

Lives saved. Rights protected.

Bridging the protection gap for refugees and migrants in the Mediterranean



Recommendation

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and migrants in the Mediterranean

By the Council of Europe
Commissioner for Human Rights

Cover photo:
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Mamahba, 17, from Guinea is covered with thermal blankets aboard the former fishing trawler Golfo Azzurro of the Spanish NGO Proactiva Open Arms, following a rescue operation near the coasts of Libya in the Central Mediterranean.

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List of acronyms

CDDH	Steering Committee for Human Rights
ECHR	European Convention on Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
IMO	International Maritime Organisation
IOM	International Organisation for Migration
JRCC	Joint Rescue Coordination Centre
NGOs	Non-Governmental Organisations
OHCHR	Office of the United Nations High Commissioner for Human Rights
RCC	Rescue Coordination Centre
SAR	Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
SRR	Search and Rescue Region
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	Office of the United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Mission in Libya

Executive summary

The protection of refugees, asylum-seekers and migrants travelling by sea forms an integral part of international human rights, refugee and maritime laws. As explained in this document, states have clear obligations to aid any person found in distress at sea, to rescue people in distress and to ensure that their rights - including the right to life and to protection from refoulement - are upheld. Therefore, the Council of Europe Commissioner for Human Rights is putting forward a Recommendation on how to help member states make these rights practical and effective.

In recent years, certain Council of Europe member states, acting individually or as part of their membership of the European Union, have progressively adopted tougher and more restrictive laws and measures to handle the attempted crossing of refugees and migrants via the Central Mediterranean route.

Politicising an issue that is of a humanitarian nature, they have adopted laws, policies and practices which have often been contrary to their legal obligations to ensure effective search and rescue operations, the prompt and safe disembarkation and treatment of rescued people, and the prevention of torture, inhuman or degrading treatment.

This Recommendation therefore aims at identifying the deficiencies of this approach, and at helping member states to reframe their response according to human rights standards.

The urgency for this is evident. Since 2014 thousands of human beings have died in the Mediterranean as they tried to reach a safe shore. At the same time, states' search and rescue operations have been reduced, resulting in the rescue of refugees and migrants in distress at sea taking much longer, or sometimes coming too late altogether. This has contributed to making the Central Mediterranean route even more dangerous. Restrictive measures have also allowed trafficking in human beings and smuggling to flourish.

In addition, the European Union and individual European states are continuing to outsource border controls to third-countries to keep refugees and migrants away from European coasts. This includes funding, equipping or training border guards of countries with notoriously bad human rights records. Whilst this approach has led to a reduction in arrivals on Europe's

shores, it has also come with a terrible human cost. Not only do migrants continue to die at sea, but in some cases they are intercepted and brought to countries – like Libya - where they are often subjected to torture, rape, slavery, exploitation or indefinite and unlawful detention.

Such measures have been compounded by tougher action against those fulfilling the age-old duty of rescuing persons in distress at sea. Captains of commercial and fishing ships may now face judicial and administrative proceedings for coming to the aid of persons in distress at sea and bringing them to a safe port for disembarkation. The criminalisation and obstruction of such humanitarian acts has especially targeted NGOs. In some cases, governments have closed ports and deliberately kept rescued persons and ships' personnel stuck at sea for prolonged periods of time, amid disagreements among member states over who should be responsible for their disembarkation.

This situation is also the result of the long-standing inability of European states to share responsibility for search and rescue operations at sea and the reception of refugees, asylum-seekers and migrants on land. Undoubtedly, some coastal countries have been left alone in facing the challenges posed by the arrival of migrants at sea. However, this cannot justify measures that endanger the life and safety of human beings.

Whilst states have the right to control their borders and ensure security, they also have the duty to effectively protect the rights enshrined in maritime, human rights and refugee law.

The 35 recommendations contained in this paper aim to help all Council of Europe member states find the right balance between these imperatives. They focus on five main areas of action: ensuring effective search and rescue coordination; guaranteeing the safe and timely disembarkation of rescued people; co-operating effectively with NGOs; preventing human rights violations while co-operating with third countries; and providing accessible safe and legal routes to Europe.

These areas of action are closely interconnected and should therefore be considered as a whole to find ways to coordinate and share responsibility for handling the current situation in a human-rights compliant way. When implemented consistently, these recommendations can help prevent refugees, asylum seekers and migrants at sea from being caught in a protection vacuum. They can also assist member states in exercising their due diligence to ensure that their actions do not, directly or indirectly, contribute to human rights violations by others, such as third countries.

These recommendations address Council of Europe member states in different roles: as coastal states, as flag states of ships in the Mediterranean,

or as states whose efforts to share responsibility are necessary to protect lives and rights at sea. Member states should use these recommendations to adjust their current approach and as a compass to design any future measures they intend to implement, both individually and as part of collective actions, including those decided within the European Union.

The current situation in the Mediterranean, and member states' responses to it, may lead to certain dilemmas. These must be resolved with the primary objective of preventing loss of life and protecting the human rights of refugees, asylum seekers and migrants at sea. The challenges are undoubtedly great, but the need to change course and preserve human life and dignity is even greater.

Summary of recommendations

Effective search and rescue (Chapter 1)

- Enhance the effective coordination of rescue operations, including by:
 - ensuring that Rescue Coordination Centres (RCCs) are fully operational and able to respond immediately to any distress call.
 - guaranteeing that shipmasters, NGOs and shipping companies are not penalised for meeting their duty to rescue persons in distress at sea.
 - effectively investigating any allegation of omission to provide immediate assistance to persons in distress at sea.
- Ensure adequate and sufficient rescue capacity in the Mediterranean, including by:
 - contributing assets specifically dedicated to Search and Rescue (SAR) operations in the Mediterranean and deployed along routes where they can make an effective contribution to the preservation of life.
 - making full use of all vessels able to assist in search and rescue operations, including ships run by NGOs.

Timely and safe disembarkation of rescued persons (Chapter 2)

- Ensure that disembarkation only takes place in a place that is safe both under maritime law and under human rights and refugee law, including by:
 - assessing the safety of a certain prospective place of disembarkation, taking full account of the risk of persecution, torture, inhuman or degrading treatment, chain *refoulement* and other serious human rights violations as well as specific risks that vulnerable persons may face.
 - refraining from issuing instructions to shipmasters that may, directly or indirectly, lead to disembarkation of rescue persons in a place that is not safe.

- respecting the discretion of shipmasters not to disembark rescued persons in unsafe places and informing all relevant actors about which places cannot be considered a place of safety and the necessity to refrain from disembarking rescued persons there.
- Strengthen the coordination of disembarkation to avoid delays, including by:
 - assisting each other to identify promptly a place of safety and ensuring that disagreements between member states, under no circumstances, put the rights of rescued persons at risk, and that precedence is always given to humanitarian considerations.
 - using the possibilities available within the framework of the European Union to agree on a mechanism for the sharing of responsibility for the reception and processing, including of asylum applications, of disembarked survivors.
- ensure that disembarked refugees and migrants are treated in a human rights-compliant manner, with appropriate safeguards in place.

Co-operation with NGOs (Chapter 3)

- Seek constructive co-operation with NGOs involved in search and rescue operations, avoid any stigmatising rhetoric and cease any acts of harassment at policy, judicial and administrative level.
- Ensure that changes in legislation or other measures affecting these NGOs are drafted in such a way as enabling their operation; hold meaningful consultations with NGOs, and solve any issues about compliance with technical or administrative requirements in a co-operative spirit.
- Facilitate the work of NGOs saving lives at sea, including by allowing them access to ports, and rescinding any generalised policies closing ports or refusing entry into territorial waters to all NGOs, or forbidding navigation in certain areas in international waters.

Co-operation with third countries (Chapter 4)

- Ensure transparency and accountability in any migration cooperation activities with third countries, including by:
 - conducting human rights risk assessments, developing risk mitigation strategies, setting up independent monitoring

- mechanisms, and by publishing the outcomes of such assessments and monitoring.
- immediately suspending any cooperation activities that endanger the human rights of those affected.
- Considering the serious human rights violations against refugees, asylum seekers and migrants in Libya, including those intercepted at sea, take the following actions:
 - urgently review all co-operation activities and practices with the Libyan Coast Guard, identify which of these impact, directly or indirectly, on the return of persons intercepted at sea to serious human rights violations, and suspend these until clear guarantees of human rights-compliance are in place.
 - postpone any additional support to the Libyan Coast Guard until steps are taken showing their human rights-compliance, continue to support efforts of international organisations in securing the release of refugees, asylum seekers and migrants from places of detention in Libya, urgently pledge places for UNHCR's evacuation scheme, and facilitate the creation of safe humanitarian corridors.

Safe and legal routes to prevent irregular, dangerous sea journeys (Chapter 5)

- Increase their participation in refugee resettlement programmes and consider enabling or expanding the possibilities for humanitarian visas, sponsorship schemes and other mechanisms that help create safe and legal routes.
- Review their policies to ensure beneficiaries of international protection have access to prompt, flexible and effective family reunification procedures.

Introduction

The effective protection of the human rights of refugees, asylum seekers and migrants travelling by sea is an important challenge for Council of Europe member states. This challenge is not new.¹ However, since movements across the Mediterranean increased in 2014, the responses of member states, individually or within the context of their membership of the European Union (EU), have evolved rapidly. These responses have created new challenges, which need to be addressed urgently.

Changing practices have particularly impacted on the effectiveness of search and rescue (SAR) at sea, the swift and safe disembarkation of rescued persons, and their treatment on land, including their possible return if found not to be in need of international protection. The impact of these changes is most clearly visible on the so-called Central Mediterranean route.² In October 2014, Italy's Mare Nostrum operation, aimed at saving human lives in the Central Mediterranean Sea, was discontinued.³ It was replaced by other missions, which gradually reduced their capacity and/or geographical scope, or generally did not have SAR as their primary objective.⁴ Furthermore, whereas Italy effectively coordinated SAR operations close to the Libyan coast in the past, the declaration by Libya of a Search and Rescue Region (SRR)⁵ saw the Libyan authorities taking increasing responsibility for such operations. Bilateral and EU support to the Libyan Coast Guard has also caused major changes to how SAR activities are coordinated and implemented in the Central Mediterranean.⁶ In addition, the drafting of a Code of Conduct for non-governmental organisations (NGOs) by Italy in July 2017, with the backing of the EU, has coincided with criminal and administrative proceedings against shipmasters (captains of ships) and NGOs, as well as political decisions to deny entry into territorial waters and ports.⁷

Whilst these policies and practices have led to a reduction in arrivals on Europe's shores, they have also come with a terrible human cost that cannot be ignored or underestimated either by member states or by competent international and European bodies.⁸ In fact, despite the absolute number of persons drowned or missing having decreased in 2018, the relative risk of death in the Mediterranean has increased dramatically.⁹

With fewer state-operated ships patrolling the Mediterranean, rescue of migrants and refugees in distress at sea now takes much longer, or sometimes might come too late altogether. Moreover, the majority of persons fleeing conflict-torn Libya through the Central Mediterranean route are now intercepted or rescued by the Libyan Coast Guard, and subsequently returned back to Libya, which has repeatedly been considered not to be a place of safety for the purpose of disembarkation, given the indefinite and arbitrary detention, unlawful killings, torture or inhuman or degrading treatment, rape, sexual violence, extortion, forced labour and exploitation that rescued migrants face in the country.¹⁰

Shipmasters simply meeting their age-old duty of rescuing persons in distress at sea may now face judicial and administrative proceedings for fulfilling such a duty. They are, for example, accused of refusing to follow instructions that would result in the disembarkation of rescued migrants and refugees in a place where their safety would be in danger. This has especially been the case when NGOs have carried out rescues. In addition, there have been several incidents of rescued persons being stuck at sea for prolonged periods as member states have argued over who should be responsible for their disembarkation.

The current situation has also increased the burden of responsibility placed on merchant or fishing ships and their crews to rescue migrants and refugees in distress in the Mediterranean. Their role has been essential in saving the lives of many people at sea. However, fears of long delays in disembarking rescued migrants, and even of prosecution, run the risk of discouraging them from fulfilling their duty of rescue. In some cases, merchant ships have even been instructed to return survivors to unsafe places such as Libya. Unrest among rescued persons about the prospect of being returned to Libya may also create unsafe situations for crew members of merchant or fishing ships.

The situation in the Mediterranean is an extremely complex one. The intense politicisation of issues that should be humanitarian in nature, and the reluctance of member states to share responsibility has made finding solutions even more difficult. Whilst states have the right to control their borders and ensure security while co-operating with neighbouring countries to this end, this cannot come at the expense of people's human rights whether at sea or on land. Effectively protecting these rights requires the full implementation of member states' obligations, under international maritime law, human rights law and refugee law, which should be read as being consistent with each other.

Every human being is entitled to the right to life and protection of human dignity. Under international maritime law, member states are bound to take

action to preserve life at sea.¹¹ Furthermore, as stipulated by the Committee of Ministers of the Council of Europe:

“the protection of the right to life is part of the core of the European Convention on Human Rights and one of the fundamental values of the democratic societies that make up the Council of Europe. It is imperative for member States to fully respect their legal obligations with regard to protecting human life at sea [...].”¹²

Similarly, the UN Human Rights Committee has noted that the right to life under the International Covenant on Civil and Political Rights (ICCPR) requires states to respect and protect the lives of individuals who find themselves in a situation of distress at sea, in accordance with their obligations under maritime law.¹³

Actions to safeguard human life at sea should be carried out in such a manner that they are consistent with the European Convention on Human Rights (hereinafter: the Convention) and other international instruments, such as the 1951 Refugee Convention. This requires ensuring that questions such as rescue and disembarkation are also resolved in full respect of the principle of non-*refoulement*,¹⁴ protection against arbitrary detention,¹⁵ and the prohibition of collective expulsion,¹⁶ among others.

This document presents recommendations by the Council of Europe Commissioner for Human Rights to help member states to ensure that these obligations are fully met. From the Commissioner’s perspective, the effective protection and promotion of the human rights of refugees, asylum seekers and migrants, at sea and on land, should always prevail over any dilemma or uncertainty that the interaction of different legal regimes, practices and policies may cause. In line with this principle, these recommendations aim to contribute to the further advancement of the protection of the lives and dignity of refugees, asylum seekers and migrants at sea, so that they are not caught in a protection vacuum. Finally, they aim to assist member states in exercising their due diligence to ensure that their actions do not, directly or indirectly, contribute to human rights violations by others, such as third countries.

Certain recommendations in this document address member states in their specific roles in relation to the current situation in the Mediterranean. They address, for example, member states bordering the Mediterranean as coastal states with specific obligations under international maritime law. But they are also relevant for member states that act as flag states of ships that carry out rescue operations. However, several recommendations also pertain to member states that are neither, but that still have an important role to play for the overall protection of life and dignity in the Mediterranean,

including through responsibility sharing for adequate rescue capacity and the timely disembarkation of those rescued.

While this document mainly draws on the experiences of recent years in the Central Mediterranean, the recommendations themselves may be applied to all situations in which the rights of refugees, asylum seekers and migrants at sea are at stake.

These recommendations should be used by member states to adjust their current practices where necessary, and as a framework to assess any future measures they intend to implement. They should do so individually, but crucially also when taking collective actions or decisions, including within the framework of their membership of the EU. The Commissioner invites the institutions, agencies and services of the EU to also help implement these recommendations. The Commissioner further calls on parliamentarians, as well as relevant human rights structures (including Ombudspersons and National Human Rights Institutions), to ensure the transparency and accountability of their respective authorities with a view to guaranteeing the implementation of these recommendations.

The recommendations are divided into five specific areas of action by Council of Europe member states: ensuring effective search and rescue coordination and adequate capacity (Chapter 1); ensuring the safe and timely disembarkation of rescued migrants and refugees (Chapter 2); cooperating effectively with NGOs (Chapter 3); preventing human rights violations in the context of migration cooperation with third countries (Chapter 4); and providing sufficient safe and legal routes to Europe (Chapter 5). It should be noted that, while these areas of action are discussed separately, it is their close interconnection that is a major source of human rights challenges in the Mediterranean. They should therefore be tackled as a whole to ensure the effective protection of refugees, asylum seekers and migrants at sea.

Chapter 1 – Effective search and rescue: coordination and capacity

1.1. Ensuring effective coordination of rescue operations

International maritime law sets out rules to ensure that persons in distress at sea receive timely assistance. Following these rules is crucial for protecting the right to life. Two obligations are particularly important. First, under maritime law, every state shall require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost, and to proceed with all possible speed to rescue persons in distress. This obligation is only limited if this cannot be done without serious danger to the ship, crew or passengers of the ship rendering assistance.¹⁷

In other words, it is up to each state to make sure that any ship flying its flag, whether state-operated or a private vessel, fulfils its rescue duties.¹⁸ As noted, the current situation actually provides some incentives for avoiding these duties. The hard-line policies of many member states to prevent new arrivals may signal to navy and other state-operated ships that it is better to try to avoid picking up migrants at sea. After all, to avoid violating the principle of non-*refoulement* (see Chapter 2), these migrants may in practice have to be brought to European shores, where they would have the right, for example, to apply for asylum.¹⁹ For merchant and fishing vessels, the increasingly long delays in the disembarkation of rescued persons (see also Chapter 2), may have serious financial implications. This could become a major disincentive for such ships to respond to distress situations. In this context, it is crucial that member states give shipmasters and shipping companies appropriate information about their obligations in the highly complex and constantly changing situation in the Mediterranean. They should also ensure that shipmasters and shipping companies have clear assurances that neither meeting their obligations under international maritime law, nor acting in accordance with fundamental human rights and refugee law principles will result in any form of penalisation.

The second, complementary obligation is that every coastal state (meaning

a state directly bordering a sea) shall promote the establishment, operation and maintenance of an adequate search and rescue service regarding safety on and over the sea, including, where necessary, by co-operation with neighbouring states.²⁰ Preserving lives at sea requires effective coordination between the various actors that might play a role in rendering assistance, including a state's own rescue assets such as aircraft, vessels and other craft and installations, private actors that are in a position to provide assistance, and the relevant authorities of other states. In order to do so, coastal states need to do a number of things. This includes the establishment of a Search and Rescue Region (SRR). This is an area of the sea in which the state involved has primary responsibility for the coordination of rescue activities. Until recently, the Central Mediterranean was covered by the partially overlapping SRRs of Italy and Malta, while another part, closer to the North African coast, was not covered by any SRR. After an earlier aborted attempt, Libya is reported to have declared its own SRR in 2018.²¹ Coastal states should also set up a fully operational Rescue Coordination Centre (RCC).²² RCCs are facilities that are equipped for receiving distress calls, and for the coordination of rescue operations in their respective SRRs. Under maritime law, such RCCs must be able to effectively implement this coordination responsibility.²³

Moreover, all RCCs, or any other relevant authorities, receiving information that any person is or seems to be in distress at sea, are required to take urgent steps to ensure that the necessary assistance is provided.²⁴ Similarly, any search and rescue unit (that is, rescue ships, helicopters, airplanes etc.) receiving information of a distress incident is obliged to initially take immediate action, if in the position to assist and shall, notify the RCC in whose area the incident has occurred without delay.²⁵ Normally, it falls on the RCC in whose SRR the incident takes place to take responsibility for the coordination of the rescue operation, including identifying which ships are able to provide assistance and issuing them with appropriate instructions.²⁶ However, distress calls may also arrive at other RCCs, such as that of the flag state. If this is the case, it should immediately inform the RCC responsible for the SRR. However, the first RCC contacted retains responsibility for responding to the distress call until it is clear that the RCC covering the SRR, or any other appropriate RCC, has been found to be willing and able to assume responsibility for coordination and has effectively done so.²⁷

In the specific context of the Central Mediterranean, concerns have recently arisen about the extent to which coordinating responsibilities are met. Much of this is related to activities by Italy, in co-operation with and with the support of the EU, to assist the Libyan Coast Guard in setting up an RCC in Libya.²⁸ This has included the stationing of at least one Italian navy ship in Libyan territorial waters.²⁹ According to information from the Italian

government, such support has been aimed at “reinforcing the autonomy of [Libyan] operational capacities”.³⁰ This has resulted in the establishment of the so-called Joint Rescue Coordination Centre (JRCC) in Libya. Italian assets are reportedly providing crucial technological infrastructure for the JRCC to operate.³¹ Furthermore, there have been reports that Italian navy staff based in Libya have been actively involved in the operational coordination of rescue situations.³²

The role of the JRCC is problematic on several counts. For one, NGOs have called attention to several incidents in which the JRCC was found to be unresponsive to distress calls. When the JRCC has assumed coordination of rescue operations, this has sometimes led to instructions to NGOs to refrain from rescuing people and to wait for the Libyan Coast Guard, even when NGOs were already on the scene or in closer proximity to the distress situation than the Libyan Coast Guard. There are also several reports of NGOs being warned or threatened to leave the scene of an incident. Furthermore, there have been worrying allegations that Libyan Coast Guard vessels, when rescuing or intercepting persons at sea, have done so in a manner that put lives at risk. Importantly, when the JRCC coordinates rescue operations, this invariably results in the disembarkation of the intercepted persons in Libya, despite the fact that it cannot be considered a place of safety (see Chapter 2).

The establishment of the JRCC has seen the emergence of a new practice in the Mediterranean, in which member states appear to apply the rules for allocation of coordination responsibility in a formalistic manner, without taking sufficient account of the concerns outlined above. Increasingly, RCCs of some Council of Europe member states, when receiving distress calls originating in the SRR declared by Libya, have tried to divert coordinating responsibility for rescue operations to the JRCC.³³ They have reportedly done so by directly approaching the JRCC to assume coordinating responsibility, but also by providing NGOs or migrants calling for assistance with the contact details of the JRCC.³⁴ In this context, the continued responsibility of member states’ RCCs to ensure search and rescue operations take place in full compliance with international obligations must be emphasised. Neither the declaration by Libya of an SRR nor the establishment of the JRCC can justify member states’ RCCs taking action that would ultimately endanger the lives of persons in distress at sea or lead to their disembarkation in a port that cannot be considered a place of safety.

Recommendations

1. Member states should ensure their RCCs are fully operational and capable of ensuring effective co-operation and coordination with all relevant actors in a SAR operation. They should ensure RCCs respond immediately to any distress call or on the basis of information received that a ship is in need of assistance.
2. With the aim of protecting the rights of rescued migrants and refugees, member states should guarantee shipmasters and shipping companies that their involvement in rescue operations will not lead to their penalisation in any form, when they have acted in compliance with international norms.
3. Flag states should effectively and promptly investigate any allegations that masters of ships flying their flag have avoided providing assistance to persons in distress, whilst they were in a position to do so without endangering their ship, crew or passengers. They should take effective measures to prevent the re-occurrence of any such incidents.
4. Member states should ensure that RCC first receiving a distress alert takes responsibility for the coordination of the incident until the RCC of the state responsible for the SRR where the incident takes place assumes operational responsibility. However, member states should only transfer coordination to the RCC responsible for the SRR if that RCC is able to fully meet its obligations under international maritime law and human rights law, including with regard to safe disembarkation.
5. Where member states coordinate their activities with the JRCC, this should only be done under the clear understanding that they fully retain their own responsibility for the preservation of life at sea and the respect of the non-*refoulement* obligation. Moreover, such coordination should only be done on the clear understanding that it may not result in the disembarkation of rescued persons in Libya, or in any other place that cannot be considered safe under maritime or human rights law.
6. Member states should investigate reports of a practice of merely giving contact details of other states' RCCs to migrants in distress or to NGOs relaying information about a possible distress situation or to any other vessel assisting in the rescue, and, where appropriate, ensure that this practice is stopped.

1.2. Ensuring adequate rescue capacity in the Mediterranean

As noted above, coastal states bear a clear obligation to establish, operate and maintain an effective and adequate search and rescue service, including through co-operation with neighbouring countries if so needed.³⁵ The extent to which any search and rescue service can be adequate and effective will depend on the specific context in which it is implemented. The availability of sufficient capacity, including in terms of rescue ships and aircraft, is clearly an important factor in this respect. However, neither international maritime law nor further guidance set out specific standards for when rescue capacity is sufficient.

The Central Mediterranean presents a number of particular challenges in terms of rescue capacity. The presence of refugees, asylum seekers and migrants attempting the perilous sea crossing over the Mediterranean results in a much larger number of distress situations than in waters where search and rescue services mainly deal with occasional incidents, such as those involving merchant or fishing vessels. Boats carrying refugees, asylum seekers and migrants are invariably overcrowded, ill-suited to long voyages, especially on rough seas, and lack competent crew and navigation equipment. As a result, such boats should be considered in distress from the moment they set out on their journeys.³⁶ In this line, it is clear that increased rescue capacity is necessary to deal with the current challenges.³⁷

An example of a response commensurate with the challenges posed by the crossing of refugees, asylum seekers and migrants on the Mediterranean was the launch of Operation Mare Nostrum by Italy in October 2013. This Operation saved thousands of lives. However, its end a year later marked the start of a gradual and on-going reduction in the availability of rescue capacity in the Central Mediterranean. Whilst replaced by successive Italian, EU and multilateral missions, these were not primarily aimed at search and rescue operations, although in practice they have also contributed to the saving of lives in line with the maritime law obligation to provide assistance to people in distress at sea. State-operated vessels have also generally been deployed closer to Europe, and thus farther away from the areas of the Mediterranean where incidents are most likely to occur. Apart from their geographical location, rescue capacity has been diminished due to the reduction of the number of state vessels operating in the Mediterranean.

Several NGOs concerned about the reduction in rescue capacity have attempted to fill this gap over the last few years. However, due to circumstances described in Chapter 2, these NGO-run operations have now been almost completely dismantled, with only an occasional presence of

a minimum number of ships closer to international waters off the Libyan coast where distress situations are most likely to occur.

Search and rescue capacity in the most-affected areas is therefore now mainly dependent, on the one hand, on passing merchant vessels, which are generally ill-equipped to rescue large numbers of migrants in distress at sea, and on the other hand, on rescue services provided by North African states. The latter also have clear limitations in terms of capacity, and particularly in the case of Libya, in their ability to rescue and disembark migrants in a way that respects their human rights and obligations under international maritime law (see Section 2.1).

Moreover, the declaration by Libya of its own SRR, covering the main areas where distress situations are most likely to occur, has significantly re-shaped the migration control and SAR landscape in the Central Mediterranean. The declaration by Libya of an SRR seems to have further signalled a retreat of member states' deployment of rescue ships and aircraft in and above international waters off the Libyan coast, seemingly on the presumption that rescue operations would now be covered by Libya. As discussed, however, the declaration by Libya of an SRR has not negated the need for increasing search and rescue capacity by member states. In this context, it should be noted that there is no rule of international maritime law, or of international law more broadly, that would prevent member states from deploying rescue assets in the SRR of another state, provided this is done outside that state's territorial waters. In this respect, the declaration by Libya of an SRR is no barrier to member states' deploying rescue assets much closer to where the need is greatest. This is particularly pressing given the flaring up of armed conflict in Libya, which may see more people trying to flee by boat and end up in distress at sea. In this context, it should be noted that the UN Support Mission in Libya (UNSMIL) and the Office of the UN High Commissioner for Human Rights (OHCHR) have also explicitly called on the Libyan Coast Guard to allow rescue operations by humanitarian rescue vessels in full respect of international maritime law standards.³⁸

In the view of the Commissioner, the current situation does not provide for adequate and effective rescue services for the saving of lives at sea. An important way to amend this current deficit is to avoid further reducing the already limited assets available and instead deploy more naval and aerial assets specifically dedicated to search and rescue activities. In addition, full use of the capacity of non-state vessels should be made to guarantee effective rescues. In this respect, the rescue operations of NGO-operated vessels should be facilitated and supported rather than restricted. Given the scale of the challenge, and its close interconnection with the question of European migration policy, this burden cannot solely be placed on coastal states. It is of the utmost importance that member states act in the spirit of

shared responsibility in this respect. In this context, the calls of countless international bodies and NGOs on member states to provide more assets, dedicated to search and rescue, can and should no longer be ignored.³⁹

Recommendations

7. All member states are urged to contribute assets specifically dedicated to SAR activities so that their number and operational reach can be expanded. This should lead to a sufficiently resourced and fully operational system for saving lives at sea, commensurate with the current challenges in the Mediterranean. Vessels should be deployed along routes where they can make an effective contribution to the prevention of casualties and able to safeguard rescued people's dignified treatment.
8. All concerned coastal states should ensure that full use is made of all search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea, including vessels run by NGOs.

Chapter 2 – Ensuring the safe and timely disembarkation of rescued migrants

2.1. Ensuring disembarkation in a place of safety

The disembarkation of rescued persons at a 'place of safety' is an integral part of any rescue operation.⁴⁰ According to Resolution MSC.167(78) of the International Maritime Organisation (IMO), providing guidance on the treatment of persons rescued at sea ("IMO Guidelines"), such a place should at least be regarded as a location where survivors' safety of life is no longer threatened, where their basic human needs (such as food, shelter and medical needs) can be met, and from where transportation arrangements can be made for survivors' next or final destination.⁴¹

From a human rights perspective, 'safety' should be read more broadly as being consistent with international human rights and refugee law. UNHCR, for example, points to the need to avoid disembarkation of rescued asylum seekers and refugees in territories where their lives and freedoms would be threatened.⁴² This follows from the prohibition of non-*refoulement*, which should be fully respected in any disembarkation arrangements. In this line, under the Convention, knowingly returning rescued persons to a place where they run a real risk of being subjected to torture or inhuman or degrading treatment, or doing so when the state should have known a serious risk of such treatment occurring existed, would amount to a violation of Article 3.⁴³ When rescue operations are carried out by vessels of Council of Europe member states, they are under a clear obligation to fully respect this principle.⁴⁴ This is also the case when member states deploy assets within the territorial waters of third countries.⁴⁵

A further consideration is that, even if rescued persons would not be subjected to such treatment in the place of disembarkation, they may be at further risk if they would then be expelled to another country where they do face this risk (so-called chain *refoulement*). The extent to which such a risk could be avoided will normally depend on the extent to which an

effective claim to international protection, such as through prompt access to fair and efficient asylum procedures, can be made and enjoyed in the country where the rescued person will be disembarked. This may also depend on the individual circumstances. Even if there are possibilities to enjoy international protection generally, this may not necessarily be the case for specific, vulnerable groups (such as, for example, LGBTI persons). Further human rights-based considerations include the extent to which disembarked persons could be subjected to arbitrary deprivation of liberty, or whether they would be vulnerable to trafficking or exploitation.

Whether a given state can provide for a place of safety in light of the considerations above, will generally depend on the specific circumstances of the case. At this moment, however, Libya is a notable exception. As reiterated by UN bodies, including UNSMIL, OHCHR, UNHCR and by NGOs, migrants and refugees who are intercepted or rescued by the Libyan Coast Guard, and subsequently disembarked in Libya, are routinely subjected to unlimited and arbitrary detention, torture, extortion, forced labour, sexual violence, and other inhuman or degrading treatment.⁴⁶ Moreover, violent conflict in different cities of Libya has put the safety of migrants and refugees, including children, many of whom remain trapped in detention centres, in grave additional risk. As such, Libyan ports cannot be considered a place of safety that would meet the above requirements.

Since the *Hirsi Jamaa* judgment, direct returns of rescued persons to Libya by non-Libyan state vessels appear to have ceased. However, the current situation in the Mediterranean still gives rise to scenarios in which rescued migrants and refugees are nonetheless disembarked in Libya, although it cannot provide a place of safety given the serious human rights violations that migrants encounter there. This is due, on the one hand, to the increased capacity of the Libyan Coast Guard to intercept refugees and migrants attempting to cross the Mediterranean as a result of the provision of assets and funds by some Council of Europe member states and the EU (see Section 4.2). On the other hand, this may be due to instructions that shipmasters receive in the course of rescue operations, which would lead to the disembarkation of migrants in a Libyan port.⁴⁷ Non-compliance with such instructions may even result in shipmasters being prosecuted.

Under the IMO Guidelines, shipmasters should normally “comply with any relevant requirements of the Government responsible for the SAR region where the survivors were recovered, or of another responding coastal State, and seek additional guidance from those authorities where difficulties arise in complying with such requirements.”⁴⁸ However, when such requirements would result in disembarkation in Libya, shipmasters are faced with a dilemma of following instructions, and thereby endangering the rescued

persons, or facing consequences for ignoring instructions and refusing to disembark migrants in Libya.

With regard to Council of Europe member states' responses to such situations, the following should be kept in mind. Whilst RCCs are primarily responsible for coordinating rescue operations, including disembarkation, shipmasters play a crucial role in decision-making. In a SAR operation, aside from the main responsibility to proceed towards the distress situation at full speed and offer assistance to people in distress, the shipmaster is responsible for maintaining safety on board as well as ensuring survivors are treated with humanity, while co-operating with responsible authorities regarding disembarkation at a place of safety.⁴⁹ The master of the ship is the one who has the overall picture of the situation on board, has a general overview of rescued people's conditions as well as external factors, including weather conditions and the ship's capability to safely complete the operation.⁵⁰ Shipmasters have discretion to take any decision that, in their professional judgement, is necessary to ensure the safety of life at sea (e.g. if the ship or persons on board are in danger because of weather conditions) and protection of the marine environment.⁵¹ Furthermore, the IMO Guidelines provide that any shipmaster should "seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized".⁵² As such, shipmasters are authorised to prevent the disembarkation of rescued persons in a place that would be unsafe. From this perspective, Council of Europe member states should respect shipmasters' decisions not to disembark rescued migrants in Libya or any other location that is not a place of safety. Importantly, Council of Member states themselves should ensure that the instructions they give to shipmasters fully comply with the fundamental principle that disembarkation can only happen in a place of safety.

Recommendations

9. Coordinating authorities and any other relevant authorities should ensure instructions given in the course of rescue operations fully respect the human rights of rescued migrants, including by preventing them from being put in situations where their right to life would be threatened, or where they would be subjected to torture, inhuman or degrading treatment, or to arbitrary deprivation of liberty. They should refrain from issuing instructions to shipmasters to disembark in countries that cannot be considered as a place of safety, either directly or indirectly.
10. In their assessment whether a certain place of disembarkation can be considered a 'place of safety', member states should not limit themselves only to the considerations elaborated in maritime law. They should take full account of human rights-related considerations as well, in particular the risk of persecution, torture, or inhuman or degrading treatment, including the risk of chain *refoulement*. Member states should conduct full assessments on the basis of reliable and objective sources, including for instance information from the UN and NGOs.
11. Beyond general safeguards against such treatment in potential places of disembarkation, they should also take into consideration specific risks of vulnerable persons.
12. Member states should respect shipmasters' discretion not to disembark rescued migrants and refugees in places that are not safe, and should not penalise, sanction or otherwise take negative action against shipmasters for decisions to safeguard the lives of rescued persons.
13. Member states should ensure that all relevant actors, including shipmasters and shipping companies, are adequately informed about which places cannot be considered safe and about the necessity to refrain from disembarking migrants and refugees there.

2.2. Strengthening coordination of disembarkation to avoid delays

The assignment of a place of safety for the disembarkation of rescued persons needs to be provided 'in a reasonable time'. This should be done with minimum further deviation of the rescuing ships intended voyage, which is particularly relevant when it is a commercial ship since it will generally only have facilities for its own crew and is not equipped to cater for the needs of large numbers of rescued persons. The disembarkation of rescued persons is now frequently delayed in the Mediterranean region. This may have important negative consequences. For rescued migrants, who may already have suffered serious physical and mental abuse and distress before and during the sea crossing, and especially those requiring medical attention or those otherwise vulnerable, delays may lead to the deterioration of their situation, eventually leading to an emergency situation. When long delays occur, the health and well-being of all rescued migrants is likely to become endangered.

In some cases, member states, rather than allowing disembarkation, have allowed ships with rescued migrants on board to shelter from bad weather close to territorial waters. In some such cases, the European Court of Human Rights has issued interim measures, requesting the Italian Government "to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary. As far as the 15 unaccompanied minors were concerned, the Government was requested to provide adequate legal assistance (e.g. legal guardianship). The Government was also requested to keep the Court regularly informed of the developments of the applicants' situation."⁵³ However, whilst such measures may be necessary to avoid an immediate emergency situation, they are insufficient to ensure timely disembarkation in a place of safety. Human rights concerns may also arise from such situations when they result in the *de facto* deprivation of liberty of rescued persons by blocking their disembarkation from rescue vessels. When confinement on board is the result of state action, this may give rise to questions over the lawfulness of deprivation of liberty, and the existence of sufficient safeguards, such as judicial review, under Article 5 of the Convention.⁵⁴

As noted in Chapter 1, delays in the disembarkation of migrants rescued by merchant vessels may also lead to significant financial losses, which in turn may deter others from fully meeting their rescue obligations. Furthermore, for ships specifically dedicated to search and rescue operations, any delay in disembarkation will delay the moment at which those ships can resume their activities, therefore creating gaps in overall search and rescue capacity at sea. For these reasons, repeated delays, due to disagreements between

member states or unilateral measures adopted by those member states, are extremely corrosive to the integrity of the search and rescue system in the Mediterranean, and thus to the objective of saving lives and protecting human dignity.

The state responsible for the SRR in which the operation was carried out should take primary responsibility for coordinating disembarkation in a place of safety.⁵⁵ This clarification to state responsibilities was introduced by amendments to the SAR Convention in 2004. However, Malta has so far refused to accept these amendments and thus the notion that it should take primary responsibility for coordinating disembarkation of persons rescued in its SRR. It should be noted that this primary responsibility does not necessarily mean that persons in a state's SRR are also disembarked on the territory of that state. In coordination with other states, a more suitable safe place of disembarkation may be found, depending on the specific circumstances. However, it should be noted that IMO's Facilitation Committee has recommended that, if a solution cannot be found swiftly, it should fall on the state responsible for the SAR area to accept the disembarkation.⁵⁶ Despite this guidance, member states, and particularly Italy and Malta, have had several disputes over disembarkation in recent years.

Disagreements over the place of disembarkation may particularly arise when a rescue operation has been carried out in the SRR of a third country, if rescued migrants cannot subsequently be disembarked there, including for human rights-related reasons. As noted, on the Central Mediterranean route, this is the case for persons rescued in the SRR declared by Libya. It is highly commendable that several Council of Europe member states, and particularly Italy, have in the past assumed responsibility for the disembarkation of migrants rescued outside their own SRRs. However, this willingness appears to have decreased considerably since the declaration by Libya of its own SRR. Apprehension about disembarkation is connected, *inter alia*, to the fact that the state allowing disembarkation will then also have responsibility for processing any asylum requests and the subsequent reception of asylum seekers, the identification of migrants, and, where relevant, their return.

Whilst states may have specific responsibilities with regard to the coordination of disembarkation, dependent on their role, an effective system of timely disembarkation in the Mediterranean can only exist when member states take shared responsibility for this. IMO Guidelines require states to have effective plans and arrangements for disembarkation of survivors and their delivery to a place of safety, with an explicit mention that this may include inter-agency or international plans as appropriate.⁵⁷ In the Mediterranean, there is an urgent need to agree on a predictable

system for swift disembarkation of rescued migrants and refugees, in full compliance with the protection of their human rights. Although there have been several instances in which member states offered to take responsibility for a number of rescued persons after their disembarkation, this has been on an ad hoc basis, and often after long-standing political disagreements and, therefore, long delays.⁵⁸

Such a predictable system is most likely to become a reality if member states that accept disembarkation know that they will not be the only one left with the responsibility of identification, asylum processing and reception. In this context, the Parliamentary Assembly of the Council of Europe has noted the need “to separate rescue operations carried out by member States from subsequent applications for asylum by those rescued at sea, as both imply distinct obligations of member States.”⁵⁹ The fact that Council of Europe member states on the Central Mediterranean route are also members of the EU provides for specific opportunities for responsibility sharing. They are bound by common minimum standards on the reception of asylum seekers, processing of asylum procedures, and return. Furthermore, the notion of solidarity and responsibility sharing is embedded in their broader obligations under EU law.⁶⁰ Current EU instruments already provide for means to do so,⁶¹ and temporary emergency measures for responsibility sharing have also been adopted earlier.⁶² In the interest of the protection of migrants’ rights and safeguarding an effective system of rescue at sea, it is crucial to build on the goodwill shown by some member states, and to overcome any obstacles to set up a temporary or more permanent system of sharing responsibility for disembarked migrants quickly. They can benefit from the various proposals put forward by international organisations and NGOs.⁶³

Recommendations

14. Member states involved in a SAR operation, including concerned coastal states, the state of the RCC first contacted, and flag states, should co-operate in order to ensure that the disembarkation of persons rescued is carried out swiftly. The relevant states should in particular assist in promptly identifying a place of safety to disembark, when the coordinating RCC is not in a position to offer a place of safety that meets international standards.
15. Under no circumstance should disagreements between member states about disembarkation responsibilities be allowed to put the human rights of rescued persons at risk. When such disagreements arise, humanitarian considerations should take precedence, with timely disembarkation of the essence. Further resolution of questions about responsibility for the reception and processing of rescued migrants should take place *after* disembarkation, rather than leaving rescued migrants stuck without a place of safety.
16. Member states of the Council of Europe which are also EU members are encouraged to urgently agree on a mechanism allowing for sharing of responsibility for their reception and processing, including asylum applications, when rescued persons are disembarked in other EU member states.

2.3. Human rights-compliant treatment of disembarked migrants

Once rescued migrants are disembarked in Council of Europe member states, they must treat them fully in line with their obligations under the Convention and other legal frameworks, including EU asylum law when appropriate. This is also the case if they otherwise come within the jurisdiction of the member state, including if the ship is awaiting entry to a port in territorial waters, or when the ship has docked but migrants do not yet have permission to disembark. Medical assistance should be promptly available, and any humanitarian needs met upon arrival. Notwithstanding any responsibility-sharing mechanisms in place, disembarked persons should be promptly informed about their rights, including the right to asylum, by the state of disembarkation. Those who wish to apply for asylum should have the guarantee they can access to a fair and effective procedure, with all necessary procedural safeguards, including effective remedies with suspensive effect as appropriate, either in the state of disembarkation or

another state that will take responsibility. Similarly, procedures should ensure that the right to family life is respected, both by safeguarding family unity and by informing disembarked persons of, and giving access to procedures for, reunification with family members elsewhere in Europe.

For those people who do not seek international protection, member states should still ensure individual identification and provide an opportunity to put forward reasons why they should not be returned, in order to meet their obligations with regard to the prohibition of collective expulsion.⁶⁴ All this requires the presence of adequately trained staff, the availability of interpreters, access to legal aid, and the possibility for the review of decisions by an independent body. Early identification of vulnerable persons, such as (unaccompanied) children, pregnant women, victims of trafficking in human beings, and victims of torture, is crucial to prevent human rights violations.⁶⁵

Disembarked migrants and refugees should have access to adequate reception conditions, with good quality accommodation, access to water, food and sanitary facilities, health care and educational facilities for children. The authorities should provide a safe environment for those disembarked, including protection against violence, in particular sexual exploitation and abuse. In this respect, special measures should be put in place for the protection of persons in a vulnerable position, including children, pregnant women, LGBTI persons, ethnic or religious minorities, and victims of torture.

Disembarked migrants and refugees, like any other person, enjoy the right to liberty and freedom of movement. Any restriction should be strictly in line with member states' obligations under the Convention.⁶⁶ Alternatives to detention, feasible in the individual case, should always be sought and found ineffective before any detention order is made.⁶⁷ Member states should invest in such alternatives to ensure that they are available and accessible.⁶⁸ To do so, they have a range of resources at their disposal to assist them, including the work of the Council of Europe's intergovernmental steering Committee for Human Rights (CDDH).⁶⁹ Furthermore, when it comes to children, the Court has emphasised that their "extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant", and that states should take appropriate measures.⁷⁰ Furthermore, the UN Committee on the Rights of the Child has found that detention of migrant children on the basis of their or their parents' migration status is not in their best interests and incompatible with states' obligations under the UN Convention on Human Rights.⁷¹ Different international bodies, including the Council of Europe's Commissioner for Human Rights and Parliamentary Assembly, have called on states to prevent the detention of migrant children and end this practice with all urgency.⁷²

If disembarked migrants are to be returned, any expulsion procedures should fully comply with member states' obligations under the ECHR as well as, where appropriate, EU law.

Recommendations

17. Member states should ensure that all safeguards are in place to ensure that disembarked migrants and refugees:

- Enjoy their right to liberty and freedom of movement. When restrictions are considered, migrants and refugees should be referred as much as possible to effective alternatives to detention, as appropriate. Such alternatives should always be used in cases involving children;
- Have access to asylum procedures, adequate information and legal support in case they want to apply for international protection;
- Are not subjected to return to a country where they would face a real risk of torture, inhuman or degrading treatment either in the first country or in any country of subsequent removal;
- Are not subjected to collective expulsions, and any expulsion decisions are taken and implemented with all safeguards under the Convention;
- Have access to effective remedies and are provided with adequate reception conditions and assistance;
- Who are vulnerable individuals are promptly identified and provided with adequate support;
- Have guarantees of family unity and can access procedures for family reunification as appropriate.

Chapter 3 – Co-operation with NGOs

Due to the reduction in state-operated search and rescue operations at sea (see 1.2 above), NGOs have provided invaluable assistance to Council of Europe member states in preserving human life at sea. In 2017, NGOs accounted for approximately 40 per cent of rescues carried out in the Central Mediterranean.⁷³ As mentioned in the introduction, however, a range of measures taken by member states have led to NGOs being compelled to abandon their activities almost entirely, without having been replaced by state-led rescue operations to avoid loss of life in the Mediterranean. The interaction between member states and NGOs is therefore an urgent issue that requires further examination.

As stated by UN experts, “search and rescue operations aiming at saving lives at sea cannot represent a violation of national legislation on border control or irregular migration, as the right to life should prevail over national and European legislation, bilateral agreements and memoranda of understanding and any other political and administrative decision aimed at tackling irregular migration”.⁷⁴ The Commissioner fully endorses this conclusion.

Moreover, any vessel enjoys, as a general principle, freedom of navigation in international seas, and has the right of innocent passage in territorial waters. Furthermore, as discussed in 1.1, unless this would put the ship, crew, or passengers in serious danger, the master of any ship, including NGO vessels, is under a clear duty to proceed with all possible speed to any person requiring assistance at sea. Under no circumstance should shipmasters be penalised simply for fulfilling these duties, regardless of the circumstances, including the nationality or migration status, of the persons concerned.⁷⁵

In addition, it should be noted that NGO-rescue vessels bringing rescued migrants to a Council of Europe member state cannot be considered as migrant smuggling within the sense of the UN Smuggling Protocol unless a number of conditions are met, including the existence of an attempt to procure illegal entry of a person into the territory of a member state. There is no question of ‘procuring illegal entry’ when an NGO, after performing a rescue, requests a member state to assign a place of safety and allow disembarkation. In addition, to the extent that an attempt at procuring

illegal entry would be made, this must have been done in order to obtain, directly or indirectly, a financial or other material benefit from doing so.⁷⁶ The Protocol intentionally excludes humanitarian assistance from the scope of smuggling.⁷⁷

Within the context of the EU, rules on smuggling vary somewhat from the UN Smuggling Protocol.⁷⁸ The EU Fundamental Rights Agency (FRA) has found that, based on these rules, the overwhelming majority of EU member states do not require financial gain or other material benefit for acts relating to the entry of migrants to be a punishable offence. Furthermore, only few provide for explicit exemptions from prosecution for humanitarian purposes.⁷⁹ In July 2018, the European Parliament adopted a resolution calling for the adoption of guidelines to prevent the criminalisation of humanitarian assistance whilst implementing EU anti-smuggling rules.⁸⁰ It should further be noted that all Council of Europe member states, except for Andorra, Iceland and Ireland, have ratified the UN Smuggling Protocol, and the EU itself has also acceded to it.

In relation to the work of NGOs in general, member states have repeatedly recognised the important contribution of human rights defenders to the advancement of human rights, democracy and the rule of law.⁸¹ On account of their efforts to protect the right to life of people in distress and respect their human dignity and well-being, as well as their role in reporting potential violations, NGOs performing search and rescue activities in the Mediterranean are, in the view of the Commissioner, to be considered human rights defenders.⁸² Council of Europe member states have undertaken clear commitments to ensure a safe and enabling environment for all human rights defenders.⁸³

A particularly worrying aspect of certain member states' interaction with NGOs engaged in the monitoring in the Mediterranean and, in case of people in distress, operating a rescue operation, is the frequent smear campaigns and media attacks against them, as well as repeated criminal investigations, often on the allegation that NGOs-operated vessels have engaged in smuggling. Whilst states have the authority to investigate and prosecute any criminal acts, this power must be used in good faith and should not simply be deployed as a way to prevent NGOs from doing their work. So far, no charges brought against NGOs having worked on the Central Mediterranean route have led to convictions,⁸⁴ whilst the mere initiation of an investigation is sufficient to disrupt their activities for a long time, or even permanently. FRA "has repeatedly underlined that actions against migrant smuggling must not result in punishing people who support migrants on the move for humanitarian considerations."⁸⁵ Similarly, the non-criminalisation of assistance to migrants is underlined by the UN Global Migration Group and OHCHR.⁸⁶

Beyond judicial harassment, NGOs have also been subject to restrictions on the use of Council of Europe member states' ports. The use of ports, both for disembarkation of rescued migrants and refugees, and for the refuelling and re-equipping of rescue vessels and changing of their crewmembers, is an essential precondition for effective search and rescue work. Moreover, the refusal of permission to leave ports once docked on the basis of judicial, administrative or technical impediments has also been observed. As a general rule, Council of Europe member states should allow search and rescue vessels to use their ports. General political decisions to 'close ports to NGOs' run counter to the shared responsibility to ensure that life and human dignity are protected in the Mediterranean. The closure of ports has been denounced by numerous international bodies, including the Commissioner for Human Rights, the Council of Europe's Parliamentary Assembly, and UN bodies and experts.⁸⁷

Recent events have also brought into focus the role of flag states with regard to their responsibility to exercise control over administrative, technical and social matters on their ships on the high seas, when engaged in having on board rescued people as a result of a SAR event.⁸⁸ Whilst this is a crucial responsibility to ensure safety at sea, including in the context of search and rescue operations, a number of decisions made by flag states with regard to search and rescue NGOs give rise to concerns. This includes sudden decisions to withdraw the flag from NGO rescue vessels.⁸⁹ It also comprises the introduction of stricter requirements that were not previously in place. In this context, the Commissioner particularly notes the example of the introduction of new safety requirements by the Dutch government, which prevented the NGO ship Sea-Watch 3 from resuming its rescue operations.⁹⁰ In this case, the District Court of The Hague ordered the postponement of the application of these new regulations to the Sea-Watch 3, finding that the regulation was insufficiently clear and that the government should have made more efforts to enter into dialogue with the NGO. As a result, the sudden introduction of the regulation did not meet the principles of good governance, in particular legal certainty.⁹¹

The important role of NGOs in providing rescue capacity, as well as member states' commitments to human rights defenders and the protection of civil society more generally, in the view of the Commissioner, requires that flag states address any possible administrative or technical deficiencies in a spirit of co-operation with NGOs, and with a view to allowing their ships to resume their rescue activities as quickly as possible. Any states' restrictions placed on NGOs must be prescribed by law, governed by objective criteria and proportionate to the legitimate aims they seek to achieve so that their exercise can be amenable to control by the courts. Furthermore, it is important to ensure that the burden of failures of member states, jointly

or individually, to meet their responsibilities, such as ensuring prompt disembarkation, are not shifted unnecessarily on to NGOs.

Recommendations

18. Member states should seek constructive co-operation with NGOs conducting SAR operations to safeguard the life and dignity of migrants and refugees rescued at sea.
19. Stigmatising rhetoric against NGOs carrying out search and rescue activities should be avoided, and their work should be recognised in protecting the life and dignity of migrants and refugees at sea.
20. Member states should abide by their obligation to ensure that NGOs carrying out SAR operations, in line with their status as human rights defenders, can carry out their work in a safe and enabling environment. They should immediately cease any acts of harassment, including at the policy, judicial and administrative level against NGOs providing search and rescue services in the Mediterranean and their crewmembers.
21. If changes in legislation or measures are foreseen affecting the statuses of NGO-operated vessels, their financing or spheres of operation, member states should ensure that these are drafted with the purpose of promoting their establishment and existence, enabling their operation and facilitating their aims and activities. In this respect, NGOs should be consulted during the decision-making process of any regulatory frameworks that directly or indirectly affect them.
22. Member states should facilitate the work of NGOs saving human lives at sea, including by allowing them access to ports for disembarkation and any other needs related to their work or technical necessities. Generalised policies to close ports to all NGOs or close territorial waters or forbid navigation in certain areas within international waters should be rescinded.
23. When any issues about compliance with technical or administrative requirements arise, these should be solved in a co-operative spirit, with the focus on allowing a vessel dedicated to human rights activities, such as preserving human life at sea, to resume its operations as quickly as possible.

Chapter 4 – Co-operation with third countries

4.1. General approach to migration co-operation with third countries

International co-operation with all states bordering the Mediterranean is crucial for the effective preservation of life and the protection of the human rights of those at sea. The Commissioner notes that her observations about the responsibilities of Council of Europe member states in no way diminish the duties of non-Council of Europe member states. Conversely, however, the fact that other states, such as those on the Southern shore of the Mediterranean, have their own obligations under international law, does not relieve Council of Europe member states from assuming and observing their own responsibilities, and acting in a spirit of co-operation and shared responsibility for the protection of life and dignity.⁹²

The Commissioner notes that migration co-operation with third countries may raise certain risks, due to gaps in the legal frameworks of those countries (e.g. with regard to the provision of international protection) or problems arising out of the practices of those countries in relation to migrants (such as ill-treatment). The Commissioner has set out a framework to ensure that Council of Europe member states do not, directly or indirectly, contribute to human rights violations through their migration cooperation with third countries.⁹³ This framework, set out below, applies to all forms of co-operation, including the provision of equipment, the deployment of personnel, the sharing of intelligence, and providing financial support.

Recommendations

24. Member states developing specific migration co-operation activities with third countries bordering the Mediterranean should conduct, beforehand, human rights risk assessments. These should look, *inter alia*, at the impact their co-operation activities may have on the rights of refugees, asylum seekers and migrants to life, to freedom from torture or inhuman or degrading treatment, protection from refoulement, the right to liberty and the right to private and family life.
25. On the basis of such risk assessments, member states should develop risk mitigation strategies, which should clearly set out the steps that will be taken to ensure that actual human rights violations do not materialise. When human rights risks cannot be sufficiently mitigated, implementation of planned co-operation activities should be put on hold.
26. When co-operation activities are implemented, these should be subject to independent mechanisms to monitor the impact of these activities, including risk mitigation strategies, on the enjoyment of human rights of those affected. Such monitoring should be undertaken by actors who do not have a political, financial or operational role in the cooperation activities.
27. Member states should also ensure that those potentially affected by co-operation activities have access to an effective system of redress.
28. The outcomes of the risk assessment and monitoring must be able to lead to an immediate suspension of co-operation activities if these endanger the human rights of those affected.
29. To ensure transparency and accountability, detailed co-operation plans, risk assessments, risk mitigation strategies and the results of monitoring should be made public.
30. The Commissioner invites the relevant EU institutions, in particular the European Commission and European External Action Service, to also ensure that these safeguards are in place to guarantee the transparency and accountability of co-operation activities with third countries, carried out under their respective responsibilities.

4.2. Specific comments on co-operation with Libya

Since 2017, some Council of Europe member states and the EU have made significant investments into the Libyan Coast Guard to improve its capacity to rescue and/or intercept migrants at sea. This has included training, the provision of assets, and other measures, such as supporting the setting up of the JRCC and Libya's declaration of an SRR.⁹⁴ It has been observed that the increased capacity of the Libyan Coast Guard has enabled it to rescue or intercept more people trying to leave Libya and sail to Europe.⁹⁵ It should be noted that, as a general point, it is commendable and consistent with the shared responsibility for safety at sea when member states provide assistance to other states to enhance their search and rescue capacity. In the case of Libya, however, assistance aimed at enhancing rescue capacity may not be distinguishable from assistance enabling the Libyan Coast Guard to prevent people from fleeing Libya. Furthermore, as noted, persons taken onboard by the Libyan Coast Guard (either through its own interception operations, or by having them transferred from a vessel that has carried out rescue) are returned to Libyan territory and are routinely detained, and subsequently subjected to torture, sexual violence, extortion and other serious human rights violations.⁹⁶ Risks to persons returned to Libya, in clear violation of the obligation only to disembark rescued persons in a place of safety, have further increased as violent conflict has flared up.

Despite the close connection between their actions and returns to Libya, there has been a remarkable silence over how member states have ensured that they are not contributing, directly or indirectly, to violations of the human rights of refugees, asylum seekers and migrants intercepted by the Libyan Coast Guard. While information is available about the fact that human rights training has been provided to the Libyan Coast Guard, and support provided to international organisations working in Libya, this is not an adequate answer to this crucial question. In this context, it is important to note that international bodies have repeatedly drawn the attention of member states, individually and collectively, to this issue. In December 2017, the UN Committee Against Torture expressed deep concern about the lack of assurance that co-operation with the Libyan Coast Guard by Italy would be reviewed in light of serious human rights violations.⁹⁷ In December 2018, UNSMIL and OHCHR made an unambiguous call to the EU and its member states to take all necessary action to ensure any such co-operation is consistent with human rights law, and called for a range of measures to give effect to this recommendation.⁹⁸ Civil society organisations have also persistently called on member states, including through their action in the framework of the EU, to ensure their actions do not contribute to human rights violations, including as a result of Libyan rescue and interception operations.⁹⁹

In March 2019, with returns by the Libyan Coast Guard of intercepted migrants to Libya continuing, and the above recommendations not implemented, the Commissioner noted that the onus was now on member states to show urgently that their support was not contributing to human rights violations, and to suspend this support if they could not do so.¹⁰⁰ The Commissioner regrets that, despite repeated calls by herself and other bodies, Council of Europe member states have not provided evidence of adequate guarantees to ensure that, acting individually or jointly, they are not contributing to serious human rights violations.

Recommendations

31. Member states should urgently review all their co-operation activities and practices with the Libyan Coast Guard and other relevant entities, and identify which of these impact, directly or indirectly, on the return of persons intercepted at sea to Libya or other human rights violations. Such activities should be suspended until clear guarantees of full human rights-compliance are in place, in line with the principles set out in section 4.1. In the interest of transparency and accountability, the results of these reviews should be made public.
32. Similarly, any additional planned support to the Libyan Coast Guard or other entities should only be provided if, following the implementation of the steps set out in section 4.1. Pending the full publication of the results of these steps, any additional support, in particular the delivery of vessels and other equipment to the Libyan Coast Guard, should be postponed.
33. Member states should continue supporting the efforts of international organisations in securing the release of refugees, asylum seekers and migrants from places of detention in Libya, and urgently pledge a significant number of places for the Libya evacuation scheme set up by UNHCR. They should also urgently facilitate the creation of safe humanitarian corridors for refugees, asylum seekers and migrants to leave conflict-affected areas.

Chapter 5 – The provision of safe and legal routes to prevent irregular, dangerous sea journeys

Whilst the previous parts have focused on the reaction to migrants attempting to cross the Mediterranean, this question is closely connected with the lack of safe and legal routes to Europe. This has widely been acknowledged as one of the factors leading to irregular migration using dangerous routes,¹⁰¹ as well as providing a situation in which smuggling in human beings can flourish. As such, the lack of safe and legal routes does not only endanger the rights of migrants themselves, but also undermines the goal of member states to combat smuggling. The lack of safe and legal routes also makes migrants more vulnerable to becoming victims of trafficking. In this context, both the UN Trafficking Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings specifically provide that states party shall take appropriate measures, as may be necessary, to enable migration to take place legally.¹⁰²

The lack of safe and legal routes is particularly pressing for people in need of international protection. In 2018, of the 1.2 million refugees in need of resettlement worldwide, including survivors of violence and torture, people with legal and physical protection needs, and women and girls at risk, only 55 700 (or 4.7 per cent) had actually been resettled.¹⁰³ UNHCR estimated that the number of refugees in need of resettlement would rise to 1.4 million. The shortage of resettlement places may lead further desperate refugees to find their own way to safety, including in Europe, via the Mediterranean. This shortage also puts an extraordinary burden on a small number of countries worldwide, often in developing regions, which host the overwhelming majority of refugees.¹⁰⁴ In the Council of Europe area, Turkey stands out as one of the major refugee-hosting countries worldwide, with UNHCR listing 3.6 million registered Syrian refugees in May 2019,¹⁰⁵ more than the number of Syrians who arrived in all other member states combined in the last few years. Whilst Council of Europe member states are not the only ones that could and should contribute to resettlement places, many of them still have significant absorption capacity that should be utilised to fairly share international responsibility for the protection of refugees. In the context

of the Mediterranean, increasing support to UNHCR's Emergency Transit Mechanism is also particularly crucial to facilitate the evacuation of refugees from Libya, and their subsequent resettlement. At the same time, Council of Europe member states should insist that this mechanism is implemented in full transparency and with adequate safeguards for the rights of those who have been evacuated.

In addition to resettlement, other possibilities to provide safe and legal routes, such as humanitarian visas¹⁰⁶ and community-based sponsorship schemes, can be utilised by Council of Europe member states. A particular concern for the Commissioner is family reunification. In a 2017 Issue Paper, the Commissioner highlighted the increasing tendency of Council of Europe member states to restrict the possibilities of family reunification.¹⁰⁷ The Issue Paper presents 36 recommendations for member states to ensure that refugees and persons with other protection statuses can effectively enjoy their right to family unity, and thus prevent their family members feeling the need to attempt to reach Europe in an irregular manner. Across the Council of Europe area, these recommendations still need to be implemented with urgency. Human rights issues also still arise from restrictions placed on family reunification involving persons with statuses that are not related to international protection concerns.¹⁰⁸

The provision of safe and legal routes for persons in need of protection and their family members should be a priority. However, a coherent approach to preventing dangerous, irregular migration across the Mediterranean would also greatly benefit from opening up safe and legal routes for other categories of migrants.¹⁰⁹ This could include enhancing opportunities for family reunification with persons other than those recognised as refugees,¹¹⁰ allowing more (temporary) labour migration, issuing more study visas, and providing other opportunities to visit Council of Europe member states in a regular manner.¹¹¹

Recommendations

34. Member states should increase their participation in resettlement programmes. Member states that have recently reduced the number of resettlement places, or have suspended their participation in resettlement programmes, should urgently review these decisions. They should also consider enabling, or expanding the possibilities for humanitarian visas, sponsorship schemes or other mechanisms that help create safe and legal routes.
35. Member states should review their policies to ensure that beneficiaries of international protection have access to prompt, flexible and effective family reunification procedures, in line with the recommendations in the Commissioner's Issue Paper.

Concluding remarks

This document has set out some of the most challenging issues, which should be tackled in a holistic approach, to ensure the preservation of life at sea and the protection of the rights of refugees, asylum seekers and migrants attempting to cross the Mediterranean. It focuses on some of the most immediate issues, but there are other areas, not set out here, that also require member states' attention. As regards deceased or missing migrants, for example, improving identification, tracing of family members, ensuring their right to the truth is effectively realised, and facilitating the repatriation of bodies or ensuring dignified burial continue to be challenging areas to be addressed. Member states can benefit from existing guidance in this area.¹¹²

The current situation in the Central Mediterranean, and Council of Europe member states' responses, raise important questions with regard to their obligations under international maritime and human rights law. Firstly, whilst these obligations are, on the whole, clear, there appears to be an increasing tendency to try to avoid having to assume these obligations, rather than to implement them fully. For example, one of the results of the *Hirsi Jamaa* judgment (see Section 2.1) appears to be that states are now actively trying to avoid having to take rescued migrants on board, and are leaving this to others, including those not covered by the European Convention on Human Rights.

New practices may also raise questions of whether member states exercise jurisdiction within the meaning of the Convention in a specific case. This is not a question that can be answered easily in the abstract. However, in light of legal challenges that have already been launched, and those that will undoubtedly follow in the future, member states should be mindful that the Convention is a living instrument. The European Court of Human Rights has found that changing patterns of migration mean that the interpretation of the Convention needs to adapt, in order to afford effective protection. Issues arising from the management of migratory flows cannot justify having recourse to practices that are not compatible with the state's obligations under the Convention. It has also noted that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them

enjoyment of the rights and guarantees protected by the Convention which states have undertaken to secure to everyone within their jurisdiction.¹¹³

Furthermore, regardless of specific responsibility under the Convention, the Commissioner notes that states may be found internationally responsible if they aid or assist other states in committing wrongful acts, which may include human rights violations under international human rights law.¹¹⁴ Also from this perspective, member states may benefit from the recommendations in this document.

Protecting human rights and having effective migration management policies are not competing goals. Rather, human rights protection should be at the heart of any legitimate and effective migration policy. Nowhere is the need for this clearer than in the Mediterranean, where the current approach by member states so far has failed to prevent the unnecessary loss of lives, has made the position of those rescued unpredictable and precarious, and has increased the risks of serious human rights violations at the hands of third countries. The challenges are undoubtedly great, but the need to change course, for the preservation of human life and dignity, is even greater.

Endnotes

1. See, for example, ECtHR *Xhavara and Others v. Italy and Albania*, Application No. 39473/98 (11 January 2001), dealing with the interception of an Albanian ship carrying migrants, which led to deaths, in 1997; ECtHR *Hirsi Jamaa and others v Italy* [GC], Application No. 27765/09 (23 February 2012), dealing with the return of intercepted migrants to Libya in 2009. Also see the Parliamentary Assembly of the Council of Europe (PACE) Report *The “left-to-die boat”: actions and reactions*, Doc. 13532 (2014); PACE Report *Lives lost in the Mediterranean Sea: who is responsible?*, Doc. 12895 (2012).
2. The Central Mediterranean route is used as shorthand for sea crossing from North African countries, most commonly Libya, but also Algeria, Egypt, and Tunisia, to Malta and Italy.
3. For details, see Italy Defence Ministry, Italian Navy, *Mare Nostrum Operation: 18 October 2013 - 31 October 2014*; the Mare Nostrum Operation has rescued 150.810 migrants over a 364-day period, as reported by the European Parliament, Resolution 2015/2660(RSP) on the latest tragedies in the Mediterranean and EU migration and asylum policies, 29 April 2015, paragraph D.
4. Whilst the primary focus of EU-led operations, such as former Operation Triton and EUNAVFOR MED, known as Operation Sophia (whose deployment of naval assets is currently suspended), has not been search and rescue, they have saved the lives of thousands of people according to the duty of all states and shipmasters under international maritime law to provide assistance to people in distress at sea. Nonetheless, as noted by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in her Report *Unlawful death of refugees and migrants*, A/72/335, 15 August 2017, paragraph 62: “[...] These operations have never matched the success achieved by Mare Nostrum in preventing casualties, in part because their primary mission is not search and rescue but border control.” See also Z. Campbell, “Europe’s deadly migration strategy”, Politico.eu, 28 February 2019.
5. The Libyan Port and Maritime Transport Authority notified the International Maritime Organisation (IMO) on 14 December 2017 with the Libyan Search and Rescue region (SRR), which followed a previous declaration in July. See the response of the Commissioner for Migration, Home Affairs and Citizenship, on behalf of the European Commission, to Parliamentary Question Reference P-003665/2018, 4 September 2018; this is also reiterated by the Maritime Rescue Coordination Center Roma, 2017 SAR Operations in the Mediterranean Sea Report, page 18. On 26 June 2018, information on Libya’s SRR was uploaded on IMO’s online information sharing system, the Global Integrated Shipping Information System (GISIS). On 28 June 2018, the former Ambassador of Italy to Libya congratulated on twitter the Libyan authorities on completing procedures related to the implementation of their SAR area.
6. On 20 June 2016, the Council of the European Union extended the mandate of Operation Sophia to provide for the “development of the capacities and in the training

of the Libyan Coast Guard and Navy in law enforcement tasks at sea, in particular to prevent human smuggling and trafficking” (Council Decision (CFSP) 2016/993); the mandate was later extended to 31 December 2018, with the additional task of, among others, monitoring the effectiveness of training provided to the Libyan Coast Guard (Council Decision (CFSP) 2017/1385); on 2 February 2017, Italy signed a Memorandum of Understanding with Libya’s Government of National Accord “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”. One day after, on 3 February 2017, the 28 EU members states of the European Council agreed at an informal summit held in Malta to undertake actions “to significantly reduce migratory flows, break the business model of smugglers and save lives. In particular, they agreed to step up cooperation with the Libyan authorities.” (The Malta Declaration). Moreover, via the EU Emergency Trust Fund for Africa, the European Commission has financed a project in support of Libya, which, among others, includes an action aimed at establishing a fully-fledged Maritime Rescue Coordination Centre (MRCC). It also aims to respond to main needs in terms of equipment and training. For further details, see European Commission, EU Emergency Trust Fund for Africa - North of Africa window, Infographic on EU cooperation on migration in Libya. See also, EEAS EU-Libya relations, 9 November 2018.

7. Italy Ministry of the Interior, Code of Conduct for NGOs undertaking activities in migrants’ rescue operations at sea, 7 August 2017; See also European Commission ‘Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity’, 4 July 2017, SEC (2017) 339, page 2. On the impact of these measures on NGOs, see FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, 2018.
8. See statistics and trends analysed by UNHCR, Desperate Journeys: refugees and migrants arriving in Europe and at Europe’s borders: January-December 2018, January 2019.
9. Ibid; for further data see IOM, Missing Migrants, Tracking Deaths along Migratory Routes.
10. UNHCR, Desperate Journeys: refugees and migrants arriving in Europe and at Europe’s borders: January-December 2018, January 2019; UNSMIL and OHCHR, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, December 2018; UNHCR, Position on Returns to Libya – Update II, September 2018; Human Rights Watch, No Escape from Hell: EU Policies contribute to abuse of migrants in Libya, January 2019; Amnesty International, Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean, August 2018.
11. The duty to save life at sea is provided by customary international law and enshrined in a number of international conventions, the most important are: the United Nations Convention on the Law of the Sea (“UNCLOS”), Montego Bay, 1982, particularly Article 98; the International Convention for the Safety of Life at Sea (“SOLAS”), London, 1974, Chapter V, Regulation 33; the International Convention on Maritime Search and Rescue (“SAR Convention”), Hamburg, 1979. Amendments were adopted in May 2004, they entered into force on 1 July 2006.
12. Committee of Ministers, Reply to PACE Recommendation 2137(2018), ‘International obligations of Council of Europe member States: to protect life at sea’, Doc. 14831, 14 February 2019. The commitment to saving lives of migrants is also reiterated in Objective 8: Save lives and establish coordinated international efforts on missing

migrants, of the UN Global Compact for Safe, Orderly and Regular Migration, 11 January 2019.

13. HRC, CCPR General Comment No. 36 (30 October 2018) on Article 6 ICCPR on the right to life, CCPR/C/GC/36, paragraph 63. All Council of Europe member states are parties to the ICCPR.
14. Article 3 of the European Convention on Human Rights (“ECHR”) and Article 33(1) of the 1951 Convention Relating to the Status of Refugees (“the 1951 Refugee Convention”).
15. Article 5 of the ECHR.
16. Article 4 of Protocol 4 to the ECHR.
17. UNCLOS, Article 98(1).
18. See also the International Maritime Organisation (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004 (“IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea”), paragraph 3.1.
19. For concerns about state-operated vessels skirting rescue obligations, see PACE Report The “left-to-die boat”: actions and reactions, Doc. 13532 (2014).
20. UNCLOS, Article 98(2).
21. See *supra* note 5.
22. See SAR Convention, Chapter 2.1 and Chapter 2.3; SOLAS Chapter V, Regulation 7(1) and UNCLOS, Article 98 (2).
23. *Ibid.*
24. SAR Convention, Chapter 2.1.1.
25. *Ibid.* Chapter 4.3.
26. *Ibid.* Chapter 3.
27. IMO Guidelines on the Treatment of Persons Rescued at Sea, paragraph 6.7.
28. IMO Sub-Committee on Navigation, Communications and Search and Rescue, Libyan Maritime Rescue Coordination Centre Project, submitted by Italy, doc. NCSR 5/INF.17, 15 December 2017 (available through the IMODOCS information portal).
29. Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell’Italia alla missione internazionale in supporto alla Guardia costiera libica adottata il 28 luglio 2017, Atto del Governo DOC. CCL, n. 2, page 5.
30. Letter from Marco Minniti, former Minister of Interior of Italy, to the Council of Europe Commissioner for Human Rights, 11 October 2017.
31. Consiglio dei ministri, Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione, 28 Dicembre 2017, DOC. CCL-bis, N. 1, Scheda 36, page 101. See also the decision by Catania Tribunal on the case of MV Open Arms, 27 March 2018, pages 21 and 22.
32. See, for example, M. Petrillo and L. Bagnoli, “The Open Arms case continued: new documents and Malta”, Open Migration, 12 April 2018. See also Global Legal Action Network, “Legal action against Italy over its coordination of Libyan Coast Guard pull-backs and abuse”, 8 May 2018.

33. UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, page 17: "LCG officials noted that the majority of distress calls they received 'were coming through Italy.'"
34. It should be noted that, if member states' RCCs alerted of a distress situation would take no further action than providing telephone details of the JRCC, they would clearly fall short of their obligation to assume responsibility until it is clear another RCC is able to take over the coordination formally.
35. UNCLOS, Article 98(2).
36. See Amnesty International, *Lives adrift: Refugees and migrants in peril in the central Mediterranean*, September 2014, page 35; Regulation (EU) 656/2014 establishing rules for the surveillance of the external borders in the context of operational co-operation coordinated by Frontex, in Article 9(2)(f)(i)-(x), sets out a useful list of factors to help assess whether a vessel may be in distress. This includes the existence of a request for assistance; the seaworthiness of the vessel and the likelihood it will not reach its final destination; the number of persons on board in relation to the type and condition of the vessel; the availability of necessary supplies such as fuel, water and food to reach the shore; the presence of qualified crew and command of the vessel; the availability and capability of safety, navigation and communication equipment; the presence of persons on board in urgent need of medical assistance, the presence of deceased persons on board; the presence of pregnant women or children on board; and the weather and sea conditions, including weather and marine forecasts.
37. See, in this respect, SOLAS Chapter V, Regulation 7(1): "Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons."
38. UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, page 58.
39. See, for example, Commissioner for Human Rights, 'Commissioner calls for more rescue capacity in the Mediterranean', 27 March 2019; UNHCR, 'UNHCR warns over Mediterranean rescue capacity', 30 September 2018; Statement by the UN Special Rapporteur on the human rights of migrants and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'EU "trying to move border to Libya" using policy that breaches rights – UN experts', 17 August 2017; as well as the countless calls from NGOs and other bodies.
40. SAR Convention, Chapter 1.3.2.
41. IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 6.12.
42. UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017; see also IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 6.17
43. ECtHR *Hirsi Jamaa and others v Italy* [GC], Application No. 27765/09 (23 February 2012), paragraph 114.
44. *Ibid.* see paragraphs 73-75, 77.

45. See Commissioner for Human Rights, Letter to the Minister of Interior of Italy seeking clarifications over Italy's maritime operations in Libyan territorial waters aimed at managing migration flows, 11 October 2017.
46. UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018; UNHCR, *Position on Returns to Libya – Update II*, September 2018, paragraph 42; Human Rights Watch, *No Escape from Hell: EU Policies contribute to abuse of migrants in Libya*, January 2019; Amnesty International, *Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean*, August 2018.
47. See, for example, M. Stierl, "Migrants calling us in distress from the Mediterranean returned to Libya by deadly 'refoulement' industry", *The Conversation*, 7 February 2019.
48. IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 5.1.7.
49. *Ibid.* paragraph 5.
50. As also acknowledged in IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 6.10 (2, 3 and 8).
51. SOLAS Chapter V, Regulation 34.1.
52. IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 5.1.
53. ECtHR Press Release, ECHR grants an interim measure in case concerning SeaWatch 3 vessel, 29 January 2019; Italy subsequently did allow disembarkation, after an agreement was reached with other EU member states over the redistribution of those disembarked.
54. See, for example, ECtHR *Medvedyev and Others v. France* [GC], Application No. 3394/03 (29 March 2010).
55. SAR Convention, Chapter 3.1.9.
56. IMO Facilitation Committee, *Principles Relating to Administrative Procedures For Disembarking Persons Rescued at Sea*, *Fal.3/Circ.194*, 22 January 2009, paragraph 3, states the following: [...] "If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support."
57. IMO Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 6.5.
58. The European Council on Refugees and Exiles (ECRE) has noted that such a 'ship by ship' approach has exacerbated the suffering of rescued migrants, has led to the political exploitation of such incidents, have increased administrative burdens and costs, and have caused reputational damage to member states. See ECRE, *Relying on relocation: ECRE's proposal for a predictable and fair relocation arrangement following disembarkation*, January 2019, page 4.
59. PACE Resolution 2229(2018), *International obligations of Council of Europe member States to protect life at sea*, paragraph 5.3.

60. Treaty on the Functioning of the EU, Article 80: "The policies of the Union set out in this Chapter [on border checks, asylum and immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."
61. Under Regulation 604/2013 (the Dublin III Regulation), EU member states could make proactive use of the family reunification provisions under Articles 8-10 and of the humanitarian clause under Article 17(2). Conversely, the tendency of EU member states to strictly application of the notion that the first country of entry should be responsible for an asylum request provides a major barrier for responsibility sharing to be effective in practice.
62. See Council Decision (EU) 2015/1523 and 2015/1601. It should be noted, however, that due to problems of implementation, the number of persons effectively relocated under these decisions fell far short of their initially intended targets.
63. See, for example, UNHCR and IOM, Proposal for a regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued-at sea, 27 June 2018; ECRE, Relying on relocation: ECRE's proposal for a predictable and fair relocation arrangement following disembarkation, January 2019; Amnesty International and Human Rights Watch, Plan of action: twenty steps for a fair and predictable rescue system in the Mediterranean Sea , 6 March 2019.
64. This is another reason why, when migrants are rescued by ships operated by Council of Europe member states, disembarkation in such a member state may be the only way to meet Convention obligations. See, in this context, ECtHR *Hirsi Jamaa and others v Italy* [GC], Application No. 27765/09 (23 February 2012), paragraphs 185 and 202, in which the Court finds that the situation on board a military vessels, lacking expertise, interpreters and legal assistance, did not allow for individual interviews and safeguards in line with the prohibition of collective expulsion (Article 4 Protocol 4) right to an effective remedy (Article 13). On the Court's case law on collective expulsions, see its factsheet.
65. As found by UN Experts on 15 May 2019, it must be noted that "in light of the well-documented pattern of human rights abuses and persons suffered by migrants in Libya, there are reasonable ground to believe that by the time migrants enter into the territory of Italy or are subjected to the jurisdiction of the Italian State, they should already be identified as victims or potential victims of trafficking." Joint Communication from Special Procedures, AL ITA 4/2019. Given available information on the treatment of migrants in Libya, member states should also take into consideration that disembarked persons are likely to have been subjected to torture or inhuman or degrading treatment.
66. For a detailed overview of the ECtHR's case law on immigration detention, see the factsheets of the Court on Migrants in detention, Accompanied migrant minors in detention, and Unaccompanied migrant minors in detention, as well as Legal and practical aspects of effective alternatives to detention in the context of migration, analysis of the Council of Europe's Steering Committee for Human Rights (CDDH), 7 December 2017, section II.1.
67. Legal and practical aspects of effective alternatives to detention in the context of migration, analysis of the Council of Europe CDDH, 7 December 2017.

68. Commissioner for Human Rights, High time for states to invest in alternatives to migrant detention, Human Rights Comment, 31 January 2017; Commissioner for Human Rights, Letter to the Secretary of State for Migration and Asylum of Belgium on the resumption of immigration detention of children, 5 June 2018; Commissioner for Human Rights, Letter to the Chairwoman of the Committee on Internal Affairs of the German Bundestag, 16 May 2019.
69. See, for example, Legal and practical aspects of effective alternatives to detention in the context of migration, analysis of the Council of Europe CDDH, 7 December 2017; UNHCR, Options Paper 2: options for governments on open reception and alternatives to detention, 25 June 2015; International Detention Coalition, There are alternatives: a handbook for preventing unnecessary immigration detention (revised edition), 2015.
70. ECtHR Popov v. France, Application Nos. 39472/07 and 39474/07 (19 January 2012), paragraph 91.
71. Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2018, paragraph 5.
72. Commissioner for Human Rights, Letter to the Secretary of State for Migration and Asylum of Belgium on the resumption of immigration detention of children, 5 June 2018; PACE Resolution 2020(2014), "The alternatives to immigration detention of children", 3 October 2014, paragraph 3.
73. See Amnesty International, Between the Devil and the Deep Blue Sea, August 2018, page 5; Maritime Rescue Coordination Center Roma, 2017 SAR Operations in the Mediterranean Sea Report, page 14.
74. UN experts include the Special Rapporteur on the human rights of migrants; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Special Rapporteur on the situation of human rights defenders, and the Independent Expert on human rights and international solidarity, Joint Communication from Special Procedures, AL ITA 4/2019, 15 May 2019, page 4.
75. In fact, as discussed in 2.1, flag states have to enforce this duty and many impose criminal sanctions for failure to meet rescue obligations.
76. Articles 3(a),6(1) and 19. Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime (UNTOC) of 15 November 2000.
77. See UNODC, Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, Part Three on Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC.
78. Directive (EU) 2002/90 defining the facilitation of unauthorized entry, transit and residence; Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.
79. FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, paragraph 4.

80. European Parliament, Resolution 2018/2769(RSP) on guidelines for Member States to prevent humanitarian assistance from being criminalised, 5 July 2018.
81. See Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, 28 November 2018 and Recommendation CM/Rec(2007)14 of the Committee of Ministers to member States on the legal status of non-governmental organisations in Europe, 10 October 2007.
82. See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the UN General Assembly on 9 December 1998.
83. See supra note 82.
84. Research by FRA “shows that most opened cases ended with an acquittal or were discontinued due to lack of evidence”. FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, paragraph 9.
85. Ibid. paragraph 5.
86. UN Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, 2018, principle 4.7.
87. Commissioner for Human Rights, Letter to the Prime Minister of Italy underscoring the need to uphold the human rights of persons rescued at sea, 7 February 2019; PACE Resolution 2229(2018), International obligations of Council of Europe member States to protect life at sea, paragraphs 1 and 5.2; Joint Communication from Special Procedures, AL ITA 4/2019, 15 May 2019.
88. UNCLOS, Article 94.
89. As was the case when Gibraltar de-flagged the Aquarius, run by the NGO SOS Mediterranean, in partnership with MSF. See, for example, Human Rights at Sea, Human Rights and International Rule of Law Ramifications of the De-Flagging of the M/V Aquarius Dignitus, February 2019. It should be noted that the Aquarius was subsequently registered with Panama but was de-flagged shortly afterwards.
90. Letter of the Dutch Minister for Infrastructure and Water Management to the Dutch Parliament, 1 April 2019, reference 2019Z06433; Sea Watch, ‘Dutch government blocks Sea-Watch 3 and other NGO ships with a new policy, citing concerns for “safety”, while people are left to drown’, 2 April 2019.
91. The Hague District Court, “Ministeriële regeling voorlopig niet op Sea-Watch van toepassing”, 7 May 2019.
92. See, for example, the Council of Europe Secretary General’s Special Representative on migration and refugees, Report of the fact-finding mission to Spain, 18-24 March 2018, SG/Inf(2018)25, published on 3 September 2018, paragraph 3.1: “as a matter of principle, member states should exercise human rights due diligence in the context of such co-operation”.
93. See, for example, Commissioner for Human Rights, European states must put human rights at the centre of their migration policies, 5 July 2018.
94. See supra note 6.
95. UNHCR, Position on Returns to Libya – Update II, September 2018, paragraph 22.

96. Ibid. paragraph 19.
97. UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017, paragraph 22.
98. UNSMIL and OHCHR, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, December 2018, pages 58-59.
99. For a recent example, see Amnesty International and Human Rights Watch, Plan of action: twenty steps for a fair and predictable rescue system in the Mediterranean Sea, 6 March 2019.
100. Commissioner for Human Rights, "Commissioner calls for more rescue capacity in the Mediterranean" 27 March 2019.
101. See, for example, PACE Resolution 2229(2018), International obligations of Council of Europe member States to protect life at sea, paragraph 4: "While emphasizing that European States are not directly responsible for causing today's substantial migration flows, the Assembly points out that the closure of borders puts asylum seekers in even more life-threatening situations, as journeys become longer and the routes are more dangerous."
102. Article 5(3), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UNTOC; Article 5(4), Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005, CETS No. 197.
103. UNHCR, "Less than 5 per cent of global refugee resettlement needs met last year", 19 February 2019.
104. UNHCR, Global Trends report of 2018 notes that 85% of the world's refugees under its mandate are hosted in developing regions.
105. UNHCR, Operational Portal refugee situations: Syria Regional Refugee Response: Turkey, figures as of 9 May 2019. It should be noted that Turkey is additionally also host to smaller numbers persons in need of international protection from other countries.
106. See particularly European Parliament, Resolution 2018/2271(INL) with recommendations to the Commission on Humanitarian Visas, 11 December 2018; PACE Resolution 2227(2018), Extra-territorial processing of asylum claims and the creation of safe refugee shelters abroad, 27 June 2018, paragraph 9.1.
107. Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe, Issue Paper, June 2017; see also UNHCR, Families Together: Family Reunification in Europe for Refugees, December 2018.
108. Commissioner for Human Rights, Time for Europe to get migrant integration right, Issue Paper, May 2016, Chapter 1.
109. UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report, A/HRC/37/50, 26 February 2018, paragraphs 36-37.
110. Commissioner for Human Rights, Time for Europe to get migrant integration right, Issue Paper, May 2016, Chapter 1; Special Representative of the Council of Europe Secretary General on migration and refugees, Issue Paper: Human rights aspects of immigrant and refugee integration policies, March 2019.
111. For political commitments to opening safe and legal routes for non-refugees, see, for example, Objective 5: Enhance availability and flexibility of pathways for regular

migration of the UN Global Compact for Safe, Orderly and Regular Migration, 11 January 2019; See also the Political Declaration of the Valletta Summit on Migration, 11-12 November 2015.

112. See, for example, ICRC, *Missing migrants and their families: the ICRC's recommendations to Policy-Makers*, Policy Paper, October 2017; International Commission on Missing Persons (ICMP), *The Paris Principles addressing the issue of missing persons*, February 2019. The Commissioner for Human Rights' Issue Paper, *Missing persons and victims of enforced disappearance in Europe*, March 2016, also sets out member states' obligations, a number of which are also applicable to the situation of missing or deceased migrants.
113. ECtHR *Medvedyev and Others v. France* [GC], Application No. 3394/03 (29 March 2010), paragraph 81; See also ECtHR *Hirsi Jamaa and others v Italy* [GC], Application No. 27765/09 (23 February 2012), paragraphs 73-75, 77, 175, 177-179.
114. UN International Law Commission, *Articles on the Responsibility for Internationally Wrongful Acts*, Article 16. This responsibility is predicated on the state in question doing so with knowledge of the circumstances of the international wrongful act, and the act being internationally wrongful if committed by that state itself.

The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by the Council of Europe to promote awareness of and respect for human rights in the member states.

The activities of this institution focus on three major, closely related areas :

- country visits and dialogue with national authorities and civil society,
- thematic studies and advice on systematic human rights work, and
- awareness-raising activities.

The current Commissioner, Dunja Mijatović, took up her functions in April 2018. She succeeded Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Álvaro Gil-Robles (1999-2006).



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