

CDDH comments on Parliamentary Assembly Recommendations 2047(2014) – “The large-scale arrival of mixed migratory flows on Italian shores”

CDDH: 82nd meeting – 19/21 November 2014 CDDH(2014)R82

1. The Steering Committee for Human Rights (CDDH) takes note of the Parliamentary Assembly’s Recommendation 2047 (2014) on “The large-scale arrival of mixed migratory flows on Italian shores”, a topic of persistent concern both in Europe and beyond. Given recent data on the ‘alarming increase’ in the number of deaths occurring during irregular crossings of the Mediterranean Sea every year,¹ the CDDH agrees on the crucial importance of increased efforts to prevent these humanitarian tragedies and concurs that the Council of Europe (CoE) has a vital role to play in tackling human rights challenges arising in this area.
2. The CDDH takes note of the Assembly’s request (para. 4.1) to reflect on the manner of introducing a new international crime, when persons obtain financial benefit, directly or indirectly, for the transportation of people in unseaworthy vessels, which carries risks of death or injury. The CDDH suggests that such a reflection is more appropriately dealt with by the European Committee on Crime Problems (CDPC) as well as by the Committee of Legal Advisers on Public International Law (CAHDI). The CDDH also wishes to draw attention to the already existing international instrument in the field, the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, which explicitly calls on States Parties to criminalize the smuggling of migrants and ancillary acts, when these are committed with intent and with the aim of obtaining, directly or indirectly, financial or material gain.² Rather than duplicating international efforts, the CDDH proposes that this Protocol should be strengthened by calling on all states not having ratified it, to do so swiftly,³ and to enhance international cooperation in the implementation thereof.
3. Concerning paragraphs 4.2 and 4.3 of the Assembly’s Recommendation, the CDDH contends that these may be discordant with well-established requirements of international law, i.e. the principle of *non-refoulement*, and in particular the jurisprudence of the European Court of Human Rights (ECtHR). The CDDH draws attention to the judgment of the ECtHR in the case of *Hirsi Jamaa and Others v. Italy* (2012), a case explicitly referred to in the Recommendation.

¹ UNHCR, “Mediterranean crossings more deadly a year after Lampedusa tragedy”, 02.10.14, at: <http://www.unhcr.org/print/542d12de9.html> (accessed: 03.10.14).

² UN Protocol, Art. 6. It is important to make a legal distinction between smuggling of migrants and human trafficking. That said, irregular migrants are at risk of being trafficked (see in this context, the [Council of Europe Convention on Action against Trafficking in Human Beings](#), the work of the [Group of Experts on Action against Trafficking in Human Beings](#) (GRETA) generally, as well as the [UN Global Plan of Action to Combat Trafficking in Persons](#)).

³ Ratification status: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en (accessed: 02.10.14).

In *Hirsi Jamaa*, the Court held that while Contracting States are free to devise their own immigration policies, this right is circumscribed by Article 3 (freedom against torture or inhuman or degrading treatment) of the European Convention on Human Rights (ECHR), where the removal of a person would expose him/her to a real risk of facing such treatment in the receiving country, irrespective of whether this person was intercepted in the waters of a non-EU country or international waters. The Court reiterated the need for an assessment of individual circumstances (prohibition of collective expulsions of aliens, Art. 4, Prot. 4), and access to an effective remedy (Art. 13). Given the foregoing, the CDDH submits that any arrangements for automatically returning people to a non-EU country, as suggested in the Recommendation, would risk contravening the ECHR's requirements.

4. The need to address possible issues encountered in the implementation of the *Hirsi Jamaa* case is reflected both in PACE Recommendations 2047 (2014) and 2046 (2014), albeit in diverging ways (*see CDDH reply to PACE Rec 2046 (2014), para. 4*). The CDDH takes note of the Assembly's request in Recommendation 2047 (2014) to "make this judgment compatible" with CoE Member States' right to draw up their own immigration policies. In this context, the CDDH refers to the Court's position quoted above, that the Contracting States' freedom to devise their own immigration policies does not relieve them from honouring their undertakings under the Convention, and to comply with the Court's judgments in any specific case. It is indeed for the Respondent State to find, under the supervision of the Committee of Ministers, the most appropriate ways of complying with the judgments, and to adapt their immigration policies accordingly. Therefore it is expected that the Committee of Ministers will continue to diligently fulfill its duty to supervise the adoption of the measures required by the *Hirsi Jamaa* judgment in accordance with Article 46 of the ECHR.

5. The CDDH takes note of the Assembly's request to consider the necessity of an extensive review of the "Dublin Regulation" and its implementation. Although the Council of Europe's activities, including ECtHR jurisprudence, have concrete repercussions on the manner in which the Regulation is applied, the CDDH considers it unsuitable for the Council of Europe to assume any role in the review of a European Union (EU) Regulation. The CDDH suggests that the Council of Europe could only encourage its member States concerned to ensure the proper application of the Dublin Regulation – and if necessary the adaptation thereof – so as to be in conformity with their obligations under the Convention, ECtHR judgments and other CoE instruments.

Recommendation 2047(2014)

Final version

The large-scale arrival of mixed migratory flows on Italian shores

Parliamentary Assembly

1. The Parliamentary Assembly refers to its [Resolution 2000 \(2014\)](#) on the large-scale arrival of mixed migratory flows on Italian shores.
2. It considers that the Council of Europe has an important role to play in assisting Italy and other member States in dealing with the human rights challenges of mixed migration flows across the Mediterranean, including the respect of *non-refoulement*, as has been highlighted by the Assembly recently in [Recommendation 2010 \(2013\)](#) “Migration and asylum: mounting tensions in the eastern Mediterranean”.
3. The recent tragic events off the coast of Lampedusa and in particular one incident in October 2013, in which well over 350 people drowned within sight of land, as well as other incidents in April-May 2014, have underscored the urgent need for increased efforts to prevent these humanitarian tragedies.
4. The Assembly therefore recommends that the Committee of Ministers make use of the expertise of the Council of Europe to help tackle the human rights challenges arising from these mixed migration flows. It recommends in particular that the Committee of Ministers:
 - 4.1. launch a reflection on how best to introduce a new international crime, whether or not defined as a crime against humanity, when a person receives a financial benefit, directly or indirectly, for transporting people in a vessel which is unsafe for the purpose and which may endanger life or cause death or injury at sea;
 - 4.2. open negotiations to ensure that migrants who are intercepted within the territorial waters of a non-European Union country can be returned automatically to that country;
 - 4.3. encourage the authorities of the countries concerned to open negotiations on the modalities and conditions of return to countries of embarkation of migrants intercepted in international waters;
 - 4.4. make it a top priority in the coming year to find solutions to the issues arising from the judgment of the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy* (judgment of 23 February 2012, Application No. 27765/09) and make this judgment compatible with the established principle that each member country of the Council of Europe is entitled to maintain control over its own borders and to grant asylum or a lesser form of international protection to those who meet the necessary requirements;
 - 4.5. consider the need for an extensive review of the Council of the European Union Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, also known as the “Dublin Regulation”, and its implementation.