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The "left-to-die boat": actions and reactions

Report[1]
Committee on Migration, Refugees and Displaced Persons
Rapporteur: Ms Tineke STRIK, Netherlands, Socialist Group

Summary

The "left-to-die boat" tragedy which took place in March/April 2011 leaves many questions unanswered. The catalogue of failures in terms of co-operation, and defining and admitting responsibility in search and rescue operations in the Mediterranean has become an endless story. Meanwhile, more women, men and children are perishing or going missing at sea.

The report stresses that while important efforts by member States, Italy in particular, have been engaged towards saving more lives at sea, a number of concerns remain and lessons still need to be learnt and acted upon. European synergies should work towards a zero-tolerance approach to lives lost at sea by filling the gaps in the legal framework, policies and practices of rescue at sea and disembarkation.

The report identifies a number of concrete measures which should be taken by member States in order to prevent communication and responsibility gaps in rescue operations at sea in the future. Furthermore, the report encourages the creation of safe legal channels for migration and sharing the responsibility for asylum seekers within Europe.

1. Reference to committee: Doc. 12498, Reference 3748 of 11 March 2011.

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A. Draft resolution[2]

1. The Parliamentary Assembly refers to its Resolution 1872 (2012) "Lives lost in the Mediterranean Sea: Who is responsible?", which was the result of a thorough investigation into the responsibilities of those who could have gone to the rescue of 72 people on board a small rubber dinghy, later known as the "left-to-die boat", who set off towards Europe on 26 March 2011, of whom only nine survived.

2. Unfortunately, the catalogue of lives lost at sea did not end with this incident. More recently, in October 2013, two vessels capsized within sight of the coast of Lampedusa, leading to the loss of over 400 lives. Again, in May 2014, two shipwrecks resulted in the deaths of dozens of people with hundreds missing. These catastrophes once again revealed the crucial need for Europe and the rest of the world to fill in the gaps in the legal framework, policies and practices of rescue at sea.

3. The Assembly acknowledges that important efforts have been engaged by member States, Italy in particular, towards saving more lives at sea. However, a number of concerns still remain, including failures to co-operate, define and admit responsibility and learn lessons. The left-to-die incident clearly highlighted the urgent need to guarantee fundamental rights, while respecting the legitimate security imperatives of border controls.

4. The Assembly therefore wants to reinforce its previous recommendations and encourage further measures to prevent communication and responsibility gaps when it comes to saving lives of people in distress in the future.

5. With a view to applying zero-tolerance towards lives lost at sea, the Assembly further recommends that member States:

5.1. with regard to rescue at sea and lives lost:

5.1.1. adopt clear, binding and enforceable common standards with regard to search and rescue operations, including disembarkation, fully consistent with international maritime law and international human rights and refugee law obligations;

5.1.2. work towards extending the recently adopted rules for the surveillance of the European Union external sea borders in the context of the operations of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), to national operations outside the framework of Frontex operations;

5.1.3. commit to improving the recording and identification of migrants who die or disappear at sea, and ensure that survivors and relatives of the victims have prompt access to information about them;

5.1.4. ensure family links are maintained or restored following rescue operations;

5.1.5. commit to swiftly, independently and thoroughly investigating any reported failures to rescue people at sea and to ensuring accountability;

5.1.6. commit to assisting coastal States to increase resources for search and rescue operations;

5.2. with regard to criminalisation of irregular migration:

5.2.1. abolish factors which dissuade private vessels from carrying out rescues, by ensuring that the people rescued will be allowed to land quickly and by ending the threat of prosecution on charges of aiding and abetting irregular immigration which give rise to moral and financial damages;

5.2.2. urge shipmasters and fishermen to comply with their obligations under international law to assist and report to the relevant authorities of the member States any migrant boats in distress;

5.2.3. ensure financial compensation for shipmasters and fishermen for possible financial losses incurred as a result of rescue operations;

5.3. with regard to push-back practices:

5.3.1. end all push-back practices and ensure that practices of rescue at sea are compliant with the right to seek asylum and the right to be protected against *refoulement*;

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2. Draft resolution adopted unanimously by the committee on 3 June 2014.

5.3.2. ensure the credibility of any judicial probe or investigation into push-back incidents by guaranteeing their independence, impartiality and transparency;

5.3.3. publicly condemn any occurrence of summary removals or collective expulsions which come to their attention and ensure accountability for any such incident;

5.3.4. ensure, in particular, that any accelerated asylum procedures and the assessment of personal circumstances in the context of search and rescue operations respect a person's right to be protected from *refoulement*, in line with the Council of Europe 2009 Guidelines on human rights protection in the context of accelerated asylum procedures; ensure that all those intercepted have access to individual procedures to seek international protection or raise other protection needs, and have access to an effective remedy against return decision;

5.3.5. ensure that any bilateral readmission agreement is drafted and implemented in a manner fully consistent with international human rights and refugee law standards and includes effective safeguards of human rights and access to an individualised fair and effective assessment;

5.4. with regard to the left-to-die boat incident:

5.4.1. fully co-operate to find answers to the outstanding questions, by informing the rapporteur swiftly and adequately about the location of their vessels during the time the boat in question was drifting in search of help, and the messages their vessels received;

5.4.2. grant the right to residence for the survivors whose applications for asylum or residence on humanitarian grounds are still pending;

5.5. show further solidarity with third countries by giving more refugees access to resettlement or temporary reception programmes, and guarantee a safe journey to protection.

6. With a view to encouraging the creation of safe legal channels and preventing irregular migrants, asylum seekers and refugees from undertaking hazardous journeys to Europe, and to sharing the responsibility for asylum seekers inside the European Union, the Assembly recommends that the European Union:

6.1. encourage its member States to increase resettlement quotas for persons in need of international protection and adopt a common approach to humanitarian visas; explore further possibilities for protected entries and migration routes enabling migrants to reach Europe in a regular manner;

6.2. take steps to further harmonise the common asylum standards and procedures in the European Union, by, for example, considering a joint processing of asylum applications and the creation of a uniform asylum status; explore further possibilities to reinforce solidarity for asylum seekers and refugees within the European Union;

6.3. strengthen Regional Protection Programmes and ensure their sustainability through sufficient funding; support neighbouring countries in improving their asylum and protection systems through mobility partnerships, and make further co-operation on migration and border control dependent on a sufficient level of protection for asylum seekers in these countries;

6.4. ensure that Frontex makes the protection of fundamental rights a priority of its joint operations, and in particular seeks the ability – which is still lacking in the recently adopted regulation – to apply the rules (on search and rescue, disembarkation and non-refoulement) to migrant boats within the territorial waters of third States which clearly cannot meet their international obligations regarding search and rescue at sea or uphold the rights of irregular migrants, asylum seekers and refugees;

6.5. ensure that Frontex establishes an effective mechanism for individual complaints of violations of fundamental rights, in order to improve its accountability;

6.6. ensure that the mechanism of the European border surveillance system (EUROSUR) contributes to protecting and saving lives at the European Union's external borders;

6.7. adopt measures to prohibit penal sanctions on private vessels carrying out search and rescue operations and to compensate them when they face economic loss after engaging in rescue operations;

6.8. set up a proper system of data collection of the mortal remains of people who lose their lives in the Mediterranean and make it swiftly accessible to relatives.

7. The Assembly recommends that the North Atlantic Treaty Organisation (NATO):

7.1. take into account possible movements of people in need of international protection in all NATO operations and reach agreements with all countries concerned to ensure that people in need of international protection are cared for;

7.2. ensure that all NATO assets are equipped with Global Maritime Distress and Safety Systems, in any of its versions, and have the means to receive Hydrolant distress messages;

7.3. publish the results of the lessons learned process in which it has been examining ways to strengthen information sharing and procedures related to search and rescue at sea during NATO-led operations.

8. The Assembly believes that the International Maritime Organisation (IMO) should play a role in promoting a common application of the legal framework of rescue at sea, as different approaches still today create excessive delays and failures to rescue people in distress at sea. To this end, it recommends that the IMO step up its efforts with a view to elaborating a regional memorandum of understanding on procedures to facilitate the disembarkation of persons rescued in the Mediterranean Sea.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution ... (2014) “The ‘left-to-die boat’: actions and reactions”.

2. The left-to-die boat tragedy and other recent ones that led to the loss of hundreds of lives need to trigger a radical change in search and rescue (SAR) policies and practices in Europe. Serious problems have arisen due to a lack of accountability, transparency and co-ordination. The Assembly considers that the Council of Europe has an important role to play in assisting member States in this respect.

3. With a view to preventing the human rights violations which result from the vacuum of responsibility in search and rescue and disembarkation, and to safeguarding solidarity among the member States, the Assembly calls on the Committee of Ministers to:

3.1. instruct the Steering Committee for Human Rights (CDDH) to carry out a feasibility study on a common approach to fill crucial gaps in the legal framework on search and rescue in the Mediterranean Sea, namely the definition of distress, the obligation to respond immediately to a distress call, irrespective of the SAR zone the call comes from, the criteria according to which member States are responsible for disembarkation, and the abolition of factors which dissuade shipmasters and fishermen from carrying out rescues;

3.2. on the basis of this feasibility study, hold a thematic debate, with the participation of the Assembly, on the above-mentioned issues, on finding safe routes for people in need of international protection (through resettlement and other types of protected entries), as well as solidarity mechanisms for European Union member States to share the responsibility for those rescued (such as relocation and joint processing of asylum requests in or outside Europe), in order to exchange best practices and offer solutions, and to find ways to facilitate agreements between States facing regular disputes on the co-ordination of rescue at sea and disembarkation;

3.3. adopt guidelines on how to comply with the *Hirsi Jamaaand Others v. Italy* judgment of the European Court of Human Rights and urge member States to refrain from push backs.

3. Draft recommendation adopted unanimously by the committee on 3 June 2014.

C. Explanatory memorandum by Ms Strik, rapporteur

1. Introduction

1. In 2011, I was asked to look into the circumstances surrounding the tragic deaths of 63 women, men and children left adrift in a boat off the coast of Europe for 15 days in March/April 2011.

2. In April 2012, the Parliamentary Assembly adopted Resolution 1872 (2012) "Lives lost in the Mediterranean Sea: Who is responsible?".[4] With many essential questions remaining unanswered even now, the tendency has been to shift the blame elsewhere and obscure the issue of who was responsible. No entity has conducted itself honourably.

3. As I concluded in my previous report, the "left-to-die boat" tragedy was clearly a collective failure every step of the way and by all key actors. Despite heavy criticism about the failures to co-operate, admit responsibility and learn lessons, it took even more tragic events towards the end of 2013 and mid-2014 for any concerted action to be seen to be taken.

4. In October 2013, two particularly grave incidents attracted worldwide attention to the issue. Two vessels capsized off the coast of Lampedusa within nine days of each other, with over 400 fatalities.[5] Again in April and May 2014, dozens of migrants drowned at sea and hundreds are missing.

5. This report aims to clarify the steps that have been taken since the adoption of Resolution 1872 (2012). I take this opportunity to thank all the authorities, stakeholders and experts who have made valuable contributions to the report.

2. The left-to-die boat: missing answers in the investigation

6. Notwithstanding continuing enquiries, from myself and others, central questions that I had identified in my April 2012 report still remain without answers. To my further enquiries I received denials, referrals back to the North Atlantic Treaty Organisation (NATO) and/or the member States, or, in some cases, no answer at all. Not having any legal standing, in particular as these questions involved military matters, it was not possible for me to compel answers. Legal cases and Freedom of Information applications are being pursued in a number of the member States implicated, but seem to be in vain.

2.1. Responsibility under NATO command

7. In Resolution 1872 (2012), the Assembly highlighted the lack of clarity as regards the responsibility of and for vessels under NATO command in respect of carrying out rescues at sea.

8. Since April 2012, the Assembly has still not received comprehensive information on the involvement of respective assets in NATO and participating member States.[6]

9. On the eve of the plenary debate in Strasbourg on 24 April 2012, I received a letter from NATO (see appendix) informing me that NATO had not declared a "military zone" in the Mediterranean and therefore had no overall co-ordination role for Search and Rescue (SAR) Operations in the area of the incident.

10. I was surprised to read that NATO did not hold satellite imagery that could help "identify military, merchant or other ships in the area … because satellite imagery was not used by NATO to develop Maritime Situational Awareness in support of [the] UN-mandated embargo operation ... or to create a Recognized Maritime Picture (RMP)". It is furthermore disappointing to read that the current RMP tool used by NATO in certain circumstances has no recording capability.

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4. Doc. 12895, paragraph 133.
5. "Lampedusa: call for investigation into allegations that boats failed to carry out rescue", Assembly press release, 4 October 2013; "Rapporteur deplores 'no lessons learned' on lives lost in the Mediterranean", Assembly press release, 29 November 2013; "Migrants claim Libyan forces fired on boat", Associated Press, 14 October 2013. See also Doc. 13531, "The large-scale arrival of mixed migratory flows on Italian shores", Committee on Migration, Refugees and Displaced Persons, (rapporteur: Christopher Chope, United Kingdom, EDG).
6. The alleged military helicopter that dropped provisions and never returned, as well as the large military vessel that allegedly ignored the boat's distress calls after half of the passengers had already died were never identified.

11. NATO informed me that at the time of the incident "only eight vessels in the Mediterranean were under NATO command, covering an operations area of over 61 000 square nautical miles". NATO also confirmed that "helicopters from ships under NATO command were flying in the general area of the migrant boat". Yet, there is no data that would allow the helicopter to be identified.

12. NATO confirmed that the Spanish frigate *Mendez Nuñez*, under NATO Command, was approximately 24 nautical miles away, and "conducted [an unsuccessful] search in an area of 60nm following an instruction received on the morning of 28 March from the ITS *Etna*". The ITS *Borsini* was said to be 37 nautical miles away from the position given.

13. I remain very sceptic at NATO's statement that not all military vessels during NATO operations are "equipped with Global Maritime Distress and Safety System" (GMDSS), in any of its versions, or have the means to receive Hydrolant distress messages. The standards for tactical communications systems which vessels must have when operating as part of a NATO-led force on operations or during training and exercises do not include requirements for civilian communications systems such as INMARSAT.

14. I am further concerned to read that neither the ships nor the "Maritime Command Naples did receive any further messages from Maritime Rescue Coordination Centre (MRCC) Rome on the boat in question" in addition to the 27 March distress call.

15. NATO has said they "continue to actively review [their] records in order to ascertain what happened". The work is apparently ongoing. Although they have engaged in a "comprehensive" lessons learned process, in which they have been "examining ways by which [they] could strengthen [NATO] information sharing and procedures related to SAR at Sea during NATO-led operations", I have no further details on the actual content of the process.

16. There are worrying information gaps which still prevent our Assembly from getting a comprehensive overview of which information regarding the distress call was shared with whom. It is still unclear which communication system the allied partners used, and how it can be possible to communicate if certain communication systems are not obligatory.

2.2. Enquiries by national parliaments and governments

17. The further responses I received after the adoption of Resolution 1872 (2012) from Italy, Spain and the United Kingdom (see Appendix) still don't allow me to ascertain the facts and responsibilities of the left-to-die boat incident.

18. Member States participating in the NATO co-ordinated operation should fully co-operate with the Assembly in order to get clarity on which actors were involved in the reported left-to-die boat. Although I have received replies from nearly all countries I have addressed, I urge the United States to reply to the outstanding questions and the parliamentarians of France, Greece, Italy, Romania, Spain, Turkey and the United Kingdom should press their governments to provide full information, if necessary by means of their inquiry competences.

19. The Italian Senate's Special Commission on the Protection and Promotion of Human Rights convened a hearing in July 2012, during which I presented the Assembly's concerns. However, no concrete results followed.

2.3. European Parliament inquiries into responsibilities

20. During the presentation of my findings before the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, I urged the members of European Parliament to co-operate in getting access to relevant sources, such as satellite information. Unfortunately, no action has been undertaken. Therefore, there was no follow-up to the letter of the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission, Ms Catherine Ashton, in which she answered that she had no relevant satellite imagery available.

21. It is still relevant and crucial to get hold of satellite imagery of that period and that specific area. It is hard to believe that these images do not exist.

2.4. National legal proceedings

22. With support from non-governmental organisations (NGOs), in particular that of the International Federation for Human Rights (FIDH), cases have been brought before the courts in Italy, France, Spain and Belgium, and Freedom of Information (FoI) applications filed in Canada, the United Kingdom and the United States.

23. The initial case brought in the *Tribunal de Grande Instance* in France in April 2012, for failure to come to the rescue of persons in peril, was dropped by the public prosecutor in December 2012 on the advice of the Ministry of Defence.

24. A second case, a civil action, was brought under Article 86 of the French Code of Criminal Procedure in June 2013 by two survivors supported by three NGOs. The judge dismissed this second case on the grounds that "exhaustive investigations by prestigious international bodies" had been unable to uncover evidence of French responsibility and, in any case, French ships were not in the area of the drifting boat nor were French aircraft charged with surveillance of this part of the sea. On 11 December 2013, the claimants gave notice of appeal against this decision.

25. A civil action was also initiated in Spain in June 2013 in the names of the same two survivors. In November 2013, the lawyer bringing the case was informed that the case had been rejected in light of a report from the Spanish Navy to the effect that the Spanish vessel *Mendez Nuñez* had not been close enough to the migrants' boat. This decision was also appealed.

26. A criminal case wasfiled in Belgium at the end of November 2013 before the Brussels Tribunal of First Instance, in the name of three of the survivors.

27. The FoI requests to Canada, the United Kingdom and the United States concerned the movement of ships in the Mediterranean at the time of the incident.[7] As of the time of writing, Canada had responded in part to the request for information, while indicating that military secrecy prevents further revelations; the information provided sheds no further light on the 2011 incident. The United Kingdom and the United States have not responded.

28. Regarding the survivors of the left-to-die boat whose applications for asylum or residence on humanitarian grounds are still pending, I urge the member States they reside in to grant them the right to residence.

3. Lessons learned from the tragedies in the Mediterranean: are there any?

29. I hope that one day the details will come to light so that appropriate lessons can be drawn from this tragic failure to act. In the meantime, I stand by my conclusion that one State's vessel under the command of NATO must take responsibility. I trust that this will be fully taken into account in any lessons learned exercises. National and international initiatives have given some food for hope, yet there's a long way to go until deaths and push-backs are fully stopped in the Mediterranean.

3.1. Italy

30. In July 2012, in execution of the judgment of the European Court of Human Rights in *Hirsi Jamaa and others v. Italy*,[8] Italy informed the Committee of Ministers that its bilateral agreement with Libya for the return of migrants intercepted at sea had been suspended in the wake of the 2011 conflict. The government underlined that any individuals intercepted in the future would be taken to special centres in Italy to assess their situation in full respect of their rights under the European Convention on Human Rights (ETS No. 5).[9] Until recently, it was not clear if this also meant that Italy respected the maritime rule that each request for help should be followed up immediately.

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7. "Following unsatisfactory responses from the U.K, the U.S.A. and Canada, where victims are unable to launch proceedings themselves, requests for information have been submitted under freedom of information laws, in order to obtain details on the precise positions and actions of their armed forces at the time of these events." FIDH, 63 migrants left to die in the Mediterranean, 4 March 2014.
8. Application No. 27765/09, judgment of 23 February 2012.
9. Action plan from the Italian Government in the case of *Hirsi Jamaa and others v. Italy*, document DH-DD(2012)671.

31. The change in the Italian Government in April 2013 raised hopes for a resolution of the problem in line with international human rights and refugee law. The appointed Prime Minister, Enrico Letta, expressed shame at the harsh immigration laws brought in by the previous coalition government, including those intended to dissuade people from helping vessels in trouble. Political realities, on the other hand, it was said, made their repeal difficult. Then 2013 and 2014 saw another upsurge in boats arriving from the African coast. The new Italian Prime Minister, Matteo Renzi, appointed in February 2014 confirmed that the Mediterranean would be at the heart of the priorities of the Italian presidency of the European Union.

32. On 3 October 2013, a boat that had set off from Libya packed with more than 500 Eritrean and some Somali men, women and children caught fire and capsized off Lampedusa. Only 155 people survived; some 366 bodies, men, women and children, were later recovered. Incidents were now occurring on a regular basis, but a tragedy of such magnitude provoked universal shock and horror and could not be ignored. I called for an immediate investigation into allegations that fishing or other boats failed to go to the rescue of drowning persons off the island of Lampedusa.[10]

33. Just one week later, on 11 October 2013, another stricken vessel sank 65 nautical miles south-east of Lampedusa, in an area where Malta has SAR responsibility. The boat sank because Libyan soldiers had shot holes in it, in order to prevent it from leaving Libya. It seems that at least 34 people died.[11] In the end, both Italian and Maltese SAR teams came to the rescue and managed to save more than 200 Syrian refugees. But delays were reported in their going to the assistance of the sinking boat.[12]

34. These delays once again appeared to be the result of, in the first place, a back and forth between Italy and Malta over who should take responsibility for the rescue and, in the second, that the rescue signals sent out did not have the urgency needed to trigger immediate assistance. Sadly, if the failures identified more than a year ago had not been repeated, possibly many more lives could have been saved.

35. Noting the urgent need to tackle the situation while European discussions were still ongoing, Italy launched Operation *Mare Nostrum* which, according to Former Defence Minister, Mario Mauro, is a "humanitarian operation" to "save human lives", as well as a "security" operation.[13] On 18 October 2013, Italy tripled its naval and air units working in the Straits of Sicily.[14] Although the operation has been successful in saving thousands of lives since it was launched, it will be short-lived unless Europe manages to provide the means to make it sustainable. Other southern States including Greece, Portugal, Spain and Malta, have also called for greater support from the European Union in patrolling the Mediterranean.

36. Since *Mare Nostrum,* Italy seems to have adopted a new approach and has interpreted "distress situation" in a very broad sense and provided prompt rescue. However, the Italian replies to my questions imply that Italy doesn't admit that according to maritime law States have to act immediately upon distress calls, regardless of whether the request comes from the State's SAR zone or another SAR zone. The obligation to co-ordinate or start a rescue action only comes to an end if the responsible SAR authority has taken over this task. The reasoning behind this maritime rule is simple: every minute counts when lives are at stake at sea. Italy should admit that the maritime rules impose an immediate action to every distress call, no matter where the call comes from.

37. No-one could now deny that meaningful steps needed to be taken urgently, and yet little attention was paid to what became of the survivors of these disasters. In January 2014, it was revealed that a number of them were held in a reception centre on Lampedusa for more than 100 days. This was a basic and often hugely overstretched first-tier reception centre where new arrivals were supposed to spend no longer than 48 hours. The Office of the United Nations High Commissioner for Refugees (UNHCR) protested to judicial authorities over what it said amounted to a prolonged detention of people in urgent need of assistance. MP Khalid Chaouki, who spent Christmas inside the centre, said the contrast was strong between the treatment

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10. "Lampedusa: call for investigation into allegations that boats failed to carry out rescue", Assembly press release, 4 October 2013. See also the report on "The large-scale arrival of mixed migratory flows on Italian shores", op. cit.
11. "Rapporteur deplores 'no lessons learned' on lives lost in the Mediterranean", Assembly press release, 29 November 2013; ECRE, "Survivors of "left to die" boat accuse the Belgian army of failing to aid persons in distress", 29 November 2013; BCC, Mediterranean "A Cemetery" – Maltese PM Muscat, 12 October 2013.
12. A Freedom of Information request to the Armed Forces of Malta seeking clarification on the timeline of the rescue mission was turned down in January 2014 on grounds that this "would or could reasonably be expected to cause damage to the security, the defence or the international relations of Malta with Italy". *Malta Today*, "AFM turns down complaint on refusal to disclose Lampedusa rescue mission timeline", 13 January 2014.
13. ANSAMed, "Immigration: Italy launches Mare Nostrum, 400 more saved", 15 October 2013.
14. *The Guardian*, "Italy to triple Mediterranean naval and air units to address migrant safety", 13 October 2013.

given to the survivors of the 3 October disaster and the torrent of expressions of solidarity immediately after it. The UNHCR demanded that the Italian authorities ensure the situation never happens again. Today, the centre in Lampedusa is being renovated, and no migrants are currently being kept on the island.

3.2. Malta

38. In August 2013, the Italian authorities asked two commercial ships, the *MV Salamis* and the *Adakent*, to go to the aid of two groups of migrants in distress off the Libyan coast – Libya still being unable to take responsibility for its SAR zone. The *Adakent was* instructed directly by the Libyan authorities, and the *MV Salamis* by the MRCC Rome on behalf of the Libyans, to transport the migrants back to Libya and disembark them in the port of Tripoli. The *Adakent* did as instructed. After rescuing 102 migrants from a boat about 45 nautical miles off the Libyan coast, the *MV Salamis*, a Greek-owned tanker, however, refused to return them and instead continued on its route to Malta. The Government of Malta informed the tanker's captain that he would not be allowed to disembark the migrants in Malta, and as the *Salamis* approached the island, the armed forces of Malta blocked it. The ship found itself at an impasse as Italy and Malta both refused to disembark the migrants.

39. On 6 August 2013, European Commissioner Malmström ordered Malta to allow the migrants to disembark in view of the urgent humanitarian needs of the passengers. This did not happen. Malta's National Security Minister stated: "As a sovereign State, we cannot give in to the barefaced breach of international law by this captain."[15] The Attorney General wrote to the local agent of the tanker holding him responsible for any damages Malta might suffer as a consequence of these events. After three days of impasse, on 7 August, the Italian authorities accepted to allow the *Salamis* to disembark the 102 migrants in the port of Syracuse.

40. These cases raise two very troubling issues. Firstly, that the migrants were being given no chance to claim asylum and were being put at risk of being returned to a dangerous situation; the Libyan coast from which they had sailed could not have been considered for them a "place of safety" within the meaning of the 1979 International Convention on Maritime Search and Rescue (SAR Convention). Secondly, being stalled at sea for several days not only threatens the health and well-being of the rescued migrants, but has also a damaging economic impact for the commercial vessel. These delays in disembarkation therefore increase the risk that private boats become more hesitant when it comes to rescuing migrants at sea.

3.3. Greece

41. In November 2013, the NGO ProAsyl reported about the fatal consequences of the closing of the land border in the Evros region of Greece, which, after August 2012, led to a shift in flight routes to the Aegean Sea route, and reports of illegal push-backs of refugees from Syria, Afghanistan, Somalia and Eritrea increased, from Greek territorial waters, the Greek islands and from the land border.[16] The report describes how those apprehended are ill-treated before being deported back to Turkey. Amnesty International[17] and Human Rights Watch (HRW) have also interviewed refugees who have had similar experiences. Special units of the Greek coastguard, the ProAsyl report says, abandon refugees in Turkish territorial waters without consideration for their safety: at least 149 people, mostly Syrian and Afghan refugees, have lost their lives in this stretch of water.

42. Since the beginning of 2014, at least 43 people have died trying to reach the Greek coasts. On 20 January 2014, nine children and three women lost their lives when their vessel sank near a Greek island while being towed by the Greek Coast Guard.[18]

43. Faced with mounting criticism from, among others, the Council of Europe[19], the UNHCR, NGOs and political parties, as well as European Commissioner Malmström and the Greek Minister of Shipping, Militiadis Varvitsiotis, ordered a judicial probe into the incident. Although the independence and impartiality of such an investigation is of crucial importance, the lack of transparency makes it impossible to monitor the investigation and the methods used. NGOs have urged the minister to lift the boat and to search for the drowned bodies.

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15. *Times of Malta*, "Migrants sent to Italy", 6 August 2013.
16. ProAsyl, "Pushed-Back: Systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land border", 7 November 2013.
17. Amnesty International, Frontier Europe: Human rights abuses on Greece's border with Turkey, 9 July 2013; Frontier of hope and fear: Migrants and refugees pushed back at Europe's border, 29 April 2014.
18. According to the survivors, the Coast Guard vessel was towing the boat toward the Turkish coast at high speed when the boat capsized. The Greek Port Authority, on the other hand, maintained that it was towing the boat towards a Greek island when a large number of those on board gathered on one side, causing it to sink. See UNHCR, Statement on boat incident off Greece coast, 21 January 2014.

44. In addition, during a meeting in February this year with the UNHCR and NGOs working in Greece, I was informed about numerous signals and evidence that Greece is practicing push-backs to Turkey on a structural basis.[20] I have expressed my concerns to Minister Dendias about these allegations from reliable sources. As this would mean a serious violation of the *non-refoulement* principle, a thorough investigation into these incidents is urgently needed. Nevertheless, more deaths at sea have been reported since then:[21] according to Amnesty International, they are the result of further attempts by the Greek authorities to push migrants back to Turkey.

45. The sealing of the land border between Greece and Turkey was carried out in co-operation with the European Union and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). "These are European borders, managed with European money, and with the support of Frontex," said the European Council on Refugees and Exiles (ECRE) Secretary General Michael Diedring. "The EU has a responsibility to take all measures needed to ensure that life is given priority and fundamental rights are respected at its borders."[22] Having assumed the presidency of the European Union in January 2014, it is all the more important that Greece shows proper leadership in this regard.

4. A European policy on migration, asylum and the duty to rescue in the Mediterranean

46. During the presentation of my findings to the European Parliament, I proposed that the Parliament should take the initiative for what I called a "pact on the Mediterranean', meaning an EU protocol for the Mediterranean region, tackling the various factors that cause rescuing and protection gaps. The failings I addressed in my report still occur. It is a missed opportunity that the European Parliament did not follow up my suggestion to propose this pact. Instead, it left it up to the European Council after the recent catastrophes. The proposals of the EU Task force Mediterranean (TFM), set up in October 2013, offer member States some tools and methods to improve their policy and practice, but a pact formulated by the EP might have been stronger on human rights and less security oriented.[23] Of course, it is not too late for the EP to make sure that the EU response guarantees compliance with fundamental rights.

4.1. Will European action match its words?

47. The European Council discussed migration flows at its meeting of 24 and 25 October 2013.[24] Expressing its deep sadness at the dramatic deaths of hundreds of people in October 2013 in the Mediterranean Sea near Lampedusa, which, it said "shocked all Europeans", the Council agreed that determined action should be taken in order to prevent the loss of lives at sea and to avoid such human tragedies happening again. It welcomed the setting up of the TFM with the purpose of developing a range of measures to be taken in this respect. The TFM, chaired by the European Commission, met twice, with participants including the European External Action Service, member States, the European Asylum Support Office (EASO), Frontex, Europol, the Fundamental Rights Agency of the European Union (FRA) and the European Maritime Safety Agency (EMSA).[25] It reported to the European Parliament and European Council in December 2013.[26]

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19. Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to Mr Nikolaos Dendias, Minister of Public Order and Citizen Protection, and Mr Miltiadis Varvitsiotis, Minister of Shipping, Maritime Affairs and the Aegean, on collective expulsions (Greece), 5 December 2013.
20. Amnesty International, Frontier of hope and fear: Migrants and refugees pushed back at Europe's border, 29 April 2014.
21. On 5 May 2014, at least 22 people drowned near the Greek island of Samos on May 2014. Assembly rapporteur reacts to Aegean migrant boat tragedy, 7 May 2014; AP, "Greece: Smuggling boats capsize, 22 migrants drown", 5 May 2014.
22. ProAsyl, "12 refugees die during alleged push-back operation off Greek island – ECRE and Pro Asyl call for independent and effective investigation", press release, 22 January 2014.
23. "Two European Summits and one task force later ... all we have is the re-affirmation of the exact same policy principles that are at the root of the problem: surveillance and prevention, not rescue and protection", Amnesty International, "Secretary General Salil Shetty to European Policy Council (EPC)", Sixty Minute Briefing, 21 January 2014.
24. European Council Conclusions, 24-25 October 2013, pp. 17-18, EUCO 169/13 – CO EUR 13/ CONCL 7.
25. Other entities were consulted, including associated countries, the UNHCR, the International Organisation for Migration, the International Centre for Migration Policy Development (ICMPD), the Migration Policy Centre, the International Maritime Organisation, UNODC and Interpol.
26. Commission to the European Parliament and the Council, Communication on the work of the Task Force Mediterranean, 4 December 2013, COM(2013)869.

48. The TFM set out some 38 operational activities to be followed. All of these, the communication says, "will have to be fully compliant with international human rights standards". Yet, the emphasis throughout is on preventing persons from attempting to enter the European Union through irregular channels, from putting their own lives at risk by undertaking dangerous journeys towards Europe. The proposed measures range from strengthened co-operation with the neighbouring transit countries (on border controls, readmission, the combat against smuggling and trafficking and access to asylum) and a strengthened role for Frontex to the exploration of further possibilities for "protected entries" into the European Union for persons in need of international protection.

49. The TFM urged in particular the member States to make more use of humanitarian visas and relocation or resettlement programmes, but also proposed to carry out a feasibility study on joint processing outside the European Union without prejudice to the existing right of access to asylum procedures in the European Union. Most of the member States however rejected the idea of a more proactive invitation policy. Commissioner Malmström stated at an inter-parliamentary meeting in Athens, in February 2014 that she could not start a pilot on joint processing outside the European Union, as member States were not prepared to accept and admit those who would be recognised refugees.

50. Yet, the proposals of the Commission to create protected entries to Europe for those in need of international protection need to be embraced urgently to show adequate signs of solidarity with the neighbouring countries of conflict regions (especially now Lebanon, Jordan and Turkey)[27] and with refugees, who fear for violence and forced returns and are thus ready to risk a dangerous journey to a safer place. The use of Evacuation Transit Centres could help process the cases to Council of Europe member States or non-European countries.

51. The Communication of the TFM addresses the problem of low human rights standards in transit countries, but it does not propose to first require an adequate protection level (regarding *non-refoulement*, access to asylum and protection mechanisms, non-discrimination, access to services and dignity) before co-operation on migration with these countries is allowed. The need for this requirement was already stressed by the United Nations special rapporteur on the human rights of migrants, François Crépeau.[28]

52. I welcome the two mobility partnerships concluded with Tunisia and Morocco, and the one being negotiated with Jordan, in the context of the Global Approach to Migration and Mobility (GAMM). The GAMM consists of four pillars: legal migration and mobility; the impact of migration on development; combating irregular migration and human trafficking; international protection and asylum policy. This co-operation with third countries has been criticised for resulting in even harsher policies towards migrants in the transit countries, while these countries have gained an interest in avoiding responsibility for migrants and in making sure that migrants don't reach the EU borders.[29] In order to avoid these perverse incentives, the pillar on "international protection and asylum policy" should be given priority. The establishment of a sufficient protection level should serve as a condition for the co-operation on the other three pillars. Furthermore, the GAMM should aim at sharing the responsibility for refugees and therefore also create secure legal avenues to Europe for those seeking protection,

53. Furthermore, the Dublin-regulation[30] *de facto* discourages the southern member States from improving their standards on reception and procedures for asylum seekers, and thus threatens the aim of a Common European Asylum System. In its proposal on the post-Stockholm programme, the Commission put forward the creation of a uniform asylum status.[31] Such a status would reinforce the mutual trust in national asylum decisions, but also facilitate intra-EU mobility. This right to mobility offers refugees and subsidiary protected persons the opportunity to choose their place of settlement, creating a natural type of solidarity.

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27. Amnesty International, *An International Failure: The Syrian Refugee crisis*, Briefing, 13 December 2013.
28. François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 24 April 2013.
29. See for instance, Euro-Mediterranean Human Rights Network, *Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and Nine Member States on 7 June 2013*, February 2014. Human Rights Watch, *Abused and expelled. Ill-Treatment of Sub-Saharan African Migrants in Morocco*, February 2014. Amnesty International, EU leaders must urgently act to stop the increasing death toll in the Mediterranean Sea, Public Statement, Brussels, 13 May 2014.
30. Regulation (EU) No. 604/2013 of the European Parliament and of the European Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 26 June 2013.
31. European Commission, An open and secure Europe: making it happen, COM(2014)154, 11 March 2014.

54. At the same time, the European Union could improve and further harmonise the application of the asylum *acquis* by starting a pilot project on joint processing inside the European Union, by offering sufficient support to member States who currently lack adequate protection standards and by encouraging the European Commission to start infringement procedures.

55. To what extent the proposals of the TFM will be adopted and how they serve to reduce the risk of further tragedies, still remains to be seen. Moreover, the Council put off further discussion of asylum and migration issues until June 2014.

4.2. A strengthened role for Frontex and EUROSUR

56. The TFM called in particular for increased support and assistance to member States in the region and reinforcement of Frontex activities in the Mediterranean.

57. "Swift implementation by member States of the new European Border Surveillance System (EUROSUR) will be crucial," the Council concluded in October, "to help detecting vessels and illegal entries, contributing to protecting and saving lives at the European Union's external borders". This became operational as of 2 December 2013 with an estimated cost of 244 million euros until 2020.

58. "Reinforcement of Frontex-co-ordinated border surveillance operations by member States' airborne and naval military assets … can also improve situational awareness and the capacity for early detection of irregular migrants at sea, thus enabling more effective prevention of loss of life." The TFM further proposed to intensify the monitoring of known departure points for irregular migration in the whole of the Mediterranean, including parts of the coast that serve as hubs for irregular migrants.

59. It can however be doubted whether more exchange of information will lead to more search and rescue actions. My report gives reason for some scepticism as it has clearly shown that the knowledge of the distress call and the location of the left-to-die boat did not lead to search and rescue. If the lack of political will is not tackled, the increase of information could also have the opposite effect, namely more deterrent actions or even push-backs.

60. Moreover, if it is sincerely intended to protect and save lives, as well as prevent irregular migration and tackle cross-border crime, EUROSUR needs to operate on the basis of clear, binding and enforceable standards on the rules of engagement with respect to detection, interception, rescue operations and disembarkation; a wider concept of distress consistent with the EU Frontex rules, agreed criteria for determining where people who are rescued will land, consistent with the right to seek asylum; and a clear commitment to respect the rights of migrants and asylum seekers. In order to improve its accountability and in line with the recommendation of the EU Ombudsman, Frontex should establish an effective mechanism for individual complaints of violations of fundamental rights.[32]

61. The regulation on Frontex-co-ordinated sea border operations which was adopted by the Council of the European Union on 13 May 2014 will partly fill these gaps.[33] This regulation however only applies to these joint operations, therefore I recommend applying the norms in this regulation to all SAR actions by individual member States and making sure that the individual assessment on safe return to a third country, which cannot be made properly on high seas, takes place on EU territory.

62. Moreover, the new regulation will not be limited to the detection of attempts at irregular border crossing but equally extends to the interception of ships suspected of trying to gain entry to the European Union without submitting to border checks, as well as the search and rescue during a sea operation.

63. I welcome in particular the efforts of the European Parliament to define clearly in the Regulation the concept of a "vessel or persons on board in a phase of distress". The rules state that "Member States shall observe their obligation to render assistance to any vessel or person in distress at sea". I nevertheless call on Frontex to ensure that the margin for interpretation of the line drawn between the phases of alert and distress and possible errors are accompanied by appropriate safeguards.

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32. See the recommendations of Inquiry No. OI/5/2012/BEH-MHZ. See also, European Ombusdman, Ombudsman calls on Frontex to deal with complaints about fundamental rights infringements, press release, 14 November 2013.

33. Council of the European Union, Council adopts new rules for the surveillance of the EU external sea borders, Press release, Brussels, 13 May 2014. See also Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union, PE-CONS 35/14.

64. Frontex's operational plan, which shall be carried out in accordance with international law and fundamental rights[34] should also "include procedures ensuring that persons with international protection needs, victims of trafficking in human beings, unaccompanied minors and other vulnerable persons are identified and provided with appropriate assistance, including access to international protection". This assessment, however, can take place during the operation at sea. It can be questioned if this can be defined as a meaningful assessment, if important safeguards such as legal aid are not in place, let alone an effective remedy against a negative decision. Despite the gaps with regard to sufficient guarantees, the regulation allows Frontex and the member States to let a migrant disembark in a third country.

65. The new Frontex rules recall the need for "co-operation with neighbouring third countries … to prevent unauthorised border crossings, to counter cross-border criminality and to avoid loss of life at sea". While efforts will be made to strengthen the capacity for SAR in North Africa, at present these capacities remain weak. It will therefore be essential at least in the short term that European Rescue Coordination Centres are immediately contacted when boats in distress at sea are identified in order to get rescue operations under way as soon as possible. Looking back to the experience of 2011 with regard to the Libyan SAR zone, the importance of clearly delineating responsibilities in such circumstances becomes immediately apparent.

4.3. Calls for solutions to the Mediterranean tragedies

66. A large number of NGOs, international and local, have continued to follow this issue in all its aspects, pursuing individual initiatives as well as working in coalition to strategise collectively and bring pressure to bear in Brussels and in the countries concerned. Many exchange information under the umbrella of Boats for People and through the web site Watch the Med and projects such as The Migrants Files. Their commitment to these issues and untiring work deserves recognition.

67. Soon after the October 2013 tragedies, the UNHCR called for immediate strengthening of the central Mediterranean's search and rescue at sea capabilities. In a proposal for a Central Mediterranean Sea Initiative,[35] the UNHCR addressed those gaps it saw remaining as regards responsibilities for disembarkation. "Differing views on disembarkation are directly linked to the question of which State or States would carry longer-term responsibility for the provision of asylum." It called for the reinforcement of SAR patrols along Mediterranean routes, greater practical co-operation between EU member States and support from the International Maritime Organisation (IMO), support for shipmasters of commercial vessels carrying out rescues, and further guidance for shipmasters[36] and within Frontex operational plans on what constitutes a distress situation.

68. Amnesty International continued to press for answers in relation to the *Salamis* and *Adakent* incidents as well as the October 2013 and more recent shipwrecks. It has issued public statements, published papers and news releases on how the European Union could best avoid further loss of lives, and has focused attention on "push-backs" and the need for Europe to stop "outsourcing" migration to places such as Libya and Egypt, where there are no human rights safeguards.

69. Human Rights Watch has issued a number of publications on migrant deaths in the Mediterranean and set out concrete recommendations on how Europe should respond. Among others, the European NGO Platform on Asylum and Migration, comprising some 26 Europe-based NGOs, looking ahead to the discussions put off until June 2014, has prepared a statement setting out key priorities for the future of European migration and asylum policy.[37]

5. Steps to be taken

70. The lessons learned process of this report highlights further specific steps which still remain to be taken by member States, NATO and the IMO.

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34. Assembly Resolution 1932 (2013) "Frontex: human rights responsibilities" and Doc. 13161.
35. UNHCR, Proposal for a Central Mediterranean Sea Initiative: EU solidarity for rescue-at-sea, protection and comprehensive responses, 16 October 2013.
36. The UNHCR has included development of such guidance among its priorities for work in the coming biennium.
37. Statement by the European NGO Platform on EU Asylum and Migration (EPAM) on elements for the future EU Programme on Asylum and Migration, 20 January 2014.

5.1. Improving NATO working methods

71. NATO expressed its deep concern over the reports of migrants dying at sea and reaffirmed that ships under its command would always respond to vessels in distress, as is their duty under the law of the sea. The Assembly's report, it confirmed, was being used as input into a lessons learned process aimed at making improvements in working methods such that loss of life could be avoided in future.

72. The NATO-led Operation Unified Protector, which had a number of ships in the Mediterranean Sea in March/April 2011, came to an end in October 2011. Currently, the Organisation has a Standing NATO Maritime Group (SNMG) in the Mediterranean. One would trust that the SNMG, and any future operations, will adjust their procedures in light of the conclusions of this exercise.

73. NATO explained that not all military vessels have the Global Maritime Distress and Safety System (GMDSS), in any of its versions, or have the means to receive Hydrolant distress messages. As long as this is not obligatory, it is unlikely that they will have it. Nonetheless, such ships would have sophisticated communications equipment that would permit reception of distress signals. The IMO, which is the UN agency responsible for safety at sea, including oversight of the SOLAS[38] and SAR Conventions, had in 2010 launched a scoping exercise to establish whether there was a need to review the Global Maritime Distress and Safety System (GMDSS) and in what respects.

5.2. Clarifying responsibilities in search and rescue

74. In investigating the incident of March-April 2011, I was confronted with major conflicting opinions as to who was considered to have primary responsibility to react to distress calls. In subsequent incidents, this always appeared to be a critical contributing factor. In seeking clarification of a number of key questions I had identified, I continued to receive referrals back to NATO by individual member States, and referrals back to the member States by NATO. To my mind, there was no clear allocation or acceptance of responsibility, at least insofar as human rights obligations were concerned.

75. Disagreements between Malta and Italy – the one geographically closer to effect a rescue, the other having primary responsibility for the zone in question – appear to continue to arise regularly, resulting in long delays in any intervention. Coordination between the SAR operations needs considerable improvement if lives are to be saved and I expect Italy to make good use of its presidency of the European Union during the next term to show political will in settling such quarrels with Malta.

76. As EUROSUR now begins its operations to improve surveillance and co-ordination among EU member States in the Mediterranean, it is crucial to set out clearly where primary responsibility for action resides within the EUROSUR network and between the national co-ordination centres.

77. It is important to know to what extent the EUROSUR system, with its national co-ordination centres for border surveillance, will safeguard swift and adequate responses to migrants in distress in the Mediterranean Sea and guarantee full accountability of the actors involved.

78. Furthermore, the Regulation on Frontex-co-ordinated sea border operations contains certain rules on interception, distress calls and disembarkation. I reiterate that the rules could fill certain gaps if member States applied them to national interception and SAR operations.

5.3. Encouraging search and rescue by private vessels

79. In this respect, it is essential to allay fishermen's fears that they may get into trouble if they rescue migrants. Yet, the national legislation in some member States, which penalises the support of irregular entrance, has not yet been repealed.[39] This means that private companies or persons, who help migrants in distress at sea, may still face prosecution. This legislation should be abolished as soon as possible.

80. In its December 2013 communication, the European Commission's TFM proposed that a call should be issued at the national level urging shipmasters of merchant vessels and fishermen to comply with their obligations under international law (UNCLOS, SOLAS and SAR Conventions), to assist and report to the relevant authorities of the member States any migrant boats in distress. This, the TFM said, should be coupled with a public reassurance that the migrants will always be allowed to disembark rapidly, and that,

38. International Convention for the Safety of Life at Sea (SOLAS), 1 November 1974.
39. In Italy the situation is promising, as on 21 January 2014 the Italian Senate repealed the previous legislation criminalising irregular migration. This, however, still needs approval by the lower house of parliament to be effective.

"provided they are acting in good faith, they would not face any negative legal consequences for providing such assistance".[40] The recent Frontex rules promote the protection of shipmasters and crew from "criminal penalties for the sole reason of having rescued persons in distress and brought them to a place of safety".

81. In its 2012 resolution, the Assembly had additionally highlighted the need to deal with the economic consequences for the rescuing vessel and its owners. The case of the *MV Salamis*, reported above, provides a very clear illustration of how prohibitive these costs can be for the individual concerned. The FRA recommended that EU member States should explore ways to support private vessels, in particular fishing vessels, when they face economic losses through their involvement in rescue operations.[41] The issue of compensation for such vessels does not appear to have been addressed by the TFM.

5.4. Safeguarding the non-refoulement principle

82. The above cases illustrate how, even very recently, and despite assurances to the contrary made to the Committee of Ministers and others, member States continue to effect push-backs. [42]

83. For the Council of Europe, the issue is clear. In accordance with the judgment of the European Court of Human Rights in the case of *Hirsi Jamaa and others v. Italy*, member States must ensure that people are not pushed back to a country where they risk being treated in violation of Article 3 of the European Convention on Human Rights. This is in addition to the States' obligation under the SAR Convention.

84. Since a great number of those intercepted can be presumed to be in need of protection, the place to which they are taken should also allow for them to be able to seek asylum. At the moment, this is definitely not guaranteed in countries such as Libya or Egypt. Moreover, even in Turkey, non-European asylum seekers face difficulties in getting access to protection because of the geographical limitation Turkey maintains with the 1951 Geneva Convention relating to the Status of Refugee.

85. Member States should cease any readmissions, even in the framework of the Dublin Regulation, should the conditions in the country of readmission not be sufficiently protective of the people's human rights and their right not to be sent back to a country where they would face persecutions or inhuman and degrading treatment. The case of the agreement between Italy and Libya is a clear example as it prevents migrants from leaving Libya (where their human rights are seriously violated) and getting access to protection in Europe.

86. The new Frontex rules allow for returns to third countries of people intercepted on the high seas following a cursory assessment of protection needs and the situation in the country to which they would be returned. According to HRW, such interceptions and push-backs only contribute to the continuing cycle of migrants and asylum seekers attempting the dangerous crossing.

5.5. Tracing the dead and restoring family links

87. The Council of Europe Commissioner for Human Rights had already in 2007 called for the identification of those migrants who die or disappear at sea. In its 2009 Stockholm Declaration, the European Union made a commitment to improve the recording and identification of migrants trying to reach Europe. Yet until recently this issue had been the subject of little public discussion.

88. While considerable effort is put into identifying those who succeed in reaching the European shores, for the purpose of immigration regulation and asylum determination, it seems that little action is taken by member States in regard to those who do not. So many individuals continue to perish and their families are unaware of what has become of them. Few families are in a position to pursue the matter themselves. In some cases, the country of origin, if alerted, might use the information to put family members still at home under pressure. This exercise must therefore be handled with utmost care and compassion.

89. In November 2013, the International Committee of the Red Cross (ICRC), together with the Italian Red Cross and Milan University took up the issue, convening a First Conference on the management and identification of unidentified decedents, with an emphasis on dead migrants: the experience of European

40. Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, COM(2013)869 final, 4 December 2013.
41. European Union Agency for Fundamental Rights, Fundamental rights at Europe's southern sea borders, March 2013.
42. See also the case of Malta, which, in July 2013, was forced by an interim measure to refrain from pushing back Somalian refugees to Libya. VOA News, "Malta force to cancel repatriation of African refugees", 10 July 2013.

Mediterranean countries. The purpose was to raise awareness about this humanitarian tragedy, share information about current practices in Italy, Spain, Greece, Malta, France and Portugal, and promote best practices at national and regional levels.

90. I support the ICRC's recommendations to develop common forensic protocols and standards, along with the creation of a European database of unidentified decedents retrieved from the Mediterranean and of missing persons. Information should be easily available to the families of victims, in order for relatives to come to terms with the loss.

91. The ICRC's activities have generally been related to collecting the Tracing Requests by the relatives in order to try to re-establish the link between separated members of a family. In this context, I support ICRC's recommendation for authorities to maintain and restore family links. "Secondary separation" of family members during rescue operations or at a later stage, for medical reasons for example, should be avoided. If this is not possible, families should be informed of the whereabouts of their relatives.

92. For the Council of Europe this is an important issue. Were these people to have died in battle or on land, all efforts would be made to identify them and notify their families. It cannot be that their situation as irregular migrants excludes them from equal consideration.

5.6. Monitoring maritime practices

93. The IMO should take a role in disseminating and promoting the proper application of maritime law. The IMO informed me that oversight of its conventions, hitherto voluntary, would become mandatory from January 2015, with a view to guaranteeing better implementation of IMO instruments. However as these audits will be limited to checking whether the national implementing systems are in place, the actual application of the rules will not be audited. It is recommended that the member States of the IMO extend its mandate in this regard.

94. On 1 July 2006, amendments to the SOLAS and SAR Conventions entered in force, placing obligations on States to co-operate and co-ordinate with a view to disembarking persons rescued at sea at a place of safety as soon as possible. This still causes excessive delays in letting people go ashore. The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea defines – unlike the SAR Convention – "a place of safety",[43] and states the need for governments and responsible RCC to "make every effort to minimise the time survivors remain aboard the assisting ship".

95. Yet, a clear duty for member States to disembark the persons rescued is still missing. Moreover, the IMO guidelines are not binding and States such as Malta have not accepted them and still distinguish between a safe place in terms of SAR and a safe place in terms of humanitarian law. The *Salamis* incident illustrates well how weak the International and EU legal framework still is regarding member States' disembarkation duties.

96. As I was informed in a letter from the IMO of 7 February 2012, the IMO took the initiative to help draft a non-binding memorandum of understanding on procedures to facilitate the disembarkation of the persons rescued in the Mediterranean Sea.[44] Its objective is to improve the co-ordination of participating governments with regard to the provision of suitable ports or places of safety for survivors, as quickly as possible. It would not create further obligations on State Parties. In June 2013, in further correspondence, the IMO said that the consideration of a regional memorandum of understanding had not yet been successful and that the drafting was still ongoing.

97. It is highly recommended that the IMO further mediates between Malta and Italy to achieve an agreement, through a bilateral memorandum of understanding for instance, on the SAR and disembarkation responsibilities. Between 2009 and 2010 memoranda of understanding on SAR regions and on co-ordination of SAR services were already signed by Italy and some of its Mediterranean neighbours (Croatia, Greece, Albania, Slovenia) and notified to the IMO. The achievement of a similar agreement between Italy and Malta would certainly be a highly important and promising step. The European Union should consider how to facilitate and promote the accomplishment of this bilateral memorandum of understanding.

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43. According to the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea, a place of safety "is a location where rescue operations are considered to terminate. It is also a place 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. Further it is a place from which transportation arrangements can be made for the survivors' next or final destination". This definition was taken up again by the May 2014 Frontex rules which go further by adding the need to take "into account the protection of their fundamental rights in compliance with the principle of non-refoulement".

44. See also the address by the IMO Secretary General at the opening of the 37th session of the IMO Facilitation Committee, 2011.

Appendix – Selection of official replies sent to the rapporteur

Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strik, rapporteur of the Committee on Migration, Refugees and Displaced Persons, dated 23 April 2012

Many thanks for your letter of 12 April to Ambassador Evans seeking additional information regarding last year's tragic migrant boat incident in the Mediterranean. I agree with your report's conclusion that this tragedy appears to have been the result of an unfortunate sequence of events, in some ways caused by an apparent lack of communication between many of those involved. If there was a missed opportunity to help on our part, we deeply regret it. But it is clear that the primary responsibility for this tragedy lies with the Gadhafi government authorities, human traffickers and the captain of the boat, all of whom put in danger the lives of the innocent people on board this vessel. The Commanders of all Allied vessels, whether under NATO command or not, are fully aware of their obligations under maritime law. These obligations apply to all vessels, their crew and captains, be they military or merchant fleet.

NATO and Allies continue to actively review our records in order to ascertain what happened during the two weeks this boat was at sea. This work is ongoing, but in the meantime, I thought it important to get back to you with as much information as we have been able to gather, in advance of the Council of Europe's Parliamentary Assembly's debate on 24 April.

NATO does not hold any satellite imagery that could help identify military, merchant or other ships in the area of interest during the time in question. This is because satellite imagery was not used by NATO to develop Maritime Situational Awareness in support of our UN-mandated embargo operation. This is because satellite capacity is limited and in most cases cannot provide a continuous real time picture. I would also stress that NATO did not declare a “military zone” in the Mediterranean and, as you know, had no overall co-ordination role for Search and Rescue Operations in the area.

The primary mission of our naval task force was to prevent the flow of weapons to Libya, enforcing the UN arms embargo, a task that we accomplished successfully, despite coming under fire on many occasions from pro-Ghadafi forces. At the time of this incident in late March, only eight vessels in the Mediterranean were under NATO command, covering an operations area of over 61,000 square nautical miles. They actively complied with all their obligations under international law, particularly SOLAS.

I can confirm that helicopters from ships under NATO command were flying in the general area of the migrant boat, including on the 27th of March. However, there is no data that we have, linking one of those helicopters under NATO command to the time and location when survivors reported that they were given water and biscuits. I have asked nations to tell me if any of their helicopters in that part of the Mediterranean during those two weeks had the words “army” or “armée” inscribed on them. Of course not only warships under NATO command, engaged in embargo operations, were operating helicopters in the area at that time. Rotary and fixed wing aircraft from Allies, non-NATO countries and non-military organizations were also active.

Further to the information already provided in Ambassador Evans letter dated 27th of March 2012 regarding the distance of other NATO vessels operating in the same area, I can confirm that the Spanish frigate “Mendez Nunez”, under NATO Command, was approximately 24 nautical miles away. The Spanish authorities have also confirmed to me that the frigate's helicopter was on deck, not airborne, at the time mentioned by the survivors. It is essential to note that the relative position of any vessel to the estimated position of the subject vessel in the draft PACE Report is of minimal relevance to the issue, as no distress event had been instigated from a NATO perspective during that time period. Also and as referred above, many other vessels, non-NATO and civilian, were also operating in or transiting through the area.

In his letter, Ambassador Evans also provided you information on Italian ships operating in that part of the Mediterranean. The Italian authorities have made very clear to us that no Italian vessel or aircraft (including helicopters) ever came into contact with the migrant boat. According to them, this includes the ITS Borsini that was 37 nautical miles away from the position given in your report. Nor did the ITS Borsini ever receive a distress call concerning the boat.

We appreciate the Parliamentary Assembly's engagement on the important issue of the loss of migrants’ lives in the Mediterranean and look forward to seeing the final resolution of the Assembly. In the meantime, NATO Allies are already taking the draft recommendations seriously. NATO is examining ways by which we could strengthen our information sharing and procedures related to Search and Rescue at Sea during NATO-led operations. Again, as mentioned by Ambassador Evans, throughout our arms embargo operation last year, NATO ships and aircraft directly assisted in the rescue of over 600 people, including in the days before and

after this incident. As well, through co-ordination with national authorities, we assisted in the rescue of hundreds more. As a matter of procedure, NATO notified the responsible national coastguard as well as the IOM and the UNHCR when boats in distress were sighted. Finally, NATO is undertaking a comprehensive lessons learned process to review to all aspects of our operation in Libya, including the Search and Rescue issues identified in your report.

I hope this additional information will further assist you in your deliberations. We will send along additional information as soon as we receive it from nations or our military command channels.

Letter from Mr Nick Harvey, Minister of State for the Armed Forces of the United Kingdom, to Ms Strik, rapporteur of the Committee on Migration, Refugees and Displaced Persons, dated 2 May 2012

Thank you for your letter to the Defence Secretary regarding the Council of Europe's investigations concerning the loss of lives on a vessel in the Mediterranean Sea.

I would first like to apologise for the delay in our response. This was caused through our misunderstanding. Despite writing to us last October, your letter was only received in mid-February and, having already channelled national information through NATO, we believed that our input had been incorporated into NATO's response that was published on 8 February.

I would like to emphasise the importance with which the United Kingdom takes its responsibilities. We also wholly support the need for transparency. All of our military vessels operating at sea are fully aware of their obligations under maritime law to render assistance to those in distress. To help with your investigation, we have checked our national records for the position of our ships in the region against the dates, times and locations specified for the vessel in your letter. Our records show that no UK military assets either saw or made contact with the stricken vessel in question. This is irrespective of whether these assets were under national, NATO or other command and control arrangements at the time.

We remain fully supportive of your investigation in the hope and expectation that lessons can be learned from this tragic incident.

Letter from Mr Giampaolo Di Paolo, Minister of Defence of Italy, to Ms Strik, rapporteur of the Committee on Migration, Refugees and Displaced Persons, dated 10 May 2012

[unofficial translation]

I refer to your letter of 4 April 2012 requesting further information concerning the "distress calls" involving the Borsini which was operating in the Mediterranean, and the activities of the aircraft on board.

In this connection, I would inform you that the Borsini received no distress call signal either through the automatic system or its radio equipment on board. Furthermore, there was no flight by the helicopter on board on 27 March 2011. The following day, it carried out a single air-sea surveillance flight, spotting a vessel sailing towards Lampedusa, in respect of which action was taken by officers from the Financial and Customs Police and the Lampedusa port authorities.

Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strik, rapporteur of the Committee on Migration, Refugees and Displaced Persons, dated 12 September 2012

Thank you for your letter of 18 May wherein you asked for further technical clarification regarding the tragic loss of life during the migrant boat incident in the Mediterranean in March 2011, which you have been investigating. I will address each of your questions in turn.

First, regarding communications on board military vessels during NATO operations, please be informed that not all such vessels are necessarily equipped with a Global Maritime Distress and Safety System (GMDSS), in any of its versions, or have the means to receive Hydrolant messages. NATO has standards for tactical communications systems which vessels must have when operating as part of a NATO-led force on operations or during training and exercises. These standards do not include requirements for civilian communications systems such as INMARSAT, on military vessels.

Second, as mentioned by Ambassador Evans in his letter of 27 March 2012, NATO's Maritime Command Naples did receive a copy of the fax from the Rome Maritime Rescue Coordination Centre (IVIRCC) at 2139 hours on 27 March 2011. As I said in my response to your first letter, based on the form and content of that fax, it was not judged to be a distress call. Therefore the watch staff passed along the information in the fax to

the NATO Operational Commander on board ITS ETNA, via military tactical communications systems, as a routine matter. Standard practice in such cases is not to record the date and time messages are sent, and acknowledgments of receipt are not requested. These types of exchanges are considered 'nonaccountable'. The Italian authorities have confirmed to me that ITS ETNA received the information from Maritime Command Naples and forwarded it to the ships under its command. But the Italians are not able to confirm that any or all of the ships under ITS ETNA's command received this information. The Spanish authorities have confirmed that their vessel ESPS Mendez-Nunez did not receive this information nor do they have any record of receiving the Rome MRCC information from ITS ETNA. Nonetheless, on the morning of 28 March 2011, the Mendez Nunez conducted a search in an area 60nm north of Tripoli with its helicopter, following an instruction received on the morning of 28 March from the ITS ETNA. Unfortunately, the helicopter did not find the boat in question. Had we located the boat we would have rescued those in need as NATO vessels have done on numerous occasions during last year's Libya operation, and since then – most recently when NATO vessels assisted in the rescue of more than 50 migrants off the Italian coast in the area of Lampedusa last week.

Regarding your third question, Maritime Command Naples did not receive any further messages from MRCC Rome on the boat in question. After being queried, nations as well have informed me that none of their ships received any such messages.

Finally, I can confirm that NATO did not use satellite imagery to monitor maritime traffic during Operation Unified Protector or to create a Recognized Maritime Picture (RMP). As to your request for copies of the RMP for areas of interest to your investigation on certain days, I am not able to provide them, as they do not exist. NATO's current RMP tool is used by tactical and operational commanders during an operation. It can accurately depict the position of military vessels in real time but in its current form has no 'recording' capability that would allow us to retain historical records.

In closing let me say that we have taken good note of the information provided in your very thorough investigation. We are using it as an input to our Lessons Learned process for Operation Unified Protector. As I mentioned before, when we complete that process, I would be happy to share our related findings with you. Like you, our goal is to improve how we work, so that – to the maximum extent possible – such loss of life can be avoided in the future.

After four exchanges with you, I can confirm that there is no further information available through our chain of military command or through national channels that has been offered to us at NATO Headquarters regarding this tragic incident.

I wish you all the very best in your future work.

Letter from Mr Alejandro Alvargonzález San Martín, Secretary General for Defence Policy of Spain, to Ms Strik, rapporteur of the Committee on Migration, Refugees and Displaced Persons, dated 21 September 2012

[courtesy translation]

I am pleased to answer the letter you sent to the Minister of Defence, Mr Pedro Morenés, regarding the SOLAS incident.

I wish to reiterate that all information sent at the time, without exceptions, is correct and responds to the truth of the facts, as could not be otherwise.

I can ratify that Frigate Mendez Nunez did not receive a fax or any other communication in relation to the incident of 27 March 2011. An ITS ETNA instruction was received at 1158A hours in the morning of 28 March 2011, leading to a 60 nautical miles search to the North of Tripoli, area which includes the co-ordinates you mention in your report. The helicopter did not observe the presence of any vessels there.

These data, as well as any further information you require on the incident, are found in the letter that Mr Richard Froh (NATO Deputy Assistant Secretary General for Operations) sent you on 12 September last.