application of the spiral model in authoritarian states are phase 1 and 2, in which repression and non-recognition of human rights also lead to an activation of a transnational advocacy network in more democratic states. The following phases, which include tactical concessions that are followed by a prescriptive status, are dependent on the vulnerability of the norm-violating states, in democratic states, most often moral vulnerability. The creation of a norm confliction accompanied the open alienation from the prohibition of torture. The Bush-administration utilised concerns over security and “anti-terrorism” for introducing a norm conflicting with international human rights norms. Moreover, the applicability of human rights norms, in this case, the prohibition of torture, was denied.¹⁴

These formal legal arguments do not contest the norm itself, but this conflicting security or culturally-based “counter-discourse” results in a decreased power of the contested human rights norms.¹⁵ It serves as an excuse within the legal discourse, as a pacifier for conflicting domestic and transnational opposition and as an instrument for excusing juxtapositions to moral values.

The Persistent Power of Human Rights highlights a particular relation between moral and material vulnerability and the willingness of a democratic state to comply with human rights norms. The more a state is materially or morally vulnerable, the

¹¹ Hans Peter Schmitz, “Transnational activism and political change in Kenya and Uganda” in Thomas Risse (1999), *supra* note 8, 39 at 67.

¹² See e.g., Sieglinde Granzer, “Changing discourse : transnational advocacy networks in Tunisia and Morocco” in Risse (1999), *supra* note 8, 109 at 119.

¹³ Kathryn Sikkink, “The United States and torture” in Risse (2013), *supra* note 9 at 145-63.

¹⁴ *Ibid* at 148.

¹⁵ Thomas Risse & Kathryn Sikkink, “Conclusions” in Risse (2013), *supra* note 9 at 275-95.

higher is the democratic regimes' willingness to comply with human rights norms.¹⁶ This situation causes an almost dialectic theoretic framework in which democratic states are less vulnerable to pressure from opposition members or transnational advocacy networks due to their material power. Moreover, less likely to follow pressure from opposition groups or transnational advocacy networks, although basing their ideological framework on moral concerns. An internal public counter-discourse that supports non-compliance, eventually, serves to strengthen the democratic regimes' practices.¹⁷

B. The Explanatory Power of the Spiral Model in the Mediterranean Case

The 1999 model only described the behaviour of liberal states as antagonists in the logic of the spiral model to norm-violating repressive regimes. However, several examples showed there are more perpetrators of human rights abuses than authoritarian regimes. One example is the vast migratory movements in the last decade that have questioned the willingness of EU member states to expand legal obligations and how strongly European states feel committed to existing human rights obligations. So, how does the spiral model apply in the Mediterranean Case?

The 2013 update of the spiral model assumes five scope conditions for determining the potential power of transnational pressure: the regime type (democratic or autocratic), the level of statehood (limited vs consolidated), the level of centralisation, material vulnerability and social vulnerability.¹⁸ Applying a minimalist definition of democracy, namely the existence of elective procedures and mechanisms ensuring participation of citizens,¹⁹ this paper considers that all EU member states are democratic regimes, also the EU itself, and reach a consolidated level of statehood. For these constellations, the spiral model assumes the particular effectiveness of naming and shaming as well as strategic litigation.²⁰

A decisive factor in the Mediterranean case is the level of centralisation. In theory, the behaviour of centralised structures eases monitoring of human rights compliance. In turn, decentralised decision-making structures and distant links between actors who are the ones committing to human rights norms and those who are obliged to comply and apply these norms have a negative impact on compliance.²¹ Further, this paper assumes decentralisation also harms the effectiveness of naming and shaming strategies and persuasion success of transnational pressure, since it also offers options for actors to hide behind other actors by pointing at each other's responsibilities.

¹⁶ *Ibid* at 288.

¹⁷ *Ibid* at 290.

¹⁸ Thomas Risse & Stephen C. Ropp, "Introduction and overview" in Risse (2013), *supra* note 9, 3 at 16–20.

¹⁹ *Ibid* at 17.

²⁰ *Ibid* at 18.

²¹ *Ibid* at 19.

Relevant actors in our case are the EU member states and the EU as a supranational organisation. Although the *Lisbon Treaty*,²² that entered into force in 2009, attributed significant competencies in the field of asylum law and migration law to the EU, the organisational structures of the EU are decentralised due to the remaining sovereign character of the EU member states. Concerning this particular scope condition, this paper, thus, assumes that the variety of actors, namely member states with diverging interests, minimises the impact of transnational pressure.

Material and social vulnerability are the two last scope conditions. Whereas the material vulnerability of the EU and its member states are low, due to the economic and political leverage of the organisation, the social vulnerability of each member state is high. An actor is socially vulnerable if the actor is concerned about its standing, in more realistic terms, reputation or identity in a specific group that bases its definition on specific values.²³ Whereas, in the beginning, European states formed the European Coal and Steel Community, the European Economic Area and the *Schengen Agreement*²⁴ to support wealth and economic growth, the adoption of the *Lisbon Treaty* and the *Charter of Fundamental Rights of the European Union*²⁵ underlines the shared values of the EU's member states. All of the EU's states are parties to the 1951 *Geneva Convention relating to the Status of Refugees*²⁶ and bound to a minimum of 12²⁷ ratified International Human Rights Treaties. Additionally, the member states are bound to the *European Convention of Human Rights* with the European Court of Human Rights in Strasbourg as a strong review body.

A strong commitment to a variety of human rights norms is, thus, observable and argue for a high social vulnerability. However, the Mediterranean case provides an example that documents the denial of human rights norms by a group of socially vulnerable states. This paper argues that since all members of the relevant group of states, namely states of the EU, are accused of denying human rights to migrants, their social vulnerability decreases. The EU member states are, thus, not incentivised to compete for their standing in their group.

The situation in the Mediterranean, a common border for states along Southern Europe, Asian and North African states, especially, in the years after 2014, sparked an extraordinary "rush of humanitarians" to Europe's liquid borders. Intensive and broad campaigns of major human rights organisations, domestic human rights networks from countries of arrival and of all the EU, travellers themselves and international governmental organisations create immense transnational pressure and, thus, a basis for

²² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, C 306/01, 12 December 2007 (entered into force 1 December 2009) [*Lisbon Treaty*].

²³ Risse & Ropp, *supra* note 18 at 21.

²⁴ *Schengen Agreement*, 14 June 1985 (entered into force 26 March 1995).

²⁵ *Charter of Fundamental Rights of the European Union*, C 326/391, 26 October 2012 (entered into force 1 December 2009).

²⁶ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

²⁷ Latvia and the Republic of Ireland are bound to 12 International Human Rights Treaties each. France, Spain, Portugal and Italy have ratified 17 of the 18 major International Human Rights Treaties.

testing the spiral model when looking at human rights norm compliance in a decentralised, consolidated democratic regime.

C. Phase One: Repression and Activation of the Network - The Mediterranean Becomes a Synonym for Rights Abuse

Phase one of the spiral model consists of repression and the activation of the transnational advocacy network. Cases before the European Court of Human Rights (ECHR) document that *non-entrée* practices of states evolved already before the *European Agenda on Migration*²⁸(EAM) as a reaction to the “refugee crisis”. This paper focuses on 2014 - February 2020, as starting from 2014, unprecedented numbers of individuals arrived at the European continent by boat. 221,721 migrants arrived in October 2015 alone.²⁹ Until 28 February 2020, 19,239 persons attempting to reach EU territory disappeared or died since the beginning of 2014.³⁰ The Mediterranean Sea today is often considered to be the “deadliest border”³¹ in the world.

1. PHASE ONE : DENIAL

The increasing number of arrivals led to the adoption of the *European Agenda on Migration*.³² The common EU response to the increasing number of migrants on a journey to the EU is the 2015 *European Agenda on Migration* as a comprehensive policy framework for migration-related issues. The key aspects of this strategy are an increased financial basis for FRONTEX (the common EU's border agency), a refined strategy for anti-smuggling-network measures, a relocation and redistribution scheme within the EU, the application of the United Nations High Commissioner for Refugees' (UNHCR) resettlement scheme and perhaps most importantly the introduction of measures for the suppression of upstream migration through Regional Development and Protection Programs, multi-purpose centres based in Niger and the establishment of "Hot Spots"³³ in third countries of departure.³⁴

²⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration* (Brussels, 13 May 2015), online: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf> [EAM].

²⁹ UNHCR, Operational Portal Refugee Situations, *Mediterranean Situation*, online: <<https://data2.unhcr.org/en/situations/mediterranean>>.

³⁰ *Ibid.*

³¹ International Organization for Migration, *Four Decades of Cross Mediterranean Undocumented Migration to Europe : A Review of the Evidence*, (2017) online : <<https://publications.iom.int/books/four-decades-cross-mediterranean-undocumented-migration-europe-review-evidence>>.

³² EAM, *supra* note 28.

³³ The EU Commission's "Hot Spot"-approach aims at channeling asylum claims of incoming migrants at the external boarder of the EU by cooperating with frontline states for the identification and registration of migrants, see EAM, *supra* note 28 at 6.

³⁴ *Ibid.*

This migration policy focuses on the prevention of the exploitation of migrants by targeting smuggling networks, criminalising the employment of persons who entered the EU without permission and strengthening cooperation for return operations.³⁵ The measures are aimed at minimising, directing and stopping migratory flows as close as possible to the country of departure.

This policy leads to a significant drop of the numbers of migrants arriving at the EU by boat crossing the Mediterranean and also to a decrease of the total number of deaths in the region, namely, from 5,096 dead and missing in 2016 to 1,335 dead and missing in 2019.³⁶ However, as a consequence of these strategies, the mortality rate for routes through the Mediterranean Sea increased, from 1,96% in 2017 to 3,63% in 2019.³⁷

In this regard, the right to life, the right to family, the right to claim asylum, the prohibition of collective repulsion and the *non-refoulement* principle among other rights are possibly affected. Whereas the violation of these rights themselves are undisputed, the legal discussion concentrates on whether European Council states are bound to guarantee these rights outside of their jurisdiction, in other words, whether the individuals approaching the EU already have access to the enumerated human rights above from outside European territory.

2. PHASE ONE: ACTIVATION OF THE NETWORK - THE RUSH OF HUMANITARIANS TO EUROPE'S SHORES

The situation in the Mediterranean Sea sparked immense engagement of actors calling for compliance with SAR-obligations and demanded the creation of safe escape ways arguing with International Refugee Law, the principle of *non-refoulement* and international human rights obligations. Major international human rights organisations collected information on the scale and frequency of pushback operations at sea, refoulement, non-compliance with international SAR-obligations, the removal to other territories, in order to deny the exercise of the right to claim asylum.³⁸ Methods used included campaigns, reports, protests, donation campaigns and extensive practical interventions and search and rescue missions (SAR-operations or SAR-missions).

Various NGOs, such as Save the Children, *Médecins Sans Frontières*, ProActiva Open Arms, *Jugend Rettet* or Sea-Watch, applied rescue ships along typical escape routes, patrolling in the Western, Central and Eastern Mediterranean Sea. Twenty-four vessels of various organisations were actively engaged in SAR-missions between 2016

³⁵ *Ibid.*

³⁶ UNHCR, Operational Portal, Refugee Situation, *Europe - Dead and Missing at Sea*, online : <<https://data2.unhcr.org/en/dataviz/95>> (updated as of 5 December 2020).

³⁷ UNHCR, *Desperate Journeys, Refugees and migrants arriving in Europe and at Europe's borders, January - December 2018* at 12.

³⁸ Human Rights Watch (Organization), *World report 2015 : events of 2014* (2015); Amnesty International, *Amnesty International Report 2015-16 : The State of the World's Human Rights* (2016) at 12.

and 1st of June 2019,³⁹ though, temporarily criminal and administrative proceedings against these organisations caused a significant drop in the number of vessels active at sea in 2018 and 2019.⁴⁰ The SAR-operations conducted involved volunteering doctors, navigators, nurses, and other aid workers.

Besides this form of active prevention of human rights abuses, other groups intervened where the decision about SAR-responsibilities are made. For example, the network Watch the Med launched an “Alarmphone” where persons who are in distress, but also relatives, friends or other initiatives can register when a boat is in distress to creating pressure on coast guards and authorities who are in charge of rescuing and to monitor their activities in real time by staying in contact with the distressed persons and the rescue agencies.⁴¹

The situation in the Mediterranean Sea is and was also accompanied by intense international pressure in international governmental bodies, especially the UN. The same day the EU adopted its *European Agenda on Migration*, the special representative of the UN-Secretary-General for International Migration and Development urged the EU “not to put any refugees or migrants in the line of fire, and to design any operation in complete conformity with international law”⁴² on the matter of “anti-smuggling-strategies”. The UN refugee agency, UNHCR, even warned that the Mediterranean Sea could turn in a “sea of blood” without sufficient vessels employed for SAR-missions.⁴³ The special representative of the UN Human Rights Council, François Crépeau, highlighted the need for safe escape ways in 2015 and demanded the development of “regular and safe migration channels, including for workers with varying skill levels, including for low-wage workers.”⁴⁴

Transnational pressure applied in the human rights discourse pushing for legal access to filing an asylum claim included highly emotionalised persuasion strategies. One example of this consciousness-raising is the spread of the picture of the young Alan Kurdi, a three-year-old Syrian-Kurdish boy, who drowned at sea in September 2015. The photo was used by the campaigning of human rights organisations and

³⁹ European Union Agency for Fundamental Rights, *2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations* (2019) online : <<https://fra.europa.eu/en/publication/2019/2019-update-ngo-ships-involved-search-and-rescue-mediterranean-and-criminal>>.

⁴⁰ Lorenzo Tondo, “No NGO rescue boats currently in central Mediterranean, agencies warn”, *The Guardian* (12 September 2018), online : <<https://www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean>>.

⁴¹ Maurice Stierl, “The WatchTheMed Alarm Phone : A Disobedient Border-Intervention” (2015) 1 :2 *Movements Journal for Critical Migration and Border Regimes Studies*, online : <<https://alarmphone.org/de/ueber-uns/>>.

⁴² UNSG, Peter Sutherland, *Note to Correspondents on the Statement on the European Agenda on Migration*, (13 May 2015), online : <<https://www.un.org/sg/en/content/sg/note-correspondents/2015-05-13/note-correspondents-statement-european-agenda-migration>>.

⁴³ Lorenzo Tondo, “Mediterranean will be ‘sea of blood’ without rescue boats, UN warns”, *The Guardian* (9 June 2019), online : <<https://www.theguardian.com/world/2019/jun/09/mediterranean-sea-of-blood-migrant-refugee-rescue-boats-un-unhcr>>.

⁴⁴ *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, UNGA, Human Rights Council, 29th Sess, UN Doc A/HRC/29/36 (2015) at 19.

directly linked the lack of access to safety with the death of a toddler. The NGO Sea-Eye, for example, named one of their rescue-vessels after the Syrian boy.⁴⁵

Also, among legal scholars, access to the enjoyment of human rights is discussed intensively regarding *non-entrée* policies at the EU's border. There are discussions on the conformity of the *EU-Turkey statement*, the conformity of the *Libya-Italy cooperation* in the Central Mediterranean Sea, the conformity of Hot-Spot approaches in transit states and the legal implications of the *EAM* in general. It is questioned whether existing laws require the possibility to seek asylum in the state of departure and what legal obligations to effectively exercise SAR-missions in the Mediterranean follow from the International Law of the Sea, International Human Rights Law or European laws.

D. Phase Two : Denial

The EU, however, addresses the issue of dangerous migration journeys through the Mediterranean as a security topic. Efforts undertaken to minimise the number of persons in distress included national border protection agencies and the EU agency FRONTEX. Also, a NATO cooperation with the FRONTEX contributed to achieve EU's goal to address illicit human smuggling and trafficking as the leading cause for the Mediterranean situation.⁴⁶

Regarding the worsening crisis in the Mediterranean Sea in 2015, EU states agreed on a military mission in order to react to the mass drownings and mass distress. The objective of the joint EU action is to end the "business of human smuggling and trafficking".⁴⁷ The mandate of the EUNAFOR Med SOPHIA started in June 2015. It was recently renewed until March 2020, in the beginning, the mission worked with air and naval forces for contributing to surveillance of migratory movements and, also, monitoring migratory flows to comply with SAR-obligations.

The operational tasks of SOPHIA are significantly limited since March 2019 over disputes between the EU member states. Instead of agreeing on an extension of the full operation and providing SAR-mission at sea, SOPHIA shrank to the provision of aerial surveillance and training to the Libyan coast guard.⁴⁸ The EU, thus, stopped rescue operations in the Mediterranean Sea.

⁴⁵ "Deutsches Rettungsschiff nach totem Flüchtlingskind benannt", *Der Spiegel* (10 February 2019), online : <<https://www.spiegel.de/panorama/justiz/alan-kurdi-deutsches-rettungsschiff-nach-totem-fluechtlingskind-benannt-a-1252581.html>>.

⁴⁶ North Atlantic Treaty Organization, *Statement by NATO Secretary General on NATO support to assist with the refugee and migrants crisis* (25 February 2016), online : <https://www.nato.int/cps/en/natohq/opinions_128372.htm>.

⁴⁷ EUNAFOR Med, "Mission at a Glance", online : <<https://www.operationsophia.eu/mission-at-a-glance/>>.

⁴⁸ Annegret Bendiek & Raphael Bossong, *Shifting Boundaries of the EU's Foreign and Security Policy, A Challenge to the Rule of Law*, (Berlin : Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, 2019) at 10, 12.

E. Phase Three : Are there Tactical Concessions?

After continuous international and internal pressure, the spiral model expects human rights-violating states to alter their behaviour, firstly, just in the form of tactical concessions. The 2015 *EAM* included a commitment from the EU states and highlighted the need for a common EU answer. The Commission, the European Parliament and the European Council expressed their commitment to prevent the loss of lives and the need to provide a collective answer to the challenges of migration:

No Member State can effectively address migration alone. It is clear that we need a new, more European approach. This requires using all policies and tools at our disposal –combining internal and external policies to best effect. All actors : Member States, EU institutions, International Organisations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality.⁴⁹

The *EAM* also introduced the establishment of a resettlement program, and stated : “There must be safe and legal ways for them to reach the EU.”⁵⁰ The agenda also highlighted options for increased responsibilities of the member states to comply with the claims for legal escape ways by a focus on “other legal avenues available to persons in need of protection”, such as family reunification, humanitarian visa, or sponsorships.⁵¹ Thus, acknowledging the need for safe routes of entry to ensure the effective enjoyment of the right to claim asylum of migrants.

The introduction of resettlement schemes is tactical concessions as described in the spiral model. By recognising the need for opening legal escape ways for some persons fleeing their home country and calling upon the EU member states to consider their options for providing international protection, the EU can respond to public pressure. However, these resettlement schemes are not aimed at providing real legal ports of entry to the EU. Instead, they are a tool of showing a superficial understanding of the issue and pacifying human rights activists by constituting a truly “low-cost”⁵² solution.

Resettlement programs are not a comprehensive approach for providing safe escape ways. The number of migrants that will be accepted through resettlement, 50,000 within two years⁵³ reveals the fig-leave character of the proposal compared to 3,635,288 UNHCR registered migrants in November 2020 in Turkey, 879,529 UNHCR registered migrants hosted by Lebanon in September 2020 or 661,997 individuals residing in Jordan at the beginning of February 2020.⁵⁴ This shows the EU resettled or will only resettle a few of those who require protection.

⁴⁹ *EAM*, *supra* note 28.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Risse & Ropp, *supra* note 18 at 6.

⁵³ Tom Wills, “EU breaks promise of safe passage for 50,000 refugees”, *Deutsche Welle* (14 October 2019), online : <https://www.dw.com/en/eu-breaks-promise-of-safe-passage-for-50000-refugees/a-50803664>.

⁵⁴ UNHCR, Operational Portal, Refugee Situation, *Syria Regional Refugee Response*, online : <https://data2.unhcr.org/en/situations/syria> (updated as of 25 November 2020).

The proposals and verbal acknowledgements for the realisation of legal escape ways did not turn into action. The EU member states did not receive as many migrants through the resettlement tool as promised. By October 2019, the EU announced to accept 50,000 in need of international protection but only accepted 37,520 persons.⁵⁵ The German promise to accept 10,200 migrants was followed by the actual arrival of 4,800 in October 2019.⁵⁶

Further doubt is cast on the efficiency of resettlement programs, because there is no legal framework creating rights for individuals to be resettled; states tend to cherry-pick only those who likely will be best integrated instead of those most vulnerable.⁵⁷ It is, thus, not surprising within the logic of the spiral model that the creation of a legal avenue to the EU is not realised through resettlement and pose only tactical concessions to appeasing harshest criticism.

F. Conclusion

Chapter two showed the immense rush of humanitarians to Europe's shore did not cause a stronger commitment of EU member states to a right to escape conflict regions, SAR-obligations and other human rights safely. Instead, the EU member states deny the claims of the individuals accessing the EU, transnational advocacy networks and opposition politicians. In the following, the paper analyses the reasons for this lack of commitment.

II. Non-Commitment and Non-Compliance of the EU: The Externalisation of International Protection

The EU organs and EU member states mainly achieved consensus or compromises on the issue of further cooperation with countries of departure. The issue of ensuring compliance with international obligations is balanced with the interest of considering EU intern interests:

There is a strong call for the EU to show global leadership by providing international protection to those in need, while ensuring effective control of its external borders, promoting safe and orderly migration and thereby contributing to an increased sense of security among all residents. Our success has direct consequences on how the EU is perceived by its own citizens as well as the international community.⁵⁸

Instead, the EU and its member states intensively focus on the aspect of border security, for example on the expansion of FRONTEX, increased integration of the European

⁵⁵ Wills, *supra* note 53.

⁵⁶ *Ibid.*

⁵⁷ Helen O'Nions, *Asylum - a right denied : a critical analysis of European asylum policy*, Law and Migration (London : Routeledge, 2016) at 184.

⁵⁸ Council of the European Union, *Way forward for EU Migration and Asylum policy - outcome of discussions - Presidency report*, LIMITE 14364/19 (2019) at 3 [Council of EU, Presidency Report].

border guards and intensifying cooperation with third countries for closing migratory routes. For this purpose, the EU initiated a Trust Fund for Africa⁵⁹ and started the Khartoum and Rabat dialogues to extend control over migratory movements in North Africa and further South to countries of transit and origin.⁶⁰

The conclusion of the *EU-Turkey statement* and the *Libya-Italy cooperation* produced immediate results and stopped individuals from entering EU territory and accession their right to claim asylum. Subsequently, this cooperation contributed to reducing the arrivals of migrants in the Central Mediterranean Sea from 119,369 in 2017 to 23,370 in 2018 and on the Eastern Mediterranean route (sea and land arrivals) from 861,630 and 177,234 arrivals in the years 2015 and 2016 to 36,310 and 50,508 arrivals in the years 2017 and 2018.⁶¹

These agreements led to a significant decrease in migrants travelling across the Mediterranean Sea and, therefore, limited the number of drownings and deaths in the Mediterranean. One might consequently argue that the EU pacified its critics by concluding or incentivising the conclusion of cooperation treaties or agreements with third states along typical escape routes. However, these are no concessions to the demands of international and internal pressure.

Instead of opening legal escape ways, the EU has closed remaining escape ways, leaving travellers without opportunities to seek asylum at all.⁶² This leads to the question of why the EU and its member states are now stuck in the phase of tactical concessions not prescribing a right to safely access the right to asylum despite the intense push for providing access? This paper argues that several factors are containing the power of persuasion techniques.

A. The Dominance of the Security-based Counter-Discourse

A critical factor in explaining progress or backlash in the process of socialisation of human rights norms is the existence of a counter-discourse. In *The Persistent Power of Human Rights*, various authors found a pattern of narratives directed against the arguments of human rights advocates sophisticating the spiral model.⁶³ Counter-

⁵⁹ European Commission, *Agreement Establishing the EU Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa, and its Internal Rules* (2015).

⁶⁰ *Declaration of the Ministerial Conference of the Khartoum Process (EU-Horn of Africa Migration Route Initiative)*, African Union Commission and European Union Commission, 28 November 2014 (signed in Rome); *Valletta Summit 11-12 November 2015, Political Declaration*, Press Release 43/17, African Union Commission and European Union Commission.

⁶¹ UNHCR, Operational Data Portal, Mediterranean Situation, , Italy <<https://data2.unhcr.org/en/situations/mediterranean/location/5205>>; UNHCR, Operational Data Portal, Mediterranean Situation, Greece, <<https://data2.unhcr.org/en/situations/mediterranean/location/5179>>.

⁶² *M.N. and others v Belgium* [GC], No 3599/18 (5 May 2020).

⁶³ Risse & Ropp, *supra* note 18 at 15; Katrin Kinzelbach, "Resisting the power of human rights : The People's Republic of China" in Risse (2013), *supra* note 9, 164 ; Sikkink, *supra* note 13; Anja Jetschke & Andrea Liese, "The power of human rights a decade after" in Risse, 2013, *supra* note , 26.

discourses in democratic states cause a decrease of moral vulnerability as violated human rights norms are devalued and, consequently, minimise the power of transnational pressure.⁶⁴ The following subchapters identify these counter-narratives, undermining human rights arguments.

1. POLITICAL SHIFT WITHIN THE EUROPEAN UNION

In part, the EU policy on migration and asylum is approved by election results in many states of the EU, also in national elections. Parties with a focus on anti-immigration policies gained major successes after 2015 in EU member states. They supported the assumptions on the difficulties for transnational pressure in a democratic regime due to the moral invulnerability of fairly and freely elected governments excusing even human rights-violating policies with a referral to the people's will.⁶⁵ In other words, if a democratically elected government decides on policies that harm the enjoyment of human rights, governments can explain their behaviour with the imperative of the will of the voters.

Italy's former minister of domestic affairs and leader of the Italian Lega Nord party, Matteo Salvini, announced a "European Spring",⁶⁶ a referral to the Arab spring, for the justification of their anti-immigrant policies highlighting the democratic nature of their policies. The situation in the so-called Visegrad-states, also, supports our assumption. The group consists of Poland, the Czech Republic, Hungary and Slovakia⁶⁷. It takes a strong stand against the reception of migrants in their states, focusing on extraterritorial humanitarian aid and strengthening of border protection measures by basing their position on a democratic decision within these countries.⁶⁸

Within Germany, initially, the arrival of almost one million refugees initiated a "*Willkommenskultur*" or "welcome culture" in 2015 and 2016 in some parts of the German society.⁶⁹ Also, the initial position of the German chancellor, Angela Merkel, "*Wir schaffen das!*" ("We can do it!")⁷⁰ underlines a discourse supporting the claims of transnational pressure.

This pro-immigrant discourse is by far not "the only discourse in town",⁷¹ instead, large domestic protest in German society sparked. The right-wing populist

⁶⁴ Jetschke & Liese, *supra* note 63 at 34.

⁶⁵ *Ibid.*

⁶⁶ Angela Giuffrida, "Matteo Salvini says Italy and Poland could build new Europe", *The Guardian* (9 January 2019), online : <<https://www.theguardian.com/world/2019/jan/09/matteo-salvini-says-italy-and-poland-could-build-new-europe>>.

⁶⁷ Visegrad Group, About, online : <<http://www.visegradgroup.eu/about>>.

⁶⁸ Visegrad Group, *Joint statement on Migration* (15 February 2016), online : <<http://www.visegradgroup.eu/calendar/2016/joint-statement-on>>.

⁶⁹ Ulrich Kober & Orkan Kösemen, *Willkommenskultur zwischen Skepsis und Pragmatik Deutschland nach der Fluchtkrise*, (Gütersloh : Bertelsmann Stiftung, 2019).

⁷⁰ Matthew Karnitschnig, "5 years from Angela Merckel three little words : Wir schaffen das!", *Politico*, (31 August 2020), online : <<https://www.politico.eu/article/angela-merkel-wir-schaffen-das-5-years-on/>>.

⁷¹ Risse & Ropp, *supra* note 18 at 21.

party *Alternative für Deutschland* (AfD) leads an intense campaign against immigration and gained 12,6% in the 2017 elections to the Federal Parliament of Germany, marking their first entry to the Bundestag.⁷² Founded as a civil society movement in October 2014 in Dresden and soon other branches in other German cities, the PEGIDA-movement demanded a right-wing shift of German and European migration politics.⁷³

These are just a few examples of the discourses opposing transnational persuasion mechanisms for an extension of the human rights of migrants. This push to restrictive positions on the issue of migration is also reflected on the EU level. EU communication documents frame the issue of individuals seeking entry to the EU differently. Whereas the *EAM* communication of the EU Commission expressed commitment to a common solution in sharing international responsibilities for migrants, the 2019 communications focus stronger on a security approach, highlighting the foremost priority to secure borders and target illicit human trafficking and smuggling and refer expressively to “what EU citizens expect from the European Union”⁷⁴ or the restoration of the “EU citizens’ trust in Schengen”.⁷⁵

2. THE ROLE OF THE “PULL-FACTOR”-DISCUSSION

A further factor in the Mediterranean case is the discourse on the direct involvement of NGOs who are stepping into public duties protecting the travellers at sea. Although the fleet of activists is working against the political agenda of increased border security and pushing for a commitment to the right of safe escape ways or at least effective mechanisms for preventing the loss of lives at sea, they are at the same time to some extent accused of substituting state-provided gaps.⁷⁶

Especially in the Mediterranean case, transnational corporations (TNCs) play a crucial role in the rescue of distressed persons at sea. An analysis of the relationship between states and activists suggests that especially service-orientated organisations are “functional to the system”.⁷⁷ In the year 2017 until June 2018, private SAR-operations accounted for 40% of all SAR-operations on the shore of north African country.⁷⁸ These numbers cast doubt on their actual role and the power

⁷² “Bundestagswahl 2017 - Endgültige Ergebnisse”, online: *Der Bundeswahlleiter* <<https://www.bundeswahlleiter.de/bundestagswahlen/2017/ergebnisse.html>>.

⁷³ Hans Vorländer, Maik Herold & Steven Schäller, *Wer geht zu PEGIDA und warum? eine empirische Untersuchung von PEGIDA-Demonstranten in Dresden*, Schriften zur Verfassungs- und Demokratieforschung 1 (Dresden: ZVD, Zentrum für Verfassungs- und Demokratieforschung, 2015).

⁷⁴ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, 6 March 2019, COM(2019) 126 final, at 18.

⁷⁵ *Ibid.*, at 12.

⁷⁶ Eugenio Cusumano & James Pattison, *The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility*, *Cambridge Review of International Affairs*, 2018, vol 31, no 1, at 55, 56.

⁷⁷ *Ibid.* at 111.

⁷⁸ Patrick Wintour, “NGO rescues off Libya encourage traffickers, says EU borders chief”, *The Guardian* (27 February 2017), online: <<https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>> [Wintour]; Manuel Bewarder and Lisa Walter,

of the application of their persuasion techniques to demanding state-provided protection to migrants.

The presence of these private vessels provides ground for criticism highlighting an alleged “pull-factor” of their SAR-missions. The argument assumes that migrants and refugees are attracted by the rescue operations or feel the provided services shift the demands of crossing the sea instead of staying in the country of departure. Several politicians employed this argument to devalue the support for NGOs operating at sea and spreading responsibilities for the situation in the Mediterranean Sea. For example, the Austrian foreign minister Sebastian Kurz declared the engagement of private rescue vessels would cause more deaths at the Mediterranean Sea.⁷⁹ Similarly, FRONTEX officials claimed NGO’s SAR-missions fuel the human trafficker’s business model.⁸⁰

A 2019 study on this link suggests no correlation between the NGOs activities and the number of departures, allegedly incentivised by private SAR-operations.⁸¹ In a way, this debate on the impact and outcome of private SAR-missions poses a *redefinition* of actions of TNCs by state actors.⁸² The pull-factor argument devalues the actions of the TNCs and shifts responsibilities for humanitarian crises away to the human rights defenders and, eventually, distracts from the lobbying of human rights organisations.

Despite the devaluation of TNC engagement, at the same time, the strategy of carrying out SAR-operations serves for mitigation. The engagement of private actors reduces the number of drownings and, thus, decreases the urgency of the issue. The rights defenders become unwillingly a “subcontractor for state-agencies”⁸³ serving a double role upholding the status of denial.

B. Transnational Pressure in a Decentralised System

The assumption that decentralisation also has a negative impact on the effectiveness of naming and shaming strategies and persuasion success of

"Rettungseinsätze vor Libyen müssen auf den Prüfstand", *Die Welt* (27. February 2017), online : <<https://www.welt.de/politik/deutschland/article162394787/Rettungseinsaetze-vor-Libyen-muessen-auf-den-Pruefstand.html>> [Bewarder and Walter].

⁷⁹ Anna von Bayern, Paul Ronzheimer & Daniel Biskup, “Private Seenotrettung führt zu mehr Toten”, *Bild am Sonntag* (5 January 2020), online : <<https://www.bild.de/politik/ausland/politik-ausland/sebastian-kurz-private-seenotretter-fuehren-zu-mehr-toten-67093716.bild.html>>; Jefferson Chase, “Refugee rescue NGOs reject human trafficking charges”, *Deutsche Welle* (18 July 2017), online : <<https://www.dw.com/en/refugee-rescue-ngos-reject-human-trafficking-charges/a-39737148>>.

⁸⁰ Wintour, *supra* note 78.

⁸¹ Eugenio Cusumano, “Migrant rescue as organized hypocrisy : EU maritime missions offshore Libya between humanitarianism and border control” (2019) 54 :1 *Cooperation and Conflict* 3 at 8.

⁸² William Walters, “Foucault and Frontiers : Notes on the Birth of the Humanitarian Border” in Ulrich Bröckling, Susanne Krasmann & Thomas Lemke, eds, *Governmentality : current issues and future challenges*, (New York : Routledge, 2011) at 156.

⁸³ Jenny Edkins, “Humanitarianism, humanity, human” (2003) 2 :2 *J Human Rights* 253 at 254.

transnational pressure, since it also offers options for actors to hide behind other actors by pointing at each other's responsibilities. Here, the 27 member states mutually influence their actions and political decisions as a single actor and their acting as part of the organisation. The 27 member states mutually reassure their behaviour, build blocs within the supranational organisation and are busy finding their strategy on a matter.

States can hide behind the supranational organisational flaws, other member states notorious norm-noncompliant behaviour, and the shortcomings of multilateral acting. The member states could not agree on most of the topics of the *EAM* agenda, such as the matter of accepting migrants redefining the country responsible for asylum claims (Dublin-IV-Regulation),⁸⁴ the responsibility for taking fingerprints of migrants at the borders (reform of the EURODAC-Regulation),⁸⁵ the standards for qualifying a third-country-national as a beneficiary of international protection (reform of the Qualification-Directive),⁸⁶ the common standards for the reception of asylum applicants (Reception Directive),⁸⁷ the improvement of the European Asylum Support Office (EASO Directive),⁸⁸ the EU intern settlement legislation (Resettlement Regulation),⁸⁹ and the EU Regulation on asylum procedures (Asylum Procedures Regulations).⁹⁰ All proposals are either blocked or stuck before the opening of the trilogue discussions between the EU Parliament, the Commission and the Council.

⁸⁴ European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* (Brussels, 4 May 2016), online : <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0270%2801%29>>.

⁸⁵ European Commission, *Proposal for a regulation of the European Parliament and the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible [...]*, (29 June 2016) online : <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R0603>>.

⁸⁶ European Commission *Proposal for a regulation of the European Parliament and of the council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection [...]* (Brussels, 13 July 2016), online : <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0466%3AFIN>>.

⁸⁷ European Commission, *Proposal for a directive for the European Parliament and of the council laying down standards for the reception of applicants for international protection (recast)*, (Brussels, 13 July 2016), online : <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0465>>.

⁸⁸ European Commission, *Amended proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010* (Brussels, 12 September 2018), online : <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0633>>.

⁸⁹ European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council* (Brussels, 13 July 2016), online : <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0468>>.

⁹⁰ European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* (Brussels, 13 July 2016).

C. The Double-Role of International Governmental Organisations

The spiral model assumes these international organisations to be complementary to transnational pressure. International organisations, such as the International Organization for Migration (IOM) or the UNHCR, serve a unique role concerning migrant's human rights. With regard to migrant's rights, these organisations do not solely advocate for the introduction of effective mechanisms to ensure individuals' right to claim asylum. The UNHCR aims to "assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute".⁹¹

In comparison with the UNHCR's mandate, the constitution of the IOM describes the purpose of the organisation as bureaucratically with a focus of providing migration-related services to the member states of the organisation, though, cooperating with NGOs on the issue of migration coordination.⁹² Regarding their role during the "refugee crisis" NGOs accused these organisation of implementing restrictive migration policies and assisting restrictive EU policies on migration through their unassertive positions.⁹³ Instead of adding to the pressure of transnational networks in the human rights discourse, international organisations serve a complex role within the mechanisms to greater human rights compliance. Regarding the issue of migration and access to claim asylum, international organisations are as "good" as the states are since they derive their legitimacy and funding from states.

The spiral model explains the denial of rights change concerning migrants' human rights and their access to the right to claim asylum by the EU and its member states. Firstly, especially the theory's assumptions on counter-discourses challenging the transnational pressure asserted work concerning the Mediterranean Sea. Important is here that there is not just one counter-discourse: Instead, there are many, some indirectly opposing the human rights discourse using the same persuasion mechanisms and strategies associated by the model with TNCs. Actors leading counter-discourses, also, organise in political parties, organise protests, campaign or form transnational movements to gain influence.

⁹¹ *Statute of the United Nations High Commissioner of Refugees*, GA Res 428(V), UNGAOR, 5th Sess, Supp No 20, UN Doc A/1775, 46.

⁹² *Constitution of the International Organization for Migration*, 1954.

⁹³ Antoine Pécoud, "What do we know about the International Organization for Migration?" (2018) 44 :10 *J Ethnic & Migration Studies* 1621; Tom Miles, "As refugee crisis grows, U.N. agency faces questions", *Reuters* (16 September 2015), online : <<https://www.reuters.com/article/us-europe-migrants-unhcr-insight/as-refugee-crisis-grows-u-n-agency-faces-questions-idUSKCN0RG13E20150916>>; Anne Koch, "The Politics and Discourse of Migrant Return : The Role of UNHCR and IOM in the Governance of Return" (2014) 40 :6 *J Ethnic & Migration Studies* 905.

Second, the assumption on the impact of the double-role of democratic elements in a regime, which also have the impact of legitimising human rights-abusive politics. Another assumption proven to be true in our case study is the impact of decentralised regime structures, which diffuse political momentum due to diverging national interests. Eventually, decision-making processes are paralysed due to these alliances complicating the possibility of political solution-finding. However, further research is vital for understanding the role of international organisations for rights change and the human rights discourse, as the example of the UNHCR and IOM showed.

The issue of human rights of migrants will continue to be a pressing topic, as international numbers of migrants and refugees are continuously rising. The process of socialisation of these norms will pose an enormous challenge to the values and identity of the European Union and its member states.