



RESEARCH SOCIAL
PLATFORM ON MIGRATION

Search and Rescue, Relocation and Disembarkation Arrangements in the Mediterranean



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INTRODUCTION

Disputes over Search and Rescue (SAR) and disembarkation of migrants rescued at sea among Mediterranean coastal states are by no means a novelty. They find their roots in long-standing disagreements over the interpretation and applicability of the law of the sea and in the inability of states to devise cooperative agreements among them to enhance the effectiveness of SAR operations and promptly disembark rescued persons to a place of safety. However, since the summer of 2018, controversies over SAR and disembarkation have resulted in increasingly restrictive policy responses towards migrants and asylum seekers attempting to cross the Mediterranean Sea.

The politics of SAR criminalisation and disengagement

Over the last few years, SAR operational capacities in the Central Mediterranean have been progressively reduced through a set of interrelated policy responses adopted by the EU and its member states.

First, the increasing policing and criminalisation of civil society actors and non-governmental organisations involved in SAR activities. Since 2017, actions taken to restrict the activity of SAR NGOs have included:

- the seizing and confiscation of NGO boats;
- the application by Italian authorities of a 'code of conduct' limiting their independence;
- the launch of legal prosecutions against NGOs based on unfounded allegations of facilitating irregular immigration and human smuggling;
- the refusal by the governments of Italy and Malta to allow NGO boats to disembark in their national ports;
- the imposition of administrative fines against those organisations.

Second, the strategic disengagement of national and EU actors from SAR activities in the Central Mediterranean. This approach has translated into the reduction of the operational space of Frontex Joint Maritime Operation Themis (launched in 2018) compared to the predecessor Triton, as well as the withdrawal (since March 2019) of the naval means and SAR-related activities of the EU Common Security and Defence Policy (CSDP) mission EUNAVFOR-MED operation Sophia.

Third, the progressive delegation of containment tasks to Libyan authorities, including 'pullbacks' to Libya of boats carrying migrants headed to Europe.

Support by the EU and its member states to the Libyan authorities has materialised in the provision of funding, training, and equipment aimed at increasing the capacity of the Libyan Coast Guard to conduct interception operations at sea and enabling Libyan authorities to set up a Libyan Maritime Rescue Coordination Centre (MRCC). EU funding has been mobilised to support these objectives through the EU Trust Fund (EUTF) for Africa.

SAR criminalisation and disengagement in the Mediterranean: policies and instruments



Policing and criminalisation of SAR NGOs:

- Launch of investigations and criminal proceedings against crew members of NGOs vessels on allegations of facilitating irregular immigration and human smuggling
- Seizing and confiscation of NGO boats
- Application of a 'code of conduct' limiting the independence of SAR NGOs
- Refusal to allow access to national ports resulting in delayed disembarkation of rescued people
- Imposition of administrative fines against SAR NGOs



Reducing/disengaging from SAR Operational capacity:

- Reduction of the operational space of Frontex Joint Maritime Operation Themis (launched in 2018) compared to the previous JO Triton
- Withdrawal of the naval means and SAR-related activities of EUNAVFOR-MED operation 'Sophia' since March 2019.



Reducing/disengaging from SAR Operational capacity:

- Provision of funding to the Libyan authorities, including through the EU Trust Fund for Africa aimed at meeting the needs of the Libyan coastguard in terms of training and equipment and gradually a Libyan Maritime Rescue Coordination Centre (MRCC).
- Training of Libyan Coast Guard officials in the framework of EUNAVFOR Med Sophia
- Sharing of information with the Libyan Coast Guard on boat sightings through satellite maritime surveillance technologies, such as EUROSUR Fusion Services under Frontex Themis Joint Operations and aerial assets of the EUNAVFOR-MED Sophia operation

International and EU legal standards

The legality and legitimacy of EU and national policies in the field of SAR and disembarkation must be assessed in light of their compatibility with legal standards stemming from the law of the sea, international and regional human rights law and secondary EU legislation in the field of border surveillance and asylum.

→ **The international law of the sea** stipulates a clear duty for every shipmaster to render assistance in case of vessels or persons in distress at sea and proceed with all possible speed to the rescue of persons in distress. The state responsible for the Search and Rescue Region (SRR) where assistance has been rendered also has primary responsibility for coordinating SAR activities in due diligence and 'good faith' with other states, as well as taking the lead in finding a port for disembarkation in a place of safety.

The United Nations High Commissioner for Refugees (UNHCR) has underlined that a place of safety must correspond with a place where rescued persons are not at any risk of persecution and where asylum seekers have access to fair and efficient asylum procedures and reception conditions.

→ **International and regional human rights and refugee law standards** cover the right to respect and protect life, the respect of the non-refoulement principle and the prohibition to expose people to death, torture, or inhuman and degrading treatment, and the right to life.

The European Court of Human Rights (ECtHR) case law has found that jurisdiction within the meaning of Article 1 of the Convention may be present in cases of both *de jure* as well as *de facto* control over individuals by state actors, including when acting extraterritorially. In its landmark 2012 case *Hirsi Jamaa and Others v Italy*, the ECtHR confirmed the extraterritorial reach of the human rights protection regime when assessing Italian authorities' 'pushbacks' to Libya of people intercepted at sea. The Court made clear that member states exercising effective control over migrants intercepted at sea exercise jurisdiction and are therefore bound by the obligations of the ECHR, even if this control takes place outside their territory.

The *Hirsi* doctrine represents the starting point for tackling more sophisticated containment policies currently deployed by EU states in the Mediterranean, including those involving the provision of financial, technical and operational assistance to third country authorities for increasing the latter capacity to prevent migrant boats from reaching European shores, so-called 'pullbacks' (Box below).

→ **The EU Regulation 656/2014**, which establishes rules on SAR and disembarkation in the context of Frontex-coordinated Joint Operations at sea, provides a common EU concept of 'place of safety' which is protection-driven. It also requires the member state hosting a Joint operation to accept disembarkation of rescued migrants in case there is no other possibility to identify a place of safety rapidly and effectively.

Member states' human rights responsibilities in the context of 'pullbacks' to Libya: Application No. 21660/18 S.S. and others v. Italy

In May 2018, a coalition of NGOs and scholars filed an application against Italy with the ECtHR on behalf of 17 survivors of an incident at sea occurred off the coast of Libya on 6 November 2017. In that circumstance, the Libyan Coast Guard interfered with the efforts of the NGO vessel Sea-Watch 3 to rescue around 130 migrants from a sinking dinghy in international waters, causing the death of more than 20 people.

The applicants claim that the intervention of the Libyan Coast Guard was partly coordinated by the Maritime Rescue Coordination Cen-

tre (MRCC) in Rome, while an Italian navy ship, part of the Italian Mare Sicuro operation, was also close to the area of intervention. In addition, the episode should be read in the context of the 2017 Italy-Libya Memorandum of Understanding, as well as financial support provided to the Libyan Coast Guard by the EU, including through the EU Trust Fund for Africa. These circumstances, it is argued by the applicants, establish Italy's legal responsibility under the ECHR for the actions of Italian and Libyan vessels in the case under consideration. The case is currently under examination by the ECtHR.

Ad hoc disembarkation and relocation arrangements

Since the summer of 2018, a number of cases of disembarkations following SAR operations at sea have been addressed through ad hoc disembarkation and relocation arrangements from Spain, Italy and Malta. These arrangements involved a limited number of member states on a voluntary and informal basis, raising concerns regarding their compliance with EU asylum standards, EU Treaty principles and fundamental rights.

Since early 2019, the European Commission has been involved in the coordination of ad hoc relocation arrangements following disembarkation in Italy and Malta. EU agencies – chiefly the European Asylum Support Office (EASO) and the European Border and Coast Guard agency (Frontex) – have been mobilised to provide ‘support’ to member states’ authorities in the implementation of relocation arrangements, in the areas of first reception, provision of information on international protection procedure, registration of applicants, and pre-relocation selection procedures.

Following unsuccessful discussions within the Council of the EU during 2019, interior ministers of five Member States (Germany, France, Italy, Malta, Finland) gathered in La Valletta on 23 September 2019 to promote further action on relocation of migrants rescued at sea.

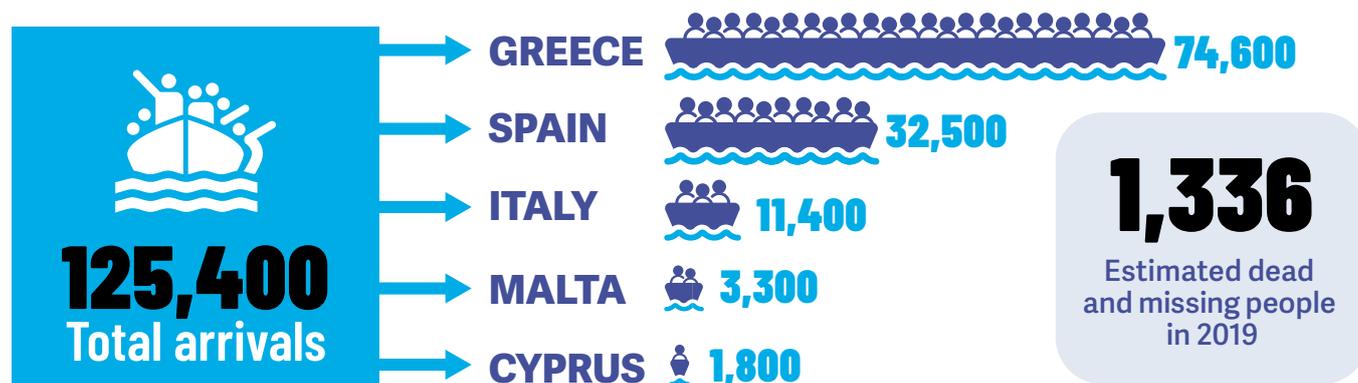
The political declaration adopted in that context – the so-called ‘Malta Declaration’ – aims to overcome the previous ‘ship by ship’ approach by setting in place a “more predictable and efficient temporary solidarity mechanism” open to all EU member states willing to participate.

The Malta Declaration lays down a solidarity mechanism which foresees the relocation of asylum seekers disembarked in Italian and Maltese ports by NGOs boats on the basis of pre-declared pledges and through a fast track system taking no more than four weeks.

The implementation of disembarkation and relocation arrangements has been characterised by a lack of publicly available information – including regarding the number of people disembarked and relocated, as well as on participating member states – which makes it difficult to ascertain member states’ fulfilment of their relocation pledges in practice.

The lack of transparency and accountability concerning the implementation of relocation arrangements raises concerns regarding the possible impact of these practices on the respect of asylum seekers’ rights, including the right to non-discrimination, which may result from the application of selective relocation criteria (e.g. based on the nationality of applicants).

Mediterranean arrivals in the EU, in 2019



Greece and Spain both include sea and land arrivals; Spain includes sea arrivals in the Mediterranean and to the Canary Islands. See UNHCR, Mediterranean Situation, <https://data2.unhcr.org/en/situations/mediterranean>



Communication from the Commission to the European Parliament, the European Council and the Council. Progress Report on the Implementation of the European Agenda on Migration, COM(2019) 481 final.

Policy recommendations



Enforce international and EU maritime, refugee and human rights standards

The European Commission and the European Parliament should ensure that all EU Member States fully and effectively comply with their commitments under international maritime, refugee and human rights law.

Compliance with international and regional standards lays at the foundation of EU border and asylum policies and is a precondition for their legitimacy and effectiveness. EU Member States should not be allowed to apply those standards 'flexibly' or disregard them altogether in the context of SAR and disembarkation activities. Disengaging from saving lives at sea, criminalizing civil society and private actors engaging in SAR operations and indirectly supporting third countries in conducting interceptions and illegal 'pullbacks' risk producing human rights violations, exposing affected individuals to torture, inhuman and degrading treatment and arbitrary detention in unsafe countries.



Enable the activity of NGOs saving lives at sea

EU institutions and member states should maintain their ports open to NGO vessels and ensure that NGOs can continue to contribute to rescuing refugees and migrants at sea, in compliance with relevant international law standards.

No EU member state should be permitted to police or criminalise civil society actors involved in SAR or humanitarian assistance in the Mediterranean. Such actions constitute an illegitimate restriction of the fundamental right of freedom of association enshrined in Article 11 of the EU Charter of Fundamental Rights (CFR) and the independence of human rights actors safeguarded by the UN Declaration on Human Rights Defenders. The criminalisation of NGOs constitutes a major threat to the EU's founding values enshrined in Article 2 of the Treaty of the European Union (TEU), which lay at the very basis of EU cooperation. The current EU legal framework on migrant smuggling should be amended to include an obligation for member states not to criminalise humanitarian assistance to asylum seekers and irregular immigrants.



Suspend cooperation on SAR and border management with the Libyan Coastguard

The EU and its member states should urgently review all their co-operation activities and practices with the Libyan Coast Guard and other relevant entities, and assess which of them contribute, directly or indirectly, to the violation of the human rights of people intercepted at sea and returned to Libya. Until clear guarantees of compliance with human rights are ensured, cooperation with Libyan authorities on SAR and disembarkation should be suspended.

EU funding instruments must not be used to bypass legal commitments enshrined in EU Treaties, national constitutions and international instruments. The EU should stop funding training and 'capacity building' activities on SAR and border maritime surveillance in third countries that are not safe for refugees and migrants, such as Libya. These forms of cooperation are illegal and incompatible with EU fundamental rights standards laid down in the EU CFR, which bind the European institutions and agencies.

Interventions in third countries should be accompanied by regular assessment of their impact on fundamental rights. Special focus should be given to ensuring that the migration-related objectives pursued through EU external funding are not inconsistent with (or run contrary to) other EU policies and objectives, including on democracy, the rule of law and human rights, as well as respect of UN principles and instruments.



Establish a new EU SAR Operation involving EU agencies and set up an EU SAR Fund

The EU and its member states should focus on devising a long-term and sustainable response to SAR challenges in the Mediterranean. Following previous calls made by international, regional and EU actors (including the European Parliament), the EU should consider the feasibility of setting up and implementing a new SAR joint operation in the Mediterranean. EU agencies, notably the EU Border and Coast Guard Agency (Frontex) and the European Asylum Support Office (EASO), should be assigned coordinating and supporting tasks at different phases of the proposed EU SAR Joint Operation, including assessing protection needs of disembarked people and implementing a relocation scheme based on a permanent distribution model in full compliance with EU asylum law.

The envisaged Joint Operation should be primarily – if not solely - focused on SAR (saving lives) and safeguarding international protection of people rescued at sea. EU agencies must rigorously comply with international, regional and EU fundamental rights and refugee standards, and be subject to a robust and impartial monitoring and independent complaint mechanism before the European Ombudsman, in cooperation with national complaint mechanism bodies. The possibility should also be considered to establish an EU SAR fund under the EU budget to help reinforce a coordinate EU SAR operations. The envisaged EU SAR Fund should be accompanied by adequate accountability mechanisms, and be primarily aimed at strengthening EU Member States' disembarkation capacities, reception facilities and domestic asylum systems.



Establish a permanent relocation mechanism based on EU law

Ad hoc and informal relocation arrangements supported and coordinated by the European Commission and EASO since early 2019 are the result of an intergovernmental-led process that stands at odd with the legal foundations of the CEAS and raise concerns about compliance of adopted relocation procedures with EU asylum standards.

As guardian of the Treaties, the European Commission should only support initiatives unequivocally falling within the remit of EU law, and ensure that relocation procedures in the context of ad hoc arrangements are fully in line with protection standards foreseen by EU asylum rules. Similarly, EASO and other EU agencies should be only involved in supporting Member States' relocation initiatives which take place in full accordance with EU asylum law.

Pending a comprehensive reform of the Dublin system, member states may decide to take up responsibility to assess an application for international protection of disembarked people even if they are not responsible under the Dublin Regulation criteria, based on the discretionary clauses provided in Article 17 of the Dublin Regulation. Any new relocation system linked to disembarkation in the Mediterranean, however, should take place under a clear EU remit and be strictly linked to the swift adoption of the proposed reform of the Dublin Regulation. The setting up of a permanent (or corrective) relocation mechanism for sharing responsibility on asylum applicants should not be *à la carte* but involve all EU member states. The guiding principle should be one of *equal solidarity*, whereby all EU member states share fairly and equally the responsibility over asylum seekers across the EU in full compliance with EU constitutive principles and fundamental rights.

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