



CROSSING THE MEDITERRANEAN SEA: SEARCHED FOR BUT NOT RESCUED

HUMAN RIGHTS AT SEA POLICY BRIEF

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Human rights apply at sea, as they do on land.



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David Lohmueller / sea-watch.org

Executive Summary

The current EU policies and practices in the Central and Eastern Mediterranean have given rise to a debate surrounding the duty to rescue people in distress at sea. Frontex claims credit for its successful border management by relying on a decrease in number of irregular migration in the Mediterranean, while the high fatality rates challenge such statements.

The high fatality rates are the result of the absence of a coordinated and truly common migration policy at EU level, in four areas: firstly, the EU member States do not comply with their duty to render assistance to people in distress at sea and Frontex argues that it has no mandate from the EU member States to conduct search and rescue operations. Secondly, the EU, through Frontex and its member States, is actively engaged in maritime interceptions in the Central and Eastern Mediterranean. In doing so the EU relies on its cooperation and agreements with Turkey and Libya. Thirdly, the EU member States refuse to designate their ports as places of safety for disembarkation of rescued people and have been using the pandemic as a pretext. Fourthly, civil-society search and rescue organisations and individuals are subject to administrative and criminal proceedings that delay their rescue operations or bring them to a halt. These four challenges have been addressed in 2020–2021 at investigative (European Parliament, European Ombudsman, and European Court of Auditors), judicial (Court of Justice of the European Union) and legislative (European Commission) levels. While the New Pact on Migration and Asylum and its legislative instruments are yet to go through the final adoption phase and two cases against Frontex are pending before the Court of Justice of the European Union, this Policy Brief makes some policy recommendations towards a truly common and coordinated EU policy on search and rescue.

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1. Note on Terminology

This Policy Brief uses the term migrant(s) as an umbrella term to include all persons who use the sea as a means to cross within a country or across an international border, temporarily or permanently, and for a variety of reasons. There is not an internationally agreed definition of the term migrant nor is it an accepted legal category. The umbrella term migrant can include legally defined categories of people such as refugees,¹ migrant workers,² smuggled migrants,³ victims of trafficking⁴ as well as not legally defined categories such as unaccompanied minors and the vague term economic migrant. The Policy Brief also uses the term irregular migrants to denote those people whose movement takes place outside the laws, regulations, or international agreements governing the entry into or exit from the state of origin, transit or destination.⁵ Crucially for the purposes of this Policy Brief that looks into the European Union and its member States' policies and practices on search and rescue of people in distress at sea, legal categories and the status of the rescued are irrelevant to the law.⁶ Finally, the fact that people use the seas for migratory purposes does not relieve States from certain human rights obligations.

2. Facts and Figures

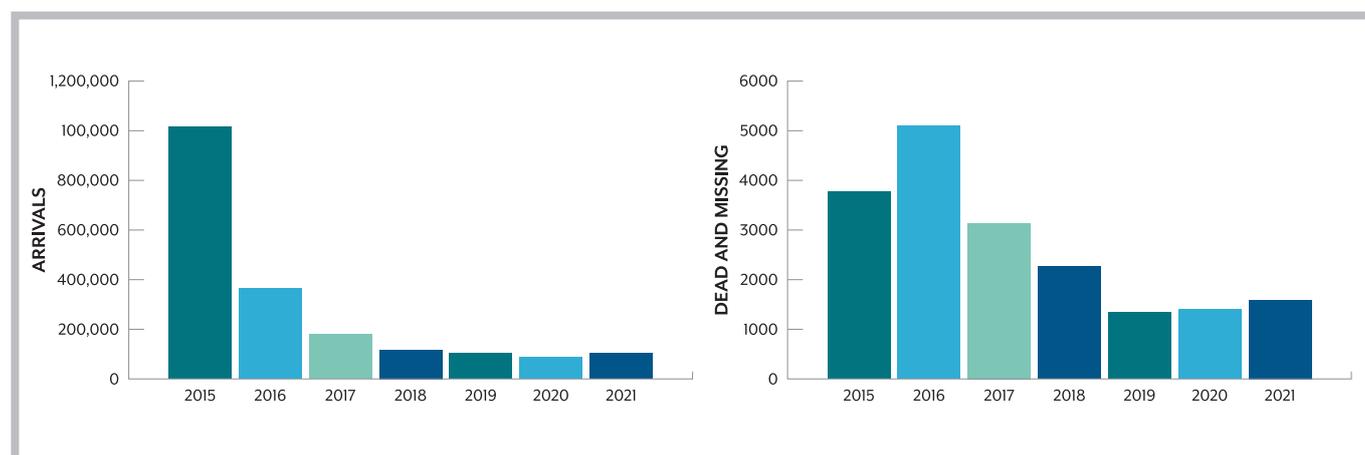
More and more irregular migrants attempt the crossing of the Central Mediterranean Sea.⁷ The European Border and Coast Guard Agency (Frontex) has evidenced this statement by announcing that from January to April 2021, the number of registered illegal border crossings on the Central Mediterranean route reached 41,000 showing an increase of 90% compared with last year.⁸ This steep rise in irregular migration flows towards Europe is far to be offset by the 25% drop in irregular crossings of the Eastern Mediterranean route, which remains an exception compared to other land and sea routes.⁹ The news must be disappointing for those who mounted last-ditch efforts in 2019 and 2020 to halt irregular boat migration in the Mediterranean by criminalising private civil-society organisations and closing ports. This is however only part of the reality.

Frontex figures only cover those migrants who managed to cross the borders. But how about those who died or disappeared at sea? The United Nations High Commissioner for Refugees database reveals what happens when crossing the deadliest migration route in the world: Not everyone reaches the shore. A comparative table on the numbers between sea arrivals¹⁰ and deaths and disappearances at sea between 2015¹¹–2021¹² is illuminating.

- 1 A refugee is 'a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. 1951 Convention Relating to the Status of Refugees, Article 1 (A) 2. It shall be noted that under international refugee law, recognition as a refugee is declaratory and not constitutive. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition and not when their refugee status is formally determined. UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011) HCR/IP/4/enG/Rev. 3, para. 9).
- 2 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Article 2 (1).
- 3 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime ((adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507) Article 3(a).
- 4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, Article 3(a).
- 5 IOM definition, <https://www.iom.int/key-migration-terms>, accessed 1 December 2021.
- 6 SOLAS Convention, Chapter V, Regulation 33(1).
- 7 IOM, <https://www.iom.int/key-migration-terms>, accessed 1 December 2021.
- 8 Frontex, 'Migratory Situation at EU's Borders in August: Detections on the Rise', 14 September 2021, <https://frontex.europa.eu/media-centre/news/news-release/migratory-situation-at-eu-s-borders-in-august-detections-on-the-rise-INIG3B>.
- 9 Ibid.
- 10 Including refugees and migrants arriving by sea to Italy, Greece, Spain, Cyprus and Malta.
- 11 No data is available for sea arrivals in 2014. Therefore, it is not possible to calculate the change in 2015.
- 12 The figures for sea arrivals and dead and missing persons at sea in 2021 were last updated on 21 November 2021.

Table 1: Arrivals and dead and missing persons in the Mediterranean from 2014 to 2021¹³

Year	Arrival	Change compared to the previous year	Dead and missing	Change compared to the previous year
2021 ¹⁴	102,572	% + 25.49	1,588	% + 26.03
2020	88,149	% - 13.94	1,401	% + 04.94
2019	102,431	% - 12.18	1,335	% - 41.18
2018	116,644	% - 35.18	2,270	% - 27.68
2017	179,959	% - 50.53	3,139	% - 38.40
2016	363,795	% - 64.21	5,096	% + 35.13
2015	1,016,615	...	3,771	...



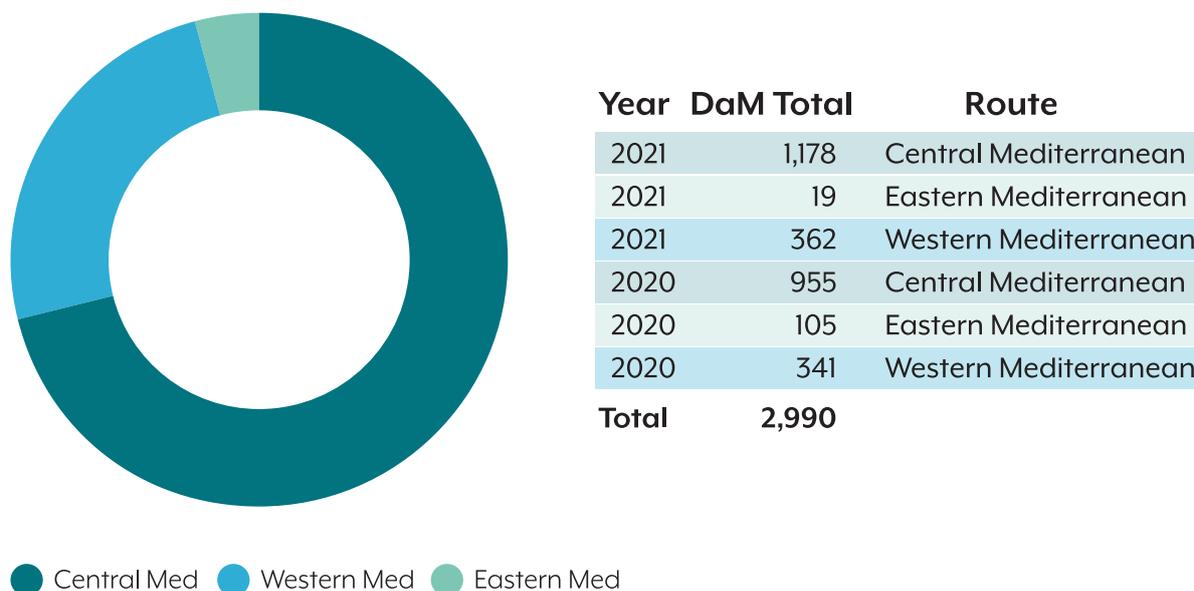
With the exception of 2019, the table shows that there has always been a higher growth or slower reduction rate of deaths and disappearances than arrivals via the Mediterranean Sea. 2021 particularly has seen a high fatality and loss rate, the rise of which was already evident in 2020. Crucially, it should also be noted that not all Mediterranean Sea routes are equally deadly. According to the United Nations High Commissioner for Refugees, the Central Mediterranean route continues to take a heavy toll on migrants' lives.

Figure 1 illustrates the shares of Central, Eastern and Western Mediterranean Sea routes in dead and missing persons at sea in 2020 and 2021.

¹³ The figures of arrival and dead and missing persons are available at: <https://data2.unhcr.org/en/situations/mediterranean>, retrieved on 26 November 2021. Changes in percentage reflects the author's calculation.

¹⁴ Calculation of changes is made based on the number of sea arrivals (81,738) and dead and missing persons (1,260) as of November 2021.

Figure 1: Dead and Missing in the Mediterranean (2020–2021)¹⁵



In light of these statistics, it becomes evident that what has been heralded as a successful common European migration policy is far from common or successful. What is more, the statistics fail to depict the reality of what has been happening at sea. They also do not account for instances for those migrants who set out for Europe, either from Libya or Turkey, but who were halfway pulled back by the Libyan Coast Guard or pushed back by the Greek authorities. Indeed, the unrecorded destiny of so many people coupled with the high mortality rate at sea proves that Europe does not have a common policy adopted at EU level for saving lives at sea and managing irregular arrivals by sea.

In addition to the dead and missing migrants, the most recent report by the UN Independent Fact-Finding Mission on Libya reveals that migrants, especially those intercepted by the Libyan Coast Guard and returned to Libya, are subject to systematic violation of their human rights.¹⁶ If not disappearing, they are often kept in detention centres where they face intolerable conditions for an indefinite period of time. Murder, enslavement, torture, imprisonment, rape, persecution and other inhuman acts against migrants have been documented by the UN Fact-Finding Mission as ‘part of a systematic and widespread attack directed at this population’.¹⁷ Those who have been fortunate enough to be saved by civil-society organisations performing search and rescue operations testify that returning to Libya is worse than death.¹⁸ Most survivors experienced many tragedies which left them no choice but to flee Libya by the sea. Their testimonies reveal that risking their life at sea is the only way out of physical and mental tortures they survived in Libya.¹⁹

Over the last two years, investigative journalists, international organisations and non-governmental organisations have consistently advocated in favour of a revised EU migration policy that is compatible with the international maritime and human rights obligations that States have freely committed to

¹⁵ <https://data2.unhcr.org/en/dataviz/95>, accessed 26 November 2021.

¹⁶ Office of the United Nations High Commissioner for Human Rights, ‘Independent Fact-Finding Mission on Libya’, 1 October 2021, para 66, https://www.ohchr.org/EN/HRBodies/HRC/FFM_Libya/Pages/Index.aspx.

¹⁷ Ibid.

¹⁸ Alarm Phone, ‘Interceptions and Death at Sea: Europe’s Answer to Migrant Struggles for Freedom’, Alarm Phone (blog), 28 August 2021, <https://alarmphone.org/en/2021/08/28/interceptions-and-death-at-sea-europes-answer-to-migrant-struggles-for-freedom/>, accessed 1 December 2021.

¹⁹ HRAS, SOS MEDITERRANEE ‘In Search of Safe Haven’: The Sea as the Only Option Crossing the Central Mediterranean Sea’ (December 2021), https://www.humanrightsatsea.org/wp-content/uploads/2021/12/HRAS_In-Search-of-Safe-Haven_Publication_DEC21_SP.pdf.

that ultimately ensures the necessary solidarity between the EU member States. In September 2020, the European Commission proposed the New Pact on Migration and Asylum (the New Pact) which does not comprehensively address solidarity and responsibility sharing between the EU member States nor does it offer a revised common policy towards search and rescue at EU level. A year later, the European Commission has published a report in which it takes stock of progress achieved thus far and of key developments in migration and asylum policy over the past year and a half.²⁰

3. Scope of the Policy Brief and Methodology

The Policy Brief investigates the current policies and practices concerning the duty to search and rescue of people in distress at sea with a focus on the Central and Eastern Mediterranean in 2020 and 2021. Additionally, it examines whether the proposed policies in the New Pact can duly address the challenges underlying search and rescue and identified by civil-society, international organisations and EU agencies.

The Policy Brief identifies and discusses four policy and practice areas. The first part illustrates how the EU and its member States have failed to exercise search and rescue operations in the Mediterranean by either completely ignoring distress calls and failing to comply with the duty to rescue or by prioritising the protection of EU external borders over the right to life. The second part discusses how the EU and its member States are on the other side actively engaging in maritime interception, pushbacks and pullbacks in the Central and Eastern Mediterranean. The third part elaborates how EU member States have denied on numerous occasions disembarkation following rescue by using the pandemic as a pretext. The fourth and final part discusses the policies and practice of criminalisation of civil-society search and rescue organisations and individuals. Finally the Policy Brief concludes and provides ten policy recommendations.

The Policy Brief has been produced on the basis of desk-based research which has looked into existing international and EU law as well as into relevant policies and practices. For data and statistics it relies on credible open sources such as databases, reports and policy documents by international (United Nations and its specialised agencies) and regional (Frontex, EU institutions) organisations, NGOs and media.

I. The Failure of the EU and its Member States to Exercise Search and Rescue Operations in the Mediterranean Sea

The duty to render assistance to persons in distress at sea is enshrined in several international conventions and is now part of customary international law. Article 98 (1) (a) of the United Nations Convention on the Law of the Sea (UNCLOS) sets forth the general obligation of States to require the master of a ship flying their flag to render assistance to any person found at sea in danger of being lost.²¹ The International Convention for the Safety of Life at Sea (SOLAS) mirrors the same obligation in Regulation V-33 by requiring the master of a ship to provide assistance to persons in distress at sea. Such assistance, as spelled out also in the International Convention on Maritime Search and Rescue (SAR Convention), must be provided regardless of the nationality or status of the distressed person or their circumstances.²² The SAR Convention also requires its member States to establish contiguous

²⁰ Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions on the Report on Migration and Asylum, 29 September 2021, <https://ec.europa.eu/info/sites/default/files/report-migration-asylum.pdf>.

²¹ United Nations Convention on the Law of the Sea (UNCLOS), Article 98.

²² (Annex, Chapter 2, 2.1.10).

search and rescue regions within each sea area²³ and for that to enter into agreements with other States.²⁴ Furthermore, every coastal State has a legal obligation under United Nations Convention on the Law of the Sea to promote the establishment, operation and maintenance of search and rescue services by way of mutual regional arrangements.²⁵

Since 2014, the EU and its member States have pursued a steady and progressive policy in turning their back on the irregular migrants crossing the Mediterranean Sea by withdrawing, limiting and diverting the deployment of naval forces engaged in search and rescue operations. Operation Triton (November 2014–January 2018) featured the first Frontex involvement following the suspension of Operation Mare Nostrum by Italy (October 2013–October 2014). Despite the great achievement of Mare Nostrum in saving life at sea, the high operational costs and the unwillingness of other EU member States to share the costs discouraged Italy from renewing the mission. Instead, Frontex stepped in to give Italy a hand by launching the joint Operation Triton (November 2014–January 2018). Contrary to Mare Nostrum, which was intended to conduct search and rescue operations, Operation Triton was designed to address trafficking and smuggling, a mandate which motivated the EU member States to generously support the operation.²⁶ During the migration crisis in 2015, the Head of Frontex, Fabrice Leggeri, made a clear point on the exclusion of search and rescue from Triton's operation plan by stating that search and rescue operation 'is not in Frontex's mandate, and this is in my understanding not in the mandate of the European Union'.²⁷

In February 2018, Operation Themis replaced Operation Triton by adding search and rescue to border control and surveillance as the operation theme in the Central Mediterranean. The intriguing aspect of Operation Themis was its surveillance extension to Algeria, Tunisia, Libya and Egypt by considering their waters as areas covering migration flows to the Mediterranean. The video on the Frontex website introducing Operation Themis was a reflection of the changing patterns of migration.²⁸ The results of Operation Themis however have shown that Frontex followed a more preventive approach by blocking migrants at the outset of their journey rather than committing to saving lives at sea. A study shows that from 2015 to 2019, out of 118,128 rescued people in the Central Mediterranean, only 40,747 – meaning 34.49% – were rescued by Frontex.²⁹

The EUNAVFOR Med Operation Sophia (June 2015–March 2020) replaced by Operation Irini, was the second maritime operation by the EU in the Central Mediterranean. As a military mission, EUNAVFOR Med retained the objective of disrupting criminal networks of smugglers and traffickers as part of the EU Common Security and Defence Policy³⁰ without any specific search and rescue mandate. Even the geographical extension of the Operation to international waters and Libya's territorial waters did not change the EU's priority in the Central Mediterranean.³¹ In fact, the core task of EUNAVFOR Med Operation Irini was the implementation of the UN arms embargo against Libya and search and rescue was not even among the secondary tasks defined for the mission.³²

23 (Annex, Chapter 2, 2.1.3).

24 (Annex, Chapter 2, 2.1.4).

25 United Nations Convention on Law of the Sea, Article 98(2).

26 'Frontex Launches Joint Operation Triton' <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-joint-operation-triton-JSYpL7>, accessed 26 September 2021.

27 Patrick Kingsley and Ian Traynor, 'EU Borders Chief Says Saving Migrants' Lives "shouldn't Be Priority" for Patrols', *The Guardian*, 22 April 2015, sec. World news, <https://www.theguardian.com/world/2015/apr/22/eu-borders-chief-says-saving-migrants-lives-cannot-be-priority-for-patrols>, accessed 1 December 2021.

28 Frontex, 'Operation Themis (Italy)', 15 February 2018, <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/>, accessed 1 December 2021.

29 Patricia Schneider, 'Dilemmas of European Migration Policies: Failure of Sea Rescue in the Mediterranean or Successful Externalization of Borders?', *Sicherheit & Frieden* 38, no. 4 (2020): 215–27, Figure 2, p.2019. <https://doi.org/10.5771/0175-274X-2020-4-215>.

30 'Legislative Train Schedule', European Parliament, <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eunavfor-med-operation-sophial>, accessed 26 September 2021.

31 *Ibid.*

32 Council of the EU and the European Council, 'EU Launches Operation IRINI to Enforce Libya Arms Embargo', 13 March 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/>, accessed 1 December 2021.

The last operation carried out in the region was the Frontex Operation Poseidon (January 2016–present). Focusing on the Eastern Mediterranean Sea, Operation Poseidon covers the Greek sea borders with Turkey and the Greek islands³³ and assists the Greek authorities in returns and readmission of migrants from the hotspots.³⁴ The same year, in March 2016, the EU signed an agreement with Turkey, in the form of a press release.³⁵ The so-called EU–Turkey deal provided for the return of all irregular migrants crossing from Turkey to Greece as of 20 March 2016 and the return of one Syrian from the Greek islands to Turkey in exchange for another Syrian to be resettled in the EU.³⁶

An immediate question arose as to what extent those claimed to be rescued by Frontex under the framework of Operation Poseidon were given a chance to seek asylum. The EU–Turkey deal has consistently been criticised for its violation of international law, especially the principle of non-refoulement. According to the principle as enshrined in the 1951 Refugee Convention:

“ No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. ”³⁷

The prohibition of return to harm is also enshrined in Article 3 of the European Convention on Human Rights which provides that ‘No one shall be subjected to torture or to inhumane or degrading treatment or punishment’.³⁸ It is accepted that an agreement setting a blanket designation of a certain country as safe for return, without assessment of the individual’s circumstances does not comply with human rights safeguards.³⁹ The EU–Turkey deal by no means guarantees the right to life and nor the freedom from inhumane degrading treatment or torture that the principle of non-refoulement ensures. Moreover, it is difficult to accept that Turkey deserves general recognition as a ‘third safe country’. Turkey excludes non-Europeans from qualifying for refugee status,⁴⁰ which necessitates an advanced clarification on how those being returned to Turkey can apply for at least a temporary protection.⁴¹ Testimonies from migrants who stayed in Turkey prove that many of them do not consider it a safe country.⁴²

As evidenced above, there is no ongoing search and rescue specific operation in the Mediterranean. Likewise, at EU level, military operations are not mandated to perform search and rescue even as a secondary task, and the two ongoing Frontex operations in Central (Operation Themis) and Eastern

33 Frontex, ‘Operation Poseidon (Greece)’, <https://frontex.europa.eu/we-support/main-operations/operation-poseidon-greece/>, accessed 26 September 2021.

34 Frontex, ‘Joint Operation Poseidon (Greece)’, 10 October 2016, <https://frontex.europa.eu/media-centre/news/focus/joint-operation-poseidon-greece--3lmFxd>, accessed 1 December 2021.

35 European Council, ‘EU-Turkey Statement, 18 March 2021’, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed 1 December 2021.

36 Ignazio Corrao, ‘EU-Turkey Statement & Action Plan’, Legislative train schedule, European Parliament, 20 October 2019, <file:///C:/Users/mps.IFSHI/Zotero/storage/XZ48IACJ/file-eu-turkey-statement-action-plan.html>, accessed 1 December 2021.

37 Article 33 of the Convention Relating to the Status of Refugees, 189 UNTS 137 (Refugee Convention).

38 Article 3 of the European Convention on Human Rights.

39 UNHCR’s Position and Recommendations on the Safe Third Country Declaration by Greece, 2 August 2021, <https://www.unhcr.org/gr/en/22885-unhcrs-position-and-recommendations-on-the-safe-third-country-declaration-by-greece.html>, accessed 1 December 2021.

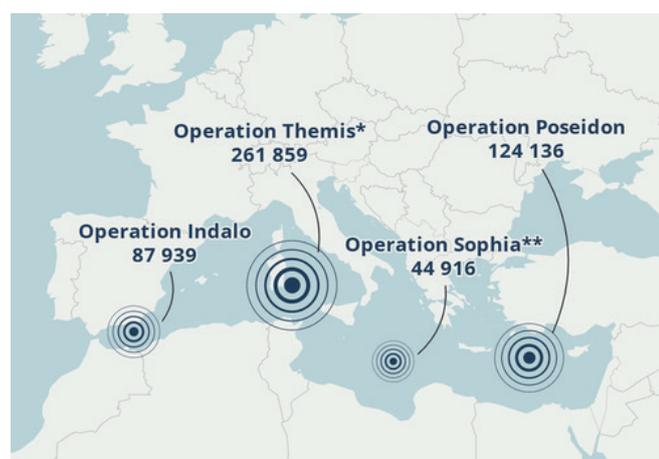
40 Bill Frelick, ‘Is Turkey Safe for Refugees?’, Human Rights Watch (blog), 22 March 2016, <https://www.hrw.org/news/2016/03/22/turkey-safe-refugees>, accessed 1 December 2021.

41 United Nations High Commissioner for Refugees, ‘Legal Considerations on Returning Asylum Seekers & Refugees from Greece to Turkey under Safe Third Country & First Country of Asylum Concepts’, 23 March 2016, p.5. <https://www.unhcr.org/56f3ec5a9.pdf>.

42 Bill Frelick, ‘Is Turkey Safe for Refugees?’, Human Rights Watch (blog), 22 March 2016, <https://www.hrw.org/news/2016/03/22/turkey-safe-refugees>, accessed 1 December 2021.

(Operation Poseidon) Mediterranean, are not in particular designed nor are in practice carried out for the purposes of saving lives at sea. If any life has been saved during Frontex operations, it has been incidental and secondary to a more significant objective which is protecting EU borders. This could be understood from the Frontex performance in the Mediterranean and the clear position of the EU regarding its incompetency for search and rescue operations. Compared to national (Italy and Libya), commercial, military and humanitarian search and rescue actors in the Central Mediterranean from 2015 to 2019, Frontex operations secured the lowest rate of contribution towards saving lives at sea. Figure 2 illustrates the number of lives saved in the EU Mediterranean operations from 2015 to October 2021.

Figure 2: Lives saved in EU Mediterranean operations (2015–2021)⁴³



Frontex has reiterated several times that it does not have a mandate to carry out search and rescue activities and the EU also defines search and rescue operation in the EU context, as operation of EU member States to render assistance to any vessel or person in distress at sea.⁴⁴

While underlining that the duty to rescue lives at sea is not only a moral duty but also an obligation under international treaty and customary law, the New Pact also insists that “national authorities remain ultimately responsible for implementing the relevant rules under international law”.⁴⁵ Strictly speaking, it is the individual member State’s duty to operate effective search and rescue zones under the United Nations Convention on the Law of the Sea.

Nevertheless, the European Commission acknowledges that search and rescue “is also a key element of the European integrated border management [and] implemented as a shared responsibility by Frontex and national authorities”.⁴⁶ The New Pact specifies that “Frontex should provide increased operational and technical support within EU competence, as well as deployment of maritime assets to member States, to improve their capabilities and thus contribute to saving lives at sea”.⁴⁷ The paradox of not having a specific mandate, but still self-engaging in providing support within EU competence, throws doubt on the sincerity of the legal obligation to save lives at sea especially by looking at other mechanisms that the New Pact puts forward.⁴⁸ Furthermore, one year after the New Pact, the first report of the European Commission is also void of any indication of deployment of new assets by the EU or its member States in the Mediterranean for search and rescue purposes. It is therefore doubtful whether adherence to the principle of separation of tasks between EU (border management) and its member States (search and rescue) is realistic and to what extent the vague proposals by the New Pact, which seems to be disrespectful to such separation, would lead to a practical solution for the life-taking dilemma in the Mediterranean.

⁴³ Infographic - Lives saved in EU Mediterranean operations (2015-2021) <https://www.consilium.europa.eu/en/infographics/saving-lives-sea/>.

⁴⁴ European Commission, ‘Search and Rescue (SAR) Operation’, Migration and Home Affairs, https://ec.europa.eu/home-affairs/orphan-pages/glossary/search-and-rescue-sar-operation_en, accessed 15 September 2021.

⁴⁵ European Commission, ‘Communication on a New Pact on Migration and Asylum’, 23 September 2020, 9, p.13. (EU Pact) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Violeta Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment – EU Immigration and Asylum Law and Policy’, 3 February 2021, <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/>, accessed 1 December 2021.

II. One Sea, Two Tactics (Pushbacks and Pullbacks)

The expressions 'border externalisation' and 'outsourcing EU border management' refer to the policy of making legal, political and practical arrangements between the EU and non-EU States with a view to keeping irregular migrants as far away as possible from the EU borders. This way the EU and its member States could avoid the situations where they do have to meet their international obligations vis-à-vis migrants. Although the objective remains similar, the EU has developed different externalisation tactics in the Central and Eastern Mediterranean.

Map of the Mediterranean Sea routes⁴⁹

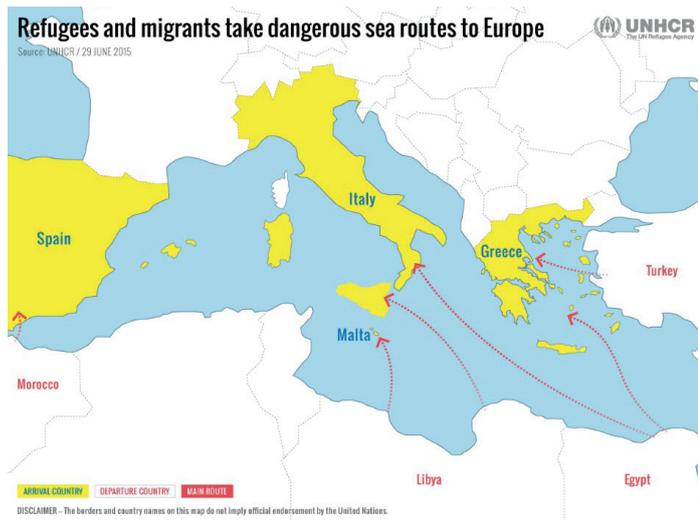


Image credit: Gemma Pauwels⁵⁰

A. Eastern Mediterranean Sea: The Practice of Pushbacks

The practice of returning migrants in the Eastern Mediterranean has raised serious concerns regarding the violation of international refugee and human rights law. Since 2020, several reports by NGOs and journalists have accused Frontex and the Greek Coast Guard of forcibly returning migrants to Turkey without an individual assessment of their circumstances and without giving asylum seekers a chance to apply for asylum (pushbacks). The pushback practices in the Aegean Sea essentially seek to obstruct access to Greek territory and limit access to international protection claims.

The practice of pushbacks in the Eastern Mediterranean Sea route is mainly concentrated in the Aegean Sea within Greek territorial waters, and most notably from the islands of Rhodes, Samos and Symi.⁵¹ Out of 87 documented pushback incidents by Watch the Med in the Eastern Mediterranean (April 2011–November 2021), 74 took place from January 2020 to November 2021,⁵² but certainly this does not cover all cases. Felipe González Morales, UN Special Rapporteur on the human rights of migrants, highlights in his Report the recording of 321 incidents involving 9,798 migrants by Mare Liberum between March and December 2020.⁵³

⁴⁹ 'The Mediterranean Passage in the Age of Refugees', 1 July 2015, p.9.

⁵⁰ <https://gemmanu.blogbird.nl/page/news>, accessed 1 December 2021.

⁵¹ 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea', Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales United Nations General Assembly (A/HRC/47/30) 12 May 2021, para.55, accessed 1 December 2021.

⁵² Watch The Med Alarm Phone, <https://watchthemed.net/>, accessed 1 December 2021.

⁵³ Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea', Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales United Nations General Assembly (A/HRC/47/30) 12 May 2021, para.55. Watch The Med Alarm Phone, <https://watchthemed.net/>, accessed 1 December 2021.



Hannah Nickell / sea-watch.org

Felix Weiss / sea-watch.org

Despite criticisms of the EU–Turkey deal from human rights advocates, the EU continues its cooperation with Turkey, as the deal turns out more profitable than expected. As the result of the one-to-one resettlement arrangement, only 31,000 Syrian refugees have been resettled in the EU, which is not even half of the maximum 72,000 outlined in the deal.⁵⁴ The EU is also facing the challenge of keeping Turkey satisfied, so it does not open its borders allowing migrants to pass through its territory and reach the Greek border as it did in 2020. The EU–Turkey deal proves so vital for the EU migration policy that Turkey appears again on the list of EU international partnerships with countries of origin and transit, and with a view to further implementing of the deal,⁵⁵ the first EU–Turkey High-Level dialogue on Migration and Security was held in October 2021.⁵⁶

The reason behind the widespread use of pushbacks in the Eastern Mediterranean Sea route is facilitated by the close geographical position of many of the Greek islands with mainland Turkey. The absence of high seas between the coastline of Turkey and the Greek islands leaves Frontex and the Greek Coast Guard with a tight time window to intercept and push back. Although Frontex has denied its participation in pushback incidents, many reported cases point at its involvement in this practice, which has triggered investigations into the work of the Agency.

In November 2020, the Working Group Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO) was established by Frontex Management Board to conduct inquiries in relation to the allegations of so-called pushbacks in the Eastern Mediterranean.⁵⁷ In the report of May 2021, Management Board came to the conclusion “that in total 8 out of the 13 examined incidents, no third-country nationals were turned back in violation of the principle of non-refoulement, and 6 out of these 8 incidents took place entirely in Turkish Territorial Waters”.⁵⁸ Following further investigation, the Management Board concluded with “the strong belief that the presented facts support an allegation of possible violation of fundamental rights or international protection obligations such as the principle of *non-refoulement*, and that it cannot be excluded that the incident has characteristics of a case of unprocessed return and violation of the principle of *non-refoulement*”.⁵⁹

54 Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions on the Report on Migration and Asylum, 29 September 2021, p.17.

55 European Commission, ‘Turkey 2021 Report’, SWD (2021)290 final/2, 19 October 2021, p.6.

56 European Commission, ‘Daily News 11 / 10 / 2021’, European Commission - European Commission, 11 October 2021, https://ec.europa.eu/commission/presscorner/detail/en/mex_21_5201, accessed 1 December 2021.

57 Frontex, ‘Management Board Decision 39/2020’, 26 November 2020, Article 2, https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2020/MB_Decision_39_2020_on_the_establishment_of_the_Management_Board_Working_Group_FRaLO.pdf, accessed 1 December 2021.

58 Frontex, ‘Conclusions of the Management Board’s Meeting on 5 March 2021 on the Report of Its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea’, Management Board updates, 3 May 2021, <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-aFewSI>.

59 Explanatory note on the state of play of the five incidents reviewed in the Final Report of the management board working group on fundamental rights and legal and operational aspects of operations, 23 April 2021. Tineke Strink, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) 14 July 2021, https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

Another investigation was opened by European Parliament's LIBE Committee who set up the Frontex Scrutiny Working Group. On 17 July 2021, the Frontex Scrutiny Working Group submitted a report on the result of its fact-finding investigation regarding alleged violations of fundamental rights, especially participation in pushbacks, by Frontex. Even though no direct Frontex involvement in violations was established, the Frontex Scrutiny Working Group found that Frontex, during its joint operations with member States, "failed to address and follow-up on these violations promptly, vigilantly and effectively".⁶⁰ The report then proceeds with details of investigated aspects and makes recommendations on reconsidering Frontex internal structures and communication (in particular, the internal complaint system, the role of the Fundamental Rights Officer, and recruitment of fundamental rights monitors) and cooperation with the host member States during joint operations (such as access to information and compliance with fundamental rights, especially the principle of *non-refoulement*).

Some findings and recommendations of the Frontex Scrutiny Working Group also correspond to those of the European Ombudsman and the European Court of Auditors. In particular, the European Ombudsman who opened an inquiry on her own initiative to look into how Frontex deals with alleged breaches of fundamental rights, had made a similar recommendation on the creation of an independent mechanism for handling complaints about Frontex operations.⁶¹ The Frontex Scrutiny Working Group also welcomes the Frontex Management Board's inquiry on the reporting mechanisms and the related recommendations, but also criticises its self-confinement "to information retrieved from within the agency itself and from the member States" and leaving further examination of outstanding pushback cases to the Executive Director.⁶²

Looking into the work of Frontex is not limited to investigative initiatives. In May 2021, front-LEX submitted the first legal action against Frontex to the Court of Justice of the European Union. The complaint was filed on behalf of two "two asylum seekers... who... were violently rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, collectively expelled, and ultimately abandoned on rafts with no means of navigation, food or water".⁶³ This unprecedented legal action against Frontex for its pushback practices and violation of human rights, however, has a long way to go, as up to now there have been no updates from the Court of Justice of the European Union regarding the proceedings. A second complaint against Frontex was lodged in October 2021. Human rights lawyers of Prakken d'Oliveira, a Dutch law firm, have asked the Court of Justice of the European Union to hold Frontex accountable for its violation of human rights. The case follows a Syrian family who was denied the right to have their asylum claim processed in Greece and eventually returned from Greece to Turkey in 2016 on a joint Greek-Frontex operation.⁶⁴ The lawyers accuse Frontex of failing to address and follow-up on its legal duty to protect fundamental rights. The case also pursues to make Frontex honour its legal duty to establish and implement an effective monitoring and complaint system.⁶⁵

60 Tineke Strink, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) 14 July 2021, https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

61 European Ombudsman, 'Decision in OI/5/2020/MHZ on the Functioning of the European Border and Coast Guard Agency's (Frontex) Complaints Mechanism for Alleged Breaches of Fundamental Rights and the Role of the Fundamental Rights Officer', <https://www.ombudsman.europa.eu/en/decision/en/143108>, accessed 1 December 2021.

62 Tineke Strink, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) 14 July 2021, p. 13 https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

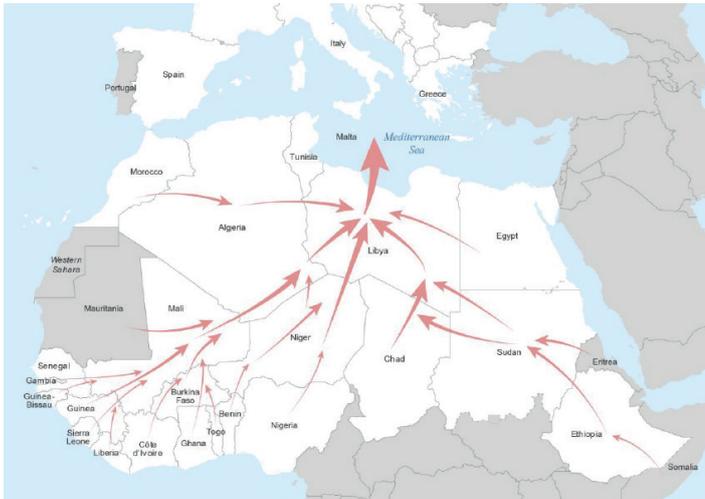
63 front-LEX, 'Legal Action Against FRONTEX Submitted – FRONT-LEX', 25 May 2021, <https://www.front-lex.eu/2021/05/25/legal-action-against-frontex-submitted-2/>, accessed 1 December 2021.

64 'Not on Our Border Watch', <https://www.notonourborderwatch.com>, accessed 1 December 2021.

65 Sea-Watch Legal Aid Fund, 'Legal Action against Frontex before the CJEU', <https://swla.eu/en/project/project>, accessed 27 October 2021.

B. Central Mediterranean Sea: The Practice of Pullbacks

Map of the Central Mediterranean Sea route⁶⁶



Compared to the Eastern Mediterranean border, externalisation at the Central Mediterranean has been designed and implemented differently. The long distance between North African coastlines and EU borders leaves Frontex and Italy with more time to get in the way of crossing and rescue attempts before migrants reach the EU territory (pullbacks). This has been facilitated in the past five years by increasing the border management capacity of Libya through financing, equipping and sharing information with the Libyan Coast Guard.

In 2017, Italy signed a Memorandum of Understanding with Libya with a view to increasing the Libyan capacity in managing its borders serving as a gateway to Europe via the Mediterranean.⁶⁷ With EU support, the project has been introduced as cooperation aiming to manage migration flows and save lives at sea by training the Libyan Coast Guard and equipping it with naval assets.⁶⁸ As the main implementing partner of the EU border management programmes, Libya has regularly received more money, training and vehicles from the EU since 2017. With a total value of €455 million in programmes, Libya remains the biggest beneficiary of the EU Emergency Trust Fund for Africa, with substantial funding going to protection of migrants and refugees and community stabilisation, alongside actions for border management.⁶⁹ Libya is also included in the Team Europe Initiative as a new financial and operations tool designed pursuant to the New Pact in order to finance programmes contributing to the implementation of the EU's migration policy.⁷⁰

The EU completes its contribution to pullbacks by sharing aerial information with the Libyan Coast Guard and guiding it to locate boats in distress in the Central Mediterranean Sea and return them back to Libya. Sea-Watch monitoring aircrafts Moonbird and Seabird have documented several incidents in 2020 and 2021 where Frontex aerial reconnaissance ignored the presence of NGO and commercial vessels in the vicinity of the boat in distress and forwarded the information to the Libyan Joint Rescue Coordination Centre.⁷¹ During some of these search and rescue operations, the Libyan Coast Guard has even entered the Maltese search and rescue zone⁷² to bring migrants back to Libya while Maltese vessels, further to those of NGOs, were better placed to render prompt assistance. Reports also show that not all these operations are peaceful and the Libyan Coast Guard avail itself of using brutal means

66 United Nations High Commissioner for Refugees, 'Central Mediterranean Route: Working on Alternatives to Dangerous Journeys', 17 October 2017, p.1. <https://www.unhcr.org/596f4c4a7.pdf>.

67 https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf, accessed 1 December 2021.

68 European Commission, 'Questions & Answers: Migration on the Central Mediterranean Route', Text, European Commission - European Commission, 25 January 2017, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_135, accessed 1 December 2021.

69 European Commission, 'EU Delivers Support to Border Management in Libya', 16 July 2020, https://ec.europa.eu/neighbourhood-enlargement/news/eu-delivers-support-border-management-libya-2020-07-16_en, accessed 1 December 2021.

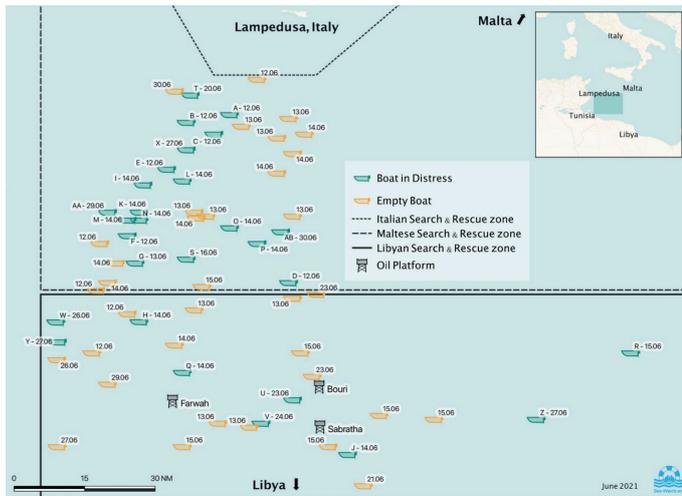
70 Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions on the Report on Migration and Asylum, A renewed EU action plan against migrant smuggling (2021-2025) 29 September 2021, p 20- 22.

71 Sea-Watch, 'Crimes of the European Border and Coast Guard Agency Frontex in the Central Mediterranean Sea', n.d., https://sea-watch.org/wp-content/uploads/2021/05/Frontex-Factsheet_Airborne_Sea-Watch_May-2021.pdf, accessed 1 December 2021.

72 Sea-Watch, 'Airborne Monthly Factsheet', Airborne Monthly Factsheet, July 2021, https://sea-watch.org/wp-content/uploads/2021/09/Airborne_Monthly_Factsheet_July-2021.pdf, accessed 1 December 2021.

such as opening the fire on the people to intercept them.⁷³

Map of Italian, Maltese and Libyan search and rescue zones⁷⁴



The EU's border management agenda in the Central Mediterranean lacks an essential legal condition of a search and rescue operation: the rescued migrants should be disembarked in a port of safety in order for a rescue operation to be completed.⁷⁵ According to the International Maritime Organization Guidelines on the treatment of persons rescued at sea, "a place of safety is a location where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met".⁷⁶ Stories recounted on inhuman treatment faced by migrants at Libyan

detention centres, as well as slavery and sexual violation and harassment reported by the United Nations High Commissioner for Refugees, show that Libya cannot be considered a place of safety.⁷⁷ The EU's recognition of the necessity of meeting international humanitarian standards by Libya in receiving and assisting migrants⁷⁸ proves that the European Union is aware that Libya does not fulfill the conditions of a port of safety.

III. Non-Assignment of Port of Safety

A search and rescue operation is completed only after rescued people are delivered to a place of safety which should be determined as soon as reasonably practicable while taking into account the particular circumstances of the case (2004 amendment to the Search and Rescue convention).⁷⁹ This rule applies equally to society vessels with a humanitarian mandate and to any other vessel carrying out search and rescue incidental to its main activity.

The obligation "to rapidly identify a place of safety" is also found in the EU Regulation No.656/2014, but some EU member States fail to honour this obligation. The European Union Agency for Fundamental Rights reports that in 2020 alone there were 22 instances where 3,597 rescued people (including at least 954 children) remained at sea for more than a day.⁸⁰ The waiting time for disembarkation, in some cases, goes beyond a week and has reached even 40 days, which puts the safety and physical integrity of the rescued migrants at risk. Even after the Valletta declaration by France, Germany, Italy and Malta to relocate rescued migrants, rescue boats continued to remain at sea for long times while awaiting a safe port.⁸¹

73 Sea-Watch, 'So-Called Libyan Coast Guard Firing Shots at Migrant Boat in Distress · Sea-Watch e.V.', Sea-Watch e.V. (blog), 5 July 2021, https://sea-watch.org/en/libyan_coast_guard_shots_fired/, accessed 1 December 2021.

74 <https://sea-watch.org/airborne-monthly-factsheet-june-2021/>, accessed 26 November 2021.

75 The International Convention for the Safety of Life at Sea, Resolution MSC.153(78), Regulation 33 (4).

76 International Maritime Organization, Resolution MSC.167/78/26 Add.2 Annex 34, Guidelines on the Treatment of Persons Rescued At Sea (20 May 2004).

77 UN High Commissioner for Refugees (UNHCR), UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020, <https://www.refworld.org/docid/5f1edee24.html>, accessed 16 November 2021.

78 European Parliament, 'Answer for Question E-001700/21', 9 July 2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-001700-ASW_EN.html, accessed 1 December 2021.

79 International Maritime Organization, 'Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979' (2021), <https://www.refworld.org/docid/432ac4d44.html>, accessed 1 December 2021.

80 European Union Agency for Fundamental Rights, 'June 2021 Update – Search and Rescue (SAR) Operations in the Mediterranean and Fundamental Rights', 18 June 2021, <https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities>, accessed 1 December 2021.

81 European Union Agency for Fundamental Rights, 'June 2021 Update – Search and Rescue (SAR) Operations in the Mediterranean and Fundamental Rights', 18 June 2021, <https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities>, accessed 1 December 2021, p 113.

Two incidents in 2020–2021 exacerbated the problem of assignment of a port of safety. The first one is the outbreak of the COVID-19 pandemic in 2020 and the second one is the decision of the Human Rights Committee on the responsibility of Italy to provide an effective remedy following a tragic loss of more than 200 people in the Maltese search and rescue zone.

The outbreak of the COVID-19 pandemic in 2020 was used by some States as a pretext for non-assignment of a place of safety. In April 2020, Italy and Malta announced that they do not allow the disembarkation of rescued migrants even if other EU member States agree to relocate them.⁸² Pursuant to a new decree, the Italian government declared its ports unsafe for disembarking migrants rescued outside the Italian search and rescue zone by foreign-flagged vessels for the entire duration of the health emergency.⁸³ The policy was widely criticised by the civil-society and international organisations, emphasising that the pandemic cannot justify a blanket ban on disembarkation.⁸⁴ Consequently, the concept of quarantine vessels was adopted in order to quarantine rescued people on board before landing to prevent any potential spread of COVID-19. This solution is not void of challenges either. These include poor reception conditions, inadequate information on the asylum procedure and on access to rights, and lack of protocols for vulnerable groups.⁸⁵

Moreover, as shown in figure 3 below, some NGO ships are still being held at ports due to the pandemic which prevents them from exercising search and rescue. Sadly, the New Pact does not offer a solution to this challenge either. On the contrary, the proposed regulation on crisis and force majeure (Crisis and Force Majeure Proposal)⁸⁶ provides EU member States with a legal basis to justify similar policies in the future and to refuse to receive rescued people. The Crisis and Force Majeure Proposal underlines “the lessons learned from the COVID-19 pandemic” and the “need for specific rules on crisis solidarity” which “also call for procedural derogations that member States can apply in their asylum and migration systems”.⁸⁷

The second incident is the landmark decision of the Human Right Committee against Italy in January 2021. In this case, in 2013 Italy received several distress calls from a sinking boat in the Mediterranean. Despite answering the calls, Italy refused to conduct a rescue operation and gave the migrants the phone number of the Rescue Coordination Centre of Malta saying that they are in the Maltese search and rescue zone. Because of the delayed action, over 200 people, including 60 children, drowned and a complaint was lodged by three survivors.⁸⁸ The Committee found that “a special relationship of dependency had been established between the individuals on the vessel in distress and Italy”,⁸⁹ in particular because the initial contact by the vessel in distress was made with the Maritime Rescue Coordination Centre in Rome. Therefore, the individuals on the vessel were affected by Italy’s inaction in a manner that was reasonably foreseeable in that they were under the effective control of Italy even though they were in the Maltese search and rescue zone.⁹⁰ The Committee then decided that Italy has an obligation to pay compensation. Establishment of such a remote and extraterritorial causal link has

82 European Council on Refugees and Exiles, ‘Med: 150 Stranded at Sea as Malta and Italy Declare Ports “Unsafe” | European Council on Refugees and Exiles (ECRE)’, 10 April 2021, <https://ecre.org/med-150-stranded-at-sea-as-malta-and-italy-declare-ports-unsafe/>, accessed 1 December 2021.

83 Association for Legal Studies on Immigration, ‘Rights on the Skids. The Experiment of Quarantine Ships and Main Points of Criticism’, March 2021, p.1.

84 Human Rights Watch, ‘EU/Italy: Port Closures Cut Migrant and Refugee Lifeline’, Human Rights Watch (blog), 9 April 2020, <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline>, accessed 1 December 2021.

85 European Union Agency for Fundamental Rights, ‘Migration: Key Fundamental Rights Concerns - Bulletin 2 - 2021’, 24 September 2021, p.5, <https://fra.europa.eu/en/publication/2021/migration-key-fundamental-rights-concerns-bulletin-2-2021>.

86 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum’, 23 September 2020, COM (2020) 613 final. (Crisis and Force Majeure Proposal).

87 Crisis and Force Majeure Proposal, p.9.

88 United Nations Human Rights Office of the High Commissioner, ‘OHCHR | Italy Failed to Rescue More than 200 Migrants, UN Committee Finds’, 27 January 2021, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26691&LangID=E>, accessed 1 December 2021.

89 ICCPR Human Rights Committee, A.S., D.I., O.I. and G.D. v Italy, 19 May 2017, CCPR/C/130/D/3042/2017, para. 7.8.

90 Ibid., para. 7.5.

led States, as predicted in Zimmermann's dissenting opinion,⁹¹ to avoid situations which may convey the impression of a special relationship of dependency. It comes therefore at no surprise that distress calls remain unanswered.

The completion of search and rescue operations is often hampered by non-assignment of port safety. Although States are under an obligation to swiftly assign a port for disembarkation of rescued people, in several instances they fail to do so and leave people remaining on board for an unreasonably extended period. The practice also discourages commercial vessels from fulfilling their search and rescue obligation because of the fear of being kept away from the port and incurring additional costs, which could be avoided by a timely assignment of a place of safety. Unfortunately, the New Pact also fails to address the questions of coordination between EU member States for disembarkation where search and rescue operations are not coordinated by Frontex. Instead, the New Pact focuses on its aim to strengthen cooperation with countries of origin and transit "to prevent dangerous journeys and irregular crossings, including through tailor-made Counter Migrant Smuggling Partnerships with third countries".⁹² Nonetheless, the solidarity relocation system proposed by the New Pact can adversely affect the States' choice in allowing for disembarkation. The solidarity relocation foresees a mechanism, which functions based on the basic, pressure or crisis mode and remains dependent on the member States' engagement with the search and rescue Solidarity Response Plan.⁹³ The complex mechanism, however, has no enforcement measure, which could be implemented if member States do not comply with the Commission indications. The relocation system set up pursuant to the proposed Migration Management Regulation⁹⁴ relies exclusively on the good faith and mutual trust between member States.⁹⁵ There are thus considerable doubts about the efficiency of this mechanism meant to replace the ad hoc solidarity initiative following search and rescue disembarkation. Lack of a compulsory relocation scheme after disembarkation could bring States to the conclusion that there is no guarantee to benefit from solidarity relocation, so the safest way to go is to withhold any assignment of port of safety.

IV. Criminal and Administrative Proceedings Against Civil-Society Search and Rescue Organisations and Individuals

Another component of the search and rescue combat package at EU level is the administrative and criminal proceedings against NGOs or other private entities undertaking search and rescue operations. In administrative cases, the caused obstruction is justified based on the ostensible non-compliance of the seized vessels with safety and security requirements or technical irregularities (e.g. *Mare Liberum*⁹⁶ and *Alan Kurdi*⁹⁷). In criminal cases, on the other hand, the accusation is mainly about aiding and facilitating illegal migration, refusal of obedience to orders or other charges (e.g. *Sea-Watch 3: Carola Rackete*⁹⁸ and *IUVENTA*⁹⁹).

91 *Ibid.*, Annex 2, para.4.

92 EU Pact, p.14.

93 Francesco Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact – EU Immigration and Asylum Law and Policy', *New Migration Pact (blog)*, 20 October 2020, <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>, accessed 1 December 2021.

94 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]', 23 September 2020, COM (2020) 610 final.

95 Violeta Moreno-Lax, 'A New Common European Approach to Search and Rescue? Entrenching Proactive Containment – EU Immigration and Asylum Law and Policy', 3 February 2021, <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment>, accessed 1 December 2021.

96 Sea-Watch Legal Aid Fund, 'Amendment to the Regulation to Prevent Civil Sea Rescue', <https://swla.eu/en/project/mare-liberum-federal-ministry-of-transport-germany>, accessed 29 September 2021.

97 Sea-Watch Legal Aid Fund, 'Suing for the Right to Save Lives', <https://swla.eu/en/project/alan-kurdi-port-state-control-palermo-court>, accessed 29 September 2021.

98 Sea-Watch Legal Aid Fund, 'Sued for Saving People', <https://swla.eu/en/project/sea-watch-3-seized-lampedusa-carola-rackete>, accessed 29 September 2021.

99 Sea-Watch Legal Aid fund, 'Seizure of IUVENTA and Prosecution of Its Crew', <https://swla.eu/en/project/iuventa-seizure>, accessed 29 September 2021.

The first legal proceeding against humanitarian aid volunteers in the Mediterranean dates back to 2016 against Team Humanity by Greece.¹⁰⁰ These actions reached a peak in 2018, resulting in most NGOs stopping their operations.¹⁰¹ The European Union Agency for Fundamental Rights, who collects data on NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them, reported that between 2016 and June 2021 Germany, Greece, Italy, Malta, the Netherlands and Spain initiated 58 proceedings against ships or individual crewmembers.¹⁰² During the first half of 2021 alone, eight new cases were opened in Italy, four of which concern vessels and administrative seizures and the rest concern criminal proceedings against individual crewmembers. Figure 3 shows the status of NGO ships involved in search and rescue operations in the Mediterranean Sea (updated 15 June 2021).

Figure 3: NGO ships involved in search and rescue operations in the Mediterranean Sea (until 15 June 2021)¹⁰³



As illustrated above, out of 19 assets, six are operational (in green) with two vessels performing search and rescue (*Geo Barents* and *Ocean Viking*) and four vessels and reconnaissance aircrafts undertaking monitoring activities (*Mytilene*, *Colibri 2*, *Seabird*, *Moonbird*), nine are not operational (in red) due to a blockade in the ports pending legal proceedings, and four are docked (in yellow) for mandatory maintenance work and temporary operation breaks.

The aggregated data by The European Union Agency for Fundamental Rights also shows that more than half of all proceedings (27) have ended in acquittal or release and only a few proceedings have resulted in condemnation (2). The rest of the proceedings are pending (24) or there is no information available about the case (3).¹⁰⁴ Here the question arises as to why, despite such a low success rate in administrative and criminal proceedings, EU member States keep using it? The answer lies in the fact that not necessarily the result but rather the proceeding itself is of significance for the EU member States.

¹⁰⁰ European Union Agency for Fundamental Rights, 'Table 2: Legal Proceedings by EU Member States against Private Entities Involved in SAR Operations in the Mediterranean Sea (June 2021)', 15 June 2021, https://fra.europa.eu/sites/default/files/fra_uploads/table_2_criminalisation_ngo_sar_as_of_june_2021_en.pdf, accessed 1 December 2021.

¹⁰¹ European Union Agency for Fundamental Rights, '2019 Update - NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations', European Union Agency for Fundamental Rights, 19 June 2019, <https://fra.europa.eu/en/publication/2019/2019-update-ngo-ships-involved-search-and-rescue-mediterranean-and-criminal>, accessed 1 December 2021.

¹⁰² European Union Agency for Fundamental Rights, 'June 2021 Update – Search and Rescue (SAR) Operations in the Mediterranean and Fundamental Rights', 18 June 2021, <https://fra.europa.eu/en/publication/2021/june-2021-update-ngo-ships-sar-activities>, accessed 1 December 2021.

¹⁰³ Ibid.

¹⁰⁴ European Union Agency for Fundamental Rights, 'Table 2: Legal Proceedings by EU Member States against Private Entities Involved in SAR Operations in the Mediterranean Sea (June 2021)', 15 June 2021, https://fra.europa.eu/sites/default/files/fra_uploads/table_2_criminalisation_ngo_sar_as_of_june_2021_en.pdf, accessed 1 December 2021.

The advantage of administrative and criminal proceedings for States is twofold. Firstly, keeping the option of initiating a proceeding open serves as a deterrence mechanism against NGOs. Regardless of the result, going through lengthy and costly procedures could dissuade activists from engaging in search and rescue operations. Secondly, the initiation of proceedings could keep NGOs away from search and rescue zones, and provide more time and space for EU collaborators to help it execute its border management programme. Moreover, the reluctance of EU national courts to rule for damages, incurred due to often-purposeful impediments to search and rescue operations, assures national authorities that they do not risk any accountability in the end for their arbitrary detention of vessels and individuals. In a recent case, the First Hall of the Civil Court in Malta dismissed the claim by Sea-Watch against Maltese authorities asking for remedies for the four-month illegal detention of *Sea-Watch 3* in the port of Valletta. Although the Maltese authorities received the registration and safely clearance by the end of August 2018, the authorisation to leave the port was delayed until October of the same year without further explanation.¹⁰⁵ The court substantiated its decision by referring to the necessity of the paperwork and even ordered the plaintiff to suffer two thirds of the costs of the case.¹⁰⁶ The administrative and criminal proceedings have been successfully instrumentalised to impede search and rescue by NGOs, but they have not totally brought saving-lives operations to a halt. Nevertheless, one should not forget that the real price of these proceedings is not paid by the NGOs but rather by those who could have been rescued but instead drowned.

At EU policy level, the New Pact proposes two soft laws, which directly concern search and rescue NGOs and their humanitarian assistance. The first instrument is the “Commission Recommendation on cooperation among member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities” (Search and Rescue Recommendation)¹⁰⁷ and the second one is the “Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorized entry, transit and residence” (Criminalisation Guidance).¹⁰⁸ The New Pact presents two main objectives for the above instruments: maintaining safety of navigation and ensuring effective migration management and preventing the criminalisation of humanitarian actors.¹⁰⁹ The Search and Rescue Recommendation¹¹⁰ recognised the valuable contribution of NGOs mainly in the Central Mediterranean to the rescue of people at sea and highlights the call by the European Parliament “for the support provided by private actors and NGOs in carrying out rescue operations at sea”.¹¹¹ Yet, the content of Search and Rescue Recommendation and Criminalisation Guidance suggests the EU pursues other goals: imposing a monitoring system and underpinning the criminalisation of search and rescue operations by private actors.

105 Sea-Watch Legal Aid Fund, ‘Unlawful Detention of the Sea-Watch 3’, <https://swla.eu/en/project/Unlawful-detention-sea-watch-3>, accessed 30 September 2021.

106 Matthew Agius, ‘2018 Detention of Sea Watch Vessel Justified by Paperwork Problems, Court Rules’, MaltaToday, 15 September 2021, http://www.maltatoday.com.mt/news/court_and_police/112075/2018_detention_of_sea_watch_vessel_justified_by_paperwork_problems_court_rules, accessed 1 December 2021.

107 Violeta Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment – EU Immigration and Asylum Law and Policy’, 3 February 2021, <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/>, accessed 1 December 2021.

108 Ibid.

109 EU Pact, p.14.

110 EU Pact, Search and Rescue Recommendation, Recital 5.

111 Ibid.

A. Monitoring System

The Commission believes that the regular presence of NGO vessels requires a specific need of enhanced coordination and cooperation between the vessels and national authorities,¹¹² because some NGO vessels conduct consecutive rescue operations on their own initiative before disembarking the rescued people at a place of safety.¹¹³ In the Commission's view, NGOs' involvement in complex and recurring search and rescue operations necessitates compliance with registration and safety and health requirements associated with their activities as a matter of public policy.¹¹⁴

As mentioned before in this Policy Brief, safety and security requirements and technical irregularities have often been used as premises to initiate administrative proceedings against NGOs while up to now none of these cases proves any violation of registration and safety rules. In fact, the Commission limits the compliance requirement to NGOs, who are not, or should not be, the only search and rescue actors in the Mediterranean. How about commercial and State vessels? And more importantly, how about the vessels of the Libyan Coast Guard who are called on a regular basis to bring migrants back to Libya? Why are they not required to comply with safety and security requirements? Contrary to the EU new approach, safety rules as enshrined in the Search and Rescue Convention are addressed to state-run civil services rather than private vessels.¹¹⁵ Furthermore, as for the coordination and cooperation between NGO vessels and national authorities, previous cases show that Frontex and national Maritime Rescue Coordination Centres have been reluctant to share the coordinates of vessels in distress with NGOs and often prioritise the Libyan Coast Guard or completely disregard distress calls. Thus, a reference to the regular presence of NGO vessels as the reason for cooperation seems inappropriate.

B. Underpinning Criminalisation

The Criminalisation Guidance prohibits the criminalisation of humanitarian assistance mandated by law as well as criminalisation of NGOs and other non-state actors as long as search and rescue operations comply with the relevant legal framework.¹¹⁶ Although the wording of the Guidance suggests an attempt to limit the criminalisation cases, the Commission has walked into a trap of setting a loosened rule with ample room for interpretation. It does not specify any criteria for humanitarian assistance nor does it provide an indication of what the relevant legal framework is.

Following the requirement of a coordinated search and rescue operation, the Commission obliges everyone involved in search and rescue activities to observe instructions received from the coordinating authority.¹¹⁷ This requirement has strongly been objected by referring to the International Convention for the Safety of Life at Sea¹¹⁸ which prohibits "other person ... shall ... prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safety of life at sea".¹¹⁹

112 EU Pact, Search and Rescue Recommendation, Recital 11.

113 Ibid., Recital 8.

114 Ibid., Recital 12.

115 Violeta Moreno-Lax, 'A New Common European Approach to Search and Rescue? Entrenching Proactive Containment – EU Immigration and Asylum Law and Policy', 3 February 2021, <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/>, accessed 1 December 2021.

116 Communication From the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 23 September 2020, C(2020) 6470 final, para. (4)(i&ii).

117 Ibid., para. (3).

118 SOLAS, Annex, Chapter. V, Regulation. 34-1.

119 Violeta Moreno-Lax, 'A New Common European Approach to Search and Rescue? Entrenching Proactive Containment – EU Immigration and Asylum Law and Policy', 3 February 2021, <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/>, accessed 1 December 2021.

Finally, the Commission leaves ample discretion to EU member States in using the possibility provided for in Article 1(2) of the Facilitation Directive, in order to distinguish between activities carried out for the purpose of humanitarian assistance and activities that aim to facilitate irregular entry or transit, and allows for the exclusion of the former from criminalisation.¹²⁰ This not only shows a green light to EU member States that they can indeed criminalise search and rescue activities, but also contradicts the Commission's objective to move away from ad hoc solutions and put in place a predictable system.¹²¹

4. Conclusions

The Central and Eastern Mediterranean continue to witness an increasing number of migrants who risk their lives to reach a safe place but instead they are pulled/pushed back to their unsafe point of departure if not drowned or disappeared. EU member States disregard their international obligation to save lives at sea and avail themselves of any opportunity to bring search and rescue by non-state actors to a halt. Initiating administrative and criminal proceedings against civil search and rescue organisations and individuals have become a common practice exercised with impunity, and the health crisis, which is not limited to the EU, is used as pretext to keep NGO search and rescue vessels at ports and withhold disembarkation.

At EU level, Frontex is also facing serious accusations of prioritising EU border management over human life and contributing to pushback and pullback practices in the Central and Eastern Mediterranean. 2020–2021 have witnessed the initiation of investigations by the European Parliament, European Ombudsman and European Court of Auditors into the work of Frontex. Frontex is also being taken to the Court of Justice of the European Union, under two independent complaints, for its non-compliance with human rights and rule of law. Sadly, with the New Pact, all hope for a more comprehensive, effective and human-centred approach towards the Mediterranean dilemma was also proved to be in vain.

The New Pact legitimises criminalisation of NGOs and individuals engaged in search and rescue activities, explicitly endorses outsourcing EU border management by giving money to Turkey and Libya, and approves that crises such as COVID-19 could be used as an excuse by the EU member States to derogate from solidarity relocation. All this contradicts what investigative journalists, civil-society and international organisations are calling for. It also ignores official reports by different EU bodies who express serious concerns about the violation of human rights.

While the New Pact and its legislative instruments are yet to go through the final adoption phase and two cases against Frontex are pending before the Court of Justice of the European Union, Human Rights at Sea suggests the following EU policy recommendations:

¹²⁰ Communication From the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 23 September 2020, C(2020) 6470 final, para. (5).

¹²¹ European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity', Text, New Pact on Migration and Asylum, 23 September 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706, accessed 1 December 2021.

5. Policy Recommendations

- 1 The EU must require its member States to respond to search and rescue needs in accordance with their international legal obligations;
- 2 The EU must explicitly ban and sanction any criminalisation and unfounded administrative proceedings against those organisations and individuals engaged in humanitarian assistance;
- 3 The EU must cease providing aid and assistance through financing the Libyan Coast Guard and Turkey in the knowledge that such aid is subsequently used for the purposes of violating human rights;
- 4 Frontex must stop sharing information with the Libyan Coast Guard and facilitating push/pullback practices in the Central and Eastern Mediterranean;
- 5 The EU and its member States must declare Libya as an unsafe place for the purposes of disembarkation following rescue and must prohibit EU-flagged vessels from disembarking in Libya;
- 6 The EU must ensure that any search and rescue operation carried out by the Libyan Coast Guard leads to disembarkation in an EU member State;
- 7 The EU must put an end to the EU–Turkey deal and its blanket return scheme;
- 8 The EU must amend its relocation scheme established in the proposed New Pact and set up a system which ensures a compulsory fair and swift relocation of rescued migrants after disembarkation;
- 9 The EU must ensure that Frontex fulfils its legal duties to protect fundamental human rights and has an independent, neutral and efficient internal complaint system;
- 10 The EU must secure a fair and effective control mechanism, which holds Frontex accountable for any violation of fundamental human rights.

Who We Are

BACKGROUND

Human Rights at Sea was established in April 2014. It was founded as an initiative to explore issues of maritime human rights development, review associated policies and legislation, and to undertake independent investigation of abuses at sea. It rapidly grew beyond all expectations and for reasons of governance it became a registered charity under the UK Charity Commission in 2015.

Today, the charity is an established, regulated and independent registered non-profit organisation based on the south coast of the United Kingdom. It undertakes **R**esearch, **A**dvocacy, **I**nvestigation and **L**obbying specifically for human rights issues in the maritime environment, including contributing to support for the human element that underpins the global maritime and fishing industries.

The charity works internationally with all individuals, commercial and maritime community organisations that have similar objectives as ourselves, including all the principal maritime welfare organisations.

OUR MISSION

To explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.



STAY IN CONTACT



We welcome any questions, comments or suggestions. Please send your feedback to: enquiries@humanrightsatsea.org



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CROSSING THE MEDITERRANEAN SEA: SEARCHED FOR BUT NOT RESCUED



Sandra Singh / sea-watch.org



HUMAN RIGHTS AT SEA

Human Rights at Sea is a Registered Charity in England and Wales No. 1161673. The organisation has been independently developed for the benefit of the international community for matters and issues concerning human rights in the maritime environment.

Its aim is to explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.

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