

Search and rescue in the Mediterranean

SUMMARY

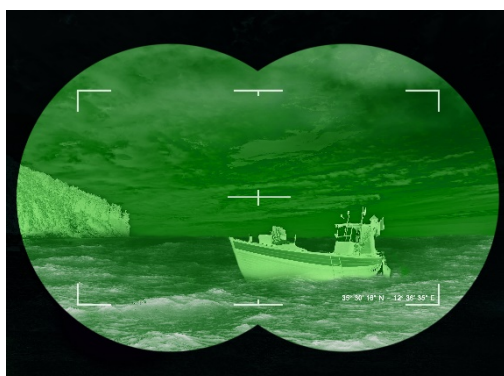
International law imposes an obligation to render assistance to persons and ships in distress at sea, which must be provided regardless of the persons' nationality or status or the circumstances in which they are found. These rules have to be applied without prejudice to the obligations deriving from 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 Frontex-led joint operations at sea.

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 in the Mediterranean. Nevertheless, over the last couple of years, the Mediterranean Sea has also been the backdrop for the largest number of casualties and missing people.

Lack of coordination in search and rescue activities, solitary action by individual countries and criminalisation of non-governmental organisations active in SAR in the Mediterranean lead 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 of migrants have been a 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.



In this Briefing

- Introduction
- Legal framework
- EU and Member State action in the Mediterranean

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 persons.

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 in the Mediterranean. However, Europe's approach has shifted to prioritise enforcement against migrants at sea, cooperation with third countries to intercept and return smugglers and migrants and criminalisation of non-governmental organisations (NGOs) that launched their own search and rescue (SAR) operations. This change of policy has turned the Mediterranean into the [deadliest sea](#) for people coming mainly from Africa and the Middle East. 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.

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 [United Nations 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 persons in distress at sea around their coasts. This is based on the SOLAS Convention (Chapter V), the UNCLOS Convention (Article 98(2)) and the [International Convention on maritime search and rescue](#) (SAR Convention, Chapter 2.1.10 and Chapter 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.¹ 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 of residence of the persons, 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*² 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 United Nations High Commissioner for Refugees (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](#)³ 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 US 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). 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. 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.

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 that is not possible, then the disembarkation 'shall' take place in the host Member State. Where disembarkation follows a SAR incident, it is for the relevant rescue coordination centre (RCC) to identify an appropriate 'place of safety'. If that is not possible, then they must be disembarked in the host Member State.

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 persons. 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. The rescued persons 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 [Charter of Fundamental Rights of the European Union](#) 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 European Union [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 \(EU\) 2016/1624](#). 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. It is important to underline that 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'.⁴

The Agency 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

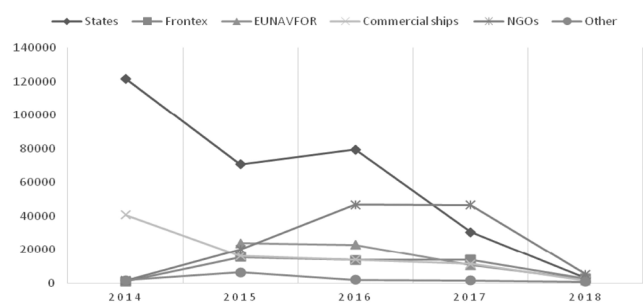
Since 2016, EU action at sea has helped to [save](#) over 536 000 people in the Mediterranean. Over the last couple of years, however, the Mediterranean Sea has also set the scene for the largest number of [casualties and missing people](#) in the world. In 2019, the number of deaths amounted to almost 1 900. However, the precise number of deaths that have occurred 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.⁵

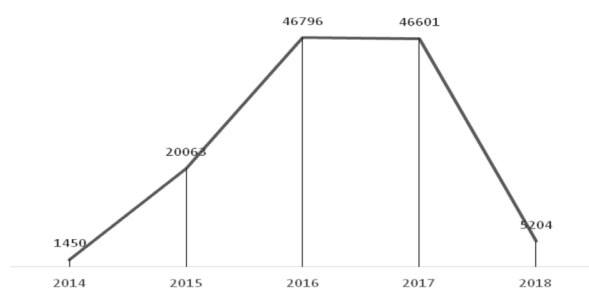
Most governments were reluctant to offer relocation spaces or to give access to protection to people who needed it. Instead of providing for effective solidarity with frontline Member States and for fair responsibility-sharing, EU countries continued to secure external borders and focused on cooperating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

Total number of rescues by all SAR operations, 2014-2018



Source: D. Irrera, [Non-governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?](#), 2019.

Total number of rescues by non-governmental SAR operations, 2014-2018



Source: D. Irrera, [Non-governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?](#), 2019.

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 a SAR mandate. In addition, 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 to 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 the people 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 [not compatible](#) with the common European asylum system (CEAS). Furthermore, according to experts, this partial solidarity fails to deliver a unified approach, fails to consider the interests of all EU countries and is against the letter and spirit of [Article 80 of the Treaty on the Functioning of the European Union \(TFEU\)](#), 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.

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 search and rescue work in the Mediterranean, as Italian and Maltese [ports closed](#) to stop the spread of the virus.

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

In September 2020, the Commission adopted a [recommendation](#) on cooperation among Member States concerning operations carried out by private vessels for the purpose of search and rescue activities. The aim is to reduce fatalities at sea, maintain safety of navigation and ensure effective migration management in compliance with relevant legal obligations. 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](#) takes the view that anyone who provides people in need with any form of humanitarian assistance should not be criminalised and that Union 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](#).

Criticism relating to action in the Mediterranean sea

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 Member States have withdrawn SAR capabilities in the Mediterranean over the last 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](#). Greece has continually [dismissed](#) reports about pushbacks to Turkey, while Italy and Malta have also rejected the accusations of pushbacks by declaring themselves [unsafe](#) due to the coronavirus pandemic and by raising the issue of [insufficient burden-sharing](#) across the European Union.

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 in relation to Libya's abuses against migrants during operations at

sea and upon return to the country in November 2017. Applicants are 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 is to have the Court assert its jurisdiction by holding that a State Party can retain effective control over persons also when its officers 'only' equip, train, and possibly instruct vessels of a third state. This model is itself an evolution compared to previous practice. In 2012, the ECtHR condemned Italy for a 'pushback' policy in the *Hirsi* 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 of the ECHR due to *refoulement*, but also of the prohibition of collective expulsions under Article 4 of Protocol 4 to the Convention.

In June 2019, two lawyers filed a [complaint](#) at the International Criminal Court (ICC) naming European Union Member States' migration policies in the Mediterranean as 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 concrete data on the locations of refugee boats to ensure the Libyan force would pick up as many refugees as possible.

In October 2020, Frontex was [accused](#) of being involved in pushbacks of migrants in the Aegean Sea, which prompted the agency to launch an internal [inquiry](#). On 1 December 2020, members of the European Parliament's [Committee on Civil Liberties, Justice and Home Affairs](#) (LIBE) demanded answers from the Frontex Executive Director Fabrice Leggeri regarding the alleged involvement of Frontex staff in pushbacks of asylum-seekers by the Greek border guard. As regards the accountability of Frontex in pushbacks, experts are not united. 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 persons in distress at sea.

Furthermore, [EU Fundamental Rights Agency](#) 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 purposes of applying the *Hirsi* judgment benchmark, they could be still responsible in light of the EU Charter of Fundamental Rights.

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'.

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ENDNOTES

- ¹ '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.
- ² 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'.
- ³ 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.
- ⁴ At the [LIBE hearing](#) on the obligations of the European Union in Search and Rescue operations in the Mediterranean Sea on 3 October 2019, director of Frontex, Fabrice Leggeri, claimed that it is not the responsibility of Frontex to decide on the safety of Libya as a destination for disembarkation. According to Mr Leggeri, Frontex has no legal mandate to coordinate operations that consists exclusively of search and rescue and is able to intervene, when border surveillance is involved, and acts under the coordination of national authorities.
- ⁵ 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 persons 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.

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