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The 'Left-to-Die Boat' incident of March 2011: Questions of International Responsibility arising from the Failure to Save Refugees at Sea

Efthymios Papastavridis

Part-time Lecturer, Democritus University of Thrace; Research Fellow, Academy of Athens; Visiting Fellow, Refugee Law Initiative, University of London **(**papastavridis@academyofathens.gr**)**

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RFUGEE LAW INITIATIVE
Human Rights Consortium| School of Advanced Study| University of London
Senate House, Malet Street, London WC1E 7HU, UK
Email: RLI@sas.ac.uk
Telephone: +44 (0)20 7862 8570

The 'Left-to-Die Boat' incident of March 2011: Questions of international responsibility arising from the failure to save refugees at sea

Efthymios Papastavridis[*]

Abstract:

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. After 16 days at sea, the boat was washed up on the Libyan shore with only 11 survivors. In this particular incident, it is remarkable that many of the vessels or helicopters, which allegedly failed to save these people, were at that time taking part in NATO's *Operation Unified Protector*. This has elicited criticism about NATO's and its Member States' failure to respond to the relevant distress calls and to anticipate adequately for an exodus of asylum seekers and refugees from Libya in the course of the said Operation. The long list of 'failures' in this respect was identified in a Report adopted by the Parliamentary Assembly Committee on Migration, Refugees and Displaced Persons of the Council of Europe (29 March 2012).The present paper discusses the issues of responsibility for human rights violations arising from this incident, including the potential responsibility of NATO. Firstly, there is a succinct reference to the primary obligations incumbent upon the States or NATO in this regard, namely obligations under human rights law. This is followed by a discussion of the secondary rules of international responsibility and their application to this particular incident; in particular, the responsibility of each and every State involved in the latter as well as of NATO is assessed accordingly.

Keywords:

Asylum- Mediterranean- responsibility- NATO- rescue

[*] Part-time Lecturer, Democritus University of Thrace; Research Fellow, Academy of Athens; Visiting Fellow, Refugee Law Initiative, University of London **(**papastavridis@academyofathens.gr**)**

1. Introductory Remarks

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. After 16 days at sea, the boat was washed up on the Libyan shore with only 11 survivors.[1] The President of the Parliamentary Assembly of the Council of Europe reacted immediately to the article by The Guardian and called for an inquiry.[2]

The inquiry was assigned to Ms Tineke Strik, Member of the Parliamentary Assembly. Her Report was adopted by the Parliamentary Assembly Committee on Migration, Refugees and Displaced Persons on 29 March 2012.[3] According to this Report, 'there were failures at every step of the way and by all key actors', including individual States, such as Libya, Italy, Malta, as well as NATO and its Member States.[4]

The details of the incident are best summarized in the Report as follows:

> The Sub-Saharan passengers, 50 men, 20 women and two babies, were accompanied to the boat by Libyan militia. They were boarded by the smugglers who removed most of their water supplies and food in order to get more people into the boat. After over 18 hours at sea with almost no petrol, little food and water and no sight of land, the "captain" called an Eritrean Priest living in Italy by satellite phone, sending a distress alert. The Italian Maritime Rescue Coordination Centre (MRCC) was immediately informed and it had the position of the boat plotted by the satellite provider and sent out a large number of calls to the ships in the area to look out for the boat. Some of these messages clearly indicated that the boat was in distress. It was from this point that things went seriously wrong.
>
> Within a few hours of the first distress signal, a military helicopter hovered over the boat and provided water and biscuits and indicated to the passengers that it would return. It never did. The boat also encountered at least two fishing vessels, neither of which came to its assistance. The boat drifted for several days. With no water and food, people started to die. On about the

[1] The Guardian, "Aircraft carrier left us to die, say migrants" (8 May 2011), available at <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>.

[2] CoE, "President calls for an inquiry into Europe's role in the deaths of 61 boat people", 9 May 2011, available at <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6619.>

[3] See the Report of the Parliamentary Assembly of the Council of Europe (PACE), "Lives Lost in the Mediterranean Sea: Who Is Responsible?" Report of the Committee on Migration, Refugees and Displaced Persons (29 March 2012), available at <assembly.coe.int/CommitteeDocs/2012/20120329 mig RPT.EN.pdf> [hereinafter: PACE Report].

[4] *Ibid*, para. 133.

> tenth day of its voyage, when half of the passengers were dead, a large aircraft carrier or helicopter-carrying vessel sailed near to the boat, close enough for the survivors to see the sailors on board looking at them with binoculars and taking photos. Despite obvious distress signals, the naval vessel sailed away. The boat eventually washed up on the Libyan shores after 15 days at sea. The ten survivors were imprisoned, where one of them died from lack of medical care. Eventually nine survivors were released after which they fled the country.[5]

What made this case different, beyond the tragedy of the lives lost, was that the boat's distress calls appear to have been ignored also by NATO and its Member States. According to the PACE Report, at least two vessels involved in NATO's *Operation Unified Protector*[6] were in the boat's vicinity when the distress call was sent, namely the Spanish frigate *Méndez Núñez* (11 miles away) and the Italian *ITS Borsini* (37 miles away).[7] NATO's only official written reply to the letter of Rapporteur, Ms Strik, of 8 December 2011 stated that

> based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question.[8]

Even though Ms Strik acknowledged that without full information on this matter it is difficult to conclude on the responsibility of NATO or boats under national command, it was clear to her that that there was a failure by NATO to react to the distress signals. More specifically, she concluded that 'the *Méndez Núñez* and the *ITS Borsini*, although in the near vicinity of the boat, failed to go to its assistance, thereby engaging the responsibility of both NATO and their respective flagship countries (Spain and Italy)'.[9] As a result, NATO must take responsibility for the ship's ignoring the calls for assistance from the "left-to-die boat".[10] In addition, the Parliamentary

[5] *Ibid*, paras. 4 and 5.

[6] 'On 22 March 2011, NATO responded to the UN's call to prevent the supply of "arms and related materials" to Libya by agreeing to launch an operation to enforce the arms embargo against the country. The next day […] NATO maritime assets stopped and searched any vessel they suspected of carrying arms, related materials or mercenaries to or from Libya. In support of UNSCR 1973, NATO then agreed to enforce the UN-mandated no-fly zone over Libya on 31 March 2011'. The Alliance took sole command and control of the international military effort for Libya on 31 March 2011' The Operation ended on 1 November 2011. See at <http.nato.int/cps/en/natolive/topics_71652.htm>

[7] *Ibid*, para. 8.

[8] *Ibid*, para. 91.

[9] *Ibid*, para 133.

[10] *Ibid*, para. 148.

Assembly called for further inquiries on the incident by both NATO and the national parliaments of the States concerned.[11]

Moreover, on the judicial level, on 11 April 2012, three NGO's – *La Fédération internationale des ligues des droits de l'homme* (FIDH), *Groupe d'information et de soutien des immigrés* (GISTI) and Migreurop – held a press conference to announce the filing of a legal complaint against the French military authorities with the *Procureur de la République du Tribunal de Grande Instance de Paris*, alleging that military forces failed to render assistance to a migrant boat within the NATO military zone during *Operation Unified Protector*.[12]

It is readily apparent that the 'left-to-die boat' incident gives rise to numerous international legal questions, including questions regarding the search and rescue regime under the law of the sea, human rights law etc. It is beyond the ambit of the present paper to address all these questions; rather, its focus will be centred on issues of responsibility for human rights violations arising from this incident, including the potential responsibility of NATO.

Firstly, there will be a succinct reference to the primary obligations incumbent upon the States or NATO in this regard, namely obligations under human rights law. This will be followed by a discussion of the secondary rules of international responsibility and their application to this particular incident; in particular, the responsibility of each and every State involved in the latter as well as of NATO will be assessed accordingly.

2. Human Rights Obligations of States concerning People-at-Sea

The boat in question was located on the high seas when it made its distress call; the high seas are defined in the 1982 UN Convention on the Law of the Sea (LOSC) as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.[13] Article 87 of LOSC proclaims the high seas to be free and open

[11] PACE, "PACE Committee Finds a 'Catalogue of Failures' that Led to Deaths of 63 People Fleeing Libyan Conflict by Sea", Press Statement (29 March 2012), available online: <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7567&L=2>.

[12] FIDH, GISTI and Migreurop concluded that the French military must have had knowledge of the distress situation, based upon the following reasons: *"*(1) Compte tenu de la connaissance de la présence et de la localisation (33°45mn de latitude nord et 13°05 mn de longitude est) de ce bateau par un avion de reconnaissance français le 27 mars à 14h55. (2) Compte tenu de la présence de l'armée française dans le périmètre de 50 milles nautiques, à partir de la localisation de l'embarcation, lors de la diffusion du message de détresse le 27 mars à 20h54 (18H54 GMT) par les garde-côtes italiens. (3) Compte tenu de l'importante présence de l'armée française dans le périmètre de la diffusion du message Hydrolant en date du 28 mars 2011 à 06h06 et de sa diffusion durant les dix jours suivants toutes les quatre heures ; *see* FIDH, GISTI & Migreurop,"Plainte Contre X." (11 April 2012), p. 18; available at <http://www.gisti.org/IMG/pdf/plainte_2012-04_c-armee-francaise.pdf>. See also J. Coppens, 'Search and Rescue at Sea' in E. Papastavridis & K. Trapp (eds.), *Criminal Acts at Sea* (Centre for Studies and Research, Hague Academy of International Law) [forthcoming]

[13] See: Article 86 of the United Nations Convention on the Law of the Sea, 1833 *UNTS* 397; entered into force 16 November 1994; as at 9 August 2013, LOSC has 166 parties, including the EC; see at

to vessels of all States, all of which have a range of non-exhaustible freedoms, including the freedom of navigation. On the contrary, the territorial sea (or waters) is subject to the sovereignty of the coastal State. Article 3 of LOSC recognizes the right to establish a territorial sea of up to 12 nautical miles. In addition, under article 57 of LOSC, States may claim an Exclusive Economic Zone (EEZ) up to 200 miles. There, first and foremost, coastal States exercise sovereign rights for the purposes of 'exploring and exploiting, conserving and managing' both its living and non-living resources.

It is beyond the scope of the present paper to discuss the obligations that States bear in relation to persons in distress at sea;[14] suffice it to mention that the duty to assist persons in distress at sea is a long-established rule of customary international law. It extends to both other vessels and coastal States in the vicinity, and all persons, including irregular maritime migrants, remain protected. The duty to rescue has been codified in LOSC, which prescribes relevant duties for both the flag and the coastal States. First, with regard to flag States, article 98 (1) of LOSC provides 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 … to render assistance to any person found at sea in danger of being lost … and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him.

Although the aforesaid provision is located in the Part of LOSC concerning the high seas, it is submitted that the duty in question applies in all maritime zones.

Obligations upon States concerning persons in distress at sea may arise, beyond the law of the sea, also from international human rights law. For example, a fundamental human right of particular relevance in the present context is the right to life.

A preliminary, yet paramount question is whether human rights law applies to the rescue of persons on the high seas. The protection of human rights extends to persons under the jurisdiction of the State parties to the pertinent treaties. It is, however, this concept of 'jurisdiction' that has aroused considerable controversy in international legal discourse.[15] In the present milieu, it is questioned whether the master of the vessel rescuing migrants on the high seas or the coastal State that coordinates the

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<http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea> (last visited 18 September 2013) [hereinafter: LOSC].

[14] On the rules on rescue-at-sea see E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans,* (Oxford: Hart Publishing, 2013), 294-300 and R Barnes, 'The International Law of the Sea and Migration Control', in V. Mitsilegas and B. Ryan (eds), *Extraterritorial Immigration Control* (The Hague: Brill, 2010), 103.

[15] From the very rich and recent jurisprudence on extraterritorial jurisdiction and human rights see *inter alia* G. Goodwin-Gill, 'The Extra-Territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction' in L. Boisson de Chazournes and M. Kohen (eds), *International Law and the Quest for its Implementation. Liber Amicorum Vera Gowland-Debbas* (Leiden: Martinus Nijhoff, 2010), 293 and M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press, 2011).

rescue operation are bound by human rights obligations, even though these acts do not take place in their territory.

The main international human rights treaties on civil and political rights, such as the ICCPR and the ECHR, conceive state responsibility for securing the rights they contain essentially in terms of the State's 'jurisdiction'. Similarly, under the Convention against Torture (CAT), the State is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction'.[16] Thus, it is necessary to establish whether a situation falls within the State's 'jurisdiction' before the obligations in these instruments are in play.[17] This notion of jurisdiction 'relates essentially to a question of fact, of actual authority and control that a State has over a given territory or person. "Jurisdiction", in this context, simply means actual power, whether exercised lawfully or not, nothing more, and nothing less'.[18] 'Factivity' in this regard 'creates normativity'[19] or in the words of the European Court of Human Rights, '*de facto* control gives rise to *de jure* responsibilities'.[20]

In the context of the present enquiry, i.e. on the high seas, it is apposite to refer to the Judgment of the European Court of Human Rights in the *Medvedyev v. France* case: even though the Respondent did not dispute the jurisdiction of the Court under article 1 of the Convention, in spite of the fact that the interception occurred on the high seas, i.e. extraterritorially of France, the Grand Chamber held that 'as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention'.[21]

More recently, in the *Hirsi* case (2012), which concerned Somalian and Eritrean migrants who had been intercepted on the high seas by the Italian authorities and sent back to Libya, the Grand Chamber held that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the

[16] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 *U.N.T.S.* 85 [hereinafter CAT].

[17] See R. Wilde, 'Triggering State Responsibility Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 40 *Israel Law Review* (2007), 503, at 506.

[18] M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008), 411, at 429.

[19] M. Sheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans *et al*. (eds*.), Extraterritorial Application of Human Rights* (Antwerp: Intersentia, 2004), 73 at 81.

[20] ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Order of 30 June, 2009; para. 88.

[21] See: *Medvedyev et al. v. France*, Judgment of 29 March 2010 (Grand Chamber, Application No. 3394/03); para 67 (emphasis added). See also case note by E. Papastavridis in 59 *International and Comparative Law Quarterly* (2010), 867.

Italian authorities…Accordingly, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1'.[22] It follows from the foregoing that the Convention extends to the high seas, provided that the State exercises effective control through its organs over the persons concerned.[23]

Hence, it is indubitable that, in principle, human rights law applies to the rescue of such persons; in addition, international refugee law and in particular, the prohibition of *non-refoulement* applies also on the high seas and thus binds the flag State, which proceeds to the rescue of the migrants. The principle of *non-refoulement* is primarily enshrined in Article 33(1) of the 1951 Refugee Convention[24] and prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture.[25] Even though the US Supreme Court found in *Sale v. Haitian Centers Council* (1993) that the Refugee Convention and article 33 fall short of applying on the high seas,[26] the subsequent decision of the Inter-American Court of Human Rights in this case[27] as well as various declarations and resolutions in different *fora*,[28] State practice[29] and scholarly opinion[30] have

[22] *Hirsi Jamaa ao v Italy* App no 27765/09 (EctHR, Grand Chamber Judgment of 23 February 2012), paras 81 and 82 [hereinafter: *Hirsi case*]. On the *Hirsi* case see M. Giuffre, 'Waterdown Rights on the High Seas: *Hirsi Jamaa and others v Italy* (2012)' 61 *International and Comparative Law Quarterly* (2012), 728–50.

[23] See in general E. Papastavridis, 'European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?', in M. Fitzmaurice & P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Leiden: Martinus Nijhoff Pub. 2013), 117.

[24] Art. 33 (1) reads as follows: '1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'; see Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 *UNTS* 137.

[25] On this principle see the excellent treatise on the issue by E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E. Feller *et al* (eds), *Refugee Protection in International Law* (2001) 87 [hereinafter: Lauterpacht/Bethlehem].

[26] See: *Sale, Acting Commissioner, INS v. Haitian Centers Council,* 113 S. Ct. (1993), 2549.

[27] See *Haitian Center for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-American Commission of Human Rights Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. (13 March 1997).

[28] See e.g. the General Principles endorsed by the IMO Facilitation Committee, which make specific reference to the 1951 Convention relating to the Status of refugee, see: 1965 Convention on Facilitation of International Maritime Traffic, as amended, 10 January 2002, Section 4.2. See also *inter alia* UNCHR EXCOM Conclusion No. 6 (XXVIII), at para (c) and Conclusion No. 97 (2003).

[29] See B. Frelick, "'Abundantly Clear'': *Refoulement*,' 19 *Georgetown Journal of International Law* (2005), at 679.

[30] See *inter alia* Justice Blackmun, Dissenting Opinion, reprinted in 6 *International Journal of Refugee Law* (1994), 71, G. Goodwin-Gill's 'Comment' in 6 *International Journal of Refugee Law* (1994), 102, L.D. Rosenberg, 'The Courts and Interception: The US' Interdiction Experience and its Impact on Refugees and Asylum Seekers', 17 *Georgetown Immigration Law Journal* (2002-3), 199.

adequately substantiated the thesis that *non-refoulement* is prohibited wherever it takes place and not only within a State's borders.

Nevertheless, it is not so evident when these treaties start applying. In other words, at which point the persons in distress are considered as subject to the jurisdiction of the States concerned? Having in mind the prerequisite of 'control', it is doubtless that these persons would be under the jurisdiction of the flag State of the rescuing State vessel. On the contrary, it is questioned whether the same conclusion can be drawn in cases of rescue operations conducted by private vessels; the flag State has mainly a due diligence obligation and the assessment of any failure by the Master of the vessel to provide assistance would inevitably be made *ex post facto*. This is possible by virtue of the duty of the master to record any reason for failing to render assistance.[31]

Also, it is questioned whether the coastal State which receives a distress call and is aware of the location of persons in distress exercises control over these persons with the result that the latter come under its jurisdiction. On the one hand, it is difficult to speak of a *de jure* control that the coastal State exercises *a priori* over vessels and persons within its search and rescue zone; the latter is not a maritime zone, in which coastal States exercise *ipso jure* sovereignty or jurisdiction. Coastal States have only an obligation to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service' therein under article 98 (2) of LOSC. Consequently, it is submitted that the coastal State lacks *de jure* control, *ergo a priori* jurisdiction over all vessels and persons located in its search and rescue zone.

On the other hand, a different conclusion can be drawn in cases of distress calls that are received and acknowledged by the Rescue Coordination Centre of the coastal State; in such cases, arguably, a long distance *de facto* control between that State, which received the call and the persons who sent it, may be established. Indeed, the life of the persons in distress depends on the behaviour of the recipient State, which, being aware of the location of the vessel in distress, exerts certain control over these persons. Hence, these persons may be considered within the jurisdiction of the coastal States concerned in this regard.

Having addressed the question when persons in distress at sea come under the jurisdiction of States for the purposes of human rights law, it is time to see which human rights exactly are applicable in the present context. Firstly, as has recently accepted the Strasbourg Court in the *Al-Skeini v. UK* case, human rights can be "divided and tailored";[32] thus, in cases, such as the one discussed above, i.e. when there are only distress calls and not yet an actual rescue operation, the only human right that come to the fore is the right to life.

[31] See Chapter V, reg 10(a) of SOLAS Convention.

[32] See *Al-Skeini v. UK*, Application No. 55721/07, Grand Chamber Judgment of 7th July 2011, para. 137.

In respect of the right to life, this is set forth in article 2 of ECHR as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained [...]

In the context of ECHR, Article 2 forbids States intentionally to deprive someone of his or her life unless it is 'no more than absolutely necessary', amongst others, 'in defence of any person from unlawful violence' or 'in order to effect a lawful arrest'. Therefore, when States engage in law enforcement operations at sea should do 'no more than absolute necessary ... to effect a lawful arrest'. As held in the landmark case of *McCann and others v. United Kingdom* (1995),[33] deprivations of life must be subject to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances. In addition, as held by the Court in Osman v United Kingdom (1999),[34] Article 2 requires States not only to restrain from causing death, but also to take measures to protect the lives of individuals within their jurisdiction. Furthermore, this article, combined with article 1 of the Convention implies that the State should put in place a proper official, independent and public investigation into any death which may have been caused by agents of the State.

When the persons are rescued, it is indisputable that both flag and coastal States are obliged to abide by the principle of *non-refoulement*, which is also a fundamental component of the treaty as well as customary prohibition of torture, cruel, inhumane, and degrading treatment or punishment.[35] Moreover, as it was evidenced in the *Medvedyev v. France case* (2010), the right to liberty and security (e.g. article 5 ECHR and article 9 of ICCPR) comes into play in this regard.

3. The Rules on International Responsibility and the *Non-Rescue* of the 'Boat-People'

Under the law of State Responsibility, every internationally wrongful act of a State entails its international responsibility,[36] while the conditions required to establish such

[33] See *McCann and others v. United Kingdom* (1995), 27 September 1995, EHHR Series A No. 324.

[34] See *Osman v United Kingdom* Application No. 87/1997/871/1083, Grand Chamber Judgment of 28 October 1998, 29 EHRR 245

[35] See Lauterpacht/Bethlehem, at 144.

[36] See article 1 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records; 56th Session, Supp. No. 10 at UN. Doc A/56/10; at 31 [hereinafter: ASR]; available at: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.>

an act are twofold: first, the conduct in question must be attributable to the State under international law; second, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.[37] Thus, the whole edifice of State Responsibility is premised upon the existence of a primary rule establishing an obligation under international law for a State.[38]

Similarly, the Articles on the Responsibility of International Organizations[39] largely follow the model of the Articles on State Responsibility. As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. A second essential element is that conduct constitutes the breach of an obligation under international law incumbent upon the international organization.[40] The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.[41]

In the context of the present enquiry, the questions to be addressed concern the alleged responsibility of the flag States and the coastal States as well as of NATO.

3.1 Flag States involved in the incident

According to the available information, the boat in distress had been initially assisted by a military helicopter—there have been reports that it must have been Italian[42]—while it had encountered two fishing boats, one flying the Italian flag and the other the Tunisian one, which never came of assistance.[43] In addition, allegedly, there had been three warships in the vicinity: the Spanish frigate *Méndez Núñez* (11

[37] See article 2 of ILC Articles.

[38] See Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries in *Yearbook of the International Law Commission (*2001- II), Part Two, at 31 [hereinafter: ASR Commentary]. On the distinction between 'primary' and 'secondary' rules see also U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology', 78 *Nordic Journal of International Law* (2009), 53.

[39] See Draft Articles on the Responsibility of International Organizations (2011); *ILC Report, Sixty-Third Session*, UN Doc. A/66/10 (2011), pp. 50–170 [hereinafter: ARIO]; available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf.> Resolution 66/100 of 9 December 2011of the GA took note of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which was annexed to the resolution.

[40] See article 4 of ARIO.

[41] As the International Court of Justice noted in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"; *I.C.J. Reports 1980*, pp. 89–90, para. 37.

[42] See PACE Report, at para 28.

[43] See *ibid*, at paras 36-38.

miles away), the Italian *ITS Borsini* (37 miles away)[44] and a French vessel.[45] None of them assisted the boat people.

The responsibility of each of the flag States involved will be analyzed separately; needless to say that any conclusion drawn will be based solely on the evidence, such as testimonies, referred to in the PACE Report.[46]

3.1.1 The Military Helicopter

It is reported that a military helicopter gave water and biscuits to the people in distress; it failed, however, to provide any further assistance to the latter as well as to inform other maritime or aeronautical assets or search and rescue services about the location of the vessel.[47] There are suspicions that the helicopter was Italian and it probably came from an Italian warship in the vicinity. Indeed, the PACE Report links it, albeit without certainty, with the *ITS Borsini*, which had a helicopter capacity.[48]

In applying the rules on State responsibility, it is submitted that the presence of the helicopter and the initial assistance provided to the persons in distress had as a result that these persons were under the *'de facto* control', hence, under the jurisdiction of the State of the registry of the helicopter. The omission to provide any further assistance was clearly attributed to that State as well as it did constitute a breach of the positive obligation set forth by the right to life under article 2 of ECHR and article 6 of ICCPR. Thus, there is no doubt as to the responsibility of the State concerned, allegedly Italy, for the failure to provide assistance to the persons in distress.

3.1.2 Commercial Shipping

According to the survivors, during their voyage and after they had run out of fuel, they encountered a number of fishing vessels:

> [t]hey saw at least one fishing boat flying the Italian flag and another flying a Tunisian flag. As they attempted to approach the Italian boat the fishermen drew in their nets and sailed away … The Tunisians told them that they were navigating in the wrong direction and gave them new directions for Lampedusa. When the people on the boat told the fishermen that they had run

[44] See *ibid*, at para 8.

[45] *Ibid*, at paras 85-57

[46] With regard to the overall credibility of the testimonies; see *ibid*, at paras. 49-50.

[47] *Ibid*, at paras 92-96.

[48] *Ibid*, at para. 112. However, later in her Report, Ms Strik mentions that the helicopter might have come from the Spanish frigate *Méndez Núñez* (paras 137-142). Thus, we cannot be certain as to the identity of the flag State involved. Noteworthy is that all the stakeholders involved (Italy, Spain and NATO) either refuse or remain silent on the identity of helicopter (para. 142).

> out of fuel, the fishermen replied that they had none to give them. They then just *"ran away from us.*[49]

Furthermore, according to Ms Strik,

> [i]t is also unclear why the Cypriot supply vessel *Sea Cheetah* did not intervene. From the analysed telephone recordings provided by the Rome MRCC, I understand that it was not far from the boat's location on 27 March 2011. However, apparently the *Sea Cheetah* took no action, nor did the Rome MRCC ask it to do so.[50]

In ascertaining the responsibility of the flag States of the private vessels that, allegedly, failed to render assistance, the first issue is the attribution of this failure to the flag States concerned. It is the view of the present author that the omission as such cannot be attributed to the respective States, *in casu*, Italy, Tunisia and Cyprus. The ground is that the Master of the private vessel is neither a *de jure* organ (article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, ASR), nor a *de facto* organ (article 8 ASR) of the State.[51] More pertinently, it cannot be considered as a 'person exercising elements of governmental authority' pursuant to article 5 of ASR. According to the ASR Commentary,

> if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage.[52]

The rescue-at-sea has been from times immemorial deemed as a private maritime tradition.[53]

Inextricably linked with the question of attribution is the preliminary issue of the extraterritorial application of human rights law. It is submitted that the flag States would not incur responsibility for the failure of the vessels to assist the persons in distress, since the latter never came under the 'jurisdiction' of the States involved. The establishment of extraterritorial jurisdiction for human rights purposes requires the 'spatial' or 'personal' control of the State concerned, which, in turn, presupposes the conduct of *de jure or de facto* State organs.

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[49] See PACE Report, at paras. 36-7.

[50] *Ibid*, at para. 103.

[51] For further analysis of this issue see E. Papastavridis, 'Rescuing People at Sea: The Responsibility of Flag and Coastal States under International Law', in G. Goodwin-Gill, Ph. Weckel (eds.), *International Migration* (Centre for Studies and Research, Hague Academy of International Law) [forthcoming]; available at Working Paper Series Social Science Research Network (27 September 2011), 18, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352>.

[52] See ASR Commentary, at 43.

[53] See Papastavridis, *supra* note 51, at 18.

Exceptionally and only in the case that the flag States had been informed about the boat in distress and had instructed their vessels not to render assistance, the persons would have been under the 'jurisdiction' of those States. In that case, the Master could have been considered as a '*de facto* organ' in accordance with article 8 of ASR and thus the failure to render assistance would have been attributed to the flag State. Consequently, the responsibility of the latter for the violation of the right to life might have arisen. Nevertheless, it is not the usual practice for commercial shipping to inform flag State authorities in respect of such matters.

3.1.3 The Warships in the Vicinity

According to the PACE Report,

> [t]he survivors all concur that on what could have been day 10 of their trip they drifted close to a very large military vessel. It was possibly an aircraft carrier or at least a vessel with helicopter facilities, with helicopters on board and possibly also fighter jets. The ship was of an off-white or light grey colour and the boat was close enough for them to see people on board wearing different coloured military uniforms. …"Some were looking through binoculars and others were taking pictures of us." …The ship remained at a distance, so the people in the boat started shouting and waving their hands. "They're just watching that there are dead children and other bodies."….There was no communication from the ship and no assistance was provided. After a short while, the military vessel sailed away, abandoning the stranded boat.[54]

There had been also other vessels in the area, besides the aforementioned large military vessel, which must have received the alert message of the Rome Maritime Rescue Coordination Centre (Rome MRCC). Indeed, the Italian Naval Fleet Command (CINCNAV) in a call made to the Rome MRCC confirmed that a military vessel under NATO command was located around 11 miles away from the boat in distress: the Spanish naval vessel *Méndez Núñez*.[55] Also, 'during a telephone conversation between the CINCNAV and the Rome MRCC, shortly after referring to the *Méndez Núñez*, mention is made of the Italian vessel *ITS Etna* as being within the specified region as well as the *ITS Borsini*. In information provided by NATO, it is confirmed that the *ITS Borsini* was 37 nautical miles away, but that the ITS Etna was much further away (155 miles).'[56]

As regards human rights law, it seems difficult to sustain the argument that the flag States of the *Méndez Núñez* and the *ITS Borsini* had exercised any kind of 'control' over the persons on the boat so as to bring about the relevant human rights obligations. A distress call to all vessels in a wide area does not suffice to establish 'jurisdiction' of all flag States over the persons concerned. Apparently, different is the

[54] PACE Report, at paras. 41-43.

[55] *Ibid*, at para. 110.

[56] *Ibid*, at para. 112.

case of the other military vessel: allegedly, the latter had visual contact with the 'boat people', it was aware of the situation, namely that people, amongst them, children, had been already dead, and stayed aloof. Arguably, the visual contact and the awareness of the situation brings the 'boat people' under the jurisdiction of the (unknown) flag State of the military vessel. Moreover, the failure to assist them is attributed to the flag State and amounts to a breach of article 2 of ECHR or article 6 of ICCPR.

3.2 Coastal States Involved

The coastal States involved in the present incident were Italy, which was the first State to be alerted, Malta, which was informed of the incident and Libya, in whose SAR zone the boat was located when it sent the distress message. In addition, Libya was the State from where the vessel departed and to where it returned.

3.2.1 Italy

According to the PACE Report, the Rome MRCC was notified on 27 March by Father Zerai about the boat and it immediately undertook several steps to coordinate their rescue: first, it tried to contact the boat. From the audio records, it is clear that the conversation was interrupted before any substantial exchange could take place. It also sent out a number of messages, using different networks and satellites, to make sure they reached a maximum number of vessels in the area. In addition, it launched a DISTRESS call on the Inmarsat-C Gateway Enhanced Group Call (EGC) addressed to all ships transiting in the Sicily Channel. Finally, it informed Malta MRCC by phone and later by fax as well as the NATO headquarters allied command in Naples and FRONTEX. Noteworthy also is that ROME MRCC kept sending this distress message every 4 hours for 10 days.[57]

Nevertheless, Italy never initiated a search and rescue operation as such. The explanation given to Ms Strik is the following:

> The Rome MRCC stated that during the period in question their assets were working around the clock, with between 20 to 25 incidents requiring attention on just one day. Between 26 and 28 March, the Italian authorities were engaged in incidents involving approximate 4 300 people. Over 2 200 of these people were assisted at sea and around 2 000 were rescued from distress situations. From the Rome MRCC's perspective, priority needed to be given to the large number of incidents occurring within Italy's SAR zone rather than incidents occurring elsewhere. The Italian authorities did not consider themselves as the responsible authority, as the boat was not located in their SAR zone. They explicitly let me know that if this had been the case, they would have certainly co-ordinated the SAR operation.[58]

[57] *Ibid*, paras 56-61.

[58] *Ibid*, at para. 69.

With regard to Italy's responsibility, even if we assume that the persons came under the 'long distance *de facto* control' of Italy and thus under its jurisdiction, Italy had to a large extent abided by its positive obligations concerning the right to life. It did take all the measures available under the present circumstances to notify all the relevant stakeholders (vessels, States, international organizations) and to cooperate in the rescue of these persons. In addition, it lacked the necessary resources, i.e. available search and rescue units, to send them on the scene. Hence, even though the omission is attributable to Italy, the latter State should not be held in violation of the right to life (article 2 ECHR).

3.2.2 Malta

The Rescue Coordination Centre of Malta was also informed of the boat's situation. Nevertheless, it did nothing to assist the persons in distress. According to the PACE Report,

> Malta MRCC noted that its helicopters, being one-engine assets, were not able to travel such long distances and get back and that its boats usually required around 20 to 24 hours to reach the end of its SAR zone. The Maltese search and rescue authorities told me they had never considered starting a search and rescue operation, as they considered the Rome MRCC, the first MRCC informed, to be responsible on the basis of maritime law, and indeed the Rome MRCC had not requested them to start a search and rescue operation.[59]

The problems that Malta faces regarding its extensive SAR zone are beyond the compass of the present Chapter.[60] Nevertheless, in the present case, it would be far-fetched to argue in the first place that the 'boat people' have come under Maltese jurisdiction and consequently to hold Malta in violation of the right to life. As explained above, people within a search and rescue zone do not *ipso facto* fall within the jurisdiction of the respective coastal State, but there must be a de facto link established between these persons and the coastal State concerned.

3.2.3 Libya

It goes without saying that Libya had a central role in the incident under scrutiny. Firstly, the unseaworthy dinghy full of people departed from Libya; more importantly, it was reported that Libyan soldiers did not prevent them from leaving and even accompanied them to their rubber dinghy. Secondly, the distress call was sent when the boat was within the Libyan SAR zone, thus technically the Tripoli MRCC was the responsible RCC. Last but not least, on 10 April, when the boat was washed up on the rocks close to Zilten, the 10 survivors were immediately arrested by the Libyan authorities, their possessions were confiscated and they were imprisoned. Due to the

[59] *Ibid*, at para. 68.

[60] See in this regard S. Klepp, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* (2011), 538.

lack of appropriate medical assistance, one of the survivors died in prison. They were then transferred from one prison to another resulting to the deterioration of their medical condition.[61]

As regards the potential responsibility of Libya for the violation of human rights law, the following remarks are in order: on the one hand, there is no doubt that the 'boat people' were under the jurisdiction of Libya and hence, they were under the protection afforded by human rights treaties, such as the ICCPR.[62] Libya had thus to protect their right to life and not force them to leave in an unseaworthy dinghy. This conduct of Libyan authorities was also in violation of the UN Smuggling Protocol (2000), to which Libya is a party and which requires States to criminalise the smuggling of migrants (article 6) and cooperate to suppress such activities at sea (article 7).[63]

Also, Libya was in violation of the prohibition of *non-refoulement* under under article 7 of the ICCPR[64] and under customary law.[65] Moreover, the removal of 72 non-Libyans with the assistance of Libyan officials could amount to a violation of the prohibition of collective expulsion of aliens, which is considered as part of the article 7 of the ICCPR. Indeed, when commenting on article 7 of the Covenant, the Human Rights Committee stated that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[66]

It is readily apparent that upon the return of the 'boat people' Libya acted again in defiance of international human rights law. The lack of any medical treatment to the survivors, their imprisonment and their maltreatment in the prison amounted to a breach of the right of life (article 6 of ICCPR)—one person passed away in the prison—the prohibition of torture and inhumane and degrading treatment (article 7 of ICCPR) and the right to liberty and security (article 9 of ICCPR).

The question is whether the aforementioned acts were attributable to Libya in view of the situation of armed conflict therein. The answer should be affirmative, since they

[61] See PACE Report, at paras. 46-48.

[62] Libya has acceded to the ICCPR on 15 May 1970; see at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>

[63] See Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by GA Res. 55/25 of 15 November 2000; it entered into force on 28 January 2004 and Libya ratified on 24 September 2004; see at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en>

[64] See: article 7 of ICCPR. In addition, the UN Human Rights Committee, in its General Comments No. 20 and No. 31, has construed the obligation set out in article 7 as including a *non-refoulement* component.

[65] Libya is not party to the 1951 Refugee Convention.

[66] See General Comment 20/44 of 3 April 1992, para.9

were conducted by their *de jure* organs (article 4 of ASR), while the existence of an internal armed conflict does not absolve the State from its responsibility arising from acts of its organs;[67] even if the acts in question were attributed to the insurrectional movement (the Libyan Transitional National Council), Libya would also be held responsible in view of the principle of the continuity of the State and article 10 (1) of ASR.[68]

3.3 NATO

It is obvious that one of the main reasons that the PACE Report has attained such publicity is its conclusion that NATO should assume responsibility for the failure to render assistance to the 'boat people' in distress. Holding such organization not only politically accountable, but also legally responsible for that omission certainly has interesting ramifications for NATO itself and for other international organizations engaged in maritime operations (e.g. EU *Operation Atalanta*). As evidenced in the PACE Report, the NATO headquarters in Naples were informed about the incident by the Rome MRCC on 27 March;[69] according to NATO, however, 'the contents of the message they received from the Rome MRCC in the evening of 27 March were unclear'.[70] Indeed, NATO never replied to this call,[71] while it refused the involvement of vessels under its command in the incident. In addition, NATO officials stressed that

> [i]n all cases, NATO warships did everything they could to respond to distress calls and provide help when necessary. In addition, through coordination with national authorities, NATO has indirectly facilitated the rescue of many hundreds more. Commanders of warships under NATO command were, and remain, fully aware of their obligations under the International Law and Law of the Sea and responded appropriately.[72]

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[67] *Cf.* articles 9 and 10 (3) of ASR.

[68] 'The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law'. See also G. Cahin, 'Attribution of Conduct to the State: Insurrectional Movements' in J. Crawford *et al.* (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 247.

[69] See PACE Report, para 105.

[70] *Ibid*, at para. 116.

[71] *Ibid*, at para. 106.

[72] Stephen Evans, "Letter from Mr Stephen Evans, Assistant Secretary General for Operations of NATO, to Ms Strink, Rapporteur of the Committee on Migrations, Refugees and Displaced Persons" (27 March 2012), available at <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_LET.APENDIX.EN.pdf>. See also: Richard Froh, "Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strink, Rapporteur of the Committee on Migrations, Refugees and Displaced Persons" (8 February 2012), available online: <http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.APENDIX.EN.pdf>.

To hold NATO responsible for the omission to render assistance to the boat in distress, it would require finding, firstly, this omission attributable to NATO itself and not its Member States and secondly, that it did amount to a breach of an international obligation of NATO as such (article 4 ARIO). On the question of attribution in cases of operations under Chapter VII, such as *Operation Unified Protector,* reference should be made to article 7 of ARIO, which enunciates that '[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'. It is true that article 7 has aroused much doctrinal controversy as well as divergent international decisions.[73] Without dwelling on this issue, it seems that both international legal doctrine and the majority of international decisions consider that the decisive criterion for the attribution of the wrongful conduct to either the international organization or its Member States lies in who exerts effective control over the act or omission in question or, in the view of the author, who has the decision-making authority over the act or omission.

In the present case, the key question is whether the decision to leave the 'boat people' without assistance was made by the NATO Commander itself or by the Commanding Officer of the warship concerned. If the former, the conduct would be attributable to NATO and if the latter, to the flag State. In principle, this would depend on the Rules of Engagement of the *Operation Unified Protector,* which set forth the operational procedures to be followed by the warships in the context of the Operation and whether the operational command in such cases would rest with NATO or the contributing Member State. Such information, however, is not generally available to public and as stated above, NATO has refuted any involvement in the incident.

To the knowledge, though, of the author, NATO's position concerning rescue at sea is that the Member States alone are responsible and not NATO, even though the warships may be under command of NATO. Member States alone are also responsible for the actions *ex post facto.* A NATO commander cannot give any order concerning the rendering of assistance or its aftermath. This is also the view of individual Member States, i.e. that NATO has no formal responsibility or any role to render assistance, which remains the responsibility of individual States.[74]

With regard to human rights law in particular and besides the issue of attribution, it is a question whether NATO as such is bound by the obligations under human rights

[73] See *inter alia* ILC, Draft Articles on the Responsibility of International Organizations with Commentaries, *Yearbook of the International Law Commission, 2011*, vol. II, Part Two, at 19-26; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test', 19 *European Journal of International Law* (2008), 509, T. Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers", 51 *Harvard International Law Review* (2010), p. 113. For relevant case-law see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (App. No.71412/01 and 78166/01), Decision on Admissibility (Grand Chamber), 2 May 2007 and Court of the Appeal in The Hague, *Mustafic and Nuhanovic*, LJN Br0132, 5 July 2011.

[74] Information provided under conditions of anonymity by a Legal Advisor of a Member State of NATO, which participated in the *Operation Unified Protector.*

law, e.g. the right to life. Apparently, NATO would be bound by the fundamental provisions of humanitarian law and human rights law, including the right to life, in the context of its mandate in Libya. However, safeguarding lives on the high seas is not part of the mandate of NATO and consequently, it falls outside the scope of the normative framework governing *Operation Unified Protector.* This entails that NATO cannot be responsible for any violation of the right to life, since it is not bound by such obligation with regard to the 'boat people' in question.

It falls upon the flag States of the vessels participating to render assistance to the persons concerned as well as to protect their right to life. In the previous part, the ostensible responsibility of each flag State involved was discussed. It is well worth mentioning here that these flag States could invoke that they were under NATO command and, hypothetically, their warships were not able to render assistance to the persons in distress due to their mandate. Apparently, even if the warships concerned were not in the position to assist these persons by themselves, this does not absolve their flag States from their obligation to notify and cooperate with other States and assets in this regard.

This notwithstanding, these States could claim that were acting under a Chapter VII Resolution and thus, by virtue of article 103 of the UN Charter, their obligations under the LOSC and the SOLAS Conventions were superseded.[75] A counter-argument on this would be that as regards human rights law, the right to life is such a fundamental right, attaining the status of a peremptory norm, which cannot be superseded or, in the alternative, in the light of the *Al-Jedda v. UK case*, it calls for a different interpretation of the relevant Resolutions.[76]

In conclusion, the responsibility of NATO in relation to the 'left-to-die boat' incident should not be lightly presumed. As the previous analysis demonstrated, NATO as such was under no obligation to rescue these persons on the high seas and thus it cannot incur any responsibility under international law. This however does not exonerate its Member States for their individual responsibility, *qua* flag States, in this regard.

[75] Article 103 of the UN Charter reads as follows: 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. See also C. Chinkin, '*Jus Cogens*, Article 103 of the UN Charter and Other Hierarch

[76] Acts *contra juris gestionis* are beyond the powers of an institution, *in casu* the Security Council and therefore the provisions of the UN Charter on the latter's powers have to be interpreted and executed in a way that is compatible with peremptory norms. See also the recent *Al-Jedda v UK* case (2011), in which the Grand Chamber of the ECtHR held that 'in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'; para 102. See also A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of UNSC Resolutions' 16 *European Journal of International Law* (2005) 59, 69.

4. Concluding Remarks

The 'left-to-die boat' incident revealed the inadequacies, the lack of resources or even the inertia of a number of actors (States, international organizations, private mariners) to rescue people in distress at sea. Indeed, many opportunities for saving the lives of those persons were lost. Of course, this incident is just the tip of the iceberg, since an incredible number of silent tragedies occur every year in the Mediterranean. Based only on confirmed cases, it is estimated that more than 1 500 lives have been lost in the Mediterranean in 2011.[77]

In this particular incident, it is remarkable that many of the vessels or helicopters, which allegedly failed to save these people, were at that time taking part in NATO's *Operation Unified Protector*. This has elicited criticism about NATO's and its Member States' failure to respond to the relevant distress calls and to anticipate adequately for an exodus of asylum seekers and refugees from Libya in the course of the said Operation.[78] The long list of 'failures' in respect identified in the respective PACE Report was analyzed through the lens of the rules on international responsibility.

The conclusions drawn in relation to the responsibility of the relevant actors varied; for example, on the one hand, it was found that in some situations, the flag States of the warships that encountered the boat were responsible for not protecting their right to life; on the other hand, it was submitted that NATO did not incur any responsibility, primarily because of the fact that NATO as such was under no relevant obligation under human rights law. Nevertheless, under no circumstances, the *Operation Unified Protector* could serve as an excuse for letting these people without assistance for ten days at the centre of the Mediterranean. There is a profound moral failure of the States and NATO in this regard, which should be underscored and hopefully avoided in future instances.

[77] See *inter alia* Report by T Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg, 7 September 2011) – CommDH (2011) 26, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1826921. >

[78] See PACE Report, Summary.