

A distress call for human rights

The widening gap in migrant protection in the Mediterranean



Follow-up report

to the 2019
Recommendation



COMMISSIONER
FOR HUMAN RIGHTS

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2019 Recommendation
by the Council of Europe
Commissioner for Human Rights

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Migrants aboard an overcrowded boat in the Mediterranean Sea, off the Libyan coast © Santi Palacios

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Foreword by the Commissioner

By now, we Europeans should know better what it means to be a migrant. Seventy years ago, hundreds of thousands of us were still waiting to be repatriated or resettled after the Second World War, while thousands of new refugees were escaping through the Iron Curtain. Millions crossed the ocean in search of means to cater for their families' needs. Yet, in 21st century Europe, we seem to have forgotten our past. For years, European countries have engaged in a race to the bottom to keep people in need of our protection outside our borders, with dire consequences. Their response to refugees and migrants trying to reach Europe via the Mediterranean is one of the most glaring examples of how bad migration policies undercut human rights law and have cost the lives of thousands of human beings in the process.

This document, prompted by the urgent need to raise awareness among member states about the impact of their policies and help them redress the situation, is a follow up to the [Recommendation](#) "*Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*", which I published in June 2019. It provides detailed recommendations to Council of Europe member states to help them ensure that their approach to attempted sea crossings by refugees and migrants will finally be compliant with their human rights obligations and the values to which they have subscribed as members of the Council of Europe.

It is clear to me that there is an urgent need to act. Despite some limited progress in some areas since the Recommendation's publication, the human rights situation in the Mediterranean region remains deplorable. I have observed a widespread unwillingness of European states to set up an adequate system of protection capable of securing at least the right to life of refugees and migrants attempting sea crossings, and ensuring that they are not exposed to serious human rights violations such as torture. Decisions adopted by Council of Europe member states motivated principally by the aim of limiting arrivals have not solved their problems: this approach has merely contributed to further, unnecessary human suffering. This situation is particularly noticeable on the Central Mediterranean route, but it is replicated, to varying degrees, elsewhere in the region. The proliferation of

reports of pushbacks in the Eastern Mediterranean is of particular concern.

There is a need to take decisive action to ensure that no more people die, and that they are no longer exposed to severe violations of their most basic rights. This is a matter of life or death – and of the credibility of European countries' commitment to human rights.

This follow-up report provides a set of actionable measures to develop a human rights-compliant approach to sea crossings in the Mediterranean region. They require effective political leadership, in which it is explained to the public how important it is to uphold the human rights of refugees and migrants. Parliamentarians have a crucial role to play in demanding full accountability for their governments' actions, while refusing to accept measures that violate the values and standards of the Council of Europe. Mutual accountability between member states is also important. Though states on the Mediterranean coast are most directly affected, and are often the ones taking action that may seriously undermine the rights of refugees and migrants, other member states which either silently condone or actively enable such actions also bear responsibility.

European countries' approach to migration has failed to bring about a co-ordinated and fair approach to sea crossings and the protection of those attempting to make them. Worse, it causes thousands of avoidable deaths every year. European countries have the means and the tools to reverse the trend. They must show a renewed commitment to human rights for all, including those of refugees and migrants.

Dunja Mijatović

Introduction

This follow-up report takes stock of developments in the human rights situation in the Mediterranean since the publication in June 2019 of the Commissioner's [Recommendation](#) *"Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean"*. It provides an overview of developments from July 2019 until December 2020 in the five key areas covered by the Recommendation: (1) effective search and rescue; (2) timely and safe disembarkation of rescued persons; (3) co-operation with non-governmental organisations (NGOs); (4) co-operation with third countries; and (5) safe and legal routes. Drawing upon the Commissioner's recommendations made in 2019, it aims to provide a brief overview of the main trends identified in this period, and how they have impacted on Council of Europe member states' obligations to preserve human life and protect the human rights of those at sea. In line with the Recommendation, this update focuses mainly on developments on the Central Mediterranean route. However, similar concerns have been noted in the wider Mediterranean region. Developments on the Atlantic route (from West Africa to Spain) are not included. However, many of the recommendations are applicable to all situations in which the rights of refugees and migrants at sea are at stake.

This stock-taking exercise shows that some progress has been achieved in some areas. In particular, awareness of the need for better responsibility sharing appears to be rising, although relocations remain ad hoc. Member states' support to the Libyan Coast Guard, which contributes to the return of refugees and migrants to Libya, where they undergo serious human rights violations, has been reconsidered in some cases, although this resulted mainly from legal action brought by NGOs and other stakeholders rather than proactive steps by member states. The cautious expansion of safe and legal routes is welcome, but it remains limited and needs to be stepped up.

The overall situation in the Mediterranean has, however, further deteriorated and gives cause for great alarm. Shipwrecks in the Mediterranean continue to be worryingly recurrent, with more than 2,600 registered deaths in the period under consideration, the vast majority on the Central Mediterranean route.¹ These numbers may well under-represent the real tally of deadly

incidents, which are increasingly likely to be happening out of sight and to go unrecorded. The growing disengagement of states' naval capacity from the Mediterranean and the increasing obstruction of NGO rescue activities, together with decisions to delay disembarkation and the failure to assign safe ports, have undermined the integrity of the search and rescue system. On the Central Mediterranean route specifically, many developments appear to be aimed, implicitly or explicitly, at "clearing the field" for interceptions by the Libyan Coast Guard, leading, according to IOM data, to more than 20,000 returns to Libya in 2019 and 2020,² exposing individuals to serious human rights violations. Co-operation activities with third countries, including Libya, have been stepped up despite the undeniable evidence of serious human rights violations, and without applying human rights safeguards or transparency and accountability principles. The Covid-19 pandemic has also led to the adoption of more restrictive measures, having a direct impact on refugees' and migrants' human rights.

In this document, the Commissioner reiterates her call on Council of Europe member states to implement her recommendations swiftly to ensure that the lives and the human rights of people in distress at sea are protected. The Commissioner's calls for action in the sections below represent a roadmap for states to follow.

Several steps are of overriding importance and cannot be delayed any longer. The Commissioner urges member states to:

- guarantee the presence of adequate and effective state-led search and rescue capacity at sea and provide for a quick and adequate response to distress calls;
- ensure safe and prompt disembarkation of those rescued, supported by genuine European solidarity;
- stop hindering civil society organisations' human rights activities, whether they are involved in search and rescue or human rights monitoring;
- end pushbacks, co-ordination of pullbacks or other activities leading to the return of refugees and migrants to areas or situations where they are exposed to serious human rights violations;
- expand safe and legal routes, beginning with those individuals in need of international protection.

Chapter 1

Effective search and rescue

Key findings in 2019

In June 2019, the Commissioner called for adequate and effective rescue capacity in the Mediterranean, by making ships and other assets available along the routes where this is most needed, and by making full use of all ships able to provide assistance, including those run by NGOs. She also called on member states to enhance effective co-ordination of rescue operations, including immediate response to distress situations, ensuring that NGOs and private vessels are not penalised for rescuing people, and that effective investigations are conducted into any allegation of failures to aid those in distress.

Developments

Lack of rescue capacity

Though the statistics show a reduction in the number of people attempting sea crossings, and therefore a decrease in deaths at sea in absolute terms, the Missing Migrants project run by the International Organisation for Migration (IOM) recorded over 2,600 deaths in the Mediterranean in the second half of 2019 and in 2020, the vast majority of which occurred on the Central Mediterranean route.³ The relative risk of drowning appears to remain high, and has been rising slowly but steadily in the months following the first wave of the Covid-19 pandemic. Shipwrecks in the Mediterranean continue to be worryingly frequent, and the lack of adequate search and rescue capacity may have resulted in many more going unrecorded.⁴

No additional ships or other assets specifically dedicated to search and rescue activities appear to have been deployed by member states out at sea along the main Central Mediterranean migration route, where it is most needed. In fact, there have been indications that the situation is regressing. In response to the Covid-19 pandemic, both Italy and Malta took restrictive measures which resulted in both countries keeping their vessels in port for a brief period in March.

Joint activities by member states in the context of EU membership also confirm this picture. A successor to Operation Sophia, Operation EUNAVFOR MED IRINI, was established in April 2020. However, the focus of its operations area was the eastern part of the Libyan Search and Rescue Region and elsewhere in the high seas between Greece and Egypt, reducing the likelihood of encountering refugees and migrants in distress at sea and of being obliged to carry out rescues and disembarkations in a place of safety. In fact, a clause was introduced that would make prolongation of the operation subject to it not causing “a pull effect on migration”.⁵

Hindering the presence and work of NGO vessels

While there is still a lack of state-operated assets specifically dedicated to search and rescue activities, neither has full use been made of other vessels able to assist in search and rescue operations, including ships run by NGOs. NGO-run search and rescue activities have continued to be hindered, either through administrative or criminal proceedings, or simply by preventing disembarkation, so that a number of NGO ships have not been able to resume rescue operations. Though the presence of NGOs at sea rose between September 2019 and February 2020, the spread of the Covid-19 pandemic and ensuing measures adopted by states led to limited deployment – if any at all – of NGO ships that could guarantee not only that people in peril would be rescued but also that the human rights situation at sea would be monitored. Importantly, in September 2020, the European Commission called for enhanced search and rescue co-ordination, including with private vessels and NGOs.⁶ However, member states’ approaches still appear to focus on limiting NGOs’ life-saving work, rather than seeing them as filling a crucial gap left by the member states’ own disengagement.

Allegations of endangering migrants, including by delayed or non-response to distress situations

The lack of rescue capacity is compounded by a seeming lack of an adequate response to distress situations. There have been repeated allegations, especially relating to Malta, of being unresponsive to refugees and migrants in distress or NGOs raising alarm. There have also been several reports of coastal states’ authorities responding only very slowly, or simply issuing instructions to commercial vessels in the vicinity of a boat that may be in distress to stand by. Failures to respond and delays in attending to distress calls, or to provide information to relevant bodies that could conduct the rescue, have risked jeopardising the right to life of people at sea.

There are also a number of highly concerning reports of situations in which state-led operations have resulted in increased risk to refugees and migrants at sea, rather than protecting them from harm. This has included allegations

of a migrant boat being towed from the Maltese to the Italian Search and Rescue Region.⁷ Such incidents have also been reported elsewhere in the Mediterranean, taking the form, for example, of allegations of dangerous manoeuvres or other inappropriate action by the Hellenic Coast Guard and vessels of other member states patrolling the Aegean.⁸

Conclusions and recommendations

The lack of state-led rescue capacity, combined with the obstacles to NGO operations, has had a severe impact on the situation in the Mediterranean. Not only has it increased the risks to refugees and migrants at sea, but it has enlarged the burden on commercial vessels to come to the rescue of those in distress. Such vessels are clearly less equipped to do so, and have faced further obstacles, including problems with disembarkation, which have put the rights and health of both survivors and crew members at risk.

Furthermore, it is impossible to escape the impression that the reduction of rescue capacity along the main migration routes, in addition to incidents in which commercial or NGO vessels were instructed to stand down, are specifically aimed at increasing the possibility that those at sea are intercepted by the Libyan Coast Guard. This takes place regardless of its well-documented inability to respond to distress calls, to conduct safe rescues and to provide a place of safety for disembarkation.

In the light of this, the Commissioner calls on member states to make saving lives at sea a priority by:

- deploying, as a matter of urgency, more capacity specifically geared towards search and rescue, especially ships, along the key migration routes;
- refraining from impeding NGOs from performing life-saving operations, ensuring that they can disembark survivors promptly so they can return to sea as quickly as possible, and enhancing coordination and information-sharing so that rescue capacity by NGOs is fully utilised;
- ensuring that they respond immediately to distress calls, whether inside or outside their own search and rescue zone, and fully investigating any credible allegations of non-response or delay.

Chapter 2

Safe and prompt disembarkation

Key findings in 2019

In the 2019 Recommendation, the Commissioner called on the authorities of Council of Europe member states to ensure disembarkations only happened in places that were safe both under maritime law and under human rights and refugee law. She urged states to carefully assess all relevant risks when assigning a place of safety, refrain from issuing instructions to shipmasters that might, directly or indirectly, lead to disembarkation in unsafe places, and respect shipmasters' discretion to refuse disembarkation in a place they do not consider safe. She also called on member states to assist each other in finding a place of safety, and not let disagreements take precedence over humanitarian considerations. In particular, they should agree on a mechanism for predictable responsibility sharing.

Developments

Disembarkations in Libya continue at alarming rates

Numerous reports have confirmed that Libya is still not a place of safety for disembarkation, owing to the serious human rights violations committed against refugees and migrants, and the ongoing conflict in the country.⁹ The Covid-19 health crisis has only worsened the situation. On 8 May 2020 the UN High Commissioner for Human Rights called for a moratorium on all interceptions and returns to Libya.¹⁰ However, despite repeated warnings by international organisations, the situation has not changed: people rescued at sea continue to be disembarked in Libya. In 2019, according to IOM data, 9,225 persons were disembarked in Libya having been intercepted or returned. In 2020, despite the Covid-19 crisis, the number of people intercepted stood at 11,891, 34% higher than the whole of 2019.

Council of Europe member states' actions and omissions continue to play

an important role in the disembarkation of refugees and migrants in Libya. Interceptions by the Libyan Coast Guard, followed by returns, continue to be possible as a result mainly of the enhanced co-operation of member states with the Libyan authorities. In addition, handing over responsibility for rescue operations to the Libyan Coast Guard, and instructing shipmasters to follow its directions, has reportedly led to more than 30 private vessels carrying out rescues returning survivors to Libya since 2018.¹¹ At least one of these private vessels was flying the flag of a Council of Europe member state.¹² As noted in the 2019 Recommendation, the withdrawal of rescue capacity off the Libyan coast, the declaration of a Search and Rescue Region by Libya and the increasing obstacles to NGO operations have allowed member states to relinquish their duties to rescue refugees and migrants, further clearing the field for the Libyan Coast Guard to intercept and return refugees and migrants at sea.

Shift to aerial surveillance creating further risks

Already since August 2018, no military ship has carried out any rescue operation in the Central Mediterranean under the EUNAVFORMED Sophia operation, whereas between January 2016 and July 2018 the operation rescued over 35,000 refugees and migrants.¹³ Since June 2019, the trend for member states to remove vessels and shift towards aerial surveillance has been confirmed. The shift to aerial surveillance is also evident in Frontex operations.¹⁴ Information gathered by member states' and EU agencies' airplanes, drones and satellites is shared with all the relevant authorities, including those in Libya. With member states' own limited presence at sea, this information seems to be particularly conducive to further interceptions and returns by the Libyan Coast Guard to unsafe ports, contrary to international maritime and human rights law.

Pushbacks elsewhere in the region on the rise

In the period since the 2019 Recommendation, extremely troubling developments have also occurred in other parts of the Mediterranean region. Direct pushbacks by state-operated vessels on the Central Mediterranean route have largely been replaced by more sophisticated methods of ensuring that refugees and migrants at sea are returned by non-European actors or private vessels. In this respect, in May 2020, the Commissioner called on Malta to refrain from issuing instructions to private vessels to disembark rescued persons in Libya, and not handing over responsibility to the Libyan Coast Guard or related entities when the foreseeable consequence of this would be disembarkation in Libya. She also urged the government to ensure full accountability for situations in which action by the Maltese authorities has directly or indirectly led to such

returns.¹⁵ Elsewhere the practice of direct pushbacks, however, appears to be on the rise. Multiple reports of pushbacks by the Hellenic Coast Guard, including putting those intercepted on life rafts and leaving them to drift back to Turkey, have prompted calls for investigations by UNHCR,¹⁶ which have so far been summarily dismissed by the government.¹⁷ This has also led to further investigations of the potential knowledge of, or involvement in, pushbacks by Frontex. Similarly, increasing attempts at crossings from Lebanon to Cyprus have led to reports of pushbacks by the Cypriot authorities.¹⁸

Delays in disembarkation continue

Following rescue operations by NGO or commercial vessels, there have been repeated delays in disembarkation, both in Malta and Italy, before and since the Covid-19 outbreak. Malta continues to take the position that it does not bear responsibility alone for allowing disembarkation of those rescued in its Search and Rescue Region. In August 2019, Italy enacted the controversial Security Decree bis, leading to considerable restrictions on the possibility to disembark rescued refugees and migrants.¹⁹ The Commissioner has noted that, in October 2020, the Italian Government amended the decree, clarifying that the entry, transit or docking in territorial waters of vessels that have conducted a rescue operation may not be prohibited when it has been immediately communicated to the competent rescue co-ordination centre and the flag state, and carried out in line with applicable international norms.²⁰ The Commissioner remains concerned, however, about the scenario in which the competent rescue co-ordination centre happens to be the Libyan one, and instructions might therefore be issued to disembark rescued refugees and migrants in Libya, thus exposing them to serious human rights violations.

A particularly severe example of delay in disembarkation occurred in August and September 2020. People rescued by the tanker Maersk Etienne had been left off the Maltese coast for almost six weeks, before being eventually transferred to an NGO ship and disembarked in Italy. The Commissioner has repeatedly denounced the risk to the physical and mental health of survivors and crews that such long delays entail, as well as highlighting states' obligations to respect, *inter alia*, rescued people's right to seek international protection, receive assistance and seek remedies against the adopted measures.²¹ These delays have also reduced the ability of NGOs to resume rescue operations, as they entail both higher operational risks and increased costs. Furthermore, the impact of such long delays on private and commercial vessels is particularly problematic, as it imposes a significant financial burden while they are diverted from their route, amid the sharp reduction in member state-led efforts.

Solidarity remains a key concern

Lack of solidarity from flag states of vessels carrying survivors, along with all other member states, remains an important factor in delays in disembarkation. In September 2019, Germany, France, Italy and Malta signed a joint declaration of intent, undertaking to adopt a predictable mechanism to assure dignified disembarkation and swift relocation of migrants.²² Reportedly, 689 persons had been relocated from Italy pursuant to the Malta Declaration by August 2020, although the mechanism was temporarily suspended due to the Covid-19 crisis.²³ Additionally, it was reported that 270 persons were relocated from Malta to other member states in 2020.²⁴ Despite this, the Declaration has not marked the expected turning point. Needs are still only partially met, and the process is ad hoc and arduous. While the European Commission's New Pact on Migration and Asylum is proposing measures to address this issue,²⁵ this will continue to rely on member states' willingness to show genuine solidarity and make a sufficient number of places available.

Confinement on ships as a method of "disembarkation"

The Covid-19 pandemic has seen the emergence of a new practice in which rescued refugees and migrants are transferred from the ships that rescued them to other vessels. In Italy, for instance, refugees and migrants are transferred to ferries off the Sicilian coast for a period of 14-day quarantine before disembarkation. As of 27 November 2020, these ships were accommodating a total of 1,195 refugees and migrants.²⁶ On occasion, such ferries have also been used when people have already disembarked on land but facilities to host them have been overcrowded.²⁷ It appears that this practice is set to continue until the end of the state of emergency. The Commissioner has expressed her particular concern about reports that persons on board these ships may not have prompt access to the necessary emergency health care services.²⁸ She has also raised concerns about the reported practice of transferring persons already lawfully residing in Italy to these ships as a response to the Covid-19 pandemic. However, this practice seems to have been discontinued by the Italian authorities.

For several months in 2020, Malta adopted a practice of holding rescued refugees and migrants outside territorial waters on private vessels not equipped to host people for a long period. The length of time appeared to exceed what was needed for quarantine reasons. The move was also specifically presented by the government as a reaction to EU member states not providing for relocation. The Commissioner has raised concerns about the lack of access for legal and other assistance providers and the possibility that this might be used to prevent persons from making asylum claims. She also noted the lack of remedies and the unlimited length of time for which

refugees and migrants were being deprived of their liberty on board. The practice was ended in June, but the government subsequently announced that it was looking into accommodating refugees and migrants on vessels in the future.²⁹

Conclusions and recommendations

The Commissioner strongly condemns the fact that, through their actions and omissions, member states have further increased the risks of returns to Libya, where refugees and migrants face serious human rights violations, rather than taking decisive measures to prevent this. The Commissioner is also very concerned by reports of pushbacks elsewhere in the Mediterranean. She notes that outright denials of allegations in reports by reputable human rights organisations, including their dismissal as “fake news,” are not serious responses by responsible governments that value the rule of law.

While there is no denying that the Covid-19 pandemic has increased the challenges for coastal states, delays in disembarkation must be avoided, as they present severe risks to the rights, health and well-being of survivors, and of the crews of the vessels that have rescued them. Increased and more predictable solidarity from other states is necessary, but using rescued refugees and migrants as pawns to push other states to relocate them is never acceptable.

In view of this situation, member states should:

- urgently review the impact of aerial surveillance activities, and ensure they do not contribute to human rights violations, including by facilitating returns to Libya;
- promptly investigate any allegations of pushbacks or other unlawful returns;
- in view of the inherent limitations associated with using ships as places of quarantine, ensure that prompt disembarkation on land of rescued people always remains the priority. “Disembarkation” onto other vessels should only be used as a temporary measure when no other adequate alternative on land is available and in line with the principles of proportionality, non-discrimination and transparency;
- ensure that the stay in quarantine of rescued persons responds to public health considerations in an appropriate manner, is strictly limited to the necessary quarantine period, and is surrounded by clear human rights safeguards. In particular vulnerable people, including children, those with underlying medical conditions and victims of torture or inhuman treatment, must be promptly identified, and provided with all the necessary medical support; everyone must

have prompt access to adequate healthcare and to information on their rights, be able to apply for asylum and have access to effective legal remedies against potential unlawful deprivation of liberty. The authorities must also ensure that the human rights situation on board is strictly monitored by independent monitoring bodies and that access is provided to human rights defenders working on guaranteeing the migrant's assistance and protection.

Chapter 3

Co-operation with NGOs

Key findings in 2019

In June 2019, the Commissioner called on Council of Europe member states to co-operate constructively with NGOs conducting search and rescue operations to secure effective protection of human rights at sea, recognising their crucial work. She urged states to refrain from engaging in any action or change, including at the policy, judicial and administrative levels, which would contravene their obligation to guarantee a safe and enabling environment for NGO ships and their crew members, in keeping with their status as human rights defenders. This also included facilitating access to territorial waters and ports for disembarkation and responding to any other needs related to their work or technical requirements.

Developments

Lack of co-ordination with NGOs

Since the 2019 Recommendation, there have been fresh complaints from NGOs that the authorities in charge of search and rescue operations have refused to co-operate with them. This has included allegations that calls to provide assistance by NGOs have been ignored, along with cases where NGO ships were sidelined in rescue operations, even though they may have been best placed to carry out the rescue. There appears to be a continuing reluctance to use the capacity provided by NGOs to ensure that lives at sea are best protected, which may also be connected to the trend referred to above towards giving the Libyan authorities more scope to carry out interceptions.

Covid-19 and restrictions on NGO activities

The Covid-19 pandemic saw the imposition of various restrictions, including the closure of Italian and Maltese ports declared to be “unsafe” by the authorities. As a result, Germany also called on private rescue vessels to

suspend their activities during the coronavirus pandemic and to recall their boats.³⁰ When NGOs were able to carry out rescues, port restrictions and new safety requirements prevented them from setting sail, which led to the gradual disappearance of NGOs from the Mediterranean. In March and May 2020, no NGO rescue vessel was reported to be present at sea. In April 2020, just two NGO-operated vessels were present at sea, for a total of only five days. Since June 2020, a few vessels have resumed their rescue activities. However, at least ten NGO vessels had been confined to ports for specific periods, and some continue to be held at the time of writing.³¹

New legislation to criminalise NGO activities

In August 2019, the legislation adopted by the Italian authorities known as Security Decree bis granted new powers to the Ministries of the Interior, Defence and Transport to restrict or prohibit the entry, transit or docking in Italy's territorial sea waters of foreign ships other than military or government non-commercial vessels, for public order and security reasons, when there were reasons to believe that the crime of aiding and abetting illegal immigration had been committed. Violations of this provision could be punished with administrative fines between 150,000 euros and 1 million euros in addition to the existing criminal sanctions for aiding and abetting illegal immigration. The ship could also be confiscated by the authorities. However, the Commissioner notes that Italy has amended these provisions, stipulating that they shall not apply to vessels conducting rescue operations. The new norms state that sanctions will not be imposed on vessels which immediately communicate the rescue to the competent rescue co-ordination centre and the flag state, and conduct the rescue in line with applicable international standards. The Commissioner reiterates that no criminal or administrative sanction should be imposed on NGO vessels which refuse to follow the instructions of the competent authority when these place the effectiveness of the rescue operation at risk or mean that survivors are disembarked in a place that is not considered safe, such as Libya. Stricter rules on NGOs' registration or operation have also been adopted in other parts of the Mediterranean region, such as Greece.³²

Criminal and administrative proceedings and other obstruction of NGOs

Stigmatisation of NGO rescue vessels has not diminished. While there is no evidence supporting such allegations, politicians and the media have continued to accuse NGOs of being a pull factor for migration.³³ The use of criminal and administrative proceedings against NGOs has also continued unabated. The EU Fundamental Rights Agency (FRA) reported that, from 2016 to 15 December 2020, some 50 proceedings were initiated by Italy, Malta, the Netherlands, Spain, Germany and Greece.³⁴ From June 2019 to December 2020, at least 23 new criminal and administrative proceedings have been initiated, the majority in Italy.³⁵ By December 2020, six NGO ships were still stuck in Italy as a result of criminal or administrative proceedings. Criminal proceedings are, for instance, still ongoing against the former captain of the rescue vessel Sea-Watch 3 and the crew members of “luventa 10”. The UN Special Rapporteur on the situation of human rights defenders has condemned the criminalisation of these human rights defenders in Italy and called on the Italian authorities to publicly recognise the important role that human rights defenders play in protecting the right to life of refugees and migrants at risk in the Mediterranean and end the criminalisation of those who defend their human rights.³⁶

Other measures taken to obstruct the work of NGOs have included allegations of safety deficiencies and accusations that NGOs were carrying more passengers than their boat was authorised to carry, because people rescued at sea were counted as normal passengers, or that they were negligently polluting the environment.³⁷ At least one case in Italy resulted in refusal to allow crew members to embark on NGO ships.³⁸

Restrictions have also affected NGOs’ air operations. In August 2019, Italy grounded two aircraft used by NGOs to carry out monitoring and identify ships in distress.³⁹ One of these had reportedly moved its operations to Italy having been subjected to administrative restrictions in Malta. In September, it was again denied permission to fly,⁴⁰ although this decision was revoked later, in October 2020.

New restrictions imposed by flag states

While flag states have a crucial responsibility to ensure safety at sea on their ships, several decisions they have taken with regard to search and rescue NGOs give rise to concerns, such as the introduction of stricter requirements that were not previously in place. The changes in legislation adopted by the Netherlands in 2019, and subsequent practices showing a lack of support for the work of the NGO Sea-Watch, have prompted the organisation to switch to a different flag state.⁴¹ Germany has also introduced new legislative amendments laying down stricter security and maintenance requirements

for boats engaging in rescue at sea, further restricting the possibility for NGO vessels to comply with such criteria.⁴² Failure to respect the regulations could result in large fines. In October 2020, the Hamburg Administrative Court found that these stricter requirements were inapplicable, due to the absence of notification to the European Commission in accordance with EU law.⁴³

Conclusions and recommendations

Restrictions on NGOs have serious implications for the protection of rights and lives at sea. Rather than recognising NGOs as key partners, filling a crucial gap left by their own disengagement, member states have persisted in an openly or tacitly hostile approach. This is leading to further reductions in rescue capacity at sea, and limits on human rights monitoring. Furthermore, such actions continue to stigmatise the work of these human rights defenders. Whilst member states are entitled to impose administrative and other necessary requirements on NGOs to ensure safety, the Commissioner notes that a worrying trend of criminalising those who save lives at sea is being perpetuated. In the light of this, member states should:

- recognise the human rights work of NGOs saving lives at sea in keeping with their status as human rights defenders;
- provide an immediate response to requests by NGOs for assistance at sea and the assignment of safe ports;
- refrain from misusing criminal and administrative proceedings and technical requirements simply to obstruct NGOs' life-saving work;
- ensure that their laws do not criminalise search and rescue or otherwise sanction refusals by shipmasters to follow instructions that could undermine the effectiveness of search and rescue operations or lead to disembarkation in unsafe places, and rescind or amend laws which may have this effect;
- ensure that NGOs have access to territorial waters and ports and can return quickly to sea, and help them to meet any other needs related to their work or technical requirements, including during the Covid-19 health crisis.

Chapter 4

Co-operation with third countries

Key findings in 2019

In June 2019, the Commissioner noted the risk that co-operation with third countries on migration could pose to the human rights of refugees and migrants. To avert this risk, she called on Council of Europe member states to take measures to guarantee transparency about, and accountability for, the human rights impact of such co-operation.

Despite the well-documented, serious human rights violations perpetrated in Libya against refugees and migrants, Libya remains a key partner for member states in migration co-operation in the Mediterranean. The Commissioner has noted that member states have failed to provide guarantees that their support, especially to the Libyan Coast Guard, will not lead to interceptions and returns to Libya to such human rights violations. Given this, she called on member states to review their co-operation activities, suspend all support leading to returns to Libya and refrain from providing further assistance until clear human rights guarantees are in place.

Developments

Co-operation with Libya continues and is enhanced

The risks involved in migration co-operation have become increasingly clear. However, measures to introduce human rights safeguards and to improve transparency and accountability are lagging behind. This is particularly evident in the co-operation efforts of member states vis-à-vis Libya.

Since the publication of the 2019 Recommendation, the Memorandum of Understanding (MoU) between Italy and Libya has been automatically extended for another three years. In a letter to the Italian Prime Minister, the Commissioner reiterated her concerns regarding Italy's co-operation with the Libyan Government of National Accord (LGNA), and called for clear safeguards to be introduced into the MoU.⁴⁴ While Italy put forward amendments to the MoU which would represent some modest progress, the MoU was extended without any clear agreement on these changes: when the automatic extension took place, no changes were included, and

negotiations on potential amendments to the MoU started only in July 2020 and were reportedly still ongoing at the end of December 2020.⁴⁵ Currently, there is no indication that the MoU would include any of the key safeguards that the Commissioner considers crucial to ensure that co-operation activities do not contribute to serious human rights violations, including independent monitoring and accountability. In the absence of such safeguards and a significant improvement in the human rights situation in Libya, it is critical for this co-operation to be suspended immediately.

Rather than seeing the co-operation between Italy and Libya as a cautionary tale, other member states appear to be using it as a blueprint. In May 2020, Malta took further steps to enhance its co-operation with Libya by signing a new Memorandum of Understanding, which provides the basis for the establishment of joint co-ordination centres in Libya and Malta.⁴⁶ Although few details of the envisaged “co-ordination centres” have since been published, this joint co-ordination might contribute to enabling the Libyan Coast Guard to intercept refugees and migrants at sea and return them to Libya. Furthermore, the Memorandum commits Malta to proposing to the EU that it will provide more funding for maritime assets to be used for intercepting refugees and migrants, but fails to provide for any specific human rights safeguards.

Action by states to ensure full transparency and accountability in co-operation is lacking

The Commissioner is still seriously concerned about the enhanced support that the Council of Europe member states continue to give to the Libyan authorities and the lack of any willingness on the part of national governments to comprehensively review such support. Scrutiny has instead been driven by work conducted outside the authority of the member states. Legal actions brought by NGOs and human rights advocates have proved particularly crucial in putting an end to specific aspects of member states’ support. In late 2019, the French government decided to cancel the planned delivery of eight vessels to the Libyan Coast Guard, reportedly following legal action taken by a group of NGOs.⁴⁷ This decision is to be welcomed, as the delivery of vessels would clearly enhance the ability of the Libyan Coast Guard to intercept and return refugees and migrants to Libya. Moreover, after an application was lodged with the European Court of Human Rights, the Commissioner intervened in the *S.S. and others v. Italy* case, pointing out that member states knew, or should have known, that certain types of support they were providing were leading to increased interceptions and returns of persons to serious human rights violations.⁴⁸ Further challenges have been lodged, for example, with the UN Human Rights Committee, and a legal submission has even been communicated

to the International Criminal Court.⁴⁹ Civil society has also been the driving force behind attempts to trigger other European oversight mechanisms, such as the EU Court of Auditors, calling for the review of European financial support for projects in Libya that give rise to serious violations of human rights.⁵⁰

While the work of civil society in triggering opportunities for external scrutiny is welcome, the Commissioner is deeply concerned about the lack of proactive action by member state governments to prevent and mitigate violations, despite the proven human rights risks connected with their co-operation efforts. Instead, member states appear to have responded to such challenges by relying on a “hyper-legalised” approach,⁵¹ attempting to take advantage of the limits of jurisdiction or areas of unclarity of the relevant legal instruments to justify activities that clearly have a negative impact on the enjoyment of human rights.

Parliamentarians also play an important role in preventing human rights violations. However, parliamentary scrutiny at both member state and EU level is increasingly hindered by the informal nature of co-operation deals, the complexity of the funding on which such co-operation relies, and the withholding of information on national security grounds. Furthermore, the Commissioner notes that, when parliamentarians have been provided with an opportunity for scrutiny, they have not always fully grasped this chance to foster a human rights-compliant approach. This was the case, for example, with the Italian Parliament’s decision to approve new financing of co-operation activities with the Libyan Coast Guard without conducting any impact assessment or monitoring, despite being aware of the lack of tangible improvements in the human rights situation in Libya.

Persistent concerns about externalisation policies without transparency and accountability measures

The Commissioner notes that, besides the specific co-operation with Libya, the general policy direction of Council of Europe member states, individually and collectively, is still moving towards more externalisation, which will involve further intensification of co-operation with other states on the southern coast of the Mediterranean, and with countries of transit and origin. Despite this, she notes that there is little sign that transparency and accountability measures are being stepped up to keep pace with the expansion of external co-operation in the area of migration.

In this respect, for a large number of member states concerned, decision making at the EU level is also of particular importance, both in terms of the general policy direction taken, and where it comes to sourcing funding for co-operation activities. The European Commission’s

New Pact on Migration and Asylum clearly confirms that external co-operation is a key pillar of the approach to migration to the EU generally, and the situation in the Mediterranean specifically. In this connection, the continued support for the Libyan Coast Guard as part of Operation IRINI is particularly relevant, along with the lack of clear monitoring mechanisms accompanying the EU Trust Fund for Africa and other means of EU financing. The Commissioner would remind Council of Europe member states that their duty to respect their human rights obligations is always incumbent on them even in the context of collective action with other member states, including that of the EU.

Conclusions and recommendations

The Commissioner condemns the continued lack of risk assessment and monitoring mechanisms to assess and prevent human rights risks in member states' expanding external co-operation activities. When such mechanisms have been set up, the Commissioner notes the lack of follow up and tangible measures to remedy known problems which pose clear risks to human rights protection.

The Commissioner notes that her call to suspend support to the Libyan Coast Guard impacting on interceptions and returns has not been implemented by Council of Europe member states. She is still highly concerned about the continued and enhanced co-operation with Libya, particularly by Italy and Malta, despite clear evidence of serious human rights risks.

The Commissioner welcomes the crucial efforts by human rights defenders to ensure judicial or other external scrutiny of member states' co-operation with third countries.

The Commissioner urgently reiterates her call on member states to:

- review all co-operation activities and practices with the Libyan Coast Guard, identify which of these result in the return, directly or indirectly, of persons intercepted at sea to serious human rights violations, and suspend these activities and practices until clear human rights guarantees are secured;
- establish human rights safeguards in their co-operation with third countries, as set out in detail in her 2019 Recommendation.

The Commissioner also calls on parliamentarians and national human rights structures in member states to:

- use their mandate to ensure governments to incorporate human rights safeguards into their external migration co-operation policies.

Chapter 5

Safe and legal routes

Key findings in 2019

In the 2019 Recommendation, the Commissioner noted that the human rights situation in the Mediterranean is closely connected to the lack of sufficient safe and legal routes to Europe. This is one of the factors leading to irregular migration via dangerous routes, and provides a context in which smuggling of and trafficking in human beings can flourish. The Commissioner called on member states to participate more in resettlement programmes, and to consider enabling or expanding possibilities for humanitarian visas, sponsorship schemes or other mechanisms to create safe and legal routes. She also called on member states to review their policies on family reunification so as to ensure that all beneficiaries of international protection in Council of Europe member states had access to prompt, flexible and effective family reunification procedures.

Developments

Refugee resettlement: some progress, but more is needed

Refugee resettlement remains the key to offering safe and legal routes. In 2020, the number of refugees in need of resettlement worldwide increased to an estimated 1.44 million,⁵² meaning that the gap between resettlement needs and availability has widened.⁵³ To provide appropriate protection for those in need of resettlement, significantly more resettlement places need to be made available. The Commissioner notes that UNHCR has set out a vision that 3 million refugees should be able to benefit from safe and legal routes by 2028, including 1 million through resettlement, and calls on the practical support of member states to achieve this.⁵⁴

As regards Europe's contribution to these efforts, there seemed to be a cautious upward trend in resettlements in 2019, with 29,066 persons resettled in Council of Europe member states.⁵⁵ For 2020, a slightly higher number, of almost 30,000 places,⁵⁶ had already been pledged by EU

member states and the United Kingdom alone, and other non-EU states, such as the Norway and Switzerland, were also expected to make significant contributions. However, these efforts have been severely hampered by the Covid-19 pandemic, resulting in the suspension of resettlements between mid-March and mid-June 2020, and they have not resumed at the previous rate.⁵⁷ By the end of 2020, only slightly more than 11,000 of the scheduled resettlements had taken place to Council of Europe member states.⁵⁸ The Commissioner is pleased to note the commendable resettlement work done by a number of member states in co-operation with UNHCR and IOM, regardless of the difficult circumstances. The fact that it is possible to continue such activities despite the Covid-19 health crisis is also reflected in the intra-EU relocations from Greece in particular, which have been accelerating in the last part of 2020.

While the general upward trend in Europe before the Covid-19 pandemic is encouraging, care must be taken to ensure that member states' efforts do not plateau, or even decline. There are signs that progress is still fragile. In the Netherlands, for example, in early 2019, the government reversed an earlier decision to expand its annual quota of resettlement places from 500 to 750. In September 2020, it also decided that, whilst it would participate in the relocation of 100 persons from Greece, this number would be deducted from the overall resettlement quota. It is also regrettable that Denmark has not reversed its decision to stop providing for a quota for resettlement places. Although the government announced in 2019 that it would start providing for some resettlement, it was reported that this would amount only to about 30 cases per year.⁵⁹

In the light of all of this, there is still significant scope for expansion of resettlement in Europe. Member states already participating in resettlement schemes should expand these to catch up with global needs and those who still do not take part should contribute urgently by offering places for resettlement.

In relation to the Mediterranean situation specifically, the implementation of the Emergency Transit Mechanisms (ETMs), through which vulnerable persons are evacuated from Libya to temporary sites in Niger and Rwanda, is still posing problems. UNHCR and IOM have repeatedly expressed concerns about the lack of resettlement places for people involved in ETMs,⁶⁰ meaning that further evacuations from Libya have become problematic, adding to the overall dire situation there.

Other legal pathways: on the radar but under-utilised?

Besides resettlement, other legal pathways are essential to provide safe and legal routes.⁶¹ Activities to provide such pathways, including private

initiatives, are expanding. For example, the “humanitarian corridors” scheme run by the Sant’Egidio Community, Caritas Italiana, the Federation of Evangelical Churches in Italy (FCEI) and the Waldensian Table has provided safe and legal routes for 3,060 persons, covering Italy, France, Belgium and Andorra.⁶² Other private or community sponsorship programmes have continued to grow, such as those in the United Kingdom. The importance of developing further legal pathways was also acknowledged in the new EU Pact on Migration and Asylum.

Regrettably, the Commissioner notes that humanitarian visas, which are another tool that European states can deploy to ensure safe and legal access to Europe, remain heavily underused. Though recent legal developments have represented a setback to the issuing of such visas by member states,⁶³ the Commissioner strongly encourages them to resort to this option to a much larger extent. The Commissioner is pleased to note, for example, that an Italian court ordered the authorities to issue visas as a form of reparation following pushbacks.⁶⁴

Restrictions on family reunification remain a concern

Family reunification is a crucial tool where it comes to ensuring that those in need of protection and their family members are brought together without undertaking dangerous journeys. Family reunification procedures in member states have also been affected by the Covid-19 pandemic. In addition to the problem of international travel restrictions, certain government services have been temporarily suspended, or have been working with reduced capacity. It is important that member states resume family reunifications as soon as possible in order to avoid long family separation, which has obvious adverse effects, both on those already in Europe and on family members waiting for permission to join them.

The Commissioner continues to be concerned about the less favourable treatment with regard to family reunification given to persons with subsidiary protection than to those recognised as under the 1951 Refugee Convention. Germany lifted its temporary suspension of family reunification for persons with subsidiary protection in 2018,⁶⁵ and Sweden, another major destination state, did so in 2019. However, laws setting very disadvantageous family reunification rules for certain categories of persons granted asylum, which often include long waiting periods before an application can be made, are still in place. This is the case, for example, in Austria, Denmark and Switzerland. In June 2020, the Grand Chamber of the European Court of Human Rights held a hearing in the case of *M.A. v. Denmark*, in which such restrictions were discussed.⁶⁶ The Commissioner intervened in this case, stating her view that differential treatment with regard to family reunification on the basis of the specific

protection status accorded to a person, and imposing long waiting periods for reunification on certain groups, is not compatible with member states' human rights obligations.⁶⁷

Conclusions and recommendations

The political situation in member states and the current Covid-19 pandemic, have made progress on expanding safe and legal routes fragile. The Commissioner notes, however, that such expansion is crucial to the protection of lives and rights of refugees and migrants in the Mediterranean, and thus requires concerted action by member states.

In this respect, she calls on member states to:

- urgently start participating in resettlement or other complementary pathway schemes, when they are not yet doing so;
- continue expanding such opportunities so that the number of places available catches up with global needs, when they are already participating in such schemes;
- ensure in particular that resettlement via ETMs is resumed and expanded so as to foster a consistent approach in the Mediterranean;
- lift restrictions on family reunification, especially as regards to distinctions in reunification rights between persons with different protection statuses.

The Commissioner also encourages member states to look at further means of expanding safe and legal routes for persons not in need of protection, for example by providing more opportunities for labour migration and study.

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The activities of this institution focus on three major, closely related areas :

- country visits and dialogue with national authorities and civil society,
- thematic studies and advice on systematic human rights work, and
- awareness-raising activities.

The current Commissioner, Dunja Mijatović, took up her functions in April 2018. She succeeded Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Álvaro Gil-Robles (1999-2006).



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