

Search and rescue efforts for Mediterranean migrants

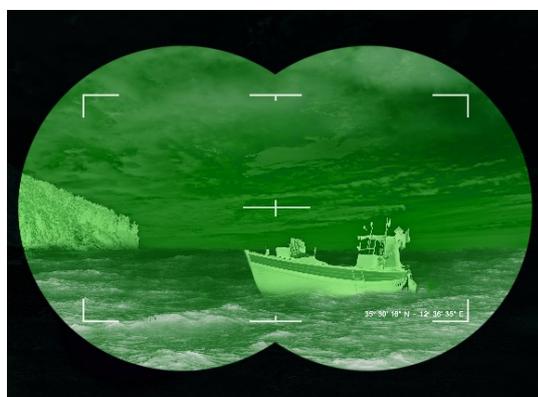
SUMMARY

International law imposes an obligation to render assistance to people and ships in distress at sea, which must be provided regardless of the persons' nationality or status or the circumstances in which they are found. These rules have to be applied without prejudice to the obligations deriving from international humanitarian law and international human rights law, including in particular the prohibition of *refoulement*. Search and rescue (SAR) and disembarkation activities of EU Member States are currently not covered by a common EU legal framework, except for those activities carried out in the context of joint operations at sea led by the European Border and Coast Guard Agency (Frontex).

In recent years, a significant proportion of migrants and asylum-seekers in distress at sea have been rescued by EU naval operations, EU agencies and non-governmental organisations (NGOs) in the Mediterranean. Nevertheless, over the past couple of years, the Mediterranean Sea has also been the backdrop for the largest number of casualties and missing people. As of October 2022, according to the United Nations High Commissioner for Refugees, the total number of dead or missing in the Mediterranean in 2022 amounts to more than 1 200.

Lack of coordination in SAR activities, solitary action by individual countries and criminalisation of NGOs active in SAR in the Mediterranean led to migrants being forced to stay for several days and sometimes weeks on boats. EU Member States and EU agencies (Frontex) have also been accused of pushbacks of asylum-seekers and other migrants to the high seas and towards Libya and Turkey. Individual actors dealing with boats full of migrants have been the subject of strong criticism and legal action. Their accountability is, however, not always clear, the reason being varied application and interpretation of different bodies of international law. One solution, proposed by academics, could be the harmonisation of the fragmented legal regime for maritime interceptions.

This updates and expands a [January 2021 EPRS briefing](#) written by Anja Radjenovic.



IN THIS BRIEFING

- Introduction
- Legal framework
- EU and Member State action in the Mediterranean
- Recent developments relating to SAR in the Mediterranean
- European Parliament position on SAR



Introduction

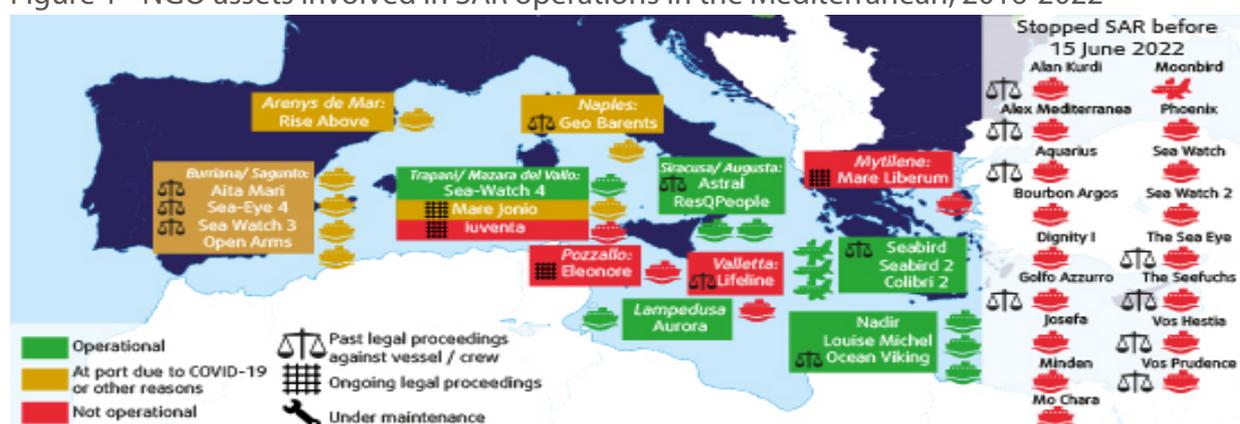
Asylum-seekers and other migrants all around the world have long risked their lives aboard unseaworthy ships and other vessels, be it in search of international protection against persecution, conflict or other threats to their life, liberty or security, or seeking work and educational opportunities and better living conditions.

International law imposes an obligation to render assistance to people and ships in distress at sea. This help must be provided regardless of the people's nationality or status or the circumstances in which they find themselves. Rescue and disembarkation to a place of safety are complex operations involving different actors with specific obligations under different bodies of international law. Even when the rescue has been undertaken, problems can arise in securing the agreement of states to the disembarkation of rescued people.

In recent years, a significant proportion of migrants and asylum-seekers in distress at sea have been [rescued](#) by EU naval operations, EU agencies and non-governmental organisations (NGOs) in the Mediterranean. [Between 2015 and July 2022, 586 562 lives were saved](#) on the Mediterranean and western African routes, nevertheless **23 933 fatalities** were also registered. **From January to June 2022, on average five people died per day trying to cross the Mediterranean Sea to reach Europe**, as [reported](#) by the EU Fundamental Rights Agency (FRA). Europe's approach has meanwhile shifted to prioritising enforcement against migrants at sea, cooperation with third countries to intercept and return [smugglers](#) and migrants, and criminalisation of NGOs that launched their own search and rescue (SAR) operations.

FRA regularly [reports](#) on the criminal and administrative proceedings against NGOs and other private entities carrying out SAR operations. The most recent report, dating back to June 2022, states that Germany, Greece, Spain, Italy, Malta and the Netherlands have initiated 60 proceedings since 2016. According to FRA, 'the most common issues detected by port authorities concerned the excessive number of passengers, ship assets not working properly, having too many life jackets on board, having inadequate sewage systems for the number of potentially rescued people, as well as for causing environmental pollution'. Moreover, [rescue vessels](#) in the Mediterranean (see Figure 1) often remained stranded at sea for a long time waiting for authorisation to enter a safe port, aggravating the safety and physical integrity of those rescued. As of June 2022, 3 716 people – including 928 children – waited at sea for over a day before the national authorities allowed them to dock. In particular, on 12 occasions, the vessels waited for a week or more. This is why, once again in May 2022, the United Nations High Commissioner for Refugees (UNHCR), together with other UN agencies, stressed the need to ensure that refugees and migrants rescued at sea are promptly disembarked in a ['place of safety'](#) where migrants' 'lives, safety and other human rights – such as access to asylum and the prohibition of cruel, inhumane or degrading treatment or arbitrary detention' are ensured.

Figure 1 - NGO assets involved in SAR operations in the Mediterranean, 2016-2022

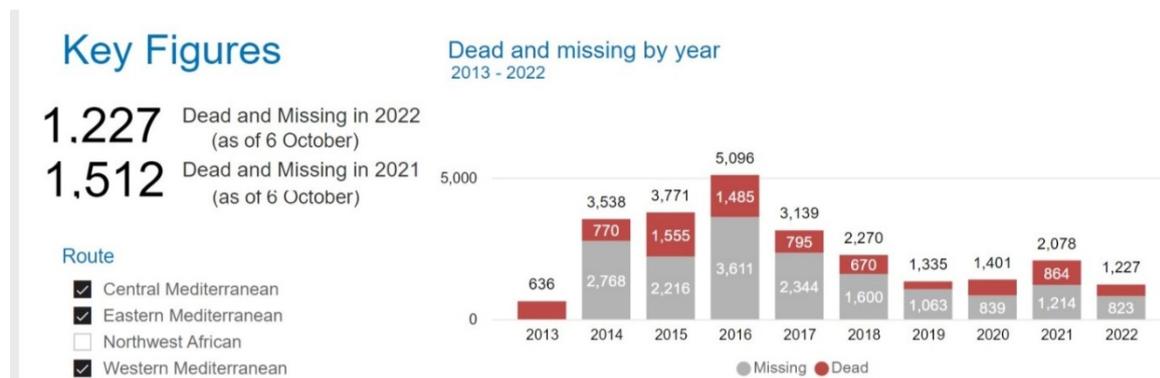


Source: [SAR operations in the Mediterranean and fundamental rights](#), FRA website, June 2022.

This change of policy has turned the Mediterranean into the [deadliest sea](#) for those coming mainly from Africa and the Middle East – in 2022 alone (as of 6 October), 1 227 individuals have gone missing and lost their lives in the Mediterranean (Figure 2).

The increasingly securitised approach to SAR at sea is, according to the majority of [academics](#) and other stakeholders, in clear breach of international maritime, refugee, and humanitarian law. In 2021, a [report](#) by the Office of the High Commissioner for Human Rights (OHCHR) pointed out that the measures taken by European countries to criminalise and halt the work of humanitarian actors in SAR operations, together with the decrease of SAR vessels operated by European countries, had 'deadly consequences for adults and children seeking safety'. Most importantly, the report concluded that the evidence collected suggests the increase in casualties in the Mediterranean waters **'is not a tragic anomaly, but rather a consequence of concrete policy decisions and practices'**¹ by the Libyan authorities, **EU Member States and institutions**, and other actors that have combined to create an environment where the dignity and human rights of migrants are at risk. The UN High Commissioner for Human Rights Michelle Bachelet has previously expressed her concern about a 'lethal disregard for desperate people'. NGOs have also [deplored](#) the European countries' disengagement from SAR operations and the delays in allowing disembarkation, with the consequent risks for human lives.

Figure 2 – Casualties and missing people in the Mediterranean Sea, 2013-2022



Source: [Dead and Missing at Sea](#), UNHCR website, accessed 6 October 2022.

Legal framework

International law

Obligations of the master of the ship

The master has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is based on the UN Convention on the Law of the Sea ([UNCLOS](#), Article 98(1)) and the 1974 International Convention for the Safety of Life at Sea ([SOLAS](#), Chapter V).

Obligations of state parties to maritime conventions

State parties to several maritime conventions need to ensure arrangements for distress communication and coordination in their area of responsibility and for the rescue of people in distress at sea around their coasts. This is based on the SOLAS Convention (Chapter V), UNCLOS (Article 98(2)) and the International Convention on maritime search and rescue ([SAR Convention](#), Chapters 2.1.10 and 1.3.2).

The SAR Convention envisages international cooperation for coordinating SAR operations, and stipulates the establishment of SAR zones independently of the delimitation of [maritime zones](#). This has also been done in the [Mediterranean](#).

The obligations relating to SAR include transport to a safe place.² An amendment to the SAR Convention entered into force in 2006 to develop these rules, including the way to determine, in each case, a safe place. The state responsible for the SAR zone should provide a safe place or make sure that such a place is found. However, there is no rule designating by default the state responsible for receiving the rescued passengers such as, for example, the state of nationality or residence of the people, the flag state or the state of departure of the ship.

All the above-mentioned rules have to be applied without prejudice to the obligations deriving from [international humanitarian law](#) and [international human rights law](#), including in particular the [prohibition of refoulement](#).

The territorial scope of the principle of *non-refoulement*³ is still debated both in literature and in practice. Some [academics](#) support its application wherever competent state authorities perform measures pertaining to border control, while for [others](#), it applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones, including the high seas. The practical consequences of its application at sea have been detailed in a [leaflet](#) edited by the UNHCR and the International Maritime Organization (IMO).

Furthermore, as explained by [experts](#), states have human rights obligations towards only those individuals that find themselves within their jurisdiction. The legal systems do not recognise state duties towards migrants before they enter the relevant state's jurisdiction. As a rule, anyone within the territory (including the territorial sea) of a state is within that state's jurisdiction. On the high seas, states have been considered to exercise jurisdiction when state officials were physically present at a particular incident and thereby exercised effective control over the individuals seeking protection (see European Court of Human Rights (ECtHR) case of [Hirsi Jamaa and others v Italy](#)).

The discussions on SAR at sea have focused mainly on *refoulement* and the illegality of [pushbacks](#)⁴ of migrant boats to their point of departure, while the increasing prevalence of departure prevention or pullbacks by third countries has largely been ignored. These latter measures raise severe concerns with respect to the [right to leave any country](#), including one's own.

In 1993, in [Sale v Haitian Centers Council](#), the United States Supreme Court concluded that both the international and US statutory prohibition against *refoulement* applied only with regard to actions taken on US territory. Accordingly, it ruled that the US policy to interdict refugees on the high seas and return them to Haiti without any screening or other processing did not violate international law.

EU law

The SAR and disembarkation activities of EU Member States are currently not covered by a common EU legal framework, except for those activities carried out in the context of Frontex-led joint operations at sea. The European Commission has consistently [emphasised](#) that SAR is not an EU competence, and has limited itself to underlining the humanitarian dimension of the SAR operations. Member States have always pointed out the EU's lack of competence, as also evidenced by the Council statement added to the regulation establishing the European border surveillance system ([Eurosur Regulation](#)). According to the statement, 'search and rescue at sea is a competence of the Member States which they exercise in the framework of international conventions'. The Eurosur Regulation includes the objective of contributing to saving the lives of migrants, and envisages the establishment of national coordination centres to ensure the timely exchange of information with respect to SAR.

[Regulation \(EU\) No 656/2014](#) on the surveillance of the external sea borders applies to all Frontex-coordinated maritime border surveillance operations, and includes a set of SAR and disembarkation obligations for the law-enforcement vessels of Member States. According to Article 9, EU Member States have an obligation to render assistance to any vessel or person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found, in accordance with international law and respect for fundamental rights. Moreover, during an SAR

operation, the operating units while awaiting instructions from the rescue coordination centre, must take the appropriate measures to ensure the safety of the persons concerned (Article 9(2)(g)).

Article 4(1) of the regulation states that no person can be 'disembarked in, forced to enter, conducted to or otherwise handed over to' an unsafe country as defined in the regulation. Where interdiction occurs in the territorial waters or contiguous zone, disembarkation should normally take place in the coastal Member State, that is, the Member State in whose territorial or contiguous zone the operation takes place. However, if rescue or interception occurs on the high seas, the preferred place of disembarkation is 'in the third country from which the vessel is assumed to have departed'. If this is not possible, then the disembarkation 'shall' take place in the host Member State. Where disembarkation follows an SAR incident, it is for the relevant rescue coordination centre (RCC) to identify an appropriate 'place of safety' (Article 10(1)(c)). If this is not possible, they must be disembarked in the host Member State. The article further specifies that these 'modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone'.

The regulation requires that the Member States participating in Frontex-coordinated joint operations cooperate with the RCC responsible to identify a place of safety and ensure speedy disembarkation of the rescued people. Article 2(12) provides a clear definition of 'place of safety', meaning 'location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic needs can be met and from which transportation arrangements can be made ... taking into account the protection of their fundamental rights in compliance with the principle of *non-refoulement*'.

Furthermore, according to Article 4(3) of the regulation, before any rescued person is disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. Those rescued also need to be given the possibility 'to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*'.

As for EU fundamental rights law, the [EU Charter of Fundamental Rights](#) becomes applicable as soon as a Member State acts within the scope of EU law. According to [experts](#), this would be the case when patrolling the external sea borders in accordance with the [Schengen Borders Code](#), regardless of whether this takes place within or outside the context of a Frontex operation. This raises the question of whether the Schengen Borders Code is applicable beyond the territory of EU Member States. In September 2012, in a case brought by the European Parliament, the Court of Justice of the EU [annulled](#) the 2010 [Council Decision](#) supplementing the Schengen Borders Code on the basis that the Council had exceeded its implementing powers. The Court of Justice did not have to decide on the Parliament's other demands including the territorial scope of the Schengen Borders Code.

Role of Frontex

Frontex's role in SAR operations is enshrined in [Regulation \(EU\) 2019/1896](#). The regulation includes operations launched and carried out in accordance with the above-mentioned Regulation (EU) No 656/2014 and international law, taking place in situations that may arise during border surveillance operations at sea. In these circumstances, Frontex is obliged to [provide](#) technical and operational assistance to Member States and non-EU countries in support of SAR operations.

SAR is a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area are also always ready to provide national authorities with support in SAR operations. SAR operations are always coordinated by the national RCC. The RCC orders vessels that are the closest to the incident or the most capable to assist in the rescue. These may include national commercial or military vessels, vessels deployed by Frontex, private boats and other.

The EU and its agencies have no mandate to conduct SAR operations, as this remains a competence of Member States. The regulation limits Frontex's accountability by establishing that 'In accordance with Union law and those instruments the Agency should assist Member States in conducting search and rescue operations in order to protect and save lives whenever and wherever so required'.⁵

Currently, Frontex runs [three operations](#) in the Mediterranean: i) operation [Themis](#) (since 2018, replacing [Triton](#)), which supports Italian border control guards also in SAR operations in the central Mediterranean; ii) operation [Poseidon](#), which supports Greece and covers the sea borders with Turkey and the Greek islands in the eastern Mediterranean, and iii) operation [Indalo](#) (with operation [Minerva](#)), which covers the western Mediterranean route between Spain and Morocco. Moreover, in March 2020, the military operation [Irin](#) (replacing operation [Sophia](#), which ran from 2015 until 2020) was launched to help disrupt the business model of human smuggling and trafficking networks by information gathering and patrolling by planes. Frontex also has an obligation to monitor human rights compliance during all its operations, and to suspend or terminate any (funding of) activities when serious or persisting violations occur.

EU and Member State action in the Mediterranean

Since 2016, EU action at sea has helped to [save](#) over 586 000 people in the Mediterranean. Over the past couple of years, however, the Mediterranean Sea has also been the scene of the largest number of [casualties and missing people](#) in the world. In 2021, the number of deaths amounted to more than 2 000. However, the precise number of those who died in the Mediterranean Sea cannot be determined. Between 2014 and 2018, for instance, about 12 000 people who drowned were never found. Out of the western, central, and eastern routes crossing the Mediterranean Sea, the central Mediterranean route was the deadliest.

Italy and Malta repeatedly prevented [NGO and other vessels](#) that were conducting SAR activities in the Mediterranean from disembarking the people they had rescued at sea in their ports. Furthermore, in early 2019, Member States decided to [cease](#) the maritime patrols of [EUNAVFOR MED Operation Sophia](#) that had saved [tens of thousands](#) of lives. A policy of forcing migrants to stay for several days and sometimes weeks on boats, together with [legal action](#) and various [administrative barriers](#) to prevent NGO ships from operating at sea, was the result of a [stand-off](#) between Member States.⁶

Most governments were reluctant to offer relocation spaces or to give access to protection to those who needed it. Instead of providing for effective solidarity with frontline Member States and for fair responsibility-sharing, EU countries continued to secure external borders and focused on cooperating with third countries (in particular [Libya](#)) to curb migration flows, prompting heavy criticism from [academics](#) and [civil society organisations](#).

The very positive results reached by Italy with [Mare Nostrum](#) in 2014 fell dramatically just one year later and were not matched by joint operation [Triton](#) nor by [EUNAVFOR MED operation Sophia](#), deployed later and without an SAR mandate. In addition, the lower number of rescues in the Mediterranean was also due to a [decrease](#) in the number of sea arrivals from 2016 onwards.

According to the above data, the SAR activities of NGOs were limited when compared with Member States' operations before 2017, but much more successful than Frontex missions.

The stark resistance from Italy and Malta to disembarkations was, for some, deplorable from a humanitarian point of view but [not necessarily unlawful](#). It prompted a group of Member States referred to as a 'coalition of the willing' to show 'ship-by-ship' solidarity with frontline Member States and stranded migrants, and make ad-hoc arrangements to take in those who had disembarked. These arrangements, although a positive shift from the previous stand-off, were nevertheless criticised for being conducted in a purely [intergovernmental](#) fashion, for being [dependent](#) on other EU countries agreeing to take responsibility for people rescued before their disembarkation, and for being unpredictable and [incompatible](#) with the common European asylum system (CEAS).

Furthermore, according to experts, this partial solidarity failed to deliver a unified approach, failed to consider the interests of all EU countries, and was against the letter and spirit of Article 80 of the Treaty on the Functioning of the EU (TFEU), which requires EU policies on asylum, migration and border management to be based on the fair sharing of responsibilities.

In December 2018, the European Commission [suggested](#) that temporary arrangements showing genuine solidarity and responsibility could be made. These arrangements, which would be time-limited and serve as a stop-gap until the new Dublin Regulation was adopted and applied, could be used to anticipate the core elements of the future EU asylum system. Furthermore, several NGOs [called for](#) – and even presented [plans](#) for – a consistent and fair relocation arrangement following disembarkation.

On 24 October 2019, the European Parliament [rejected](#) a motion for a resolution to step up SAR operations by Member States and Frontex in the Mediterranean Sea.

After a series of informal discussions, in September 2019 the ministers of four Member States (Germany, France, Italy and Malta) reached an [agreement](#) on a predictable temporary solidarity mechanism. They 'jointly committed' to a non-legally binding scheme with voluntary pledges for the relocation of migrants before disembarkation in the central Mediterranean. Although the deal was welcomed by some NGOs, including [Amnesty International](#) and [Oxfam](#), others raised [concerns](#) regarding its compliance with the EU Treaties and EU principles – such as equal solidarity and fair distribution of responsibility for asylum-seekers among all Member States. Furthermore, SAR NGOs operating in the Mediterranean issued a [joint statement](#) calling for sanctions against countries that refused to comply. During the [discussions](#) on the asylum and migration pact in December 2020, the EU Home Affairs Council called the statement a useful operational example of solidarity through action, but stressed the need for a more coherent approach. The coronavirus pandemic further restricted SAR work in the Mediterranean, as Italian and Maltese [ports closed](#) to stop the spread of the virus.

In September 2020, the Commission adopted a [recommendation](#) on cooperation among Member States concerning operations carried out by private vessels for the purpose of SAR activities. The aim was to reduce fatalities at sea, maintain safety of navigation, and ensure effective migration management in compliance with relevant legal obligations. The recommendation called on the Commission to set up an [Interdisciplinary European Contact Group](#) on SAR with the aim of strengthening the cooperation between Member States and private vessels involved in SAR operations, exchanging information and best practice, and assisting and advising the Commission in SAR-related matters. The group started its work in [March 2021](#). At the same time, and as a response to a [resolution](#) by the European Parliament, the Commission issued [guidance](#) on the implementation of EU rules on the facilitation of unauthorised entry, transit and residence.

The 'facilitators package' ([Council Directive 2002/90](#) and [Council Framework Decision 2002/946/JHA](#)) concerning the facilitation of unauthorised entry, transit and residence in the EU has been widely [criticised](#). The [European Parliament](#) took the view that anyone who provides people in need with any form of humanitarian assistance should not be criminalised, and that EU law should reflect that principle. Parliament called for guidance and adequate monitoring systems on the application of the facilitators package in its [resolution](#) of 5 July 2018 and at its [hearing](#) of 27 September 2018.

Recent developments relating to SAR in the Mediterranean

Some EU Member States and EU agencies (Frontex) have been suspected of pushbacks of asylum-seekers and other migrants to the high seas, and towards Libya (considered [unsafe](#)) and Turkey (accused of [not adhering](#) to the *non-refoulement* principle). The EU and its Member States have withdrawn SAR capabilities in the Mediterranean over the past six years, and some EU countries have [criminalised NGOs](#) who have stepped in to fill the gap in SAR operations. The argument has been that SAR constitutes a 'pull factor' for migrants to the EU. The practice has been criticised by [stakeholders](#) and [academics](#). Whether or not SAR operations represent a 'pull factor' of irregular

migration at sea remains [debatable](#). Indeed, the argument that SAR operations would incentivise migrant smuggling is not [uncontested](#): some argue that there is no causal link between SAR operations and the number of migrants embarking on dangerous sea journeys towards the EU, that this argument is too simplistic, and that attention should be given to the real drivers of migration, including economic, geopolitical, social, demographic, and environmental ones. Greece has continually [dismissed](#) reports about pushbacks to Turkey, while Italy and Malta have also rejected the accusations of pushbacks by declaring themselves [unsafe](#) at the time on account of the coronavirus pandemic, and by raising the issue of [insufficient burden-sharing](#) across the EU.

On 8 May 2018, the Global Legal Action Network submitted a case (*S.S. and others v Italy*) to the European Court of Human Rights (ECtHR) in relation to Libya's abuses against migrants during operations at sea and on return to the country in November 2017. The case was backed by two joint third-party interventions: [one](#) by Amnesty International and Human Rights Watch, and [another](#) by the International Commission of Jurists (ICJ), the Advice on Individual Rights in Europe (AIRE) Centre, the European Council on Refugees and Exiles (ECRE), and the Dutch Refugee Council (DCR). Applicants were seeking justice before the court, claiming that Italy breached its obligations under the European Convention on Human Rights ([ECHR](#)) by cooperating with Libya to enable its coast guard to intercept people at sea and take them back to Libya. As explained by [experts](#), the obvious goal of the applicants and their defenders was to have the court assert its jurisdiction by holding that a state party can retain effective control over people also when its officers 'only' equip, train, and possibly instruct vessels of a third state. In this case, according to [academics](#), 'interveners launched a more principled understanding of jurisdiction which focused on the influence the state held in a given situation in ascertaining whether jurisdiction was exercised'. This model is itself an evolution compared with previous practice. In 2012, the ECtHR condemned Italy for a 'pushback' policy in the *Hirsi Jamaa and Others v Italy* case, when its coastguard physically intercepted a migrant boat and returned approximately 200 passengers to Libya. Confronted with the question of the extraterritorial application of the ECHR, the court asserted that the applicants had been 'under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'. The result was a breach not only of Article 3 ECHR owing to *refoulement*, but also of the prohibition of collective expulsions under Article 4 of Protocol 4 to the ECHR.

In June 2019, two lawyers filed a [complaint](#) at the International Criminal Court (ICC) claiming EU Member States' migration policies in the Mediterranean are crimes against humanity. They argue that the EU's policies are responsible for thousands of migrant deaths in the Mediterranean. The lawyers outline several EU actions to deter migration, which they argue have violated human rights, including: the start of the Triton operation in the Mediterranean in 2014, which reduced the number of sea rescues and created large zones off the Libyan coast without any rescue capacities; the persecution of NGO sea rescue groups by some Member States; the policy of returning some 40 000 migrants to militia-controlled camps in Libya 'where atrocious crimes are committed'; funding and training Libya's coast guard, as well as providing specific data on the locations of refugee boats to ensure the Libyan force would pick up as many refugees as possible. On 23 November 2021, ICC Prosecutor Karim Khan presented his first report on the situation in Libya to the [UN Security Council](#). He noted accounts of violent raids on Tripoli migrant camps, as well as arbitrary arrests and detentions of migrants, including women and children. Commentators have implied that ICC and Europol are in the process of signing a cooperation agreement to help identify those who are responsible for crimes committed against migrants. However, for now, the prosecutor seems unwilling to pronounce on a possible qualification of crime against humanity or war crime.

Following the allegation of violation of fundamental rights and involvement in pushbacks, in particular in the Aegean Sea, Frontex came under the European Parliament's [scrutiny](#). Parliament decided, inter alia, to set up a Frontex scrutiny working group ([FSWG](#)), and postponed the granting of discharge to Frontex twice (in 2021 and 2022). The allegations prompted Frontex to launch an internal [inquiry](#). On several occasions, members of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs ([LIBE](#)) demanded answers from Frontex's then Executive Director,

Fabrice Leggeri, regarding the alleged involvement of Frontex staff in pushbacks of asylum-seekers by the Greek border guard. Ultimately, in April 2022, Leggeri [resigned](#) with immediate effect. Experts are divided over the accountability of Frontex in pushbacks. According to [some](#), Frontex's set-up and working methods allow all actors involved to shift the blame to others, while individuals face many practical as well as legal obstacles to bring Frontex to court. [Others](#), however, insist that illegal pushbacks by Frontex units in the Mediterranean mean the EU incurs 'derivative responsibility' for a violation of the principle of *non-refoulement* and of the duty to assist those in distress at sea.

Furthermore, [FRA](#) has emphasised that 'state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations'. Even in the case where financial and/or technical 'aid or assistance' by an EU Member State or an EU agency to a third country may not qualify as 'exercising effective control' for the purposes of applying the *Hirsi* judgment benchmark, they could be still responsible in light of the EU Charter of Fundamental Rights.

In 2021, the UN Human Rights Committee issued [two interconnected decisions](#) that some [commentators](#) have qualified as 'landmark in the legal attempts to hold European countries accountable for the violation of human rights occurring as a result of the mismanagement of migratory flows and their retreat from responsibility for saving lives at sea, as required by international law'. The two cases were brought against [Malta](#) and [Italy](#) following a 2013 incident near Lampedusa, where a boat was shipwrecked, causing the disappearance and death of more than 200 people. The claimants alleged that Malta and Italy have failed to assist those who were in distress at sea, thus violating their international obligations. Moreover, the claimants argued that after the tragedy, Malta and Italy failed to carry out an effective investigation into the causes and responsibilities of the shipwreck. The committee considered that Italy has failed to show that it has met its due diligence obligations to protect the right to life pursuant to Article 6(1) of the International Covenant of Civil and Political Rights (ICCPR), and that it has failed to meet its duty to conduct a prompt investigation of the allegations after the tragedy. The case against Malta was dismissed and declared inadmissible because of the applicants' failure to exhaust domestic remedies.

The controversies surrounding the accountability of individual actors dealing with boat migrants at sea has been observed not only in the Mediterranean but also in [other parts of the world](#). The reason is varied application and interpretation of different bodies of international law. According to [experts](#), the SAR regime, refugee law, international human rights law, the law of the sea, and the human smuggling and trafficking frameworks are all relevant in this regard. States often deal with these regimes in a fragmented manner, cherry-picking provisions that allow them to justify a securitised approach to protect state interests. [Harmonising](#) those laws could lead to the establishment of a 'politically realistic legal regime for maritime interceptions'.

Moreover, in August 2022, the Court of Justice of the EU (CJEU) delivered its judgment on the joined cases [C-14/21](#) and [C-15/21](#). The cases concerned two German ships, *Sea Watch 3* and *Sea Watch 4*, which carry out humanitarian activities relating to SAR operations in the Mediterranean Sea. During the summer of 2020, the two ships rescued and then disembarked those on board in two Sicilian ports (Palermo and Porto Empedocle). The port authorities inspected the boats and subsequently detained the ships on the grounds that they were not certified to carry out SAR operations, and that the number of people taken on board exceeded the legally authorised number. *Sea Watch* brought two actions for annulment of this decision to the Regional Administrative Court (TAR) of Sicily, which referred questions for a preliminary ruling (Article 267 TFEU) to the CJEU with a view to clarifying and receiving guidance on [Directive 2009/16/EC](#) on port state control. The CJEU clarified that Directive 2009/16/EC is applicable to any ship, including those operated by humanitarian organisations; it must be interpreted in light of international law by which Member States are required to abide, including the SOLAS Convention and UNCLOS. Once the disembarkation of all those rescued is concluded, the port authorities have the power to inspect the vessel and verify that rules on safety at sea have been respected: i) on the basis of legal and factual evidence, ii) in the case

of serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment, and iii) considering the conditions under which those ships operate (paragraph 126). In the event of deficiencies, the port authorities may adopt corrective measures that should be suitable, necessary and proportionate (paragraph 153), always taking into consideration the principle of sincere cooperation (paragraph 59) between the state of the port authorities and the flag state.

European Parliament position on SAR

Over the years, and particularly since the increased flows of migrants and refugees to the EU in 2015, the **European Parliament has consistently stressed the need to save lives and provide humanitarian assistance to those in need at sea in line with international law obligations.**

For example, in a 2015 [resolution](#), Parliament called on both the EU and its Member States to enhance cooperation and funding of SAR operations to assist people in distress at sea and prevent the loss of lives. Parliament also noted that the **principle of solidarity** (Article 80 TFEU) and the **fair sharing of responsibilities** should be the **pillars of a comprehensive European approach**. That same resolution called on the Council to trigger the 2001 [Temporary Protection Directive](#) or [Article 78\(3\) TFEU](#), both of which envisage a solidarity mechanism. While the former was never activated prior to Russia's invasion of Ukraine in early 2022, the latter served as a legal basis for EU measures activated in 2015, to help Italy and Greece face unprecedented arrivals of asylum-seekers at the EU's southern external borders (Council Decisions [2015/1523](#) and [2015/1601](#)). It was also used more recently, in December 2021, when the Commission put forward a proposal for [provisional emergency measures](#) for Latvia, Lithuania and Poland to be able address the 'emergency situation' at their borders with Belarus.

In 2016, Parliament [recalled](#) that **saving lives is a priority and a legal obligation under international law for the EU and its Member States**. Parliament noted that, because of the increased number of irregular arrivals by sea, the numbers of missing and dead have increased, too, and that consequently, **'a permanent, robust and effective Union response in search and rescue operations at sea is crucial to preventing an escalating death toll of migrants attempting to cross the Mediterranean Sea'**. Parliament invited Member States to **ensure financial assistance and appropriate assets to carry out SAR operations**, and stressed that **private shipmasters or NGOs that genuinely assist people in distress at sea should not risk punishment for providing such assistance**.

In a 2018 [resolution](#), Parliament called for 'the **non-criminalisation of humanitarian assistance**, for greater search and rescue capacities for people in distress, for greater capacities to be deployed by all states, and for the support provided by private actors and NGOs in carrying out rescue operations at sea and on land to be acknowledged'. Parliament repeated its call for the non-criminalisation of humanitarian assistance in another [resolution](#) that same year, calling on the Commission 'to adopt guidelines for Member States specifying which forms of facilitation should not be criminalised'. In another 2018 [resolution](#) on the annual report on the functioning of the Schengen area, Parliament regretted the loss of too many lives in the Mediterranean Sea, and underlined that 'a permanent, robust and effective Union response in search and rescue operations at sea is crucial in preventing the loss of life at sea'. It further stressed that cooperation at national level between different law enforcement services, including the border guards and the maritime SAR authorities, was not optimal, and invited national border guard authorities to **provide adequate resources for SAR operations**.

In a 2019 [resolution](#), Parliament acknowledged 'the **work of the NGOs operating in the Mediterranean** and their **efforts to save lives and provide humanitarian assistance to those in need**'. It reminded Member States once again of their **obligation to assist people in distress at sea under international law**, and called on them to **assist and support NGOs carrying out SAR operations**.

MAIN REFERENCES

- Citroni G., [No More Elusion of Responsibility for Rescue Operations at Sea: The Human Rights' Committee Views' on the Case A.S., D.I., O.I. and G.D. v. Italy and Malta](#), *OpinioJuris*, March 2021.
- Fink M., Gombeer K. and Rijpma J., [In search of a safe harbour for the Aquarius: the troubled waters of international and EU law](#), *EU Immigration and Asylum Law and Policy* blog, July 2018.
- Ghezalbach D., Moreno-Lax V., Klein N. and Opeskin B., '[Securitization of search and rescue at sea: The response to boat migration in the Mediterranean and offshore Australia](#)', *International and Comparative Law Quarterly*, January 2018.
- Irrera D., '[Non-governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?](#)', *European Foreign Affairs Review*, Vol. 25(3), October 2019.
- Trvisanut S., '[The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea](#)', *Leiden Journal of International Law*, July 2014.
- Luyten K. and Del Monte M., [European Parliament scrutiny of Frontex](#), EPRS, European Parliament, September 2022.

ENDNOTES

- ¹ Bold for emphasis added by the author of this briefing.
- ² 'Place of safety' is not defined in the relevant treaty law. The 2004 [guidelines](#) of the International Maritime Organization indicate that a place of safety is a place: where the survivors' safety of life is no longer threatened; where their basic human needs (such as food, shelter and medical needs) can be met; and from which transportation arrangements can be made for the survivors' next or final destination.
- ³ Article 33(1) of the [1951 Refugee Convention](#) contains the principle of non-refoulement, according to which states are prohibited from 'expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories, where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion'.
- ⁴ Although not a legal term, 'pushbacks' in the area of migration refer to refusals of entry and expulsions by a country of individuals or groups without any individual assessment of their protection needs.
- ⁵ At the [LIBE hearing](#) on the obligations of the EU in SAR operations in the Mediterranean Sea on 3 October 2019, then Director of Frontex Fabrice Leggeri claimed that it was not the responsibility of Frontex to decide on the safety of Libya as a destination for disembarkation. According to Leggeri, Frontex has no legal mandate to coordinate operations that consists exclusively of SAR and is able to intervene when border surveillance is involved, and acts under the coordination of national authorities.
- ⁶ According to the [French Constitutional Court](#), acts of mutual aid undertaken for humanitarian purposes cannot be punished or repressed, irrespective of the status of the people helped, even where that results in their irregular entry into national territory without authorisation. According to [experts](#), a similar approach should guide legislators and prosecutors across jurisdictions when confronted with 'boat migration' situations in the Mediterranean and beyond.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2022.

Photo credits: © Nightman1965 / Adobe Stock.

eprs@ep.europa.eu (contact)

www.eprs.ep.parl.union.eu (intranet)

www.europarl.europa.eu/thinktank (internet)

<http://epthinktank.eu> (blog)