

Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
OL ITA 3/2017

8 August 2017

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolution 35/15.

I had the opportunity to conduct a fact-finding thematic visit to Italy, from 10 to 16 May 2017, and to the European Union Institutions in Brussels, from 18 to 19 May, in connection with the preparation of my upcoming report on the issue of the right to life in the context of mixed migration, which I will present before the General Assembly at its seventy-second session this year.

I would like to convey my gratitude for the cooperation extended to my mandate in the preparation of and during this visit. This letter follows up on some recent developments, which may impact on the right to life, particularly the issue of Search and Rescue (SAR) operations on the Mediterranean Sea and the draft Code of Conduct for non-governmental organizations (NGOs) operating in this area.

The dangerous situation on the Mediterranean for migrants and asylum-seekers attempting to cross it is neither new nor temporary and requires a response that matches the serious threat posed to the right to life of these human beings, regardless of their status. I agree with European Commission President Juncker's recent statement that the focus of European efforts should be on solidarity. This means solidarity both with migrants and refugees who are fleeing terrible circumstances, and with those EU Member States that carry the heaviest burden. The sustained political will and its translation into concerted action by each EU Member State is essential to create this solidarity, through which to protect the right to life of these thousands of people seeking shelter or opportunities abroad, in accordance with international human rights law and standards. While in Italy, I had the honour to meet with the Italian Coast Guard involved in these operations as well as with several NGOs. Altogether, they are contributing to protecting the right to life by preventing loss of life on the Mediterranean.

States have a positive obligation to protect individuals against actions by non-State actors that put at risk or violate their right to life. This includes due diligence to prevent arbitrary deprivations of life, including where there is a real and immediate risk to the life of an identified individual or group of individuals from the criminal acts of a third party, in this case smugglers or traffickers.¹ As with all other human rights principles, States' responsibility to protect and exercise due diligence must be

¹ CCPR/C/21/Rev.1/Add.13, para. 8.

implemented without discrimination. This means, among other things, without discrimination on the basis of migration status. Due diligence requires an assessment of: (a) how much the State knew or should have known; (b) the risks or likelihood of harm; and (c) the seriousness of the harm². It is my considered opinion, based on existing evidence, that the deaths in the Mediterranean are foreseeable and largely preventable.

Three Maritime Conventions impose a duty to provide an “adequate and effective” search and rescue (SAR) service at sea.³ Rescue must be provided “regardless of the nationality or status” of the person in distress or the “circumstances in which that person is found.”⁴ The intent of these treaties is to create a system to rescue all vessels in distress.

There is no doubt that Italy carries a particular heavy responsibility and burden in relation to protecting the right to life of those crossing the Mediterranean. I commend the Government of Italy for its Mare Nostrum Operation, which, from 2013 to 2014, has been credited with saving thousands of lives. I deeply regret the abandonment of Mare Nostrum, in part because of EU Member States’ failure to abide by their commitments to Italy, and uphold the principle of burden-sharing.

The primary mission of Frontex Operations Triton and Sophia that followed the Mare Nostrum operation is not SAR but border control, including the disruption of the business model of criminal networks. These substitute operations have not matched Mare Nostrum in terms of preventing mass casualties and loss of life at sea, and are creating an important protection gap. Several NGOs took the responsibility to fill this vacuum by conducting SAR operations in the Mediterranean. During the past Easter weekend alone, they rescued over 8000 persons and brought them to safety.

During my thematic visit in May, NGOs involved in SAR operations confirmed that they are implementing their SAR operations in full compliance with the principles and obligations enshrined in the existing treaties and customary law as well as in the domestic legislation governing SAR activities and in coordination with the Italian Coast Guard and its Maritime Rescue Coordination Centre (MRCC). They told me about their commitment to operate in coordination with the Coast Guard and MRCC, and in compliance with international law. SAR operations conducted by NGOs have proven of utmost necessity to saving the lives of thousands of men, women and children.

Still, in spite of their efforts, according to information provided during my mission, at least 2,206 people have lost their lives crossing the Mediterranean (Central Mediterranean Route) in the first half of 2017, and the number is expected to increase significantly during the summer period with a rise in the number of crossings due to good weather conditions. While writing this letter, at least 13 persons more are said to have lost their lives.

² A/HRC/35/23

³ 1982 Convention on the Law of the Sea, 1833 *UNTS* 3 (UNCLOS), Art. 98; 1974 Safety of Life at Sea Convention, 1184 *UNTS* 18961 (SOLAS), Regulation 15; 1979 Search and Rescue Convention, 1405 *UNTS* 97 (SAR), Annex, Art. 2.1.1.

⁴ 1979 Search and Rescue Convention, 1405 *UNTS* 97 (SAR), Annex, Art. 2.1.10.

Code of Conduct for NGOs

It is in this context that I have read with great alarm the European Commission “Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity.” Its first measure “to reduce migratory pressure along the Central Mediterranean Route and increase solidarity” demands that Italy drafts, in consultation with the Commission and on the basis of a dialogue with the relevant NGOs, a Code of Conduct for NGOs involved in SAR activities, that the Council may possibly endorse.

I understand that the Italian Government has recently held consultations with NGOs regarding the Code and that several of them have chosen not to sign it. As the Code appears not to have been finalized yet, I will at this stage not offer a detailed analysis on the basis of international human rights law. I will focus instead on what I surmise is the implicit rationale behind this initiative – a rationale which I find deeply disturbing and a clear demonstration that Italy and EU Member States view the risks and reality of deaths a price worth paying for the sake of migration deterrence.

In dictating the terms of the Code of Conduct, Italy is effectively mandating procedures that NGOs should follow in performing SAR. As such, it should ensure that these procedures do protect lives and do not reduce the space for life-saving activities, which would lead to more deaths at sea. For example, by prohibiting trans-shipments except in situations of grave and imminent danger, Italy is potentially forcing vessels unnecessarily to abandon SAR patrols, leaving migrants at great risk. If it is not the case, then Italy should publicly explain the rationale for this and all other mandates, and explain how these provisions protect life.

The Code of Conduct seems to aim at reducing the efficacy of the NGOs efforts and letting the Libyan Coast Guard bear the burden of saving lives in Libyan waters. During and after my mission to Italy, I received several reports from various stakeholders involved in search and rescue according to which the Libyan coast guard is not able to carry out effective SAR operations. In one incident, for instance, the Libyan coast guard reportedly fired rubber bullets at a rubber dinghy thereby endangering the persons on board⁵.

Assistance to the Libyan authorities

The enhanced cooperation with the Libyan authorities, also announced on 4 July 2017, may on the surface appear to address these problems. The measures include a 46 million Euro project to support Libya to formally notify their SAR areas and establish an MRCC, with support of the EU, and to step up on-going training activities of the Libyan coast guard, as well as to conclude the prioritization exercise of equipment and maintenance with the Libyan authorities. However, this announcement followed repeated

⁵ See for more incidents the latest OHCHR/UNSMIL report (A/HRC/34/42), in particular paras. 43-47.

reports of massive human rights violations and abuses committed against migrants by various actors in Libya, including at the hands of border guards. The migrants and refugees I interviewed provided horrifying accounts of killings, sometimes preceded by sexual violence and torture, by a range of State and non-State actors there.

In one of its latest reports⁶, OHCHR concluded that Libya has not been able to ensure effective protection for migrants stuck in the country. Various human rights organizations have issued similar warnings and detailed, among other violations, summary executions of migrants and refugees as well as their unlawful deaths as a result of a lack of food in detention or other detention conditions. Perpetrators reportedly include State officials, members of armed groups, traffickers, smugglers and individuals. The United Nations High Commissioner for Refugees (UNHCR) has also reported that life-threatening insecurity, instability, difficult economic conditions plus widespread exploitation and abuse are currently prevailing in Libya.

Violations by Libyan security officials, including the coast guard, have also been alleged, including of the right to life during the interception of migrants and refugees, mostly using rubber dinghies, attempting to cross the Mediterranean. These interceptions have reportedly included shooting at vessels and otherwise attacking them as well as using dangerous interception techniques. Several migrants and refugees I have interviewed have reported attempting to cross the Mediterranean several times, being intercepted, and trying again to escape the conflict and their extremely vulnerable situation in Libya. Several of them further indicated that they did not enter Libya with the intent of trying to reach Europe but that there was no other way out of Libya to save their lives.

Based on interviews I held in June with persons either based in Libya or with regular access to the country, it appears that many officials are themselves implicated in the smuggling or trafficking business and that the prospect of an EU grant has sharpened competition between the various armed groups operating in Libya, intent on demonstrating that they are combating irregular migration. The end-product is, allegedly, more violence against migrants.

In this context, serious concerns have been raised about the number of migrants and refugees intercepted and taken to shore as compared to the numbers being taken to detention centers, indicating that a number are taken to unofficial places of detention where they are at increased risk of grave abuses, including killings.

I am not suggesting that Libya and the Libyan security sector should not be supported and trained. There is no doubt that the Libyan coastguard's search and rescue capabilities have to be improved to contribute to saving lives at sea. However, this cannot happen in the absence of demonstrable guarantees that the rights of intercepted migrants and refugees will be respected, including their right of non-refoulement, and protected against abuses by non-State actors. Instead, current evidence points to migrants intercepted by the Libyan coast guard, returned to official and unofficial detention centers

⁶ Ibid.

where they suffer a range of violations, including arbitrary killings. External assistance, no matter how much it is needed, must not lead to further abuses of migrants. This would be the antithesis to protecting the right to life, the antithesis to search and rescue, and may be construed as an indefensible criminal policy.

It is my opinion that by funding and training the very agencies that commit these abuses, the EU could potentially be aiding and assisting further killings and/or loss of life. The International Law Commission in article 16 of its Articles on State Responsibility sets forth the appropriate standards:

“A State, which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”

Courts have indicated that this provision expresses customary international law.⁷ The aid or assistance does not need to be "essential" to the performance of the unlawful acts, but it must "contribute [...] significantly to that act."⁸ Moreover, the State providing aid must have done so with the "knowledge of the circumstances of the internationally wrongful act."⁹ All assistance in the context of entry control must be viewed in this light. In setting up programmes such as the above-mentioned, that the EU describes as humanitarian, it must carefully examine risks, including whether they might be aiding and assisting in arbitrary deprivation of life. Funding initiatives to Libya where human rights violations are endemic must seek to enhance protection and not aid or contribute to known violations in the name of migration or border control.

The only option for the EU and its Member States, including Italy, is to respect their international human rights obligations and the European Convention on Human Rights. This means that as long as migrants returned to or transiting through Libya are at risk of gross human rights violations, including arbitrary killings, Italy with the full support of the EU and other Member States must provide SAR on the Mediterranean, and in doing so prevent their return to Libya, as well as ensure that NGOs can contribute fully to this end. The situation in Libya will have to be independently and objectively assessed before any meaningful changes can be brought to this approach; it is evident that the current EU aid package will not deliver the appropriate human rights outcome immediately.

The disproportionate burden imposed on Italy ought to be tackled seriously by EU Member States, including through a designated EU led SAR operation, the protection of operations conducted by NGOs, and EU burden-sharing post-disembarkation, including through relocation.

⁷ See Thomas Gammeltoft-Hansen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence," *Colum. J. Transnat'l L.* 53, no. 2 (2015): 277-78, and cases cited therein.

⁸ Commentary to the ILC Draft Articles on Responsibility for States for Internationally Wrongful Acts, Art. 16, para 5.

⁹ Ibid. para. 4.

For your information, a letter of similar contents has been transmitted to the European Union (OTH 18/2017) and the Government of Libya (LBY 3/2017).

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.
2. Please provide detailed information on the current status of the Code of Conduct, as well as on the consultations held. Please indicate the legal status of the Code, how it will be enforced and by whom, and the appeals procedures available to NGOs.
3. Please indicate how your Excellency's Government is planning to fulfil its obligations to prevent the loss of life on the Mediterranean. In particular, please indicate which measures will be taken to replace NGOs SAR operations.

I would appreciate receiving a response within 60 days.

I intend to publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned issues.

The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issues in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions