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Third party intervention
by the Council of Europe Commissioner for Human Rights

under Article 36, paragraph 3, of the European Convention on Human Rights

Application No. 21660/18
S.S. and others v. Italy

Introduction

1. On 12 September 2019, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of her decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning the case of *S.S. and others v. Italy*. The case relates to the interception and rescue operation of a migrant dinghy in distress in the Mediterranean Sea, carrying a group of around 150 persons, including the 17 applicants, who had left Libya, and the alleged human rights violations resulting from this operation.

2. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.[1]

3. The effective protection of the human rights of migrants, asylum-seekers and refugees, including those travelling by sea, is a priority theme for the Commissioner. This intervention is based on the work of the Commissioner, as well as her predecessors,[2] on protecting migrants, asylum seekers and refugees who attempt to cross the Mediterranean in an effort to reach Council of Europe member states (hereinafter: 'member states'), in particular Italy. It builds especially on the Commissioner's Recommendation 'Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean' (hereinafter: 'the Commissioner's Recommendation'), published in June 2019.[3] The Recommendation analyses current developments regarding the rights of refugees, asylum seekers and migrants in the Central Mediterranean and provides detailed guidance to member states on ensuring the effective protection of those rights. It covers a wide range of issues, including effective search and rescue coordination and capacity, the prompt and safe disembarkation of rescued persons, co-operation with non-governmental organisations (NGOs), co-operation with third countries, and the provision of safe and legal routes. Whilst these recommendations should be seen holistically, in the current submission the Commissioner particularly focuses on a limited number of issues which she believes are of particular relevance to the case at hand.

4. In Section I of the present submission, the Commissioner provides an overview on the legal frameworks she considers of particular relevance to the current case. Section II deals with the human rights implications of the return of persons intercepted or rescued at sea to Libya. Section III describes developments in such returns to Libya, in particular the shift from direct returns by member states to increasing interceptions and returns by the Libyan Coast Guard. Section IV discusses one key element in this shift, namely the support to and co-operation with the Libyan Coast Guard by member states, in particular Italy. Section V provides observations on another key element of this shift: the way in which member states deal with incoming distress calls and

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[1] Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

[2] See, among others, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 13 to 15 January 2009, CommDH(2009)16 of 16 April 2009; Letters from Thomas Hammarberg, Commissioner for Human Rights, to Italy and Malta, concerning migrants' rights, 25 August 2009; Commissioner Thomas Hammarberg, Issue Paper 'Criminalisation of Migration in Europe – Human Rights Implications', 2010; Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Italy from 26 to 27 May 2011, CommDH(2011)26 of 7 September 2011; Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Italy from 3 to 6 July 2012, CommDH(2012)26 of 18 September 2012; Letter from Nils Muižnieks, Commissioner for Human Rights, to the Italian Minister of the Interior, Marco Minniti, 28 September 2017; Letter from Dunja Mijatović, Commissioner for Human Rights, to the Italian Prime Minister, Giuseppe Conte, 31 January 2019.

[3] Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019.

the coordination of specific rescue operations. Section VI provides the Commissioner's concluding observations.

I. Overview of the applicable legal framework

5. The question of states' responses to the crossings of refugees, asylum seekers and migrants in the Central Mediterranean brings into focus the legal framework for search and rescue (SAR) and treatment of survivors under international maritime law, as well as the provisions of international human rights and refugee law. As emphasised in the Commissioner's Recommendation, the adequate protection of the human rights of these persons requires a reading of maritime law on the one hand, and human rights and refugee law on the other, as being consistent with each other.[4]

6. This is particularly the case for the protection of the right to life. In this context, the UN Human Rights Committee has noted that the right to life under the International Covenant on Civil and Political Rights (ICCPR) requires states to respect and protect the lives of individuals who find themselves in a situation of distress at sea, in accordance with their obligations under maritime law.[5]

7. Furthermore, as acknowledged by the Committee of Ministers of the Council of Europe:

> *"the protection of the right to life is part of the core of the European Convention on Human Rights and one of the fundamental values of the democratic societies that make up the Council of Europe. It is imperative for member States to fully respect their legal obligations with regard to protecting human life at sea […]."*[6]

8. The obligation to come to the assistance of those in distress at sea constitutes one of the oldest maritime obligations. Member states are bound to take action to preserve life at sea regardless of the persons' nationality, legal status, or the circumstances in which they are found.[7] The centrality of the protection of the right to life at sea is evident from the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the International Convention for the Safety of Life at Sea of 1974, as amended, (SOLAS), and the International Convention on Maritime Search and Rescue of 1979, as amended, (SAR).[8]

9. In addition to effective action to come to the assistance of persons in distress, an important question where international maritime law, human rights and refugee law meet is in their disembarkation on land. Under maritime law, such disembarkation must happen in a place of safety,[9] which is a place where survivors' safety of life is no longer threatened, where their basic needs can be met, and from where transportation arrangements can be made for survivors' next or final destination.[10] A human rights and refugee law-consistent reading further broadens these requirements. This would entail, at a minimum, protection of rights under Articles 2 and 3, as well

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[4] Commissioner's Recommendation, p. 16.
[5] HRC, CCPR General Comment No. 36 (30 October 2018) on Article 6 ICCPR on the right to life, CCPR/C/GC/36, paragraph 63.
[6] Committee of Ministers, Reply to PACE Recommendation 2137(2018), 'International obligations of Council of Europe member States: to protect life at sea', Doc. 14831, 14 February 2019.
[7] Chapter 2, paragraph 2.1.10 of Annex to the International Convention on Maritime Search and Rescue of 1979 (SAR), 1979.
[8] Article 98(1) of UNCLOS, 1982, states that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, *inter alia*, to render assistance to any person found at sea and in danger of becoming lost. Chapter 2, paragraph 2.1.10 of Annex to SAR, 1979, states, "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found". Regulation 15 of Chapter V of the Annex to SOLAS, obliges each State to "ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea around its coasts."
[9] SAR Convention, Chapter 1.3.2.
[10] IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, paragraph 6.12.

as Article 4 of Protocol 4 of the Convention. The Court's case law, and in particular the Grand Chamber's judgment in *Hirsi Jamaa and Others v. Italy*, has been essential in ensuring a human rights compliant treatment of those rescued at sea.

10. In making her observations, the Commissioner is mindful of the Court's case-law that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which member states have undertaken to secure to everyone within their jurisdiction.[11] The Commissioner also notes that the Court has repeatedly stressed that the Convention is a living instrument, and that changing patterns of migration mean that the interpretation of the Convention needs to adapt accordingly, in order to afford effective protection.

II. Returns of migrants to Libya

11. The Commissioner observes that there have been consistent reports, by UN bodies and NGOs, of the fact that migrants returned to Libya are routinely deprived of their liberty, arbitrarily and indefinitely, in Libya's detention centres, where they are subjected to torture or inhuman or degrading treatment, faced with other abuse, including rape, and sometimes sold into slavery.[12] The Commissioner also notes that information about this situation in Libya has been widely available for a considerable period of time, including when the incident that is at issue in the current case took place.[13] In this respect she specifically notes that her predecessor, in February 2017, expressed concern about Libya's notoriously bad human rights record and severe political instability.[14] Based on grave concerns about returns to Libya, in September 2017 he also wrote to the then-Minister of the Interior of Italy to seek clarification about the country's deployment of ships in Libyan territorial waters and the potential consequences for intercepted migrants, reminding the Italian government of the Court's case law:

> *"In light of recent reports from the United Nations and various non-governmental organisations on the current human rights situation of migrants in Libya, which paint a picture that is, in my view no less disturbing than in 2012 [when the Grand Chamber delivered the Hirsi Jamaa judgment], handing over individuals to the Libyan authorities or other groups in Libya would expose them to a real risk of torture or inhuman or degrading treatment or punishment."*[15]

12. Other reports from the period during which the incident at issue in the present case took place express similar concerns.[16] In light of the above, the Commissioner is of the view that, at the time of the incident in the current case, the authorities of any member state of the Council of Europe

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[11] ECtHR *Issa and Others v. Turkey,* Application No. 31821/96 (16 November 2004), paragraph 71; ECtHR *Medvedyev and Others v. France* [GC], Application No. 3394/03 (29 March 2010), paragraph 81.

[12] Statement by the President of the Security Council of 7 December 2017, S/PRST/2017/24; UNHCR, Position on Returns to Libya – Update II, September 2018; UNHCR, Desperate Journeys: refugees and migrants arriving in Europe and at Europe's borders: January-December 2018, January 2019; UNSMIL and OHCHR, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, December 2018; Amnesty International, Report 2017/18: The state of the world's human rights, February 2018; Amnesty International, Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean, August 2018; Human Rights Watch, No Escape from Hell: EU Policies contribute to abuse of migrants in Libya, January 2019; CNN Report, 'People for sale: Where lives are auctioned for $400', 14 November 2017.

[13] Ibid. See also UNHCR, Position on Returns to Libya – Update I, October 2015, in which UNHCR had found that Libya could not be considered a "place of safety" in view of the situation described therein.

[14] Nils Muižnieks, Commissioner for Human Rights, 'EU agreements with third countries must uphold human rights', 2 February 2017.

[15] Letter from Nils Muižnieks, Commissioner for Human Rights, to the Italian Minister of the Interior, Marco Minniti, 28 September 2017.

[16] See, for example, UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017.

would or should have been aware of the risks faced by persons brought back to Libya in whatever manner.

III. Developments regarding returns to Libya

13. Both the Commissioner and her predecessors have expressed concerns about actions by Council of Europe member states that have led to the collective expulsion and *refoulement* of migrants to Libya.[17] Since the Grand Chamber delivered its landmark judgment in the *Hirsi Jamaa* case in 2012, and especially following the increase of (attempted) crossings of the Mediterranean since 2014, the Commissioner has observed a marked change in relation to such returns. Whereas previously concerns related mainly to Council of Europe member states directly returning persons intercepted or rescued at sea themselves, subsequent developments have led to increasing interceptions and returns by the Libyan Coast Guard.

14. In the Commissioner's view, this shift is closely related to a number of interconnected actions taken by Council of Europe member states, individually and collectively, including within the framework of their membership of the European Union. This includes the gradual withdrawal, both in terms of vessels at sea and in geographical coverage, of maritime operations involving member states. This decline began with the discontinuation of Italy's Operation Mare Nostrum in October 2014. Subsequent operations, such as those led by Frontex, have been more limited in scope. As highlighted by the Commissioner, the decision to continue Operation Sophia (EU NAVFORMED) without any naval assets in March 2019 has further reduced the presence of state-operated vessels that could carry out SAR activities.[18] At the same time, actions taken by member states, most prominently by Italy, have had an extremely limiting effect on the ability of non-governmental organisations (NGOs) trying to fill the SAR gap left by states. This has especially been the case since the adoption by Italy of its controversial Code of Conduct for NGOs. Closure of ports, confiscation of NGO vessels and administrative sanctions and prosecutions have all contributed to the severe reduction of NGO rescue capacity in international waters off the Libyan coast. This has further been strengthened by reported threats by the Libyan Coast Guard against NGOs (see paragraph 28).

15. This reduction of rescue capacity by European state vessels and NGOs in international waters off the Libyan coast has coincided with other actions by Council of Europe member states, prominently Italy and some EU institutions. This has made interceptions of migrants at sea by the Libyan Coast Guard, and their subsequent return, much more likely. The Commissioner observes that these actions can be divided into two categories, which she considers particularly relevant to the current case: support to and co-operation with the Libyan Coast Guard to strengthen its ability to intercept migrants at sea (section IV), and changes in Italy's response to distress calls and its coordination of specific rescue operations (section V).

IV. Co-operation with Libya in the Mediterranean and its impact on the human rights of migrants

16. The Commissioner is of the view that issues related to the assessment of member states' responsibilities in cases such as the one at hand should be seen, firstly, within the wider context of efforts to strengthen Libya's capacity to control irregular migration and carry out interceptions in the Mediterranean. In this respect, the Commissioner would like to focus on the human rights aspects of co-operation by Council of Europe states with third countries in general, and on the co-operation of Italy with Libya in particular.

17. Co-operation with third countries has become an increasingly prominent aspect of Council of Europe member states' migration policies, both individually and collectively, such as in the

[17] See Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Italy from 3 to 6 July 2012, CommDH(2012)26 of 18 September 2012, paragraph 127 and Letter from Nils Muižnieks, Commissioner for Human Rights, to the Italian Minister of the Interior, Marco Minniti, 28 September 2017.
[18] Statement of Dunja Mijatović, Commissioner for Human Rights, of 27 March 2019 on the withdrawal of naval assets from Operation Sophia.

context of their membership of the European Union. Whilst such co-operation in and of itself may be legitimate, the Commissioner stresses that member states must carry it out in a manner consistent with their human rights obligations. She agrees with others, such as the Secretary General's Special Representative on Refugees and Migration, that any migration co-operation with third countries requires Council of Europe member states to exercise due diligence with respect to the potential human rights consequences.[19] In particular, the Commissioner and her predecessor have repeatedly recommended that member states take specific actions to ensure sufficient transparency and accountability in their co-operation activities with third countries to ensure that they do not contribute, directly or indirectly, to human rights violations at the hands of those third countries. This includes making human rights risk assessments, developing risk mitigation strategies, and ensuring independent monitoring during implementation.[20]

18. This principle is of particular relevance when co-operation covers both the control of irregular migration by sea and the interconnected issue of ensuring effective search and rescue. In this respect, the Commissioner has noted that the fact that states on the Southern shore of the Mediterranean have their specific obligations under maritime and human rights and refugee law should in no way be seen to relieve Council of Europe member states of their own responsibilities, including in relation to the protection of human life and dignity.[21] This starting point is especially relevant when it comes to Italy's co-operation with Libya, in light of the well-documented human rights violations committed by various actors in that country, including the Libyan Coast Guard.

19. The Commissioner notes that whilst different actors co-operate and support Libya in the field of migration, including EU institutions,[22] the role of Italy, and its bilateral co-operation with Libya, is particularly prominent. Mutual assistance in combating irregular immigration in the Mediterranean is a long-standing feature of Italy and Libya's co-operation which precedes the current co-operation activities with the Government of National Accord (GNA) and other entities in Libya, and which has already raised well-documented human rights risks for migrants and refugees attempting to reach Europe via the Central Mediterranean route.[23] More recently, the co-operation between the two countries resulted in the signing of a Memorandum of Understanding on 2

[19] Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018, SG/Inf(2018)25, paragraph 3.1.

[20] Commissioner's Recommendation, Section 4.1; Dunja Mijatović, Commissioner for Human Rights, 'European states must put human rights at the centre of their migration policies', 5 July 2018; Nils Muižnieks, Commissioner for Human Rights, 'EU agreements with third countries must uphold human rights', *Huffington Post*, 2 February 2017.

[21] Commissioner's Recommendation, p. 41 and 42.

[22] Note, for example, that on 20 June 2016, the Council of the European Union extended the mandate of Operation Sophia to provide for the "development of the capacities and in the training of the Libyan Coast Guard and Navy in law enforcement tasks at sea, in particular to prevent human smuggling and trafficking" (Council Decision (CFSP) 2016/993); the mandate was later extended to 31 December 2018, with the additional task of, among others, monitoring the effectiveness of training provided to the Libyan Coast Guard (Council Decision (CFSP) 2017/1385); on 3 February 2017, the 28 EU members states of the European Council agreed at an informal summit held in Malta to undertake actions "to significantly reduce migratory flows, break the business model of smugglers and save lives. In particular, they agreed to step up cooperation with the Libyan authorities." (The Malta Declaration). Moreover, via the EU Emergency Trust Fund for Africa, the European Commission has financed a project in support of Libya, which, among others, includes an action aimed at establishing a fully-fledged Maritime Rescue Coordination Centre (MRCC). It also aims to respond to main needs in terms of equipment and training. For further details, see European Commission, EU Emergency Trust Fund for Africa - North of Africa window, Infographic on EU cooperation on migration in Libya. See also, European External Action Service, EU-Libya relations, 25 September 2019.

[23] Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Italy from 26 to 27 May 2011, CommDH(2011)26 of 7 September 2011; Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Italy from 3 to 6 July 2012, CommDH(2012)26 of 18 September 2012.

February 2017 on, *inter alia*, the fight against illegal immigration, human trafficking and reinforcing border security.[24]

20. Against this background, it has been observed that Italy has provided important equipment, including several coast guard vessels, to enable the Libyan Coast Guard to operate more effectively at sea. According to information from the Italian government, such support has been aimed at "reinforcing the autonomy of [Libyan] operational capacities".[25] Crucially, after an earlier aborted attempt, Libya is reported to have declared its own Search and Rescue Region (SRR) in 2018.[26] As noted in the Commissioner's Recommendation, part of the work to establish a Libyan SRR was the establishment of a Joint Rescue Coordination Centre (JRCC).[27] The JRCC is operated with the active involvement of Italian staff and equipment. The deployment of an Italian navy vessel in Libyan territorial waters, which led to the above-mentioned letter by the Commissioner's predecessor to the Italian government in September 2017, and further operational support have been part of the infrastructure to enable the coordination of search and rescue operations from Libya.[28]

21. The Commissioner emphasises that several NGOs have reported that, since these various types of support were provided to Libya, the number of migrants intercepted, and subsequently returned to Libya, has increased significantly.[29]

22. Given the well-documented situation in Libya, various institutions have expressed deep concern about the human rights compliance of the co-operation activities between Italy and Libya, including the UN Committee Against Torture, and in a joint report, the UN Mission in Libya and the UN Office of the High Commissioner for Human Rights. [30] Consistent with these concerns, the Commissioner has also called on Council of Europe member states, in particular Italy, to urgently review all co-operation activities and practices with the Libyan Coast Guard and other relevant entities, and identify which of these impact, directly or indirectly, on the return of persons intercepted at sea to Libya or other human rights violations. She has urged the suspension of any

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[24] Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra Io Stato della Libia e la Repubblica Italiana, 2 February 2017.

[25] Letter from Marco Minniti, former Minister of Interior of Italy, to the Council of Europe Commissioner for Human Rights, 11 October 2017.

[26] The Libyan Port and Maritime Transport Authority notified the International Maritime Organisation (IMO) on 14 December 2017 with the Libyan Search and Rescue region (SRR), which followed a previous declaration in July. See the response of the Commissioner for Migration, Home Affairs and Citizenship, on behalf of the European Commission, to Parliamentary Question Reference P-003665/2018, 4 September 2018; this is also reiterated by the Maritime Rescue Coordination Center Roma, 2017 SAR Operations in the Mediterranean Sea Report, p. 18. On 26 June 2018, information on Libya's SRR was uploaded on IMO's online information sharing system, the Global Integrated Shipping Information System (GISIS). On 28 June 2018, the former Ambassador of Italy to Libya congratulated on twitter the Libyan authorities on completing procedures related to the implementation of their SAR area.

[27] Commissioner's Recommendation, p. 20 and 21.

[28] See among others, Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell'Italia alla missione internazionale in supporto alla Guardia costiera libica adottata il 28 luglio 2017, Atto del Governo DOC. CCL, n. 2, p. 5; Consiglio dei Ministri, Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione, 28 Dicembre 2017, DOC. CCL-bis, N. 1, Scheda 36, p. 101. See also the decision by Catania Tribunal on the case of MV Open Arms, 27 March 2018, p. 21 and 22.

[29] Amnesty International, Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean, August 2018; Human Rights Watch, No Escape from Hell: EU Policies contribute to abuse of migrants in Libya, January 2019.

[30] UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017; UNSMIL and OHCHR, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, December 2018.

such activities until clear guarantees of full human rights compliance are in place, in line with the principles discussed in paragraph 17 above.[31]

23. In her Recommendation, the Commissioner regretted that, despite her repeated calls and those of other bodies, Council of Europe member states had not provided evidence of adequate guarantees to ensure that their support to Libya was not contributing to serious human rights violations.[32] In this context, the Commissioner is aware of various activities of individual members states and the EU, such as training, which aim to improve the human rights awareness of Libyan actors. Furthermore, she acknowledges member states' support to the work of international organisations in Libya trying to address the situation in Libyan detention centres, including by setting up evacuation programmes. However, the Commissioner considers it important to reiterate that none of these activities have so far managed to address the central problem that migrants intercepted and returned to Libya are routinely detained and subjected to grave human rights violations. As commendable as various activities are, they do not provide an adequate guarantee for the protection of the rights of those returned to Libya.

V. Responsibilities of states as first recipients of distress calls and the coordination of rescue operations

24. In addition to efforts to strengthen the capacity of the Libyan Coast Guard, a change in practice can also be noted as regards co-ordination of specific rescue operations by Council of Europe member states. The Commissioner has noted a tendency of Council of Europe member states to transfer, in various ways, responsibility for coordination of rescue operations to Libya, in particular since the setting up of the JRCC and the initial attempts by Libya to declare an SRR in 2017.[33] In this context, the Commissioner wishes to share her observations on member states' responsibilities when receiving distress calls or requests for assistance.

25. In January 2019, following increasing incidents where rescued migrants' rights were put at serious risk, the Commissioner addressed a letter to the Italian Prime Minister, Giuseppe Conte, in which she expressed her deep concerns about Italy's measures of relinquishing responsibility for search and rescue operations in the Mediterranean Sea to authorities which appear unwilling or unable to protect rescued migrants from torture or inhuman or degrading treatment and emphasised the need to always prioritise humanitarian considerations in questions of disembarkation.[34]

26. Under international maritime law, every coastal state is required to take certain steps to ensure effective search and rescue. This includes setting up a Rescue Coordination Centre (RCC). Under maritime law, such RCCs must be able to effectively implement this coordination responsibility.[35]

27. The role of the RCC primarily relates to the coordination of rescue operations in its own Search and Rescue Region (SRR), which each coastal state is also required to set up. Normally, therefore, it would fall on the RCC in whose SRR an incident takes place to take responsibility for the coordination of the rescue operation.[36] Crucially, however, the role of an RCC is not limited to its own SRR. Rather, an RCC may also receive distress calls or requests from assistance in relation to incidents occurring outside its own SRR. This happens frequently in the Central Mediterranean, where RCCs of Council of Europe member states, especially the Maritime

[31] Commissioner's Recommendation, p. 44, recommendations 31 and 32.
[32] Commissioner's Recommendation, p. 44.
[33] Commissioner's Recommendation, p. 20 and 21.
[34] Letter from Dunja Mijatović, Commissioner for Human Rights, to the Italian Prime Minister, Giuseppe Conte, 31 January 2019.
[35] See SAR Convention, Chapter 2.1 and Chapter 2.3; SOLAS Chapter V, Regulation 7(1) and UNCLOS, Article 98 (2).
[36] Ibid. Chapter 3.

Rescue Coordination Centre (MRCC) in Rome, receive distress calls from vessels sailing within the SRR that Libya has declared.

28. As noted in the Commissioner's Recommendation, under international maritime law, the first RCC contacted retains responsibility for responding to the distress call until it is clear that the RCC covering the SRR, or any other appropriate RCC, has been found to be willing and able to assume responsibility for coordination and has effectively done so.[37] In situations where the latter does not occur, the first RCC receiving a distress call will be bound to proceed with the effective coordination of the rescue operation. In line with the principles set out in Section I, this responsibility entails ensuring that the rescue is carried out in safety and in compliance with the relevant maritime rules, in a manner consistent with human rights law and refugee law. This, in the view of the Commissioner, requires that the authorities of the state that is the first recipient of a distress call carefully consider the potential consequences, especially as regards the human rights of those in distress, of transferring coordination responsibility to another RCC (including the one primarily responsible for the SRR where the incident occurs). The Commissioner has recommended that the coordination responsibility is only transferred to the RCC responsible for the SRR where the incident occurs when the latter is able to fully meet its obligations under international maritime law and human rights law, including with regard to safe disembarkation.[38]

29. The Commissioner does not consider this requirement to be met when a member state, after receiving a distress call, transfers coordination responsibility to the JRCC in Tripoli, in view of the various serious issues outlined in her Recommendation. The Recommendation notes, for example, reports of the JRCC being unresponsive to distress calls, raising questions whether it is sufficiently effective within the meaning of maritime law. Secondly, it also notes with concern that, when the JRCC has assumed coordination of rescue operations, this has sometimes led to instructions to NGOs who may have already engaged in search and rescue to wait for the Libyan Coast Guard, even when NGOs were already on the scene or in closer proximity to the distress situation than the Coast Guard. The Recommendation further notes reports of NGOs being warned or threatened to leave the scene of an incident, and worrying allegations that Libyan Coast Guard vessels, when rescuing or intercepting persons at sea, have done so in a manner that has put lives at risk.[39]

30. Crucially, when the JRCC has coordinated rescue operations, this has invariably led to the disembarkation of intercepted persons in Libya. In light of the situation described in section II above, the Commissioner considers that this does not meet the requirement of disembarkation in a place of safety under maritime law, and goes against the prohibitions of torture or inhuman or degrading treatment, slavery, and arbitrary deprivation of liberty, and potentially a range of other rights enshrined in international human rights instruments.

31. Even when coordination responsibility is not formally or explicitly transferred to the Tripoli JRCC, issues may arise. The Commissioner has expressed concern about reports that merchant or NGO vessels contacting the Rome MRCC in relation to distress situations have sometimes been told to contact the Tripoli JRCC instead.[40] The Commissioner does not consider such a way of deflecting responsibility for a clear request for assistance to be in line with the principles set out above.

32. When a member state retains responsibility for a rescue operation and engages in its coordination, this again must be done in full compliance with maritime law, read in conjunction with its responsibilities under human rights and refugee law, including the prevention of loss of life and of the return of persons to serious human rights violations. In this respect, the Commissioner has recommended that member states should refrain from issuing instructions to shipmasters to disembark in countries that cannot be considered a place of safety, either directly

[37] IMO Guidelines on the Treatment of Persons Rescued at Sea, paragraph 6.7.
[38] Commissioner's Recommendation, p. 22, recommendation 4.
[39] Commissioner's Recommendation, p. 21.
[40] Commissioner's Recommendation, p. 21, footnote 34.

or indirectly.[41] Furthermore, in order to ensure effective protection of the right to life, she has recommended that all concerned coastal states should ensure that full use is made of all search and rescue units and other available facilities for providing assistance to a person who is, or appears to be in distress at sea, including vessels run by NGOs.[42] In this light, the Commissioner notes that any instruction to NGOs or others in a position to provide assistance, especially those specifically equipped to safely carry out rescue operations, to stand by and refrain from participating in that operation where there are no other vessels better placed and equipped to provide assistance would raise serious issues of compatibility with both maritime law and human rights law.

33. The Commissioner wishes to emphasise that, even in cases where the assistance of the Libyan authorities is inevitable for the prevention of immediate loss of life, this should be done on the clear understanding that a member state engaged in the coordination of a rescue operation fully retains its own responsibility for the preservation of life at sea, the disembarkation of survivors to a place of safety and respect for its human rights obligations, including the prohibition of *refoulement*.[43]

VI. Concluding observations

34. The Commissioner recalls that the effective protection and promotion of the human rights of refugees, asylum seekers and migrants, at sea and on land, requires the full implementation of member states' obligations, under international maritime law, human rights law and refugee law. These legal frameworks must be read consistently with each other. Any uncertainty or dilemma rising from the current situation in the Mediterranean, and member states' responses to it, must be resolved with the primary objective of preventing loss of life at sea and the upholding of human rights.

35. To conclude, the Commissioner stresses that:

- In recent years, changes in member states' migration management practices in the Central Mediterranean have led to the increased return of migrants, asylum seekers and refugees to Libya. Such returns have routinely resulted in migrants, asylum seekers and refugees being exposed to torture or inhuman or degrading treatment or punishment, as well as other serious human rights violations. The Commissioner notes that member states knew, or should have known, about the risk of such serious human rights violations occurring in Libya, on the basis of the extensive information available on the human rights situation in the country.
- She considers that certain types of assistance, such as the delivery of vessels, the provision of communications infrastructure, and support in declaring an SRR, including through the establishment of the JRCC, have particularly increased the Libyan Coast Guard's capacity to intercept persons at sea and therefore increased the risks of returns to Libya.
- Member states' relevant authorities, when receiving distress calls originating from any search and rescue region, should not transfer, either formally or *de facto*, responsibility for rescue operations to other authorities when they know or should have known that this action would lead to the exposure of people in distress at sea to serious violations of their rights protected under the Convention.
- Instructions issued by member states' relevant authorities in the course of rescue operations must be human rights compliant and must be made in such a way that they neither obstruct safety at sea and effective rescue in a distress incident, nor lead to the disembarkation of persons rescued at sea in a place that is not safe under international maritime, human rights or refugee law.

[41] Commissioner's Recommendation, p. 30, recommendation 9.
[42] Commissioner's Recommendation, p. 25, recommendation 8.
[43] Commissioner's Recommendation, p. 22, recommendation 5.