



Geneva International Centre *for* Justice



HUMAN RIGHTS VIOLATIONS IN THE CENTRAL MEDITERRANEAN

MAY 2019 // WRITTEN BY GIULIA MARINI

HUMAN RIGHTS VIOLATIONS
IN THE CENTRAL MEDITERRANEAN SEA

Written by

Giulia Marini

April/May 2019

Geneva International Centre *for* Justice

Independent, non-profit, non-governmental organization

GICJ is an independent, non-profit, non-governmental organization dedicated to the promotion and reinforcement of commitments to the principles and norms of human rights. GICJ is headquartered in Geneva, Switzerland and is governed by the Swiss Civil Code and its statutes. Basing its work on the rules and principles of International Law, International Humanitarian Law and International Human Rights Law, GICJ observes and documents human rights violations and seeks justice for victims through all legal means available.

Mission

GICJ's mission is to improve lives by tackling violations and all forms of violence and degrading or inhumane treatment through the strengthening of respect for human rights; reinforcing the independence of lawyers and judiciaries; consolidating the principles of equity and non-discrimination; ensuring that rule of law is upheld; promoting a culture of awareness on human rights; and combating impunity.

Work

GICJ has been tackling issues of justice and accountability since it was established. GICJ maintains a partnership with various NGOs, lawyers and a vast civil society network around the world. Through these channels, GICJ is able to receive documentation and evidence of human rights violations and abuses as they occur in several countries. GICJ continues to bring this information to the attention of relevant UN bodies in order to gain justice for all victims.

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1. Executive Summary

For millennia, the Mediterranean Sea – and, in particular, the Central Mediterranean area - has been a fundamental crossroads for people, goods, cultures and economic exchanges. In recent times, this route has been traversed by thousands of migrants and refugees aiming to reach Europe from Sub-Saharan Africa and North Africa. Amongst the various sea-based routes to reach Europe, according to the UN Special Rapporteur on the human rights of migrants, the Central Mediterranean has been by far the most commonly used route since 2013.

The increase in the use of the Central Mediterranean route has tragically resulted in large-scale loss of life¹. According to the UN High Commission for Refugees (UNHCR), Libya remains the main point of departure for refugee and migrants. These mixed movements of people – as defined by the UNHCR – includes persons fleeing persecution, conflict and violence as well as persons simply looking for better living conditions. These people, while on the move, face several risks of being subject to grave human rights violations and death².

Since 1 January 2019, the International Organization for Migration (IOM) recorded that 432 migrants lost their life in the Mediterranean³, of which 257 occurred along the Central Mediterranean Route. Although the total number of losses has dropped drastically since 2018 – when the number of deaths amounted to 620 – with more than 14,500 deaths recorded since 2014, the Central Mediterranean is considered to be the deadliest migration route in the world⁴.

Throughout the whole migration path, human rights violations can occur both in the pre-departure phase, while crossing the Mediterranean and once arrived at the destination. However, the aim of this report is to assess the accountability of States for human rights violations occurring in the Central Mediterranean route, i.e. during the crossing phase.

¹ [A/HRC/29/36](#), Report of the Special Rapporteur on the human rights of migrants, François Crépeau.

² UNHCR, Central Mediterranean Route Situation, 2018 Appeal.

³ IOM Missing Migrants Data Collection (<https://missingmigrants.iom.int/region/mediterranean>), IOM Flows monitoring (<http://migration.iom.int/europe?type=arrivals>) – Last updated 08/05/2019.

⁴ IOM, The Central Mediterranean route: Migrant Fatalities (Jan. 2014 – July 2017).

The first part of this report is dedicated to identifying the law applicable to events occurring at sea. The legal framework necessary to assess violations in the Central Mediterranean Sea mainly consists of obligations arising under international human rights law, international refugee law and international maritime law.

The second part is focused on States' Search-and-Rescue (SAR) obligations under the law of the sea, which are fundamental to understanding States rights and duties during SAR operations specifically involving migrants at sea. Besides analysing the concerned international conventions, this section contains a chronological report of the rescue obligations carried out by various States and by the European Union in the area. This section also tackles the pivotal role of NGOs in SAR operations and addresses the issue of the accusations against them by several Governments in recent years.

The third part focuses on one of the main issues: the issue of accountability for human rights violations at sea. This issue is far from being resolved as it gives rise to several unsolved legal issues. The fourth part, which is closely related to the previous one, reports the most relevant cases of possible human rights violations that occurred in 2018 and 2019 in the Central Mediterranean Area. Particular emphasis has been given to the most recent cases of denial of access to port of SAR ships carrying hundreds of migrants by EU Member States and to the situations that may possibly amount to human rights violations for which States can be deemed responsible. The conclusion aims to address States, the European Union and the international community with observations and recommendations on the issue.

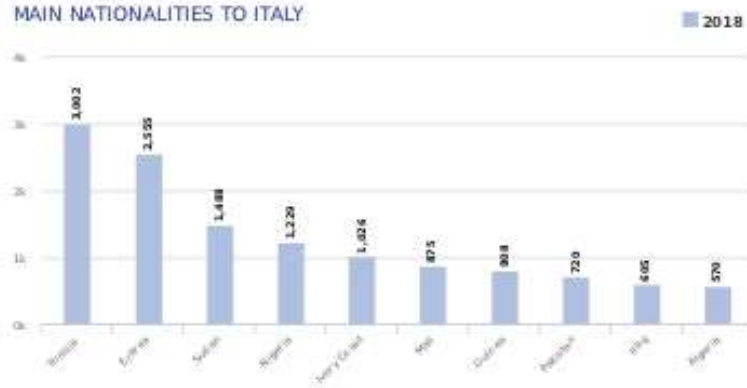
MEDITERRANEAN UPDATE

MIGRATION FLOWS EUROPE: ARRIVALS AND FATALITIES

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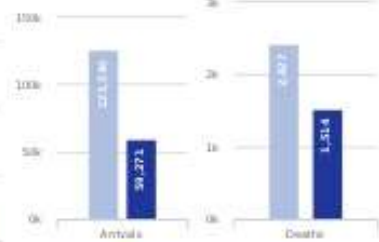


MAIN NATIONALITIES TO ITALY



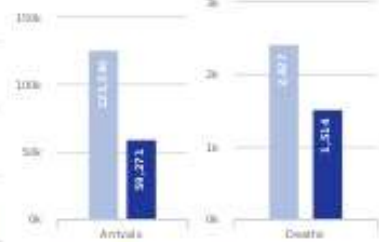
ARRIVALS

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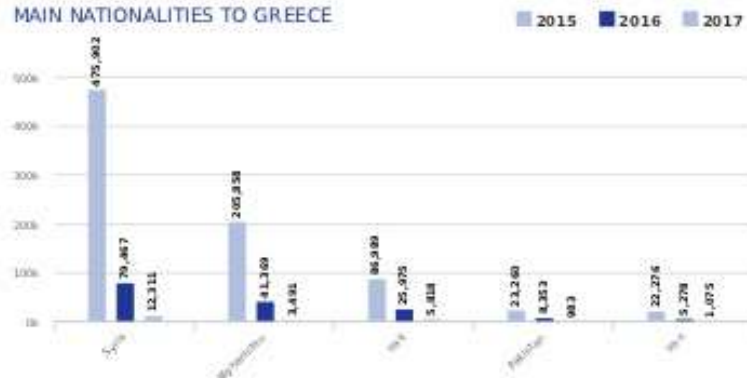
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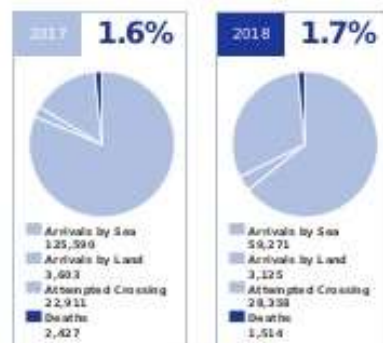


Note: Arrivals data for the past year are from January to end of the month specified. Arrivals data for the current year are updated every Tuesday and Friday.

MAIN NATIONALITIES TO GREECE



ESTIMATED FATALITY RATE



Note: Arrivals data for the past year are from January to end of the month specified. Arrivals data for the current year are updated every Tuesday and Friday. Attempted crossings include those migrants rescued from the Mediterranean by the Turkish and Libyan Coast Guards.

#migrationeurope | migration.iom.int/europe

2. Applicable Law

The right of states to control the entry and residence of aliens in their territory is a well-established and longstanding principle of international customary law and finds its basis on the principle of sovereignty. However, this right has been gradually eroded by international human rights law and international refugee law.⁵

2.1. International Human Rights Law

By reason of their universal nature, human rights apply to all people, in all places, at all times. This is the underlying principle of any regional or international human rights treaty. Such concept is clearly expressed in Article 1 and Article 2 of the Universal Declaration of Human Rights (UDHR). UDHR proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to rights and freedoms without distinction of any kind. Hence, human rights of all people embarked on ships crossing the Mediterranean must be protected, regardless of the conditions in which they are found, their nationality or their legal status.

International human rights law recognises – among other rights – the right to human dignity⁶, the right to life⁷, the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment⁸, the right to liberty and security⁹, and the right of freedom of movement, which includes the right of a person to leave any country, including his own, and to return to his country¹⁰. The Human Rights Committee, the monitoring body of the ICCPR, issued several General Comments on the above-mentioned rights mentioning their applicability on situations occurring at sea or when dealing with migrants.

In General Comment No. 36, the Human Rights Committee dealt with the right to life. Such right is not only recognized as a supreme right, but the duty to protect it “requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been

⁵ [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08(2007).pdf)

⁶ Article 1 UDHR, Preamble of the International Covenant on Civil and Political Rights (ICCPR).

⁷ Article 3 UDHR, Article 6(1) ICCPR.

⁸ Article 5 UDHR, Article 7 ICCPR, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁹ Article 3 UDHR, Article 9 ICCPR.

¹⁰ Article 13 UDHR, Article 11 ICCPR.

placed at particular risk because of specific threats”¹¹ – including a situation of distress at sea. In this regard, it is also specified that “States parties are also required to respect and protect the lives of all individuals located on marine vessels flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State’s effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.”

In General Comment No. 35, the Human Rights Committee held that “detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. [...] Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.”¹²

General Comment No. 27 deals with the freedom to leave any country, including one’s own. In this document, the Human Rights Committee recognises that the “freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the Country. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee.”¹³

Another core human rights treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), in its Article 3, provides that “no State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. This provision contains a clear

¹¹ General Comment No. 36 (2018) on Article 6 of the ICCPR (Right to life).

¹² General Comment No. 35 (2014) on Article 9 of the ICCPR (Liberty and security of person).

¹³ General Comment No. 27 (1999) on Article 12 of the ICCPR (Freedom of movement).

reminder of the principle of *non-refoulement*, a core principle of international refugee law which will be dealt with in subsequent paragraphs.

2.1.1. Human Rights Law in the European context

Besides international human rights law, most of the rights mentioned above have a corresponding right in regional instruments such as the European Convention on Human Rights¹⁴ (ECHR) and the Charter of Fundamental Rights of the European Union¹⁵ (CFR). In addition to international human rights law, CFR Art. 19 and Art. 4 of Protocol No. 4 to the ECHR impose a prohibition on collective expulsion of aliens. Such prohibition was at the centre of one of the most important cases brought in front of the European Court of Human Rights (ECtHR) dealing with migration across the Mediterranean, namely *Hirsi Jaama and Others v. Italy*.

2.2. International Refugee Law

The 1951 Convention Relating to the Status of Refugees (1951 Refugees Convention) and its 1967 Protocol are the core international treaties on refugees' rights. In addition to these instruments, rights of refugees are often complemented by regional treaties and standards.

The 1951 Refugees Convention, in its Article 1, provides for a definition of the term “**refugee**”: a refugee is someone who has left her/his country of origin and is unable or unwilling to return due to well-founded fears of being persecuted. The term “refugee” must not be confused with “asylum-seeker” or “migrant”, as the former entails a different set of protection rules and rights.

An **asylum-seeker** is someone who fled her/his country of origins and is requesting for international protection. The key difference between refugees and asylum-seekers is that the latter's requests of protection has yet to be processed. Consequently, not all asylum-seekers are granted the status of refugee. Nonetheless, they still enjoy the right not to be sent back to their countries of origin until their asylum request has been processed.

¹⁴ See respectively articles 2, 3, 5 and Article 4 of the Protocol N. 4.

¹⁵ See respectively articles 1, 4, 6, 7 and 45 (though it does not mention the right to leave any country).

Migrants constitute another separate category. They are commonly understood as persons who decide to move for reasons that do not entail a direct threat to their life or freedom¹⁶. Instead, their decision to migrate can be based on several reasons, for example, to find better work or living conditions, to study, or for family reunification. As stated above, the importance of distinguishing and defining these categories lies on the fact that the core principle of international refugee law, the principle of *non-refoulement*, does not apply to migrants.

The principle of *non-refoulement*, as expressed in Article 33(1) of the 1951 Refugee Convention, is a norm of customary international law. It prohibits any act of forcible removal or rejection that puts the person concerned at risk of persecution. It does not give any relevance to the way the removal is carried out, e.g., in the form expulsion, deportation, extradition, non-admission at the border, interception, transfer. Indeed, the main focus of the principle of *non-refoulement* is on the effects and consequences of the action of removal, namely a threat to one's liberty or freedom.

The *non-refoulement* principle imposes a restraint on State sovereignty as it limits the discretion to refuse admission into a State's territory, thus constituting an exemption to migration control. Concretely, such principle requires States to grant the right to temporarily access their national territory during the assessment of asylum applications.

The principle applies both to asylum-seekers and refugees, regardless of their legal or illegal entry into a State's territory. Some interpretations of this principle seem to allow the removal of migrants to "safe countries", defined as non-refugee-producing countries or countries in which refugees can enjoy asylum without any danger.¹⁷ Even in this case a temporary admission has to be granted in order to assess that the third country concerned is not a country of persecution and provides an effective protection against any subsequent *refoulement* in breach of Article 33. Therefore, the principle of *non-refoulement* imposes a *de facto* duty to admit refugees in any circumstances.

According to the Palermo Protocol and EU Regulation 656/2014, in the case of events taking place at sea, it is not possible to make a formal evaluation of refugee status or asylum-seeker status. As a

¹⁶ UNCHR, A Guide to International Refugee Protection and Building State Asylum Systems (2017).

¹⁷ UNHCR, Background Note on the Safe Country Concept and Refugee Status (EC/SCP/68).

consequence, any vessel involved in search and rescue (SAR) operations has the duty to rescue and transport to a “safe place” all people collected at sea. Once migrants reach a place of safety, the competent authorities will proceed with an evaluation of their status as refugees or asylum seekers.

2.3. Search and Rescue Obligations Under the Law of Sea

In the case of events taking place on the High Seas, the applicable law is found in international treaties and customary international law. Specifically, when assessing States’ SAR obligations under the law of sea, the main legal instruments to be taken into account are:

- 1974 International Convention for the Safety of Life at Sea (SOLAS);
- 1979 International Convention on Maritime Search and Rescue (SAR Convention);
- 1982 UN Convention on the Law of the Sea (UNCLOS), also ratified by the European Union;
- 1989 International Convention on Salvage (1989 IMO Convention).

In addition to these binding instruments, several UN Agencies such as the International Maritime Organization (IMO), the UN Office of the High Commissioner for Human Rights (OHCHR) and the UNHCR have provided non-binding guidelines on the treatment of persons rescued at sea. These include:

- 1997 UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum;
- 2000 OHCHR Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol);
- 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea;
- 2015 UNHCR Rescue at Sea: A Guide to Principles and Practices as Applied to Refugees and Migrants;
- 2016 OHCHR Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations.

2.3.1. The duty to rescue life at sea

The duty of solidarity at sea – namely, the duty to assist persons in situations of distress at sea – is a longstanding maritime tradition and an obligation recognized by international law¹⁸. Specifically, it constitutes a norm of customary international law, meaning that such obligation is imposed on all States, regardless of whether or not they have ratified UNCLOS or other relevant treaties. This principle applies to all people without distinction as to their nationality, their status or the circumstances in which they are found.

UNCLOS does not provide any definition of the notion of **distress**. It is defined in the 1979 SAR Convention as a situation “wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance”. In other words, it is a situation where there is a sufficient and imminent threat to life .

Events such as shipwrecks or collisions clearly fall under the definition of distress presented above that triggers SAR operations. Conversely, there are many other situations in which the factual presence of a grave and imminent danger is more difficult to assess. These may include, among others: overcrowded ships, substandard vessels, lack of security equipment, medical emergencies and infected people. These situations require an individual assessment in which the imminence and the gravity of the danger have to be evaluated. In these cases, the presence of a distress call must be taken seriously into account by the potential rescuers.

2.3.2. Obligations of flag and coastal States

UNCLOS Article 98 prescribes the duty to render assistance to any person found at sea in danger of being lost with reference to both flag and coastal States. It does not make any distinction on the nature of the rescuing vessels; therefore, this obligation applies to both privately owned vessels as well as State-owned vessel.

UNCLOS Art. 98(1) imposes the duty to rescue on **flag States** by compelling them to oblige masters of ships flying their flag to rescue people in distress at sea. By contrast, other regulations impose duties

¹⁸ Appendix to the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea

directly upon masters of ship. SOLAS Regulation 33 provides that the master of a ship at sea which is in a position to be able to provide assistance is bound to do so with all speed. Article 10(1) of 1989 IMO Convention requires every master to render assistance to any person in danger of being lost at sea. Equally, Art. 10(2) requires States to adopt the necessary measures to enforce the master's duty.

UNCLOS Art. 98(2) prescribes that **coastal States** shall promote the establishment of a SAR service in arrangement with neighbouring States with the purpose of guaranteeing safety on and over the sea. Additionally, Article 9 of 1989 IMO Convention provides for "the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from [...] acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations".

2.3.3. Exceptions

Whilst UNCLOS Art. 98(1) provides that the duty to rescue life at sea persists unless SAR operations put into serious danger the rescuing ship, its crew or passengers, SOLAS Regulation 33 leaves the door open for other vague and unspecified grounds. It provides that the ship receiving the distress alert may does not have a duty to rescue if it is unable or considers it unreasonable or unnecessary to proceed to assist. In such cases, the master must inform the appropriate SAR service.

While the UNCLOS exception refers only to the conditions of the rescuing ship, SOLAS Regulation leaves the ship master with a great margin of discretion. And such margin of discretion may ultimately lead to harmful situations when the factual presence of an imminent danger is not so apparent.

2.4. Search and Rescue Obligations in the European Context

As outlined above, in the global context the duty to render assistance to persons in distress at sea is regulated by several international instruments. In the European Union (EU) context, conduct during SAR operations is regulated by Regulation 656/2014.¹⁹

This regulation establishes the rules for the surveillance of external sea borders in the context of operational cooperation coordinated by the European Agency Frontex.²⁰ In particular, it incorporates into EU law that border management activities must respect the principle of *non-refoulement*.²¹ Not to mention that the right to life, enshrined in ECHR Article 4 and CFR Article 2, in the context of the Central Mediterranean migration route, also translates into the duty of European States to render assistance to persons in distress at sea.²²

2.4.1. EU Regulation 656/2014

The declared aim of Regulation 656/2014 is to reaffirm the commitment of the EU to follow the rules set out in international law and to respect fundamental rights in SAR operations coordinated by Frontex. In particular, it clarifies the extent to which Frontex operations at sea are bound to the legal regime laid down in the international instruments outlined above.

This Regulation, dealing with interception in the territorial sea and on the High Seas, provides that “any measure taken in the course of a surveillance operation should be proportionate to the objectives pursued, non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers in accordance with the principle of *non-refoulement*”.

¹⁹ Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014

²⁰ European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

²¹ Schengen Borders Code

²² EU Directorate-General for External Policies, “Migrants in the Mediterranean: Protecting human rights”, (2015).

3. Search and Rescue Obligations Regime

3.1. Search and Rescue Operations

The SAR Convention describes SAR operations as “the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources including co-operating aircraft, vessels and other crafts and installations”.

As outlined above, both public and private entities can be involved in SAR operations. Amongst them there are coastal States, flag States under which law private vessels and ships are registered and operate, State-owned vessels, NGO ships and other private vessels. Each type of entity has a different set of obligations.

3.2. Search and Rescue Regions

The duty to assist persons in situations of distress at sea persists in any area of the sea, even if the applicable law may differ depending on whether SAR operations are taking place in domestic or international waters. However, the multitude of entities potentially involved in SAR operations often results in confusion over who is the most competent authority.

The SAR Convention provides for the stipulation of agreements between contiguous States for the delimitation of the different SAR zones of national competence. Such division has to include both domestic waters and adjacent international waters. In practical terms, it follows that all seas are divided into SAR zones in which each coastal State is – or should be – the responsible authority. According to the SAR Convention, a “**search and rescue region**” (SRR) is an area of defined dimensions within which SAR services are provided.

3.2.1. SRRs in the Mediterranean

SRRs in the Mediterranean were set out during a conference held in Valencia in 1997 under the auspices of the IMO. The conference resulted in the “General Agreement on a Provisional SAR Plan”, which established SRRs across the Mediterranean.



Source: SAR Contacts

But once SRRs are identified, who is the competent authority to coordinate SAR operations? The easiest answer is that every coastal State competent for a specific SAR zone has to coordinate the SAR operation to rescue people in distress. However, this does not happen all the time. The Central Mediterranean scenario has been rendered chaotic by several factors undermining the success of coordination between coastal States.

First of all, the situation was complicated for a long time by the fact that Libya – while it ratified the SAR Convention – did not set out its own SRR until the end of 2017. Even now, a question remains as to how and to what extent Libya is able to comply with its SAR obligations.



Source: UNHCR.

Secondly, there are issues related to Italian and Maltese SRRs. The 1997 Valencia Conference failed to include Malta in the General Agreement as the Maltese SRR was unilaterally established by that country. Up to the present day, there are areas in the Central Mediterranean where the Italian SRR and Maltese SRR overlap. As a result, this situation creates complications when events of distress occur in that specific area.

3.3. Coordination of SAR Operations

It is now clear that the identification of SRRs is of fundamental importance in the coordination of SAR operations since States are supposed to be the entities coordinating SAR operations occurring in their SRRs.

The shipmaster of a vessel rescuing persons at sea has to immediately inform the competent regional SAR Coordination Centre, which is determined based on the SRR division. Shipmasters are only compelled to provide assistance to people in distress at sea. Once the rescuing operation is concluded, they arrange disembarkation and any further obligation towards the rescued people is transferred to the State competent for the given SRR.

Indeed, as recognized by the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, the first entity alerted to the presence of an event of distress has to take all the appropriate measures – rescuing the people – and notify the competent SAR authority for that specific area and wait until the responsibilities are handed over to the latter.

When the Regional Coordination Centre (RCC) contacted by the shipmaster does not correspond to the RCC responsible for the SRR in which the event of distress is taking place, the first-contacted RCC should transfer the case to the responsible RCC. In other words, the first SAR authority to be notified of a situation of distress has to take all the appropriate measures to assist the rescued people and to notify it to the competent SAR authority.

3.4. Place of Safety

Once the phase of rescue at sea is concluded, the SAR operation is not yet complete. The rescued people must be taken to a so-called “**safe place**”. The entity competent to identify the safe place is the RCC as part of its coordination duty. In this perspective, the identification of the correct SAR authority coordinating the SAR operation is of fundamental importance. The SAR Convention does not contain any definition of place of safety, but it is defined in the EU Regulation 656/2014.

According to Regulation 656/2014, a place of safety “means a location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors’ next destination or final destination, taking into account the protection of their fundamental rights in compliance with the principle of *non-refoulement*”.

Outside of the European framework, the definition of this notion can be found in the 2004 IMO Guidelines. There, it is defined as a location where rescue operations are considered to terminate, where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.

In both cases, as highlighted in the Appendix to the 2004 IMO Guidelines, “it would be inconsistent with the intent of the SAR Convention to define a place of safety solely by reference to geographical location as it may not necessarily be on land. Rather, a place of safety should be determined by reference to its characteristics and by what it can provide for the survivors”.

In practice, since it is a place where rescue operations are considered to be completed and where primary human needs can be met, it is consequential that a place of safety cannot be a place where people are at risk of being subjected to violence or other forms of persecution and torture. Importantly, a ship can only be a temporary place of safety. In this regard, the IMO Guidelines state that “an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. [...] An assisting ship may not have appropriate facilities and equipment. [...] Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made”.

The concept of place of safety is also strictly related to the international refugee law principle of *non-refoulement* and the concept of a safe third country. With regard to the notion of a safe third country, in September 2018 the UNHCR released a document regarding returns to Libya. According to the UNHCR, it is not appropriate for States to designate or apply in practice a designation of Libya as a so-called “safe third country”, due to the current situation of conflict and instability. Since 2015, the

UNHCR has determined that Libya should not be regarded as a safe third country in light of the absence of a functioning asylum system, the widely reported difficulties and abuses faced by asylum-seekers and refugees in Libya, the absence of protection from such abuses and the lack of durable solutions.

3.5. SAR Operations Across the Central Mediterranean

3.5.1. Operation *Mare Nostrum*

On 3 October 2013, a few miles away from the port of the island of Lampedusa, a vessel transporting migrants across the Central Mediterranean Sea shipwrecked, causing the death of 368 people. In response, on 18 October Italy officially launched a military humanitarian operation across the Central Mediterranean Sea called “*Mare Nostrum*”, the declared aim of which was to tackle the humanitarian emergency in the Strait of Sicily due to the dramatic increase of migration flows at sea.²³ The operation was widely applauded by the international community, and in particular by the IOM.²⁴



Source: IOM / Francesco Malavolta 2014.

²³ <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>

²⁴ <https://missingmigrants.iom.int/iom-applauds-italy's-life-saving-mare-nostrum-operation-“not-migrant-pull-factor”>

The main purposes of this operation were to safeguard life at sea and to bring to justice human traffickers and migrant smugglers. The operation was managed by the Italian Navy with the participation of several domestic governmental agencies involved in controlling migration flows by sea. Between October 2013 and October 2014, Italy, through the *Mare Nostrum* operation, rescued more than 150,000 people in Libyan and international waters. Given the fact that all the financial burdens were placed upon Italy²⁵, the operation ended on 31 October 2014, coinciding with the start of a new EU-led operation called Triton.

3.5.2. EU-led operations

At the time *Mare Nostrum* was launched, it was not the only operation carried out in the Mediterranean. Indeed, the EU agency Frontex was also carrying out two different operations at the same time. Operation "**Hermes**" had the purpose of combatting irregular immigration from Tunisia, Libya and Algeria to the Italian coasts, while "**Aeneas**" was based in the Ionian Sea in order to watch over the Italian coasts of Puglia and Calabria.

Frontex's role in SAR operations is enshrined in EU Regulation 2016/1624, which obliges the EU to "provide technical and operational assistance to Member States and non-EU countries in support of SAR operations that may arise during border surveillance operations at sea".²⁶ However, it does not mean that Frontex replaces border control activities at EU's borders, but merely that it provides additional help to countries on the EU border.²⁷

Operation "**Triton**" was officially launched by Frontex on 1 November 2014, with the support of EU and non-EU members. It replaced all the above-mentioned missions active in the Central Mediterranean – *Mare Nostrum*, Hermes and Aeneas. While its main objectives were border surveillance, but it also carried out SAR operations involving migrants. Unlike *Mare Nostrum*, Triton provided for the control of international waters only up to 30 miles from the Italian coasts due to its mainly-controlling purposes.

²⁵ EU Directorate-General for External Policies, "Migrants in the Mediterranean: Protecting human rights", (2015).

²⁶ <https://frontex.europa.eu/operations/search-rescue/>

²⁷ <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/>

Starting 1 February 2018, Frontex launched the joint operation “Themis” in partnership with the Italian authorities and with the support of the EU Member States and Schengen Associated Countries to replace Triton by redefining its operational areas at sea.

3.5.3. The case of the Libyan Coast Guard

The proper functioning of the Libyan state apparatus, including the Coast Guard, has been strongly undermined due to the situation of chaos in the country. Some international analysts have recently advanced the hypothesis that there can be more than one coast guard, including some under the control of militias. The EU, along with several Member States, tried to support Libya’s Coast Guard (LYCG) by giving resources – including funds, vessels and training courses for Libyan officials – to the Government of National Accord, one of authorities currently fighting for control over Libya. Despite the training, various incidents and violations of human rights by Libyan officials have been widely reported by civil society organizations as well as international organizations.



Source: *The Independent* (Lizzie Dearden)

The UN Panel of Experts on Libya, whose mandate is to monitor the political transition in Libya, reported that the LYCG is directly involved in serious human rights violations, including involvement in trafficking networks and in the management of detention centres for migrants (where human rights are systematically violated).²⁸ Several NGOs involved in SAR operations across the central

²⁸ <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>

Mediterranean Sea have widely reported about dangerous and aggressive intervention of the LYCG during rescue operations²⁹, including the deployment of firearms against NGO ships, and the mistreatment of migrants.

3.6. NGO Participation in SAR Operations

NGO ships are engaged daily in SAR operations in order to provide migrants with humanitarian aid. Their presence in the Central Mediterranean has been constant since 2014, when the Italian Navy SAR operation *Mare Nostrum* stopped running. According to a report issued by the Italian Senate³⁰, in the first six months of 2017, SAR operations by NGOs rescued around one third of all the persons rescued at the central Mediterranean Sea during this period.

Migrant Offshore Aid Station (MOAS)³¹, founded in 2014 in response to a shipwreck off the Italian island of Lampedusa that killed over 360 people in October 2013, was the first NGO to run a SAR operation in the Central Mediterranean (August 2014). Although their SAR operations in the central Mediterranean Sea were suspended in August 2017, during their three years of activity they rendered assistance to 38,421 persons³².

MOAS was soon followed by other NGOs. Médecins Sans Frontières (MSF)³³, Open Arms³⁴, Boat Refugee, SOS Méditerranée, Save the Children, Sea-Eye, and Sea-Watch amongst others. Today, Sea-Watch is present in the area with three missions (*Sea-Watch 3*, *Moonbird*, and *Mediterranea/Mare Jonio*), patrolling the Libyan 24-nautical-mile zone and actively searching for boats in distress³⁵. By contrast, MSF and SOS Méditerranée's vessel *Aquarius* ceased all operations across the Central Mediterranean as its SAR activities officially ended on 4 October 2018. The vessel had been operating in the area since 2016, where they assisted nearly 30,000 people in international waters between Libya, Italy and Malta.³⁶

²⁹ <https://sea-watch.org/en/update-evidence-for-reckless-behavior-of-libyan-coast-guards/>

³⁰ <http://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf>

³¹ <https://www.moas.eu/>

³² <https://www.moas.eu/it/central-mediterranean/>

³³ <http://searchandrescue.msf.org>

³⁴ <https://www.openarms.es/en/our-missions/mediterranean>

³⁵ <https://sea-watch.org/en/project/sea-watch-3/>

³⁶ <https://www.msf.org/aquarius-forced-end-operations-europe-condemns-people-drown>

3.6.1. Criminalization of NGO activities

Most of the NGOs mentioned above had to gradually stop carrying out their humanitarian missions due to the trend of criminalising NGOs' SAR operations in the central Mediterranean Sea. In certain countries this resulted in the seizure of rescue vessels and arrests of crew members³⁷. In Italy, Malta, Greece and Spain, criminalization of SAR NGOs resulted not only in the seizure of vessels but also in the initiation of investigations and criminal proceedings. As reported by the EU Agency for Fundamental Rights (FRA), "the increasing number of legal actions against NGOs has contributed to a drop in dedicated and effective search and rescue assets in the Mediterranean at a time when death at sea remain high." Allegations include the possibility that some NGOs operating in the area might be cooperating with smugglers in Libya, thus causing a shift in the public perceptions of their effective humanitarian contribution³⁸. However, these allegations were dismissed by the Italian Senate's report on NGO contributions to SAR operations³⁹.

3.6.2. NGO codes of conduct

In February 2017, a consortium of NGOs launched a Voluntary Code of Conduct for Search and Rescue operations undertaken by civil society NGOs operating in the Mediterranean Sea. The declared aim of this voluntary code is "to deliver a co-ordinated and comprehensive humanitarian approach to the on-going Mediterranean SAR NGO" by following the principle of humanity. Between July and August 2017, Italy (with the support of the European Commission) tried to tackle the presence of SAR NGOs in the Mediterranean by issuing a new Code of Conduct for NGOs Involved in Migrants' Rescue Operations at Sea. While the February 2017 Code of Conduct was welcomed by most of the SAR NGOs, the one issued by Italy created division amongst them. Although Save the Children signed it, other SAR NGOs including Sea-Watch and *Médicins Sans Frontières* refused. As highlighted by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions back in 2017, in the worst scenario the Italian Code of Conduct could reduce the ability of NGOs to carry out life-saving activities which could ultimately lead to more deaths in the Mediterranean⁴⁰.

³⁷ <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>

³⁸ <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>

³⁹ <http://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf>

⁴⁰ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21971&LangID=E>

Mediterranean Rescue Operations



European vessels in the Mediterranean to save lives.

- EU Member States - Schengen area
 - EU Member States - Schengen candidates*
 - EU Member States - Non-Schengen
 - Non-EU States - Schengen area
- * In process of fulfilling Schengen acquis obligations.

- Land migration routes
- Maritime migration routes
- Central Mediterranean route
- East Africa route
- East Mediterranean route
- West Mediterranean route

- German Navy** (2 vessels)
FGS Berlin and FGS Hessen
- Hellenic Coast Guard** (national vessels)
Operational activities include various Greek assets.
- Italian Coast Guard** (3 vessels)
CP 282, CP 322 and CP 304
- Italian Guardia di Finanza** (2 vessels)
Cinius and Fusco
- Italian Navy** (3 vessels)
Driade, Fasan and Vaghi
- Operation Indalo** (2 vessels)
Rio Navia and Rio Segura
Operation Indalo includes one aircraft and additional Spanish assets.
- Operation Triton** (6 vessels)
Civilian Vessel - Norway
Godetia - Belgium Navy
HMS Bulwark - UK Royal Navy
HMC Protector - UK Border Agency
Le Eithne - Irish Navy
Patrol Vessel - Latvia Coastal Patrol
Poseidon - Swedish Navy
Rio Segura - Spanish Coast Guard (cross-over support from Operation Indalo during summer months).
During the peak summer season, Triton will deploy 3 airplanes, 6 Offshore Patrol Vessels, 32 patrol boats, 2 helicopters, 9 deterring and 6 screening teams. In total fifteen Member States plus Norway have made available various resources and assets to strengthen joint operations in the Mediterranean.
- Independent rescue** (2 vessels)
Bourbon Argos - Médecins Sans Frontières (MSF)
Phoenix - Migrant Offshore Aid Station (MOAS)
MOAS operations also include two remote piloted aircraft and two inflatable rigid-hulled inflatable boats.

Compiled jointly by the International Organization for Migration (IOM) - Migration Research Division (MRD) and Media and Communications Division (MCD). Various sources have been consulted in compiling data, including and not limited to IOM field offices, European Commission 2015, European Parliament 2015, Frontex 2015, and Mediterranean Emergency European Council 2015. Data represents estimates of operational activity. Placement of vessels on map are for illustrative purposes only. Boundaries indicated on map do not imply official endorsement or acceptance by IOM, 16/6/15.

MissingMigrants.iom.int

Source: IOM's Missing Migrants Project.

4. The Issue of Accountability for Human Rights Violations at Sea

So far, the aim of this report has been to outline the applicable law at sea as well as the way in which SAR operations are, or should be, conducted. The purpose of the present section is to merge together the previous sections in order to outline the specific human rights obligations of States in the Central Mediterranean when dealing with vessels carrying migrants.

Human rights obligations of States arise whenever they exercise any form of jurisdiction. Indeed, the exercise of jurisdiction by a State is essential to holding that State responsible for acts infringing human rights. This means that whenever a person finds herself or himself under the jurisdiction of a State, the State must respect and comply with its obligations under international human rights conventions relative to that person.

4.1. State Jurisdiction at Sea

A State's jurisdiction is primarily territorial; however, this does not prevent jurisdiction from being applied extraterritorially. When it comes to determining the human rights obligations of States across the Central Mediterranean, the main difficulties arise when trying to assess which State is exercising its jurisdiction in a given moment and in a specific area. While there are situations that are quite simple to assess – as in the case of a vessel finding itself in the territorial sea of a State – when it comes to events occurring in the High Seas, the situation is more complicated.

When a vessel – whether it is a ship carrying migrants or a cruise ship – enters the territorial water of a State, it falls under the jurisdiction of the territorial State. Indeed, UNCLOS Article 2 prescribes that “the sovereignty of a coastal State extends to an adjacent belt of sea, described as the territorial sea. [...] The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.” As long as territorial waters are concerned, there are no issues when assessing a State's jurisdiction as they are considered to be part of the State's territory. The situation is quite different for events taking place in the High Seas.

High Seas are considered an area where no State can claim sovereignty. The 1958 Convention on the High Seas, in its Article 1 and 2, defines the term “high seas” as all parts of the sea that are not

included in the territorial sea or in the internal waters of a State where no State may subject any part of them to its sovereignty. When a vessel is located in the High Seas, the vessel is under the jurisdiction of the State whose flag it flies (UNCLOS Article 92). As observed by the ECtHR in *Hirsi Jamaa and Others v. Italy*, “by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying.”⁴¹

Consequently, in all cases concerning acts on the High Seas carried out on board vessels flying a State’s flag, there is an extraterritorial exercise of the State’s jurisdiction, which corresponds to a *de jure* control exercised by the State in question over the individuals on the vessels. In cases involving vessels belonging to a State’s authority, there is no doubt that the persons on board are under the jurisdiction of the given State and that they find themselves under the effective control of State officials.⁴² This is true also with regards to events taking place in the High Seas.

In situations of distress occurring on the High Seas that ultimately lead to the death of a passenger of a vessel, establishing which State has to respect human rights obligations arising under treaty law is more difficult than in any of the cases presented above. As previously outlined, all seas – including the Mediterranean – are divided into SAR zones in each of which a particular coastal State has responsibility. In theory, this division should facilitate the recognition of a State’s obligations. In reality, in the Central Mediterranean area, States have consistently failed to comply with their SAR obligation, ultimately leading to the death of hundreds of people for which no State is held accountable.

When a boat, whether it is located on the High Seas or within the territorial waters of a State, is intentionally damaged by national authority vessels, the situation falls within the jurisdiction of the State to which the national authority belongs. This was reaffirmed by the ECtHR in *Xhavara and Others v. Italy and Albania*. By contrast, when national authority vessels limit themselves to escort ships back to the Departure State, assessing jurisdiction is more complicated due to the lack of effecting control over the escorted persons⁴³.

⁴¹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgement, §77.

⁴² EU Directorate-General for External Policies, “*Migrants in the Mediterranean: Protecting Human Rights*”, (2015).

⁴³ EU Directorate-General for External Policies, “*Migrants in the Mediterranean: Protecting Human Rights*”, (2015).

5. Human rights violations in the Central Mediterranean

5.1. The Jurisprudence of ECtHR

With the beginning of the migration crisis across the whole Mediterranean, the ECtHR received many applications by individuals whose human rights were violated at sea by several ECHR States Parties. While the Strasbourg Court dealt with many cases pertaining migrants crossing the Mediterranean, most of the cases concerned the phase following the sea voyage. Such cases include *Suso Masa v. Malta*, *Louled Massoud v. Malta*, *N.D. and N.T. v. Spain* or *Khlaifia and Others v. Italy*. Therefore, there has been mainly one landmark case dealing with human rights violations at sea: *Hirsi Jamaa and Others v. Italy*.

5.1.1. *Hirsi Jamaa and Others v. Italy*

The first case in which the ECtHR dealt with interception-at-sea in the Central Mediterranean is *Hirsi Jamaa and Others v. Italy*. The importance of this case is due to the fact that the ECtHR recognized that individuals are under the jurisdiction of a contracting State, even on the High Seas, when the given State exercises effective control over them— a key aspect to evaluate in order to apply the ECHR to events occurring at sea.

In the case, the applicants – eleven Somali nationals and thirteen Eritrean nationals – were part of a group of migrants intercepted by the Italian Coast Guard in Maltese SRR, but still in the High Seas. The migrants left Libya with the aim of reaching the Italian coasts. Once intercepted and transferred into Italian military ships, they were returned to Libya without any opportunity to apply for asylum or any individual processing. This return exposed them to possible serious human rights violations given the well-known Libyan situation.

States parties to the ECHR maintain their right to control the entry, residence and expulsion of aliens. And even though the ECHR does not contain any right to political asylum, the expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the ECHR, the prohibition on torture. Consequently, in the present case, the ECtHR concluded that the return of the applicants to Libya amounted to a violation of Article 3 as well as Article 4 of Protocol No. 4 thus partially limiting States control over their ability to control access to their territory.

5.2. Most Recent Cases of SAR Vessels Denied Access to EU Ports

5.2.1. The first *Aquarius* case (June 2018)

Since the establishment of a new government in June 2018, Italy has shifted its approach towards the management of migration flows in the Mediterranean. One of the declared purposes of the Conte Cabinet was to apply stricter policies on migration, with a specific focus on ships carrying migrants landing on Italian soil. The *Aquarius* case is only the first of a series of cases of human rights violations that occurred during the summer of 2018 in the Central Mediterranean area.

On Sunday 10 June 2018, the Italian Minister of the Interior and Deputy Prime Minister, Matteo Salvini, did not grant authorization to the *Aquarius* to enter an Italian port. At the time of such refusal, on board *Aquarius*, a vessel operated by MSF and SOS Méditerranée flying the flag of Gibraltar and devoted to carrying out search and rescue operations, there were 629 migrants – among these were 134 children (including 123 unaccompanied minors) and 7 pregnant women. The 629 people on board were rescued on the night of 9 June during SAR operations under the coordination of the Italian Coast Guard in Libyan SRR.



Source: SOS Méditerranée

The migrants had been found in the Central Mediterranean on several inflatable rafts. When discovered by the vessels, the migrants were in a situation of clear distress, which implicated the duty of rescue for the State in whose SAR zone the incident happened. In this case, the Italian Coast Guard respected Italy's duty to rescue people at sea by coordinating SAR operations. But, once people were transferred on the *Aquarius* ship, Italian authorities denied *Aquarius* the ability to dock and prohibited the disembarkation of the rescued migrants. Subsequently, Italy asked Malta to take care of the rescued migrants. The Maltese government immediately denied responsibility for receiving the rescued migrants.

In the light of the double refusal by the Italian and Maltese authorities, the *Aquarius* ship remained at sea until the afternoon of Monday 11 June, when the Spanish Prime Minister Pedro Sánchez announced that Spain would welcome the migrants by allowing them to disembark in the port of Valencia. MSF and SOS Méditerranée immediately notified authorities of the humanitarian and medical risks of a sea journey to Valencia⁴⁴, to which the Italian authorities reacted by transferring 524 people to Italian ships to take them to Valencia.

5.2.2. The second *Aquarius* case (August 2018)

On 10 August 2018, the *Aquarius* ship rescued 141 people from the Libyan SRR – among these were 69 children (including 67 unaccompanied minors) and 2 pregnant women. MSF and SOS Méditerranée immediately called on European governments to indicate a place of safety, as close as possible to the rescue site and in accordance with international maritime law, for the disembarkation of the 141 migrants on board.⁴⁵ Both Maltese and Italian maritime authorities immediately informed MSF and SOS Méditerranée that they would not provide any safe place on their territories. The denial was soon reiterated by the Italian government, thus overruling the mayors of two Italian cities – Naples and Palermo – who had declared the ability to welcome the ship in their ports and refusing to let *Aquarius* disembark the 141 migrants in Italian territory.

⁴⁴ <https://www.msf.org/central-mediterranean-european-governments-must-put-peoples-lives-politics>

⁴⁵ <https://www.medicisenzafrontiere.it/news-e-storie/news/chiediamo-ai-governi-europei-un-luogo-sicuro-di-sbarco/?codiceCausale=1025&codiceCampagna=18.ZZW.SP.1.SOCFB>

The second *Aquarius* case triggered a political crisis amongst several EU Member States, which could not find an agreement either on the place of disembarkation or on the distribution of the 141 rescued migrants. Finally, after 6 days at sea, Malta allowed the migrants to disembark, and they were then distributed among EU countries – including Italy.

5.2.3. The *Open Arms* case (December 2018)

On 21 December 2018, a vessel run by the Spanish NGO Open Arms rescued 311 migrants in distress at sea off the coast of Libya. Malta, France, Tunisia and Italy refused to open their ports to let the rescued people disembark or did not reply to any request advanced by Open Arms. Rescued migrants included a two-day-old baby and his mother, the only ones that Malta let disembark. The remaining people were later disembarked in Algeciras, Spain.

5.2.4. The *Sea Eye and Sea Watch 3* case (December 2018 – January 2019)

On 22 December 2018, the *Sea Watch 3* vessel flying a Dutch flag and run by the German NGO Sea Watch rescued 25 people in distress at sea. When Sea Watch contacted the coordination centres of the Italian Coast Guard (MRCC) and Malta (RCC), they were instructed to contact the Libyan Coast Guard (LYCG) as the SAR operation took place in Libyan SRR.

Since they did not receive any news from the LYCG, Sea Watch decided to contact Spanish authorities asking whether the migrants on board their vessel could be welcomed, as with the 311 migrants rescued by Open Arms, but the request was refused. For days, the *Sea Watch 3* vessel waited, without any response from a Mediterranean state, to be directed towards a place of safety to disembark rescued migrants. On 27 December, still waiting to be directed to a port, the vessel was informed of another SAR case by the MRCC on behalf of the LYCG. Another 17 people had been rescued in the same area by the German NGO, Sea Eye.

As the vessels waited, weather conditions deteriorated dramatically, placing both migrants and crew in critical situations. On 2 January 2019, the Maltese authorities allowed both ships to enter Maltese territorial waters but not to disembark. Mediation between European countries continued until 10 January, when the migrants rescued by Sea Watch and Sea Eye were allowed to disembark in Malta

– after 20 and 13 days at sea respectively – and were later distributed among eight European countries.

5.2.5. The second *Sea-Watch 3* case (January 2019)

On Saturday 19 January 2019, the *Sea Watch 3* vessel rescued 47 people in a rubber boat in front of the Libyan coast. Among them there are 13 minors, 8 of whom are unaccompanied. On 24 January, after 5 days of travel, the ship had arrived off the coast of Syracuse, Italy. The Italian government authorized its entry into Italian territorial waters due to bad weather conditions, but it would not designate any place of safety to disembark the 47 migrants on board.



Source: *SeaWatch.org*

5.2.6. Denial to access ports in the light of international maritime law

In most of the cases reported above, people were rescued in Libyan SRR, which is the area of the Central Mediterranean where Libya is responsible for its SAR obligations under international law. In cases such as the ones involving *Aquarius*, it was Italy that coordinated SAR operations in the Libyan SRR due to the lack of compliance of Libyan authorities to carry out their SAR duty under international

law. Even if this made Italy the State responsible under the SAR Convention, it did not place Italy under an obligation to allow disembarkation of the rescued migrants on its own territory.⁴⁶

States enjoy exclusive sovereignty in their territory, which include territorial waters. As a consequence, no State is obliged to allow foreign vessels into its territorial waters and especially its ports⁴⁷, with the exception of ships in distress. Vessels in distress have the right to be granted access to a port. A situation of distress, as defined in the 1979 SAR Convention, occurs “wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance”. Arguably, in all the cases reported above there was a situation of distress since the people on board were confined for days in limited spaces while in need of medical and humanitarian assistance. However, States can justify their denial of port access by claiming that the people on board were no longer in a situation of distress.

5.2.7. Duty to disembark

With regard to the duty to disembark rescued people, the 1979 SAR Convention leaves many doors open. Once the phase of rescue at sea is concluded, rescued people must be taken to a place of safety. The entity competent to identify the safe place is the RCC as part of its coordination duty. Therefore, it appears that the 1979 SAR Convention does not provide for any duty to disembark rescued people, but merely to recognise a port for disembarkation.

However, the duty to disembark does exist for EU Member States acting as host Member State in the context of operational cooperation coordinate by Frontex as provided under EU Regulation 656/2014⁴⁸. Article 10, which specifically deals with disembarkation, explicitly says: “If it is not possible to arrange for the participating unit to be released of its obligation referred to in Article 9(1) as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorised to disembark the rescued persons in the host Member State.”

⁴⁶ <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/>

⁴⁷ <https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/>

⁴⁸ Ibid.

5.2.8. Denial of access to ports in the light of international human rights law

Does refusing to grant access to ports by people rescued during a SAR operation violate any provision under international human rights law? Arguably, if all the above-mentioned cases are ever brought in front of the ECtHR for violations of the rights to life and liberty, the centre of the discussion would be which State has responsibility for such human rights violations. **Would it be the flag State or the coast State? Or both?** As stated above, a State's responsibility to respect human rights arises only with respect to those who fall under its jurisdiction. Given that **most of the cases reported above** took place in the High Seas, it can be difficult to assess under which State's jurisdiction the migrants find themselves.

It is commonly accepted that States exercise jurisdiction when state officials were physically present as they exercise effective control over the individuals seeking protection. Thus, when migrants are rescued and subsequently transferred to an Italian or Maltese state vessels, they would have found themselves under the jurisdiction of the given State. For example, Italian authorities, by conducting SAR operations, did exercise some forms of control over the *Aquarius* vessel and, consequently, over its passengers. However, it is debatable whether such level of control is enough to implicate the State's human rights obligations.

5.3. The *Diciotti* case

Since June 2018, the Italian Government has blocked several ships carrying migrants from landing on Italian territory under the slogan "We close our ports" and calling for an intervention by the EU and its Member States. The most emblematic case was the one involving the *Ubaldo Diciotti*, a vessel of the Italian Coast Guard, which occurred between 15 and 26 August 2018, when 177 migrants were held in *de facto* arbitrary detention. Compared to all the cases presented above, the *Diciotti* case represents a *unicum* as there is no doubt that the people on board were under Italian jurisdiction.

5.3.1. The facts

On 15 August 2018, the *Diciotti* ship rescued 190 migrants in Maltese SAR, which were refused entry by Malta. The ship then remained stationary off the coast of Lampedusa (Italy) for five days. There, 13 migrants were allowed to disembark due to medical reasons. On 20 August 2018, the Italian Minister of Infrastructure and Transport, Danilo Toninelli, designated the port of Catania for the

docking of the ship. However, the ship remained anchored at the port of Catania with the 177 migrants confined on board due to the refusal of the Italian Minister of the Interior and Deputy Prime Minister, Matteo Salvini, to allow the migrants to disembark. Matteo Salvini's refusal followed threats to return the migrants to Libya if other Member States of the EU did not step in to help Italy managing the migrants.

On 22 August, the Public Prosecutor's office of the Tribunal of Agrigento started criminal procedures alleging false imprisonment and illegal detention. As a consequence, Luigi Patronaggio, Public Prosecutor of the Tribunal of Agrigento, was granted access to the *Diciotti* ship in order to check the physical and juridical conditions of the migrants on board. He noted that the situation on board was under control but precarious⁴⁹. He reported the presence of several cases of scabies as well as critical issues of law.

In light of this finding, both the Public Prosecutor of Agrigento and the Public Prosecutor's office of the Juvenile Court of Catania publicly asked that the unaccompanied minors on board the ship be allowed to disembark. Subsequently, 27 unaccompanied minors were taken off the ship on 22 August. The rest of the migrants were ultimately allowed to disembark during the night of Saturday 25 August.

Though most of the 177 migrants did not reach Italian soil until the 26 August 2018, it is without any doubt that all the 190 migrants rescued by Italy's Coast Guard were under Italian jurisdiction as soon as they set foot on the *Diciotti* on 15 August 2018. Indeed, when a ship belongs to the State's coast guard, those on board are under the effective control of the State and, consequently, under the State's jurisdiction. Therefore, given that the migrants boarded on the *Diciotti* ship were under Italian jurisdiction, the Italian Government had an obligation to respect, protect and fulfil their human rights.

5.3.2. The *Diciotti* case in the light of international human rights law

Personal liberty is considered inviolable by Article 13 of the Italian Constitution⁵⁰, which also prescribes that no one can be detained for more than 96 hours if the detention is not validated by

⁴⁹ Interview with Luigi Patronaggio, Public Prosecutor of the Tribunal of Agrigento, 23/08/2018: <https://www.youtube.com/watch?v=HK6sYmbj32>

⁵⁰ https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

the Judiciary. Moreover, the right to liberty is enshrined in several international instruments to which Italy is a state party. These include: ICCPR in Article 9, Convention on the Rights of the Child (CRC) in Article 37, as well as UDHR in Article 3. It is also prescribed in regional instruments such as the ECHR in Article 5 and CFR in Article 6.

More precisely, Art. 9(1) of the ICCPR prescribes that no one shall be subjected to arbitrary arrest or detention. Even so, the right to liberty is not absolute. Art. 9(1) of the ICCPR prescribes that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. However, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest (Art. 9(2) ICCPR) and shall be entitled to take proceedings before a court (Art. 9(4) ICCPR). Lastly, anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (Art. 9(5) ICCPR).

As stated by the Human Rights Committee, deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement as enshrined in Article 12 of the ICCPR.⁵¹ In the *Diciotti* case, holding migrants on a boat for 10 days with no option to disembark amounts to a *de facto* deprivation of liberty. The Italian National Prevention Mechanism (NPM), established pursuant to the Optional Protocol of the Convention Against Torture (CAT), held the view that the 177 people aboard the *Diciotti* were in a *de facto* condition of deprivation of liberty⁵².

5.3.3. The *Diciotti* case in the light of international refugee law

Matteo Salvini on 19 August 2018 publicly declared⁵³ that if the EU did not intervene in order to help Italy with managing the migration crisis, Italy would return the migrants held on the *Diciotti* back to Libya. Salvini's statement promised an action that, according to international law, is illegal. In his attempt to pressure the EU, Salvini completely disregarded several principles of international law,

⁵¹ Human Rights Committee, General Comment No. 35.

⁵² http://www.garantenazionaleprivatiliberta.it/gnpl/it/dettaglio_contenuto.page?contentId=CNG3624&modelId=10021

⁵³ Interview with Matteo Salvini, Italian Minister of the Interior and Deputy Prime Minister, 19/08/2018: <https://www.facebook.com/salviniofficial/videos/2158310574440343/>

including obligations that are legally binding for Italy under the Geneva Convention relating to the 1951 Refugees Convention.

The threat by the Italian Minister to return migrants to Libya undermined the core principle of international refugee law, namely, the principle of *non-refoulement*, which is articulated in Article 33(1) of the 1951 Refugees Convention and constitutes customary international law. The conditions described in article 33(1) of the 1951 Refugees Convention were all present. It would have been unlawful to send back the asylum-seekers to Libya, considered by the international community as a non-safe place, without granting them a temporary admission into Italy. Italy has the duty to protect non-nationals from being returned to countries in which their life is threatened or where they risk being subjected to torture or inhuman and degrading treatment, regardless of their immigration status.

5.3.4. Accountability for human rights violations

The *de facto* detention of 177 migrants amounts to a violation of the right to liberty enshrined in ICCPR in Article 9 and ECHR in Article 5. In this specific case, there is no clear legal basis upon which the *de facto* detention could have been grounded, at either the national or international level.

In Italy, a detention order can only be issued by judicial authorities. In the present case, the holding of the 177 migrants on the *Diciotti* ship was not based upon any detention order. Nor did the Italian Government specify any grounds upon which the *de facto* detention had been ordered. These facts constitute a violation of Articles 9(1) and 9(2) of the ICCPR. Once the Public Prosecutor of Agrigento concluded the preliminary investigations, Matteo Salvini and Matteo Piantedosi (Chief of the Cabinet of the Ministry of Interior) were indicted with the commission of the crimes listed above.⁵⁴

Since the two persons were under investigations for acts committed in their official functions on 25 August the Public Prosecutor's office of the Tribunal of Agrigento transmitted the case file to the Tribunal of Ministers. In accordance with Article 96 of the Italian Constitution and subsequent laws (Constitutional Law 1/1989 and Law 219/1989), Ministers are subject to normal justice for crimes

⁵⁴ In the Italian legal system: *Registro delle notizie di reato a carico di persone note*.

committed in the exercise of their duties, but any proceedings need to be authorized by the Senate of the Republic or the Chamber of Deputies.

Although Art. 9(4) of the ICCPR prescribes that victims of unlawful arrest or detention are entitled to take proceedings before a court, none of the 177 victims in the present case had the chance to bring the case in front of a judge. Instead, on 20 March 2019 the Senate of the Republic rejected the authorization to proceed against the Minister of the Interior for the present case, thus leaving 177 people without the possibility of obtaining justice for the human rights violations they suffered.

6. Concluding Observations and Recommendations

Geneva Intentional Centre for Justice (GICJ) continues to be worried by the gravity of the situation across the central Mediterranean Sea. Although the total number of losses and casualties in the area has dropped drastically since 2018, GICJ keeps looking with great attention at the Central Mediterranean migration route and remains deeply concerned about the behaviour of the involved stakeholders with regards to the respect of human rights obligations.

The events highlighted in this report show that the EU needs to foster cooperation amongst its Member States with regard to migration issues in order to ensure the respect of human rights in all circumstances and at all times. It is evident that the lack of cooperation is one of the main reasons behind States denying SAR vessels access to European ports on several occasions between June 2018 and early 2019. In this regard, GICJ recommends to the EU to remind its Member States to respect their SAR duties both under international and EU law. In addition, GICJ asks the EU to consider drafting a new regulation that includes a more comprehensive human rights approach to Frontex border operations.

Migrants, asylum-seekers and refugees must be treated in accordance with applicable international standards, in particular international human rights law and international refugee law, when crossing the Mediterranean. With respect to the outlined legal framework, GICJ invites all States that have not yet done so to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to sign the Global Compact for Migration. GICJ regrettably observes that the vast majority of States bordering the Mediterranean Sea did not ratify this Convention.

GICJ condemns the growing criminalisation of NGO activities. The NGOs engaged in SAR operations across the Central Mediterranean are conducting such activities with the sole aim of providing migrants with humanitarian aid, thus compensating for the lack of action by States. Their presence in the Central Mediterranean prevented the number of deaths and casualties from being higher. Allegations against them include the possibility that some NGOs operating in the area might be in cooperation with smugglers in Libya. GICJ urges States and State officials to stop make false

accusations which cause a negative shift in the public perceptions towards NGOs and reduces the effectiveness of their humanitarian work.

This report clearly outlined that human rights obligations at sea give rise to unsolved legal issues with regard to the exercise of State jurisdiction. However, GICJ would like to underline that this should not be used as an excuse by States not to comply with the respect of human rights during SAR operations conducted or overseen by them. GICJ reiterates its request to all States bordering the Mediterranean to strengthen their respect for and their commitment to human rights under all circumstances and at all times, to put an end to violations and combat impunity.

Geneva International Centre *for* Justice



Headquarters

The Ecumenical Centre
150, Route de Ferney
CH 1211 Geneva 2
Switzerland



+41 227881971



info@gicj.org



www.gicj.org

Postal Address

P.O. Box: GICJ598
Vernier
CH-1214 Geneva
Switzerland



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