

INTRODUCTION TO THE TEMPORARY DEPRIVATION OF LIBERTY (DOL)

PRODUCED BY HOPE NOT HATE

IN CONSULTATION WITH HUMAN RIGHTS AT SEA

WHAT IS DEFEND EUROPE?

Defend Europe is an attempt by far-right activists to confront and block humanitarian rescue ships operating in the Mediterranean.

It is being led by key members of the European 'Identitarian' movement, a collection of far-right activists operating in France, Germany, Austria and Italy.

They have secured a ship and aim to disrupt and inhibit the vital efforts of NGOs saving the lives of migrants and refugees – many of whom are children – crossing the Mediterranean this summer.

This confrontational and dangerous project is organised by far-right activists with a long track record of anti-Muslim and anti-immigrant activism and while organised by Europeans it is being supported, funded and promoted by the extreme far-right around the world.

WHAT ARE THEY PLANNING?

Martin Sellner, co-leader of the Austrian Identitarian branch and main representative of the mission, stated in a video that the group would “block those ships from going to the Libyan coast”, and the group shared a graphic on social media titled ‘You Shall Not Pass’ depicting an NGO ship being blocked.

While they have indicated that while they won't stop NGOs rescuing refugees they may attempt to stop NGO ships returning to Europe. They have also said that they will “confront” NGO ships and “intervene” if they believe laws are being broken.

Defend Europe claim that they intend to return any refugees it comes into contact with to the Libyan coast. Both Sellner and the Defend Europe site's FAQ suggest they will do this by working with the Libyan coastguard as a “recon” ship: alerting them to migrants and refugees they have found.

INTRODUCTION TO THE TEMPORARY DEPRIVATION OF LIBERTY (DoL)

INTRODUCTION

In the context of busy daily operations saving life at sea by crews of private vessels, the consideration of the need by the shipmaster and/or crew to act to temporarily deprive an individual of their liberty (DoL)¹ and consequently deprive them of a fundamental individual human right, should be a main planning and operational consideration for search and rescue (SAR) NGO crews.

Such an action may originate from the need to protect the vessel or craft² on which you are working, to protect yourself as an individual from a threat to your personal safety, to protect the safety and security of others, to prevent an individual from committing a criminal act against you, a colleague or another person; or to protect a victim from potential abuse including acts of sexual violence.

This introduction and voluntary guidance is based upon pre-existing guidance published by Human Rights at Sea, tailored to the SAR NGO community.

ASSUMPTIONS

- Your organisation is aware of both the need and requirement for training in terms of deprivation of liberty relating to incidents that may involve a need to temporarily deprive an individual of their liberty in order to protect yourself, your colleagues, or the vessel or craft upon which you are working while at sea undertaking rescue operations.
- Your organisation has established actions and procedures relating to responses to potential or actual need to temporarily deprive an individual of their liberty by a shipmaster and/or crew.
- Individual organisations will have researched the applicable legislative DoL provisions of their flag State and apply them on SAR operations.
- SAR NGO crews may have recourse to individual national legislation explicitly covering the lawful temporary deprivation of liberty, including the basis upon and context in which civilians may use such powers.
- SAR NGO crews do not generally have constabulary powers conferred on them, nor do they carry constabulary officers onboard as part of the vessel's crew complement.

- SAR NGO crews cannot formally arrest or detain individuals as per the powers conferred on a State's constabulary officer.
- A court of law will ultimately determine whether or not any deprivation of liberty was lawful under the circumstances it was undertaken.

SCOPE

This Guidance ('the Guidance') covers the DoL by the Shipmaster, and/or by crew of persons suspected of having committed a criminal offence at sea, notably in immediate proximity to, or on board a private vessel, up until their handover to the competent State authorities³ for further investigation, prosecution or release. It also includes the situation where, for their own protection, an individual may be temporarily deprived of their liberty (DoL) in order to prevent a criminal act being undertaken against them.

UNDERLYING PRINCIPLES

This Guidance is based on two underlying core principles:

1. First, **human rights apply at sea as they do on land.**
2. Second, DoL is an **exceptional measure** since it interferes with the general right to liberty.

FUNDAMENTAL RULES

Based on the two underlying principles, the Guidance substantiates two fundamental rules:

1. Fundamental Rule 1

Authorisation for DoL must pre-exist and its requirements must be fully met at the beginning and during the entire period of DoL. Shipmasters and crew can only undertake acts relating to DoL where they are unequivocally authorised to do so by DoL law, and where all the requirements set forth in the respective authorisation are fully met at the beginning and during the entire period of DoL.

2. Fundamental Rule 2

DoL must be lawful and comply with human rights law. Shipmasters and crew must respect and apply the applicable domestic and international law governing DoL on board a private vessel, most notably the fundamental principles of relevant human rights law.

GUIDANCE OBJECTIVES

The respect and application of these two fundamental rules by Shipmasters and crew when undertaking acts relating to DoL contributes to achieving two objectives:

- First, that the human rights of criminal suspects at sea are safeguarded at all times; and,
- Second, that seafarers are not criminalised, or held liable in any other way, for acts relating to DoL.

AUTHORISATION AND REQUIREMENTS FOR DEPRIVATION OF LIBERTY (FUNDAMENTAL RULE 1)

1. **RIGHT TO LIBERTY.** The right to liberty of criminal suspects applies at sea as it does on land.
2. **DEPRIVATION OF LIBERTY.** The right to liberty is not absolute. In exceptional cases and in respect of the requirements and procedures set out in applicable domestic and international law, a criminal suspect may be deprived of his or her liberty.
3. **ARREST AND DETENTION.**
 - a. **By State authorities.** As a general rule, only competent State authorities may deprive a criminal suspect of his or her liberty. This is generally referred to as 'arrest' and 'detention'.
 - b. **By private persons vested with law enforcement powers.** Exceptionally, private persons are vested with, delegated or otherwise lawfully authorised by a State to exercise the law enforcement powers of arrest and detention.
4. **PRIVATE ARREST AND DETENTION**
 - a. **By private persons not vested with law enforcement powers.** Private persons not vested with the law enforcement powers of arrest and detention may, exceptionally, be allowed to deprive a criminal suspect of his or her liberty in their private capacity. This is generally referred to as 'private arrest and detention' or 'citizen's arrest'.
 - b. **Legal basis for private arrest and detention.** Whether a private person is authorised to engage in an act of private arrest and detention is governed by domestic and international law. While the approaches to private arrest and detention vary considerably between jurisdictions, three groups of rules authorising private arrest and detention can be distinguished:
 1. **Explicit rules on private arrest.** Rules explicitly allowing for private persons to hold a criminal suspect up until his or her handover to the competent State authorities;
 2. **Rules on self-defence.** Rules of criminal law pertaining to self-defence or defence of third persons implicitly allowing for holding the attacker until his or her handover to the competent State authorities;

1 Deprivation of Liberty means the removal of a person's freedom of movement.

2 Includes Rigid Hulled Inflatable Boat (RHIB).

3 Officially recognised State police, customs or judicial authorities.

- 3. Rules on handover of criminal suspects.** Rules allowing for private persons to hand over criminal suspects, which imply that private persons may deprive a criminal suspect of his or her liberty up and until his or her handover to the competent State authorities (for example, Article 8 SUA Convention providing the Shipmaster with a right to delivery).

5. AUTHORISATION AND REQUIREMENTS.

Private persons may only undertake acts relating to DoL where they are unequivocally authorised to do so by DoL law, and where all the requirements set forth in the respective authorisation are fully met at the beginning and during the entire period of DoL.

SPECIFIC GUIDANCES

DEPRIVATION OF LIBERTY AUTHORISED BY A SHIPMASTER

Authorisation. A Shipmaster may only authorise and oversee the DoL of a criminal suspect by crew where he or she is unequivocally authorised to do so by DoL law.

Requirements. For each act of DoL, the Shipmaster must ensure that the requirements set out in the applicable authorisation are fully met at the beginning and during the entire period of DoL.

Consulting authorising State. Shipmasters must, where possible, consult with the competent authorities of the authorising State before authorising an act of DoL.

Shipowner's legal advice and permission. Shipmasters must, where possible, seek the legal advice and express permission of the shipowner and/or flag State to authorise and oversee acts relating to DoL.

Shipmaster's ultimate responsibility. The Shipmaster has the ultimate responsibility for the safety and security of the vessel under his or her command. This includes acts relating to DoL undertaken by the crew.

DEPRIVATION OF LIBERTY BY THE CREW

Authorisation. The crew can only deprive a criminal suspect of his or her liberty where they are unequivocally authorised to undertake this exceptional measure by the Shipmaster and by DoL law.

Requirements. For each act related to DoL, the crew must ensure, together with the Shipmaster, that the requirements set out in the applicable authorisation are met at the beginning and during the entire period of DoL.

Respect Shipmaster's ultimate responsibility. The crew must respect the Shipmaster's ultimate responsibility for the safety and security of the vessel under his or her command at all times, which includes acts relating to DoL undertaken by the crew.

LAWFUL DEPRIVATION OF LIBERTY IN RESPECT FOR HUMAN RIGHTS LAW (FUNDAMENTAL RULE 2)

DEPRIVATION OF LIBERTY MUST BE LAWFUL

Shipmasters and crew must respect and apply DoL law, most notably the fundamental principles of relevant human rights law when depriving a criminal suspect of his or her liberty.

RESPECT FOR HUMAN RIGHTS OF CRIMINAL SUSPECTS

Arrest and detention. Shipmasters and crew vested with law enforcement powers to arrest and detain are under an obligation to respect and protect the human rights of criminal suspects deprived of their liberty on board a private vessel as set out in applicable international and domestic human rights law.

Private arrest and detention. Shipmasters and crew undertaking private arrest and detention of criminal suspects on board a private vessel must be aware of and respect the fundamental principles of relevant human rights law.

SPECIFIC HUMAN RIGHTS TO BE RESPECTED

The human rights of criminal suspects deprived of their liberty on board a private vessel must be respected. They include, but are not limited to, the following:

Procedural safeguards.

- **Arrest and detention:** Criminal suspects arrested and detained on board a private vessel by persons vested with law enforcement powers must be granted the procedural safeguards as established by applicable international and domestic human rights law. These include, but are not limited to, the right to be informed about the reason for the arrest and continued detention, as well as about a possible surrender, and the rights to be brought promptly before a judge and to legal representation.
- **Private arrest and detention:** Shipmasters not vested with the law enforcement powers of arrest and detention must notably ensure that a criminal suspect deprived of his or her liberty is informed about the reasons of his or her private arrest, continued private detention and about a potential handover to the

competent State authorities. Further, the Shipmaster must inform relevant authorities as soon as possible about the private arrest and detention and must organise and implement the handover of the criminal suspect to the competent State authorities without delay.

Treatment of criminal suspects. Shipmasters and crew responsible for the supervising and handling of criminal suspects deprived of their liberty on board a private vessel must respect fundamental principles of relevant human rights that include, as a minimum, the following:

- **Humane treatment.** They must treat criminal suspects with humanity and with respect for their inherent human dignity.
- **Physical and moral integrity.** They are prohibited from subjecting criminal suspects to torture or to cruel, inhuman or degrading treatment.
- **Prohibition of discrimination.** They are prohibited from discriminating against criminal suspects based on any ground whatsoever.

CHECKLISTS FOR ACTORS INVOLVED IN DEPRIVATION OF LIBERTY

ENSURING APPLICATION OF FUNDAMENTAL RULES

In order to ensure the application of the two fundamental rules in relation to DoL on board private vessels, the responsibilities of the DoL actors in the maritime, fishing and security industries are set out below in the form of checklists.

MAIN ACTORS' RESPONSIBILITIES.

The main actors involved in acts relating to DoL are:

- i. Shipowners (as employers).
- ii. Shipmasters.
- iii. Crew.

The main actors' responsibilities are divided into two distinct stages:

- i. Pre-transit planning and in-transit.
- ii. During and after DoL incidents.

SHIPOWNERS' RESPONSIBILITIES

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Shipowners' responsibilities in relation to DoL on board private vessels include, but are not limited to, the following:

PRE-TRANSIT PLANNING AND IN-TRANSIT

Legal frameworks and policy relating to DoL on board private vessels

- Responsibility to establish a DoL policy.
- Responsibility to set out to the Shipmaster and crew the applicable DoL law and policy.
- Responsibility to ensure that an external auditing of the DoL policy is regularly undertaken and recorded.
- Responsibility to instruct the DoL policy.

Respect of DoL law and policy by Shipmaster and crew

- Responsibility to ensure that the Shipmaster and crew understand and apply applicable DoL law and policy.
- Responsibility to ensure that the understanding and application of applicable DoL law and policy is a requirement for the Shipmaster and crew's employment and maintenance of the employment contract.
- Responsibility to ensure that the Shipmaster and crew regularly undergo training and instruction on applicable DoL law and policy.
- Responsibility to monitor and ensure the Shipmaster and crew's compliance with applicable DoL law and policy.
- Responsibility to establish a mechanism for confidentially reporting cases of non-compliance with applicable DoL law and policy directly to the shipowner without internal or external interference to that process.

Insurance. Responsibility to ensure that insurance cover is in place to protect against potential claims arising from instances of DoL.

DURING AND AFTER DOL INCIDENTS

Situations of non-compliance with DoL law and policy by Shipmasters and crew

- Responsibility to efficiently and effectively investigate and address with reports of non-compliance with applicable DoL law and policy on board a private vessel in a transparent and lawful manner.
- Responsibility to take the necessary measures against Shipmaster, and crew for not complying with applicable DoL law and policy on board a private vessel, including informing the competent State authorities of the incident.

SHIPMASTERS' RESPONSIBILITIES

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Shipmasters' responsibilities in relation to DoL on board private vessels include, but are not limited to, the following:

PRE-TRANSIT PLANNING AND IN-TRANSIT

Respect of DoL law and policy by Shipmaster

- Responsibility to understand and apply applicable DoL law and policy.
- Responsibility to regularly undergo training and instruction on applicable DoL law and policy.

Respect of DoL law and policy by crew

- Responsibility to ensure that crew embarked, or to be embarked, and who are authorised to undertake acts relating to DoL, understand and fully apply applicable DoL law and policy.
- Responsibility to ensure that crew embarked, or to be embarked, and who are authorised to undertake acts relating to DoL, regularly undergo training and instruction on applicable DoL law and policy.

DURING AND AFTER DOL INCIDENTS

Authorisation of and requirements for DoL (Fundamental Rule 1)

- Responsibility to only authorise and oversee acts relating to DoL by crew if unequivocally authorised to do so by applicable DoL law and policy.
- Responsibility to ensure that the requirements for DoL set out in the respective authorisation are fully met at the beginning and during the entire period of DoL.
- Right to decide not to authorise DoL of a criminal suspect if to do so would interfere with the safety and security of the ship.

Respect for DoL law and human rights (Fundamental Rule 2)

- Responsibility to ensure that DoL complies with applicable DoL law and policy, notably that procedural safeguards are granted and that the treatment of criminal suspects complies with human rights law.
- Responsibility not to commit, aid and abet, incite or participate in any form of human rights violation and to refrain from any abuse of criminal suspects.
- Responsibility to oversee, either directly or through the delegated authority of another officer, acts relating to DoL undertaken by crew.
- Responsibility to prevent the human rights of criminal suspects from being violated or abused in any way whatsoever.
- Responsibility to immediately report to the shipowner and the flag State any alleged human rights violations or abuses, whether directly witnessed by the Shipmaster, or reported to him by any other person, including the criminal suspect, and to update the shipowner following due investigation by the Shipmaster.

CREW'S RESPONSIBILITIES

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The crew's responsibilities in relation to DoL on board private vessels include, but are not limited to, the following:

PRE-TRANSIT PLANNING AND IN-TRANSIT

Respect for DoL law and policy by crew

- Responsibility to understand and apply applicable DoL law and policy.
- Responsibility to regularly undergo training and instruction on applicable DoL law and policy.

DURING AND AFTER DEPRIVATION OF LIBERTY INCIDENTS

Authorisation and requirements for DoL (Fundamental Rule 1)

- Responsibility to only undertake acts relating to DoL if authorised by applicable DoL law and policy.
- Responsibility to ensure, together with the Shipmaster, that the requirements for DoL set out in the respective authorisation are fully met at the beginning and during the entire period of DoL.

Respect for DoL law and human rights (Fundamental Rule 2)

- Responsibility to ensure that DoL complies with applicable DoL law and policy, notably that procedural safeguards are granted and treatment of criminal suspects complies with human rights law.
- Responsibility not to commit, aid and abet, incite or participate in any form human rights violation and to refrain from any abuse of criminal suspects.
- Responsibility to prevent the human rights of criminal suspects being violated or abused in any way whatsoever.
- Responsibility to immediately report to the Shipmaster all alleged human rights violations or abuses, whether directly witnessed by the crew, or reported to the crew by any other person, including the criminal suspect.

INCIDENT REPORTING

All incidents involving the temporary deprivation of liberty of any individual by the crew (individual or collective) of a SAR NGO vessel craft must be immediately recorded within the vessel's log, recorded on all available media means, reported to individual organisation's operations rooms and as so determined, reported to Maritime Rescue Co-ordination Centres and State constabulary forces where assistance is required upon arrival in a port State's jurisdiction.

DEFINITIONS

Arrest means the seizure of a person by a competent State authority or competent State official or a private person unequivocally vested with, delegated or otherwise lawfully authorised by a State to exercise this law enforcement power.

Competent authorities means State law enforcement, prosecutorial or judicial authorities concerned with implementing appropriate law enforcement measures.

Crew means officers and ratings, civilian volunteers and commercially trained crews.

Criminal offence means an illegal act or omission of any type entailing a penal sanction as defined by applicable international or domestic law.

Criminal suspect means an individual who is reasonably suspected of having been involved in the commission of a criminal offence.

Deprivation of Liberty (DoL) law means the applicable domestic and international law pertaining to DoL on board private vessels relating to the specific voyage and routing.

Deprivation of Liberty (DoL) policy means a company's human rights policy which explicitly addresses how DoL on board private vessels complies with applicable DoL law.

Deprivation of Liberty (DoL) means the removal of a person's freedom of movement.

Detention means the keeping of an arrested person in custody by a competent State authority or competent State official or a private person unequivocally vested with, delegated or otherwise lawfully authorised by a State to exercise this law enforcement power.

Human Rights mean all rights inherent to all human beings who are equally entitled to them without discrimination. These rights are all interrelated, interdependent and indivisible.

Private arrest and detention means the removal of a person's freedom of movement by a private person not possessing any law enforcement powers but authorised to do so by law.

Private vessel means every type of vessel that is not a warship or otherwise State owned.

Shipmaster means the master or captain of a private vessel.

INTERNATIONAL INSTRUMENTS AND CASE LAW

1. The Universal Declaration of Human Rights (UDHR), 1948.
2. The International Covenant on Civil and Political Rights (ICCPR), 1966.
3. The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988.
4. The UN Guiding Principles on Business and Human Rights 2011.
5. United Nations Convention on the Law of the Sea (UNCLOS) 1982.
6. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), Rome, 1988.
7. International Ship and Port Facility Security (ISPS) Code 2004.
8. International Convention for the Safety of Life at Sea (SOLAS), 1974.
9. EU Port Security Directive – Directive 2005/65/EC.
10. ISO 28007-1:2015 Procedures for Private Maritime Security Companies (2015).
11. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1953.
12. American Convention on Human Rights, Pact of San José, 1978.
13. African Charter on Human and People's Rights, Banjul Charter, 1986.
14. Arab Charter on Human Rights, 2008.
15. Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, 2012.
16. The *MV SAIGA (No.2) Case (St. Vincent and the Grenadines v. Guinea)*, 1 July 1999.
17. ECtHR, *Ali Samatar and Others v. France*, applications nos. 17110/10 and 17301/10 (4 December 2014).
18. ECtHR, *Hassan and Others v. France*, application nos. 46695/10 and 54588/10 (4 December 2014).
19. ECtHR, *Medvedyev and Others v. France*, application no. 3394/03 (29 March 2010).
20. ECtHR, *Rigopoulos v. Spain*, application no. 37388/97 (12 January 1999).