

The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea?

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ABSTRACT: Lampedusa – an Italian island barely 70 miles from northern Africa and 100 miles from Malta – has become a gateway to Europe for migrants. In some seasons, boats filled with asylum seekers arrive almost daily. However, yearly, hundreds of people die trying to cross the Mediterranean Sea. This paper will deal with the obligations of States towards seaborne migrants, the question of why so many people die near Lampedusa and the possible solutions in order to prevent further loss of life at sea.

1 INTRODUCTION

In the 1980s, computer software for geospatial data (better known as GIS software) had been on the market for more than a decade, but hardware, especially “high-resolution” graphic screens were very expensive and most software very specialized. It was still early days in the marine geospatial world, and much would happen before geospatial data would become mainstream.

On 3 October 2013, a trawler carrying over 500 migrants from Libya to Italy sank off the Italian island of Lampedusa. The boat – that had sailed from Misrata in Libya – carried mainly migrants from Eritrea, Somalia and Ghana. After a journey of two days, the vessel began taking on water when its motor stopped working. Some passengers set fire to a piece of material to try to attract the attention of passing ships. However, the fire spread to the rest of the boat, creating a panic. As the migrants all moved to one side, the boat capsized. So close to reaching Lampedusa, the migrants – of which many could not swim – were tossed into the sea. Although an emergency response involving the Italian Coast

Guard resulted in the rescue of 155 survivors, the total number of dead was reported as more than 360. [1]

Reportedly, the migrants had each paid at least \$3,000 to the Libyan, Somali and Sudanese smugglers before making the sea crossing from Libya. Women – who were unable to pay the amount of money – were said to have been raped and men who rebelled were tied up and tortured. The alleged captain of the boat, a 35-year-old Tunisian named as Khaled BENSALAM, was arrested under suspicion of being responsible for the sinking and charged with manslaughter. On 8 November, a Somali and a Palestinian man were also arrested under suspicion of having been among the smugglers that organized the voyage. [2]

On 11 October 2013, a second shipwreck occurred 120 kilometres from Lampedusa, near Malta. The boat, carrying over 200 migrants from Syria and Palestine, capsized when people on board moved to one side of the vessel as they tried to get the attention of a passing aircraft. The rescue operation was coordinated by the Maltese authorities, with the assistance of the Italian Coast Guard. At least 34 individuals were confirmed dead. Most survivors

were taken to Malta. The Maltese Prime Minister of Malta, Joseph MUSCAT, complained about the lack of solidarity among European countries on the problem of seaborne migration. He stated: “As things stand we are building a cemetery within our Mediterranean Sea”. [3] Also Ban KI-MOON, the UN Secretary-General, called on the international community ‘as a whole’ to take action to prevent such tragedies in the future. [4]

Lampedusa is an Italian island barely 70 miles from northern Africa and 100 miles from Malta. Therefore, it has become a gateway to Europe for migrants. In some seasons, boats filled with migrants and asylum seekers arrive almost daily. Between January and September 2013, more than 31.000 migrants arrived in the EU using the Central Mediterranean route, mainly via Sicily and Lampedusa, but also – although to a lesser extent – on the Coasts of Calabria, Puglia and Malta. The main nationalities include Eritreans, Somalis and other sub-Saharan Africans, as well as Syrian nationals. The migratory pressure over the summer months of 2013 was comparable to the same period in 2011. [5]

But why do so many people die near Lampedusa and what can we do to prevent this? In order to answer these questions, we will first take a look at the international obligations of States towards migrants at sea, with regard to rendering assistance and disembarkation. Afterwards, the specific situation of Lampedusa will be dealt with. Finally, some possible solutions will be put forward.

2 DUTY TO RENDER ASSISTANCE

2.1 Request for assistance needed?

It is a legal obligation for shipmasters and States under customary international law, as well as under Articles 58(2) and 98(1) Law of the Sea Convention (LOSC) to render assistance to persons in danger of being lost and to proceed with all possible speed to the rescue of persons in distress [6]. Article 98(1) LOSC states: “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: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.” According to Article 98(2) LOSC, where circumstances so require, coastal States have to cooperate with neighbouring States.

The actual distress phase is defined by the 1979 International Convention on Maritime Search and Rescue (SAR Convention) [7] – a treaty monitored by the International Maritime Organization (IMO) that imputes multi-State coordination of search and rescue systems – as: “A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.” [8]. When exactly a situation is identified as requiring immediate assistance, can be different

according to which State is handling the situation. For some States the vessel must really be on the point of sinking [9]. However, the International Law Commission (ILC) stated that – although a situation of distress may at most include a situation of serious danger – it is not necessarily one that jeopardizes the life of the persons concerned [10]. In contrast, for other States it is sufficient for the vessel to be unseaworthy [11]. MORENO-LAX even suggests that unseaworthiness *per se* entails distress. [12]

Council Decision 2010/252 [13] adopted additional guidelines that must be respected by European Member States during search and rescue situations at sea when operating within a Frontex – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [14] – joint operation at sea. Although the European Court of Justice (ECJ) annulled Council Decision 2010/252, and thus also the guidelines therein, the effects of the Council Decision have to be maintained until a new act can be adopted in accordance with ordinary legislative procedures. [15]

When deciding whether a vessel is in distress or not, search and rescue units should take all relevant elements into account, in particular: “(a) the existence of a request for assistance; (b) the seaworthiness of the ship and the likelihood that the ship will not reach its final destination; (c) the number of passengers in relation to the type of ship (overloading); (d) the availability of necessary supplies (fuel, water, food, etc.) to reach a shore; (e) the presence of qualified crew and command of the ship; (f) the availability of safety, navigation and communication equipment; (g) the presence of passengers in urgent need of medical assistance; (h) the presence of deceased passengers; (i) the presence of pregnant women or children; and (j) the weather and sea conditions.” [16]

Thus – according to these guidelines – although unseaworthiness is certainly an element to take into consideration when assessing the situation, it does not automatically imply a distress situation. As every situation is different, the fact whether persons at sea are in distress or not will depend on the specific circumstances. Therefore, an assessment can only be made on a case-by-case basis. Although the definition of distress is quite vague, this allows shipmasters and States to take all relevant elements into account. Their margin of appreciation to decide whether persons are in distress or not is regarded as being essential. However, one element that is indisputable, is that the existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance. [17]

Nevertheless, some countries still require a request for assistance. For example, the Armed Forces of Malta (AFM) – responsible for dealing with the search and rescue operations [18] – are being accused of not fulfilling their duty, by for example only helping persons who are actually requesting assistance [19]. Nevertheless, there are also migrant boats who refuse to be rescued by Malta, because they want to go to Italy. For example, on 9 July 2012, a boat – reportedly carrying 50 Eritreans and Somalis – was at sea. They refused to be rescued by Maltese military forces. In 2012, UNHCR reported that of all the migrant vessels

intercepted by Maltese authorities, the majority elected not to be rescued and continued to Italy. [20]

2.2 *Self-induced distress situations*

Due to increased interception measures at sea, smugglers are often sending migrants to navigate the sea on their own, rather than risk being caught with the passengers. Also, because of the likelihood that the vessels will not return, smugglers are utilizing less expensive materials to build the boats. With no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people, resulting in more drownings [21]. Illegal migrants are often transported on ships that are not properly manned, equipped or licensed for carrying passengers on international voyages and that States should take steps to eliminate these unsafe practices [22]. For example, every year tens of thousands of Somalis and Ethiopians – often fleeing violence, human rights abuses and poverty in the Horn of Africa – pay smugglers to ferry them across the Gulf of Aden to Yemen. Many never make it, as the boats capsize or smugglers beat some of the passengers to death, force them overboard, or disembark people too far from shores [23].

Smugglers are generally well informed about States' protection obligations in case of distress situations and thus they act to exploit them. They are able to instruct migrants what to do upon interception to increase their chances of gaining entry into and remaining in countries of destination. For instance, States have been faced with situations of people sabotaging their own vessels to force authorities to carry out rescues [24]. As the concept of distress is not qualified, it also includes 'self-induced' distress as a type of distress in need of rescue [25]. PUGH argues that a group of determined people who have set out on a risky voyage in a substandard vessel may not be easily recognized as being in a condition of distress. Therefore, this argument cannot be supported.

Moreover, so-called 'rescuers' are in fact smugglers. On 9 September 2012, Italian authorities questioned survivor reports that the boat on which they were sailing from Tunisia actually sank or capsized near Lampedusa on 7 September. Italian authorities raised the possibility that the survivors were intentionally landed on the small island of Lampiono – approximately 20 km west of Lampedusa – by a smuggler's 'mother ship' and that the smugglers then returned to Tunisia. Some of the 56 survivors who were rescued from Lampiono reported that their boat sank and they were forced to swim to the island. However, Italian authorities did not find sufficient debris, bodies, or other evidence that would indicate that their boat sank. Although two bodies were recovered, the locations of the recovered bodies are not consistent with the location where the migrant boat is reported to have sunk [26]. These kind of practices can result in criminalization of seafarers, as almost happened in the aforementioned case of the *Cap Anamur*. The fear of criminalization by those who go to the rescue of boats carrying migrants is one of the reasons why commercial vessels fail to go to the rescue of persons in distress at sea [27].

3 DISEMBARKATION OF RESCUED PERSONS

3.1 *No disembarkation duty*

Neither treaty law nor customary international law requires States to let rescued persons disembark onto their territory. Both the International Convention on Safety of Life at Sea (SOLAS Convention) [28] – a treaty seeking to ensure protection of passengers aboard ships in distress through the prevention of situations of distress – and the SAR Convention [29] only provide that States must arrange for the disembarkation of persons rescued at sea as soon as reasonably practicable [30].

As a result, persons rescued at sea can spend weeks on a ship at sea before a State allows them to go ashore. The case of the *Marine I* provides an example. On 30 January 2007, the Spanish Coast Guard received a distress call from the vessel *Marine I*. It was alleged that over 300 migrants from Guinea were on board. Although the *Marine I* was within the Senegalese Search and Rescue Region (SRR), Senegal requested Spain to proceed with a rescue operation, claiming that Senegal did not have the proper means to assist. Because the Mauritanian port of Nouadhibou was closest to the emergency, Senegal also informed Mauritania of the situation. On 4 February, a Spanish maritime rescue tug reached the *Marine I* and provided immediate relief by handing out supplies of water and food. The Spanish government also commenced negotiations with Senegal and Mauritania on the fate of the migrants. On 12 February (two weeks after the distress call), Spain, Senegal and Mauritania finally reached an agreement regarding the passengers. It was reportedly agreed that Spain would pay €650,000, in return for Mauritania allowing the passengers to disembark. Repatriation commenced the day after the migrants had disembarked. Guinea agreed to readmit thirty-five passengers, all of African origin [31]. In total, Spain reported 18,000 irregular arrivals by sea from West Africa that year [32]. The fact that Spain was prepared to pay as much as €650,000 to prevent the disembarkation of 300 migrants shows that some States are reluctant to allow disembarkation of rescued persons onto their territory. Consequently, in practice some shipmasters will ignore migrants at sea because they know that their entrance into ports will be refused.

3.2 *Delivery to a place of safety*

In the SAR Convention, rescue is described as “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.” [33]. Although the SAR Convention states that rescue implies that persons in distress have to be delivered to a place of safety [34], it does not define what a place of safety is. The 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea state that a place of safety can be defined as a location where rescue operations are considered to terminate, where the survivors' safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors' next or final destination [35]. Disembarkation of asylum-seekers

recovered at sea, in territories where their lives and freedom would be threatened, must be avoided [36] in order to prevent the violation of the non-refoulement principle [37]. The government in charge of the SRR in which the survivors were recovered is held responsible for providing a place of safety on its own territory or ensuring that such a place of safety is granted in another country [38]. Although an assisting ship may only serve as a temporary place of safety [39], there is still no actual duty for States to disembark the persons rescued [40].

However, Malta does not accept the 2004 IMO Guidelines [41]. Therefore, according to Malta there is a safe place in terms of search and rescue and there is a safe place in terms of humanitarian law [42]. The 2004 Guidelines, however, do state that a place of safety has to fulfil humanitarian requirements too. On 5 August 2013, the Liberian-registered tanker *Salamis* rescued 102 migrants aboard a damaged dinghy about 45 nm off Libya and 140 nm from Malta. The crew responded to an alert from Rome's Maritime Rescue Co-ordination Centre (MRCC) to help the migrants. After the rescue – co-ordinated by authorities in Rome – the *Salamis* headed for Malta, the destination for its cargo of gasoil. However, Maltese authorities told the shipmaster to proceed to the closest port of safety in Libya. Although the AFM was supplying food and water to the migrants, the ship was refused entrance to Maltese waters. The EU stated that – as the migrants included four pregnant women, one injured woman who needed immediate hospital care and a five-month-old infant – it was the humanitarian duty of the Maltese authorities to allow these persons to disembark. Sending the ship back to Libya would have been contrary to international law [43]. This is certainly true after the *Hirsi Case*, where the European Court of Human Rights decided that bringing migrants back to Libya constituted a violation of Article 3 of the European Convention of Human Rights [44] because *in casu* the applicants had been exposed to: (1) the risk of ill-treatment in Libya; and (2) of repatriation to Somalia or Eritrea [45].

4 LAMPEDUSA: A UNIQUE PROBLEM

The Italian island of Lampedusa is both part of the Maltese and the Italian Search and Rescue Region (SRR). According to the LOSC and the SAR Convention, coastal States shall establish adequate and effective search-and-rescue (SAR) services (for example, through the creation of a Rescue Co-ordination Centre (RCC)) and, where circumstances so require, cooperate with neighbouring States for this purpose [46]. States must ensure that sufficient SRRs are established within each sea area. These regions should be contiguous and – as far as practicable – not overlap [47]. Each SRR shall be established by agreement among parties concerned [48]. The delimitation of SRRs is not related to and shall not prejudice the delimitation of any boundary between States [49]. Parties are required to ensure the closest practicable coordination between maritime and aeronautical services [50]. The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual) – which was jointly published by IMO and the International Civil

Aviation Organization (ICAO) – provides guidelines for a common aviation and maritime approach to organizing and providing search and rescue services [51].

The SAR Convention aims to create an international system for coordinating rescue operations and therefore State parties are invited to conclude SAR agreements with neighbouring States to regulate and coordinate SAR operations and services in the agreed maritime zone [52]. Such agreement do not only technically and operatively implement the obligation laid down in Article 98(2) LOSC, they also diminish the risk of non-rescue incidents. Next to this, they can offer an economic advantage to the extent that the contracting parties can share costs arising from organizing and carrying out SAR operations [53]. However, for the moment, several States in the Mediterranean have for example unilaterally declared a SRR, resulting in overlaps, such as the area around Lampedusa. This often results in delays when deciding who is responsible, thus jeopardizing the lives of migrants in distress.



Figure 1. Maritime Search and Rescue Regions – Mediterranean West [54]

For example, in April 2009, the Turkish owned and Panamanian flagged ship *M/V Pinar E* rescued 142 African migrants off the coast of Lampedusa. The ship and the rescued migrants were the subject of an ensuing stand-off between Italy and Malta regarding who would receive the migrants. While Malta insisted that the *M/V Pinar E* would take the migrants to Lampedusa because it was the nearest port to where the stricken boats were found, Italy maintained that the persons were rescued in the Maltese SRR and thus fell under Malta's responsibility. Although Italy finally agreed to allow disembarkation in Sicily, the decision was made exclusively in consideration of the painful humanitarian emergency aboard the cargo ship. Italy made clear that its acceptance of the migrants must not in any way be understood as a precedent nor as a recognition of Malta's reasons for refusing them [55]. This is one of the many incidents that highlight the lack of cooperation and coordination between SAR services of these two States.

On 6 April 2011, Malta informed the Italian Maritime Rescue Coordination Centre of the presence of a boat in distress, 45 miles from the Italian island of Lampedusa. As Maltese patrol boats were temporarily unavailable, Italian search and rescue assets were shipped to the area. The boat – which had departed from the Libyan port of Zuara – carried

some 300 persons who had been fleeing the north coast of Africa in search of a better life. Normally, the type of vessel was only capable of holding a maximum of 40 people. Moreover, the engine was severely damaged, which made it impossible to manoeuvre the boat. Over 250 migrants were lost after their vessel capsized due to flooding. Eventually, only 52 persons could be saved by the Italian Coast Guard [56].

On 9 November 2011, 44 people – mostly sub-Saharan – were rescued by the Italian navy ship *Foscari* after two days of sending out distress calls from a satellite phone in the Mediterranean Sea. The delay in rescuing the boat led to huge risks to the lives of the persons in distress. Risks for example included drowning, dehydration and exposure. After the rescue, the migrants were transported to Sicily, not to Lampedusa or Malta which were the two closest ports. UNHCR spokesman Adrian EDWARDS stated that UNHCR was grateful that the Italian navy took this initiative despite the fact that the boat was in Maltese SRR [57]. In response, the AFM and the Maltese SAR authorities both rejected what they characterized as the “*impression conveyed*” by the UNHCR spokesperson that Maltese SAR authorities abdicated from their responsibilities and did not cooperate with the relevant Italian authorities. The AFM statement – as reported by the newspaper *Times of Malta* – outlines in detail the Maltese response to the distress call from the migrant boat. The AFM said that the decision for the *Foscari* to take the rescued migrants to an Italian port in Sicily was the result of Italian insistence that Lampedusa does not represent a place of safety for the disembarkation of migrants. According to Malta, Lampedusa did represent the nearest place of safety under the relevant legal regime applicable with the Malta SRR. Therefore, the persons should have been disembarked here [58].

5 POSSIBLE SOLUTIONS TO PREVENT LOSS OF LIFE

5.1 Cooperation between States

According to Article 98(2) LOSC, where circumstances so require, coastal States have to cooperate with neighbouring States. While discussing the obligation to cooperate in suppressing piracy, GUILFOYLE notes: “*While a duty to cooperate to the fullest possible extent may seem a strong obligation, the international community has not agreed that it has any specific minimum content. Identifying a breach of a duty to cooperate is notoriously difficult.*” [59] It is clear that a number of loopholes seriously impair the effectiveness of the duty to cooperate [60]. First of all, in public international law there is no general customary law-based obligation for States to cooperate. Therefore, duties to cooperate are treaty-based and as such the cooperative relationship is being artificially created. Secondly, provisions on cooperative conduct are often not manifestly demonstrably based on reciprocity or mutuality of benefit. Thirdly, the wordings of the obligation leaves it unclear as to the specific conduct required in fulfilment of that obligation. Therefore, the proof of such a breach would be very difficult. Fourthly,

treaties that include an obligation to cooperate, often include a margin of appreciation. For example, Article 98(2) LOSC asks coastal States to cooperate “*where circumstances so require*”. Lastly, the effectiveness of a cooperation duty can also be impaired by non-cooperation. A particular problem is unilateral actions by States. For example, powerful States may turn to unilateralism when they decide that they may achieve their foreign policy goals by unilateral action rather than cooperation. As the international system is based upon sovereign equality of States, the system is in fact characterized by gross inequalities in power that are a structural obstacle to cooperation and thus encourages powerful States “*to go it alone*” [61]. On the one hand, there are a growing number of obligations to cooperate in international law, for example to suppress drug trafficking by sea [62] or to prevent the proliferation of weapons of mass destruction and their transport by sea [63]. On the other hand, there exists an unsatisfactory degree of implementation of these duties because of non-compliance [64].

On international level, the International Maritime Organization (IMO) took the initiative to help drafting a Memorandum of Understanding (MoU) on concerted procedures relating to the disembarkation of persons rescued at sea [65]. In March 2010, the United States stated that the discussions between Mediterranean countries concerning rescue and disembarkation of migrants at sea is based on a regional problem requiring a regional solution. However, Italy, Malta and Spain expressed their disappointment that other countries seemingly did not recognize that the problem was much wider than simply a regional one. Other parts of the world are also confronted with similar difficulties and, even more importantly, ships of all flags are currently involved in the resulting rescue operations. Therefore, the IMO Secretary-General proposed to first develop a pilot project for a regional solution in the Mediterranean. Second, if this project works, it could be applied in other parts of the world [66].

One of the primary concerns of the IMO is the integrity of the search and rescue and, consequentially, the safety of life at sea regime [67]. Therefore, the IMO wants to prevent incidents – which cause loss of life at sea – from recurring [68]. On the one hand, the system of rescuing migrants in the Mediterranean Basin has to be improved. On the other hand, these persons also have to be disembarked at a place of safety in accordance with the SAR and SOLAS Conventions [69]. The ultimate goal here will be the development of a Regional Agreement in the form of a MoU on concerted procedures relating to the disembarkation of persons rescued at sea [70]. A MoU is a well-accepted type of legal instrument in international law and practice and it is being identified as “*an informal but nevertheless legal agreement*” between two or more parties [71]. Whether this MoU is meant to be binding is not clear at the moment. However, a soft law agreement would not necessarily be a negative factor.

It was considered beneficial – in order to make significant progress towards finalizing the draft Regional MoU – to hold informal consultations among interested parties to agree on some of the more contentious issues and associated draft texts before

organizing the next regional formal meeting. Accordingly, informal consultations were held at IMO Headquarters on 21 February 2012. Some of the most contentious aspects were discussed and agreements reached on sensitive subjects and the draft text of the Regional MoU was improved accordingly [72]. However, after some discussion, taking into account that the work on this matter was still in progress, it was decided to extend the target completion year [73]. The development of a soft law framework has already been successfully applied to address gaps in international law in the past [74]. BARNES states that – consistent with the general trend towards the use of soft law instruments – new legal initiatives concerning migrants at sea are most likely to take the form of non-binding measures [75].

On European level, Frontex organizes joint operations at sea. This co-operation can help saving lives. Nevertheless, among States there is still some discussion as where to disembark rescued persons. **Council Decision 2010/252** [76], supplementing the Schengen Borders Code, states in its Guidelines that regarding disembarkation, priority should be given to the third country from where the ship carrying the persons departed or through the territorial waters or SRR of which that ship transited. If this is not possible, priority should be given to disembarkation in the Member State hosting the surveillance operation at sea [77]. The operational plan, used during a joint operation at sea, should spell out the modalities for the disembarkation of the persons rescued. Nevertheless, when not specified in the operational plan, the mission's host country carries the ultimate responsibility. Malta strongly opposes these guidelines and as a result stopped hosting Frontex operations. Also the new Commission proposal of 2013 puts the ultimate burden on the host State [78]. The Mediterranean countries already objected this new proposal. Cyprus, Greece, Italy, Malta, France and Spain have taken the position that there is no need for further regulations pertaining to rescue at sea or post-rescue places of disembarkation since other international laws already deal 'amply' with the matters [79].

With respect to financial arrangements, we can think, for example, of capacity-building for RCCs, as well as for processing and reception centres. The EU is already funding projects to improve the capacities of EU Member States in the case of the arrival of large groups of irregular arrivals, e.g., the strengthening of reception capacity in Lampedusa. Likewise, the Communication on Strengthened Practical Cooperation, issued by the Commission in February 2006, proposed to set up rapid-reaction migration units to better respond to sudden influxes of irregular migrants [80].

5.2 *The use of new technologies*

One of the problems is the isolated nature of the ocean. As a result, it is difficult to prove a failure of search and rescue obligations. Nevertheless, satellite images for example could provide for proof. The European Union Satellite Centre (EUSC) gathers a great deal of data and pictures across the globe [81]. EUSC already stated that access to satellite imagery of

the area could be a valuable tool to identify the location of ships as certain vessels are large enough to be spotted and possibly identified from such data [82].

In July 2012, the AFM expressed interest in benefitting from a European Union-sponsored project involving the deployment of 'drones' – Unmanned Aerial Vehicles (UAVs) – to assist in migrant patrols at sea. While the AFM is fully involved in the development of the system, it is however not yet participating in the testing of such drones [83]. Frontex' Research and Development Unit is currently engaged in a study to identify more cost efficient and operational effective solutions for aerial border surveillance, in particular Unmanned Aircraft Systems (UAS's) with Optional Piloted Vehicles (OPVs) that could be used during joint operations at sea [84]. The United States is already using 'Predator drones' to monitor land and sea borders. However, serious questions have been raised about the effectiveness of surveillance drones operating over the sea as – until now – the drones have had limited success in for example spotting drug runners in the open ocean [85]. The use of drones for land and sea border surveillance is contemplated by in the EU Commission's proposal on the establishment of the European Border Surveillance System (EUROSUR) [86]. The main purpose of EUROSUR is to improve the situational awareness and reaction capability at the external borders of the Member States and of the European Union [87]. The planned surveillance of the Mediterranean – using UAVs, satellites and shipboard monitoring systems – could aid in the rescue of refugees shipwrecked on the open seas [88]. However, EUROSUR could cover up a lack of substance. For example, maritime rescue services are not part of EUROSUR and border guards do not share information with them [89]. Moreover, EUROSUR should be adapted to meet the specific needs that asylum seekers may have. For example, the exchange of personal data with third countries should be prohibited, as this exchange may jeopardize both the safety and protection of asylum seekers and refugees, and their data protection rights [90].

6 CONCLUSION

Under international law, it is clear that there exists a duty of rendering assistance regardless of an actual request for help. Next to this, also self-induced distress situations require assistance. However, due to overlaps of SRRs, there are delays in deciding who is responsible, thus jeopardizing the lives of migrants in distress. This is exactly what happens near Lampedusa. A possible solution would be strengthened cooperation between States. However, as States cannot be obliged to cooperate, cooperation efforts are postponed, such as the on concerted procedures relating to the disembarkation of persons rescued at sea. Moreover, as there is no disembarkation duty under international law, initiatives introducing such a duty – such as new EU rules on disembarkation within Frontex operations – are being criticized by coastal States. It is clear that States are not willing to accept a disembarkation duty.

Within Europe, this is not surprising. The Dublin II Regulation is regarded as unfavourable for Mediterranean coastal States, as the Member State responsible for an asylum claim will be the State through which the asylum seeker first entered the European Union [91]. DE BLOUW believes that the modification of the Dublin Regulation is the first and most important step to eradicating human rights abuses in Southern Europe as this could lessen the immigration burden on coastal Mediterranean Member States [92]. To help Malta to cope with the migration problem, EUREMA (European Relocation Malta) – a pilot project for intra-EU re-allocation of beneficiaries of protection from Malta – was launched in July 2009 and co-funded by the EU. Its objectives are the implementation of the principle of solidarity among states, the identification of resettlement solutions for people in need and the improvement of the situation for those who remain in Malta. Nevertheless, this project is not a solution to the negative impact of the Dublin II Regulation [93].

Next to cooperation, new technologies could be used not only to prove failure of search and rescue obligations, but also to assist in migrant patrols at sea. We should however bear in mind that States should be encouraged to share the burden, for example by engaging in resettlement and readmission agreements. When States know they can share the burden after disembarkation, they will be less reluctant to accept a duty to disembark sea-borne migrants. Normally the political, socio-economic and financial costs of asylum have to be carried by one State, namely, the State of disembarkation. However, due to burden-sharing agreements this will not be the case.

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