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International obligations of Council of Europe member States: to protect life at sea

Report[1]
Committee on Migration, Refugees and Displaced Persons
Rapporteur: Ms Petra De SUTTER, Belgium, Socialists, Democrats and Greens Group

Summary

In view of the high numbers of lives lost in the Mediterranean Sea by asylum seekers trying desperately to reach Europe on makeshift boats, member States should respect their international obligations and co-ordinate their efforts in protecting human life at sea. In particular, they should establish clear geographical responsibilities for international search and rescue operations at sea. Rescue operations carried out at sea by member States should be disconnected from subsequent applications for asylum by those rescued.

This report calls on all member States to put the protection of human lives above all other considerations and regardless of the status of the persons concerned. The Parliamentary Assembly calls on the Committee of Ministers to prepare guidelines on the protection of human life at sea through search and rescue operations, and on member States to implement fully the Council of Europe Convention on Action against Trafficking in Human Beings.

1. Reference to committee: Reference 4393 of 25 June 2018 (debate under urgent procedure).

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls its Resolution 1872 (2012) "Lives lost in the Mediterranean Sea: who is responsible?", Resolution 1999 (2014) "The left-to-die boat: actions and reactions", Resolution 2000 (2014) on the large-scale arrival of mixed migratory flows on Italian shores, Resolution 2050 (2015) "The human tragedy in the Mediterranean: immediate action needed" and Resolution 2088 (2016) "The Mediterranean Sea: a front door to irregular migration". The Assembly is alarmed by the fact that coastal member States are refusing entry to their ports by foreign vessels with passengers rescued at sea on board.

2. The Assembly is appalled by the high numbers of lives lost in the Mediterranean Sea by asylum seekers who are trying desperately to reach Europe on makeshift boats. It calls on member States to respect their international obligations and co-ordinate their efforts to protect human life at sea.

3. Saving lives at sea and on land is a moral as well as legal obligation for member States, framed by legal provisions which serve to regulate the implementation of the fundamental duty to respect human rights, including the right to life. The Assembly calls on member States to duly take account of this duty in all their action.

4. Emphasising that European States are not directly responsible for causing today's high migration flows, the Assembly points out that the closure of borders puts asylum seekers in even more life-threatening situations, as journeys become longer and routes more dangerous. The European Union's increasing focus on border security, and its increasing demands on partner countries to enforce this security, do not comply with the obligation to respect human rights and dignity above all.

5. In the light of the need to fulfil their obligations to save lives at sea, the Parliamentary Assembly calls on the Council of Europe member States to:

5.1. establish clear geographical responsibilities for international search and rescue operations at sea and disembarkation under the International Convention on Maritime Search and Rescue, for instance in the framework of the International Maritime Organization or through bi- or multilateral agreements;

5.2. allow commercial and non-governmental ships to enter ports of coastal States, and assist those ships in their rescue operations;

5.3. disconnect rescue operations carried out by member States from subsequent applications for asylum by those rescued at sea, as both imply distinct obligations of member States;

5.4. support countries along Europe's borders by making more efficient use of mechanisms to share costs, resources and infrastructure devoted to migration management;

5.5. sign and ratify, if they have not yet done so, the amendments of 2004 to the International Convention on Maritime Search and Rescue as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention against Transnational Organized Crime.

6. The Assembly calls on the European Union member States to:

6.1. lead the way in working to finally ensure fair and regular resettlement programmes;

6.2. continue the combat against smuggling and trafficking in order to reduce the risks involved in long sea journeys by enabling migrants to travel in adequate conditions;

6.3. ensure that the missions of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) can effectively assist in search and rescue operations;

6.4. uphold the international standards for the protection of life at sea in devising and implementing common action.

2. Draft resolution adopted by the committee on 26 June 2018.

B. Draft recommendation[3]

1. Recalling its Resolution … (2018) "International obligations of Council of Europe member States: to protect life at sea", the Parliamentary Assembly recommends that the Committee of Ministers:

1.1. develop guidelines for member States on the protection of human life at sea through search and rescue operations, in accordance with the obligations flowing from the European Convention on Human Rights (ETS No. 5) and other international legal texts;

1.2. pay particular attention to the risks incurred by those at sea, especially women and children, of being smuggled as well as trafficked, and ensure that they enjoy protection under, in particular, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197);

1.3. hold a thematic debate on European policies for the protection of life at sea, the right to enter a foreign port in circumstances of distress and the right to apply for refugee status.

3. Draft recommendation adopted by the committee on 26 June 2018.

C. Explanatory memorandum by Ms Petra De Sutter, rapporteur

1. Introduction

1. Following an initiative by the Socialists, Democrats and Greens Group, the Parliamentary Assembly decided on 25 June 2018 to hold a debate under urgent procedure on "International obligations of Council of Europe member States: to protect life at sea". The Committee on Migration, Refugees and Displaced Persons was seized for report and appointed me rapporteur.

2. This initiative was triggered by two incidents which caught wide attention in the media and in politics. At first, the governments of Italy and Malta refused entry to their national ports for the *MS Aquarius*, which is operated by the French–German non-governmental organisation (NGO) SOS Méditerranée and owned by the German NGO Sea Watch and which had rescued asylum seekers off the coast of Libya.[4] Spain finally offered entry to the *MS Aquarius* as a humanitarian gesture.[5] Shortly thereafter, the *MS Lifeline*, which is operated under the Dutch flag by the German NGO Mission Lifeline and had also rescued asylum seekers off the coast of Libya, was also refused entry to Italian and Maltese ports.[6]

3. The Assembly has several times addressed the issue of lives lost in the Mediterranean Sea and the need to rescue refugees and migrants on unseaworthy vessels. It is therefore necessary to clarify the relevant legal obligations of our member States and provide guidance on how humanitarian aid can be supported by member States individually as well as through closer co-operation at European level.

4. It is important to emphasise that the fundamental right to protection of human life and the respect for human dignity must be the yardstick of all political action in this area. The Missing Migrants Project of the International Organization for Migration (IOM) estimates that 960 people have been lost in the Mediterranean Sea in the first half of 2018.[7] In the face of such immense human tragedy, we cannot look away from this challenge. The Council of Europe must be one of the pillars upholding humanitarian standards and international law.

5. People who are facing so much pressure that they put their lives at risk in order to flee from their country, should be treated with respect and be afforded the humanitarian assistance necessary to protect their lives and to ensure that their applications for refugee status can be made in accordance with international standards.

2. International legal standards

2.1. International Convention of 1974 for the Safety of Life at Sea

6. While it has been a common principle of customary international law that a vessel in distress could enter a foreign port, the International Convention for the Safety of Life at Sea of 1974 codified many earlier customary principles. Under its Regulation V/33.1, a ship at sea, which can provide assistance and receives information that persons are in distress at sea, should proceed with all speed to their assistance.

7. Regulation V/7 stipulates that necessary arrangements should be made by national authorities for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their national coasts. These arrangements shall include the establishment, operation and maintenance of search and rescue facilities.

2.2. International Convention of 1979 on Maritime Search and Rescue

8. In order to lay down common standards for search and rescue operations, the International Convention on Maritime Search and Rescue was created five years later. Under its Chapter 2.1.10, States shall ensure that assistance is provided to any person in distress at sea, regardless of the nationality or status of such a person or the circumstances in which that person is found. Chapter 1.3.2 requires that persons in distress at sea shall be provided with initial medical or other needs, and shall be delivered to a place of safety.

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4. https://www.timesofmalta.com/articles/view/20180623/local/malta-will-deny-aquarius-from-docking-in-future-crew-claims-government.682588.
5. https://elpais.com/elpais/2018/06/18/inenglish/1529305036_939444.html.
6. www.dw.com/en/italy-to-seize-german-ngo-rescue-ship-carrying-226-migrants/a-44342405.
7. https://missingmigrants.iom.int/.

9. In May 2004, several amendments to the convention were adopted which concern persons in distress at sea. They include a new definition of persons in distress in chapter 2, new paragraphs in chapter 3 regarding assistance to the master of a ship at sea in delivering persons rescued at sea to a place of safety as well as a new paragraph in chapter 4 regarding rescue co-ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

10. The latter provisions seem particularly relevant for cases like the ones described above concerning the *MS Aquarius* and the *MS Lifeline.* Member States should co-operate more closely in coming to a unified interpretation of these provisions and establishing new provisions, in particular regarding the identification of the most appropriate places for disembarking asylum seekers found in distress at sea. However, the 2004 amendments have not been ratified by all member States including Malta, which is positioned close to the Libyan coast.

2.3. United Nations Convention of 1982 of the Law of the Sea

11. Under Article 98 of the 1982 United Nations Convention of the Law of the Sea:

(1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

12. In Europe, coastal States have set up search and rescue services. However, the co-ordination of action seems to be hampered by a confusion of geographic responsibilities, in particular if ships are moving between rescue areas. In addition, legal uncertainty exists as to whether a ship loses its immunity from the application of coastal State laws when it has created the situation of distress itself.

2.4. Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention of 2000 against Transnational Organized Crime

13. The Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention against Transnational Organized Crime defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. Illegal entry shall mean “crossing borders without complying with the necessary requirements for legal entry into the receiving State”.

14. However, under Article 31 of the United Nations 1951 Convention relating to the Status of Refugees, “States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. This means that persons seeking refugee status cannot be considered illegal immigrants if they arrive directly from a territory where their life or freedom is threatened, and therefore cannot be punished for doing so.

15. The latter exception for persons seeking refugee status would also apply to standards set by the IMO concerning smuggling, trafficking and transport of migrants by sea.

2.5. Additional standards by the International Maritime Organization

16. The IMO has been addressing the rescue and smuggling of persons at sea for many years, such as in 1993 through Resolution A.773(18) on Enhancement of safety of life at sea by the prevention and suppression of unsafe practices associated with alien smuggling by ships.

17. The IMO Guidelines on the Treatment of Persons Rescued at Sea stipulates in Article 6.7 that "[w]hen appropriate, the first rescue co-ordination centre (RCC) contacted should immediately begin efforts to transfer the case to the RCC responsible for the region in which the assistance is being rendered. When the RCC responsible for the search and rescue (SAR) region in which assistance is needed is informed about the situation, that RCC should immediately accept responsibility for co-ordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for survivors, fall primarily on the Government responsible for that region. The first RCC, however, is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility."[8]

18. In 1997 followed Resolution A.867(20) on Combating unsafe practices associated with the trafficking or transport of migrants by sea[9] and Resolution A.871(20) on Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases.

19. Resolution A.867(20) stipulated that "governments should co-operate in taking, as a matter of the highest priority, all necessary action to prevent and suppress any unsafe practices associated with the trafficking or transport of migrants by sea."

20. Under Resolution A.920(22) of 29 November 2001,[10] the IMO recognised the need to consider whether additional international measures are necessary to improve safety at sea and reduce the risk to the lives of persons on board ships, in particular in rescue operations. This resolution requested a review of relevant international conventions with a view to ensuring that "survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found; ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and survivors, regardless of nationality or status, including undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions".

21. In 2003, the IMO adopted non-binding Guidelines on Places of Refuge for Ships in Need of Assistance, which apply to a ship in need of assistance, meaning "a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard". However, the latter Guidelines do not apply to rescue operations of individuals.

22. The IMO has undoubtedly set important relevant standards and should therefore be used as a forum for developing international law further and ensuring that existing international legal standards be respected more effectively as regards rescue of persons at sea.

3. Council of Europe benchmarks

23. The European Convention on Human Rights (ETS No. 5) binds all member States and allows individuals to apply, after having exhausted national legal remedies, to the European Court of Human Rights in cases where their fundamental rights have been violated by public authorities of member States. In addition, the Convention imposes positive obligations on member States to ensure the protection of some rights, for instance by penalising the violation of such rights by private persons or by providing means of redress.

24. In the context of the present report, three provisions of the Convention are particularly relevant: Article 2 requires the protection of everyone's right to life; Article 3 prohibits torture and inhuman or degrading treatment; and Article 5.1.*f* requires that no one shall be deprived of his or her liberty, except for "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country". In addition, persons rescued at sea applying for refugee status have the right to a fair trial under Article 6 and the right to an effective remedy under Article 13 of the Convention.

25. In the case of *Hirsi Jamaa and others v. Italy*,[11] for instance, the European Court of Human Rights found a violation of the Convention by Italy. The United Nations High Commissioner for Refugees submitted subsequently to the Committee of Ministers recommendations to the Italian Government for the execution of this judgment, which are also relevant for this report.

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8. See Annex 34, Resolution MSC.167(78) of 20 May 2004, www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/MSC.167(78).pdf.
9. See for example at: https://puc.overheid.nl/nsi/doc/PUC_2501_14/1/.
10. www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20A.920%2822%29.pdf.
11. Application No. 27765/09, judgment of 23 February 2012 (Grand Chamber).

26. On behalf of surviving relatives of 17 persons who died in the Mediterranean Sea on 6 November 2017 in the course of a rescue operation by the Libyan Coast Guard and *MS Sea Watch 3*, which was partly co-ordinated by the Italian Maritime Rescue and Coordination Centre, the NGOs Global Legal Action Network (GLAN) and Associazione per gli Studi Giuridici sull'Immigrazione/Association for Juridical Studies on Immigration (ASGI) have recently submitted a complaint under Article 2 (right to life), Article 3 (prohibition of torture and inhumane or degrading treatment) and Article 4 of Protocol 4 to the Convention (prohibition of collective expulsions) to the European Court of Human Rights against Italy due to its co-ordination of this rescue operation.

27. The Assembly has adopted Resolution 1872 (2012) "Lives lost in the Mediterranean Sea: who is responsible?", Resolution 1999 (2014) "The left-to-die boat: actions and reactions", Resolution 2000 (2014) on the large-scale arrival of mixed migratory flows on Italian shores, Resolution 2050 (2015) "The human tragedy in the Mediterranean: immediate action needed" and Resolution 2088 (2016) "The Mediterranean Sea: a front door to irregular migration", all of which are pertinent to the present debate and report.

28. Unfortunately, the Committee of Ministers has not yet addressed this subject by setting its own standards.

4. Obligations of government ships

29. Besides commercial vessels and private ships operated by humanitarian NGOs, government ships are often involved in search and rescue operations. As they exercise public authority under the flag of a State, higher standards apply to government ships, in particular as regards the respect of the rights enshrined in the European Convention on Human Rights.

30. Therefore, member States should ensure that national coastguard ships adhere to such higher standards when involved in the rescue of persons at sea, for instance in the context of missions of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

5. Helping NGOs to help refugees at sea

31. On World Refugee Day,[12] the Council of Europe Commissioner for Human Rights, Dunja Mijatović, expressed her concern about the increasing pressure and restrictions put on the work of NGOs assisting migrants, asylum seekers and refugees in Europe. She called on the lifting of restrictions on these NGOs, including those providing maritime search and rescue services. The obstacles to NGO work at sea in her opinion "shows contempt for the human rights principles they defend, and for the immense contribution to our societies they have made". She went on to state that co-operation and support from States would "not only secure the rights of those in need of protection, but also be beneficial for our societies as a whole".

6. Humanitarian and political imperatives

32. The member States of the Council of Europe have entered into a wide range of basic obligations through their ratification of international conventions, beginning with the European Convention on Human Rights which amongst others aims to protect the right to life, the right to a fair hearing, the right to respect for private and family life and the protection of property, while prohibiting torture and inhuman or degrading treatment or punishment, forced labour, arbitrary and unlawful detention, and discrimination. The undertakings arising from this protection should be applied within the territory of member States but also at sea.

33. Whatever the Council of Europe member States' legal undertakings, their moral obligations should come as an additional and superior level of protection. It is essential to safeguard first and foremost human life, and where human life is at stake, saving people must come before all other considerations.

34. The question of responsibility for lives lost at sea has been addressed many times by the Parliamentary Assembly, in particular since Resolution 1872 (2012). Other resolutions include Resolution 1999 (2014), Resolution 2000 (2014), Resolution 2050 (2015) and Resolution 2088 (2016).

12. "Commissioner calls on member states to cooperate with NGOs assisting migrants", 19 June 2018, https://www.coe.int/en/web/commissioner/-/commissioner-calls-on-member-states-to-cooperate-with-ngos-assisting-migrants

35. These texts all call for "zero-tolerance" action where lives in danger at sea are concerned, and emphasise the need to first of all save people without regard for the processes and legislation which should be applied to them once their safety has been secured. The Commissioner for Human Rights has also insisted that saving lives at sea is an obligation that cannot be circumvented under any circumstances, and that European co-operation is crucial to ensure sufficient search and rescue capacity.

36. The refusal of Italy and Malta to allow boats carrying shipwrecked migrants to dock is partly the result of right-wing, protectionist and populist politicians coming to power. The argument that breaking point has been reached and that these countries are saturated with arrivals is contradicted by figures: as United Nations High Commissioner for Refugees Filippo Grandi stated on 22 June 2018, "Europe today is no longer in the crux of a migration or refugee crisis. Mediterranean arrivals numbers are at pre-2014 levels and are dropping towards their long-term historic averages".

37. On the other hand, as international organisations have continually repeated, it is also the result of a lack of solidarity on the part of other European States. The failure to share responsibility for the reception and integration of migrants gives substance to arguments in front-line countries, among both politicians and the population at large that they are assuming much more than their fair share in saving and hosting migrants coming into Europe. The protracted nature of the context does not help: political solutions to the situation, in particular the conflict in Syria, seem no nearer than they were in 2011.

7. Conclusions and recommendations

38. My experience in preparing the urgent debate on the subject of this report has led to the strengthening of several strong personal convictions as a politician, which I hope will be shared by the Assembly during the debate.

39. The first of these is that saving lives is a moral, legal and absolute requirement for member States, in the same way as it is for individuals. Member States cannot close their eyes to human suffering whether it is on their doorstep or on that of their neighbours. The legal provisions outlined in the report can only serve to frame this fundamental duty to respect the right to life, the right to human dignity, decent living conditions and to be heard in fair proceedings.

40. The only way to ensure the fulfilment of this obligation, in particular in the context of this report, is to disconnect rescue operations carried out by member States from responsibility for the future of asylum seekers. Saving the lives of asylum seekers should not imply a subsequent overstretching of national resources through the need to support practically alone the reception and integration of migrants in numbers proportional to those rescued. This is especially true as most of Europe's border countries are already suffering from a prolonged economic downturn. Europe, and in particular European Union member States, must make more efficient use of mechanisms to share costs, resources and infrastructure devoted to migration management. The European Union must lead the way in working to finally ensure fair and regular resettlement.

41. Although it cannot be said that European States are directly responsible for the current high migration flows, the closure of borders one after another puts asylum seekers in even more life-threatening situations as journeys become longer and routes more dangerous. The harrowing experience of the migrants aboard the *MS Aquarius* whose journey to safety was lengthened by almost a week by the Italian and Maltese refusals is the latest example, but there are many others. In this area too, the European Union's increasing focus on border security (and demands on partner countries to enforce this security) does not comply with the obligation to respect human rights and dignity above all.

42. There is no certainty whatsoever that making travel for asylum seekers safer would increase the likelihood of their setting off on their journey. The only factor which would really reduce the determination of refugees to seek better lives would be to address successfully the root causes of forced migration – peace-keeping, development co-operation, economic and social support. Therefore, States must also do everything in their power to increase the fight against smuggling and trafficking which would do much to reduce the deadly danger of the journeys undertaken by people fleeing conflict and oppression, and at the same time de-escalate tensions between countries of origin, transit and destination.