

## Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible?

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On Sunday, 8 May 2011, the British newspaper [The Guardian](#) reported the story of a boat carrying 72 persons, among them asylum seekers, women and children, which left Tripoli (Libya) for the Italian island of Lampedusa at the end of March 2011 (for comments, see [here](#) and [here](#)). After 16 days at sea, the boat was washed up on the Libyan shore with only 11 survivors. During the 16 days route, survivors told that they used their satellite phone, which later ran out of battery, to call an Eritrean priest in Rome for help (see [Resolution 1872](#) of the Parliamentary Assembly of the Council of Europe). The priest alerted the Italian Maritime Regional Coordination Centre, which located the migrants' vessel and sent out many calls to the ships in the area. Pursuant to survivors' testimonies, on about the tenth day of their voyage, when half of the passengers were dead, a large aircraft carrier or helicopter-carrying vessel (probably involved in the NATO's Operation Unified Protector, which was on going at that time off the Libyan shores) sailed near to the boat, close enough for the survivors to see the sailors on board looking at them with binoculars and taking photos. But no one rescued them.

Flag states and coastal states have a duty to render assistance to persons found at sea in the danger of being lost and people in distress (Article 98 of the [United Nations Convention on the Law of the Sea](#) (UNCLOS)). This core obligation under both treaty law (see also the 1974 [Convention on the Safety of Life at Sea](#) (SOLAS Convention), the 1979 [Search and Rescue Convention](#) (SAR Convention) and the 1989 [International Convention on Salvage](#)) and customary law applies in any maritime zone and in relation to any activity there performed. While implementing this duty states can either perform directly the search and rescue (SAR) operations, namely through their own SAR services, or ask a vessel, which is located in the proximity of the endangered persons, be it any merchant ship or the state vessel of another country, to perform the rescue operation.

The texts here mentioned expressly refers to states, flag or coastal. Practice however offers more and more examples of police activities performed under the command of an international organization or a supranational body. A question then rises:

- who are the bearers of the obligation? Namely, are those 'entities' (such as NATO) bound by the duty to render assistance?

The answer could be affirmative only if we consider that the duty to render assistance under customary international law has a wider scope of application *ratione personae*, if compared with the same obligation under treaty law. The practice however does not allow yet such a conclusion.

Another question raised by recent practice concerns the recipient of the obligation:

- Is the duty to render assistance a purely inter-state obligation or does it entail a right to be rescued for people in distress at sea?

The law of the sea allocates obligations and rights in different maritime zones among states. However, the multiplication of activities at sea and the increased human presence lead to the question of the protection of the human element, in particular of the application of human rights at sea. Many scholars have already discussed the application of the relevant human

rights treaties at sea, pointing out that the law of the sea, specifically UNCLOS, pursues some community interests, among which the protection of human rights (see a.o. [here](#)). Some authors have stressed the complementarity of these two fields of international law (see [here](#)). The duty to render assistance can then be considered as the corollary obligation of the right to life when applied at sea and, consequently, a right to be rescued for the people in distress at sea can be deduced from the application of human rights instruments at sea.

Pursuant to the case law of the European Court of Human Rights ([ECtHR](#)), when the SAR operation consists in taking on board of the rescuing vessel the persons in distress, the latter fall within the jurisdiction of the flag state and the [European Convention on Human Rights](#) applies ([Hirsi case](#)). This is perfectly in line UNCLOS Article 92, which affirms the exclusive jurisdiction of the flag state on its own vessels on the high seas. The determination of the exercise of jurisdiction might however result more difficult when the rescued persons are not taken on board of the rescuing unit, or when the SAR services are not performed.

In the ECtHR [Xhavara case](#), which did not concern a SAR operation, the ECtHR recognized the exercise of jurisdiction by Italian authorities on two grounds: the activities were performed on the basis of a bilateral agreement; and the fact that there was a collision between the Italian navy vessel and the migrants' boat. Applying this reasoning by analogy, when the SAR operation is performed on the basis of an international agreement and there is contact between the rescuing unit and the vessel in distress, the ECHR applies.

The non-performance of SAR services is a trickier instance. The main question to be answered here is whether human rights instruments do apply in cases of SAR non-performance, i.e. whether the non-rescued persons do fall within the jurisdiction of any state while they are in distress at sea. It can be argued that the distress call creates a 'relation' between the state, which receives it, and the persons who send it. The life of the persons in distress depends on the behaviour of the recipient state. The argument could go further and support the existence of an exclusive long distance *de facto* control that the state, which received the call, exercises on the lives of those people. Their lives are submitted to the discretion of that state, in the case mentioned above the lives of the migrants depended on the Italian authorities and their capacity to activate SAR services.

This *de facto* control becomes also *de jure* when the distress situation is located within the SAR zone of the recipient state, which has an obligation to 'promote the establishment, operation and maintenance of an *adequate and effective* search and rescue service' (UNCLOS Article 98(2), emphasis added). There is then an assumption of authority (ECtHR [Al-Skeini and others case](#)) the coastal state exercises in its SAR zone. The coastal state is then bound by an obligation of due diligence. The loss of lives or the risk of losses in its SAR zone may entail a violation of the right to life of the concerned persons, of their 'right to survival', and a violation of its obligations under law of the sea instruments.