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Responsibility, Emergency, Blame: Reporting on Migrant Deaths on the Mediterranean in the Council of Europe

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Abstract

In 2011 at least 1500 migrants perished in the Mediterranean en route to Europe. In one notable case 63 of 72 passengers of a refugee dinghy died in the course of a two-week drift. Despite communicating distress, they were left to die by passing military vessels and maritime authorities. This article analyzes the inquiry into this case conducted within the Council of Europe as a revealing instance of international human rights supervision. Through a focus on the practice of human rights reporting in instances of multiple institutional and moral failures, it shows how the rapporteur arrived at a politically acceptable account of who was responsible for the boat's tragedy. Distinguishing between the concepts of responsibility as duty and responsibility as guilt, the article considers the implications of privileging the former over the latter. It argues for a human rights practice that embraces a robust notion of responsibility which combines both.

On the 10th of April, 2011, in Zlitan, a Libyan town situated 160 km east of Tripoli and 60 km west of Misrata, a small rubber boat with 11 emaciated people on board washed up on the beach.[i] One woman died immediately upon reaching land, most of the others (nine men and one woman) lost consciousness as a result of extreme exhaustion. At the time Libya was in the midst of conflict, the coast patrolled by the military. The passengers of the boat were swiftly arrested, their possessions confiscated and no medical assistance provided. Another member of the group, a man, died during imprisonment due to the lack of appropriate care. Eventually, the nine remaining survivors bribed their way out of prison and made their way to Tripoli, where they received shelter and medical assistance at a Catholic church.

Thus ended the failed attempt to escape Libya of 72 people who just over two weeks earlier embarked upon a risky maritime journey from Tripoli to Lampedusa. Lampedusa is the Italian island off the coast of Sicily, notorious for being the first destination for boat migrants fleeing North Africa. Tripoli, and the rest of Libya, in the Spring of 2011 became a danger zone for sub-Saharan labor migrants caught up in the conflict between pro-government forces and anti-government militia. Thousands of men, women and children found themselves in the midst of chaos, often facing attacks on the account of being suspected pro-Gaddafi mercenaries. Hence the choice of many to attempt the perilous journey across the Mediterranean. Gangs of smugglers took advantage of the situation and for steep fees they crammed as many people as possible into barely seaworthy vessels, before sending them off into the high seas without provisions or adequate navigational aides. Such was the case of the Zlitan boat whose passengers crowded into a rubber dinghy on the night of the 26th of March and, with barely a few bottles of water and a

pack of biscuits between them, set off from Libya with the hope of reaching Italian soil within 24 hours. But the sea became rough and after 18 hours of navigation the boat started running out of fuel with no land in sight. Set adrift in the middle of the sea, a few days into the journey, one by one the passengers started to die. In the end, 63 people in total perished in the course of this attempted escape. This number is part of a much larger death toll. According to UNHCR estimates, 1500 people lost their lives on the Mediterranean in 2011 and although precise numbers are notoriously difficult to establish, hundreds more died since then in maritime accidents or of suffocation, hunger and thirst on overcrowded migrant boats.[ii] Their stories remain untold and their deaths unaccounted for. What sets apart the Zlitan boat from other similar cases is the fact that owing to the widely publicized testimonies of the nine survivors, the knowledge of how the fatal journey unfolded entered the public domain. Theirs is "the story [which] gave a face to all these disappeared people."[iii] We know that the migrants were not just floating in the midst of some maritime equivalent of a desert. NATO had just begun the operation "Unified Protector" and the area was teeming with military ships. The migrants saw other boats and were seen by their crews. They made contact with persons on land and they sent distress signals to other vessels and aircraft who passed them. Documents exist which show that their requests for rescue were received and registered by several competent authorities. Had any one of these actors followed up on these calls, the lives of the passengers could have been saved. Instead the dinghy was left adrift in the middle of the busiest sea in the world, later to become known as the "left-to-die boat."

Shortly after the British *Guardian* first published the boat's story in May of 2011, establishing who was responsible for its fate was taken up as an urgent task by European human

rights organizations, most prominently the Parliamentary Assembly of the Council of Europe (PACE). In mid-2011 PACE's Committee on Migration, Refugees and Displaced Persons nominated the Dutch socialist senator Tineke Strik as its rapporteur to conduct an inquiry into the case. The first report was published a year later (PACE 2012). In mid-2013 the rapporteur's mandate was extended and as of this writing further work is ongoing. Based on fieldwork conducted at the Council of Europe in Strasbourg in the Spring and Summer of 2013 and on a study of pertinent documents produced thus far, this essay sets itself the goal of analyzing the process of accounting for the "left-to-die" boat disaster. How has the knowledge of what happened been generated? What possibilities does it open?

Beyond highlighting the achievements and limitations of this particular PACE inquiry, the point of this case study is to understand more broadly the practice, the politics and the potential of human rights inquiry in instances of multiple institutional and moral failures. After the harm is done, how do European human rights bodies establish the causes, and when do they decide to act in the first place? How is responsibility conceived of and assigned? One key question is that of applicable legal frameworks. But the law and the complexities of its possible applications are only one part of the story. In assessing the available mechanisms for documenting human rights violations in Europe we must pay equal attention to such extra-legal factors as institutional and international politics, contested notions of moral duty as well as issues of representation and authority (personal as well as institutional). As I show, human rights inquiry is a practice wherein ideas of legal, moral and political responsibility are thoroughly intertwined. To tease them apart, I offer a discussion of an institutional response to a singular event, along with a framework for understanding more broadly the emerging practices of

responding to and accounting for the harms suffered by non-citizens caught up in the European border regime. Paraphrasing Talal Asad (2000), I ask what can human rights rapporteurs do? Ultimately, recalling Elaine Scarry's work on emergency, I suggest that they have an important role to play in developing new models of what she calls "emergency thinking" (2011). That mission however must go hand in hand with the pursuit of justice for victims of those emergencies where rescue never came.

Responsibility and Human Rights

As many scholars and practitioners have pointed out, the enduring shortage of effective enforcement mechanisms is one among the key reasons why human rights consistently fail to deliver on their promise of universality.[iv] The idea of human rights is about transcending boundaries. Citizenship is bounded. Other types of identities are bounded. But human rights were conceived of as universal, applicable regardless of one's nationality, gender and ethnic, racial or legal status. Bracketing for the moment the salient question of whether such universality can be upheld or defended in world of diversity, inequality and neo-imperialism, let us focus on the fact that human rights are meant to operate where the protections of citizenship fail or do not reach. Shaped in their modern form by the experience of the Holocaust and mass statelessness, human rights are intended as a backup for the domestic systems of rights, a sort of a legal parachute which ideally should open in an emergency. Real life situations however, notably those involving migrants, regularly test this proposition. As Stefanie Grant has shown, "for much of the 60 years after 1948 [the year of the UDHR] migrants were on the margins of human rights law, caught between international principles of universality and exclusionary rules of state

sovereignty and national law" (2011: 25, see also Dembour and Kelly 2011). We may think of the case of the "left-to-die" boat as an instance of the human rights parachute not opening. Existing protections failed and the PACE rapporteur chose to examine the causes through the lens of responsibility.[v] She titled the report *Lives lost in the Mediterranean Sea: Who is responsible?* and organized it as an assessment of multiple failures of several different systems and agents that together led to the boat's abandonment (PACE 2012). Overall, the incident is characterized as a "collective failure" and the notion of responsibility is repeatedly invoked. These concepts deserve a close focus. What sort of responsibility is at stake? And what exactly is a "failure" in a human rights context?

I shall preface the examination of Strik's reporting with a more general reflection on responsibility, a concept which has received recent careful attention of human rights scholars in the special issue of this journal on Humanitarianism and Responsibility (Mitoma & Bystrom 2013 and others). In the introductory essay Glen Mitoma and Kerry Bystrom show that this concept has become a cornerstone of contemporary humanitarianism and call for its "sustained interrogation" to uncover and clarify "the various and crosscutting visions of responsibility that currently operate within the discussions of humanitarianism carried out by practitioners, policy-makers, scholars, and a more general public beseeched to respond to humanitarian crises" (2013: 4). Here, I contribute a reflection on responsibility after the fact. How is it established and attributed, and to what effect?

Responsibility has two conventional senses: the 'capability of fulfilling an obligation or duty' and the 'state or fact of being accountable.' The first sense is anticipatory. It entails expected conduct, a job to be done, an act to be performed. The imperative may be moral, or it

may stem from an assignment of duty within a social unit. The second sense is retrospective. To be accountable means to be answerable, which entails a relationship: accountability is the responsibility of an agent to someone else (Keohane 2002: 1124) or, as recently suggested by Goodhart, to specific norms (2011). In a court of law, one can be pronounced responsible for having committed an unlawful act or for failing to fulfill an obligation. Such decision has traditionally entailed some form of punishment (retribution), the need to make amends (reparation), or both (Feinberg 1970: 26). However, philosophers and social scientists who have examined the issue have noted that this traditional juridical concept of responsibility is no longer stable, that the link between harm and the agent who caused it is being severed (see e.g. Ricoeur 1995, Kelty 2008). Drawing on Ricoeur, Stan van Hooft notes that today "the management of risk through insurance and processes of indemnification has sometimes replaced that of imputing responsibility and fault to particular agents. … A new kind of collective responsibility has weakened the imputation of particular fault to particular individuals" (2004). It has therefore weakened accountability, or the mechanisms and practical possibilities of holding individuals and the bodies they represent to account for their deeds and omissions. This coincides with the tendency to implore individuals and groups to be responsible for an open-ended spectrum of acts and choices.

Posited as rational, self-directed subjects, responsible persons are those who are capable of grasping their own strengths and weaknesses, anticipating the future and planning for it, understanding the consequences of their actions, calculating risk and guarding against adversity. In this sense, (personal) responsibility is essentially the highest achievement of that form of self-governance whose promotion has been such a key element in the global advance of

neoliberalism. It has little to do with care of the other, instead it is the ability to administer and maximize one's material and symbolic resources so as to ensure the best possible outcomes for oneself and one's dependants, ideally without enlisting external help. Thus understood, the virtue of responsibility has been stripped of its more communal or collectivist aspects and appropriated for ideological purposes within contemporary narratives of the autarkic self. This process has been termed the 'responsibilization of subjects' and critiqued as an element of contemporary governmentality (Shamir 2008).

On the other hand we have the phenomenon of what might be called agentless responsibility, strongly associated with Beckian concepts of risk (Beck 1992, 2000). Here, contemporary social and cultural anxieties around technological developments, climate change, conflict and other forms of risk and insecurity generate calls for responsibility without naming the responsible subject (Kelty and McCarthy 2010, Strydom 1999). In this instance duty is collective, or societal (Strydom 1999: 67). All of us (including, in no particular order, people, corporations and politicians) must be more responsible in how we manage the planet's resources, how we use new technologies, how we do business and how we consume. These exhortations apply to everyone and to no one in particular. The moral imperatives may be strong, but when no specific agent is designated as the duty-holder, the obligation remains ambient, often contested, and ultimately unenforceable. Somewhere in between personal and collective responsibility sits the concept of corporate social responsibility (CSR), a form of self-regulation which for some constitutes the gospel of new socially conscious and responsible business, while to others appearing as a ruse designed to boost the public image of corporations and deflect attention from their harmful practices.[vi]

It may seem at first glance that the law should be, to a significant measure, immune to these instabilities of responsibility. Obligations and faults may be a matter of political debate and cultural contestation. But as H. L. A. Hart has shown, in a court of law, unlike in ordinary language, the ascriptions of rights and responsibility, although complex and defeasible, do not leave much room for ambiguity (Hart 1949). But not all areas of law are equal in this regard, and today a common law court room serves as a poor model for explaining the infinitely complex and heterogeneous possibilities afforded by contemporary international legal systems (Merry 2006, 2010). The concept of responsibility is often invoked in the international legal arena, for example in the ongoing work of the ILC Draft Articles on State Responsibility (Crawford & Olleson 2005) or in the debates around the concept of Responsibility to Protect (Gilligan 2013). But as Mitoma and Bystrom have shown, its meaning and place is by no means settled (2013, see also Forsythe 2013).

International human rights law determines the obligations of states towards all human beings. But unlike national civil or criminal law, it lacks a unified and universal system for adjudicating responsibility when those obligations are broken. The European Court of Human Rights, alongside other regional courts (the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights) does provide for binding forms of legal decision and has decided landmark cases, but its capacity is limited and access to it subjected to multiple conditions (Abdelgawad 2011, Leach 2011). With the realization of rights dependent primarily on national judicial institutions, the potential of human rights to challenge what Liisa Malkki called "the national order of things" (1995) remains unfulfilled (see also Asad 2000).

This does not mean however that the bodies and organizations that together make up the global human rights movement are incapable of delivering pronouncements of fault. What it does mean is that when such pronouncements are delivered, only rarely do they take the form of a binding judicial decision.[vii] In most places most of the time human rights are monitored at a distance by bodies whose role is neither that of law enforcement, nor of prosecution, but of one or another form of oversight. Indeed, the entire 20th century history of supranational institutions is to a large extent one of establishing what Jane Cowan calls "regimes of supervision" (2007: 547). She argues that the "historical moment when international society became institutionalized" is the moment when in 1919 at the Paris Peace Conference the newly founded League of Nations assumed a supervisory role over states parties' compliance with the various minority treaties signed in Versailles. "Because details on exactly *how* the League was to 'guarantee' treaty implementation had been left hazy and because no precedents existed," writes Cowan, "League civil servants, particularly at higher levels, had unusual latitude to define their role and their practices" (Cowan 2007: 549).

From this historical wellspring of international administrative practice emerged most of the contemporary quasi-legal ways of assessing human rights abuses, giving rise to a historically distinct mode of sovereignty which Cowan terms "the supervised state" (2007). These practices include supranational monitoring, special investigations, fact-finding missions, expert reports, and other forms of international oversight of human rights whose most prominent effect is that they render states' transgressions known and visible. Within the United Nations, expert inquiry is pursued in response to violations of human rights perpetrated by UN member states. Appointing a designated official to conduct an inquiry allows international organizations to address

allegations of human rights violations diplomatically, where no direct action is legally possible or politically viable. An official rapporteur can call on experts and witnesses to document facts pertinent to a specific case or issue, and he or she can disseminate them using the parent organization's platform. Some human rights scholars highlight the distinctive advantages of these mechanisms, pointing out for example that the UN's special rapporteurs "have been credited for influencing significantly the elaboration, interpretation and implementation of international human rights law and brought the human rights law work of the UN to the ordinary men and women around the globe" (Subedi at al. 2011: 155). Ultimately, without directly infringing on national sovereignty, international organizations can expose crimes and pass implicit or explicit moral judgment. As Darius Rejali argues in *Torture and Democracy*, they can have the powerful effect of influencing policy through shame and international opprobrium (2007). They cannot however compel anyone to make amends or accept punishment, that is to engage in acts which are at heart of responsibility as a juridical concept (Ricoeur 1995: 11).

A matter of conscience

"NATO units left 61 migrants to die of hunger and thirst" read the front page headline in the paper edition of the *Guardian* on May 8, 2011. We read that "despite alarms being raised with the Italian coastguard and the boat making contact with a military helicopter and a warship, no rescue effort was attempted" (Shenker 2011). Further, the story gives details of the identities of the migrants (they were Ethiopians, Nigerians, Sudanese, Ghanaians and Eritreans of both sexes and varying ages, the youngest one year old) and of the key points in their harrowing journey. Based on interviews with the survivors corroborated by other sources, the reporter Jack

Shenker recounts how the migrants used the boat's satellite phone to call a priest, Father Zerai, who was their contact in Rome and who in turn alerted the Italian coast guard to the boat's distress. He reports that they were seen by a helicopter which according to the survivors had the word ARMY spelled out on its side, and which lowered some water and biscuits into their vessel, but then left without a trace. Shenker established that subsequently they were trying to communicate with a military plane taking off from a nearby aircraft carrier by holding two starving babies over their heads. Reporting on the fact that most passengers eventually succumbed to hunger and thirst, he explains that "the *Guardian* has made extensive inquiries to ascertain the identity of the aircraft carrier, and has concluded that it is likely to have been the French ship Charles de Gaulle, which was operating in the Mediterranean on those dates" (Shenker 2011).[viii] Preliminary blame was laid at the feet of the military, implicating not just the French commander of one vessel but also NATO forces more broadly.

Unusually for migrant boat disasters placed on the front page, the article attracted a great deal of attention. That migrant journeys are perilous and often end in death would not have come as a surprise to the average consumer of European media, but the story of protracted drift and of unanswered calls for help was powerful and its context significant. Operation "Unified Protector" was under way, ostensibly launched to protect Libyan civilians from the fallout of the conflict between Gaddafi and rebel forces.[ix] The *Guardian*'s allegations undermined this narrative of benevolence. NATO firmly demanded a correction, denying that their units were involved.[x] A number of human rights organizations such as Migreurop and the International Federation for Human Rights (FIDH) also followed up on the case. The most high-level response however came from the Council of Europe. On May 9, 2011, the day after the article was

published, the President of the Parliamentary Assembly, Mevlüt Çavusoglu issued a statement calling for an inquiry. "If this grave accusation is true" said the President,

> that, despite the alarm being raised, and despite the fact that this boat, fleeing Libya, had been located by armed forces operating in the Mediterranean, no attempt was made to rescue the 72 passengers aboard, then it is a dark day for Europe as a whole. … I call for an immediate and comprehensive inquiry into the circumstances of the deaths of the 61 people who perished, including babies, children and women who – one by one – died of starvation and thirst while Europe looked on.[xi]

By framing the call in this manner, the PACE president referenced a larger European history and narrative of responding to harm, one where coming to the rescue of the dying and the suffering is an undisputed moral imperative which nevertheless at certain points in history has eluded Europeans. The specter of "Europe looking on" as women and children die is a key rhetorical trope in the European human rights discourse, a warning derived primarily from narratives of indifference and bystanders' guilt during the Holocaust. That large-scale abdication of responsibility in the future had to be prevented by legal and institutional means was an intuition that informed the creation of the European human rights machinery. The founders sketched out a vision for the Council of Europe, especially its Parliamentary Assembly as "the conscience of Europe" (Adenauer, cited in Kleinsorge 2010). It encompasses keeping a watchful eye on the human rights situation in member states by means of a range of oversight procedures, one of which is the launching of inquiries and preparation of reports by the PACE thematic committees

on specific issues within the aim and scope of the Council (Evans & Silk 2013).[xii] Equally, this vision implies the need to raise public alarm in cases of apparent indifference vis-à-vis those instances of harm where member states can be considered at fault. The imperative to examine the case of the boat stemmed directly from this conception of the Parliamentary Assembly's role. The report produced as a result reflects the contradictions inherent in the very idea of a collective conscience.

A Room with a View

The Parliamentary Assembly brings together parliamentary delegations of all of its 47 member states and it meets four times a year in Strasbourg for week-long Part-Sessions (four Part-Sessions make up one Annual Session). Over 300 parliamentarians meet in thematic committees, political groups and plenaries to discuss urgent issues related to the functioning of democracy, human rights and the rule of law (for example, in the first half of 2013, the issues on PACE's agenda included the situation in Syria and the resulting refugee crisis, the threats to democracy in Hungary, the reform of the European Court of Human Rights and the human rights responsibilities of Frontex, the European Union's external border agency). The hub of this quarterly activity is the Palais de l'Europe, a fortress-like square building with the shell-shaped dome of the hemicycle in the middle. Designed by Henri Bernard to replace the more modest Maison de l'Europe, the current headquarters were inaugurated in 1977. The building dominated the European District in Strasbourg until the 1999 launch of the Louise Weiss building, the official seat of the European Parliament which today dwarfs its neighbors with its distinctive tower reminiscent of Breughel's depiction of Babel. Completing the local cacophony of

architectural symbolism is the area's third prominent edifice, the 1994 European Court of Human Rights (ECtHR) building located on the bank of the Ille, with its two circular chambers designed to resemble the scales of justice.

I explored the neighborhood intermittently in the spring and summer of 2013, when I came to Strasbourg to attend the meetings of the Committee on Migration, Refugees and Displaced Persons scheduled during the Part-Sessions, and to speak, among others, with Senator Strik, who at the time was seeking an extension of her mandate as the left-to-die boat rapporteur (granted in early June). In addition to asking questions of the parliamentarians and civil servants, taking in the meetings and collecting documents circulating among the PACE members, I studied the material environment wherein the elite discourse on human rights takes shape, noting that the uses of space in and around the buildings reflect some of the tensions of European human rights.

For example, stepping off the silent modern tram at the Droits de l'Homme stop on Allée de la Robertsau one can turn left and find oneself in front of the European Court of Human Rights or make a right, walk across the Canal de la Marne au Rhin and another 200 meters towards the steps leading up to the front entrance of the Palais de l'Europe. Regardless of the way one chooses to go, one element of the surroundings is difficult to miss. Along the banks of the canal, on both sides of Avenue de l'Europe sits a handful of tents pitched by applicants to the ECtHR who in this way manifest their disgruntlement, impatience and disappointment with the official mechanisms of justice. On accusatory placards taped to the tents and attached to nearby railings they announce that they will camp there until justice is served, even though their cases may already have been declared inadmissible. Men and women in business attire pass the tents without pause, presumably having accepted what one civil servant told me was the local

consensus: that these people had problems which are "not of legal nature," and neither the Court

nor anyone else at the Council is in a position to help them. The Court, write Kelly and Dembour

"is unfortunately not equipped to ease the pain of all those who had invested their hopes in

human rights law" (2007: 1). One way to manifest the endurance of such hopes is to refuse to

leave even after the case is closed. Camping is a metaphor, a powerful device in the

contemporary language of protest as occupation. Pitching a tent means asserting rights,

demanding attention through dogged presence in a space that is ostensibly public, but which, as

the fate of the Occupy movement has shown, ultimately is revealed as belonging to anyone but

the protesters.

Nor are European institutions able or inclined to highlight and address the grievances of

all of the communities and groups which claim that their rights are trampled upon by the

authorities of CoE member states. Further on the other side of the canal, the sidewalk adjacent to

the Parc de l'Orangerie opposite Palais de l'Europe is the site of repeated manifestations by the

Freedom for Abdullah Öcalan movement. They gather during the Part-Sessions to display

banners (*Nous sommes en veille permanente jusq'á la liberation d' A. Öcalan*), distribute flyers

and collect signatures under petitions to free the Kurdish leader and other political prisoners in

Turkey. I was told that at times their protests have become disruptive. All I saw however was

peaceful solicitation by men draped in Kurdish flags and wearing T-shirts bearing the image of

Öcalan's mustached face, embodying the pathos of a long-standing cause. Despite the sympathy

they can count on within the United European Left (the leftmost of PACE's political groups), the

Kurdish issue rarely reaches the plenaries in the hemicycle, blocked by larger interests and

political concerns.[xiii]

Who demonstrates and for which cause changes with the seasons. In April, past the Öcalan protesters, right in front of the park entrance a Georgian painter staged a lone protest against Russia's policies in the Caucasus. Along the park fence he displayed twenty-odd oil paintings symbolically depicting Russian aggression. On one, a monstrous two-faced head combined the visage of Putin on one side and of Stalin on the other. On another, a growling bear in a sheep's skin trampled upon a map of Georgia clutching a grenade in its paws. A swastika composed of army boots was rendered against the background of the white, blue and red Russian flag. The painter welcomed anyone who came up to look at the paintings with a warm smile, thanking for the attention. The art was not for sale, he said in his rudimentary English, it was to tell "the truth about Russia."

"We are said to be the conscience of Europe" said to me a Polish member of PACE and of the Committee on Migration, Refugees and Displaced Persons, when I asked him how the committee sets its priorities, "and everyone has a dirty conscience from time to time." Neither an answer to my question, nor an explanation of anything, the statement nevertheless captures neatly the fundamental paradox inherent in supranational human rights supervision. Those who make up the institutions whose prerogative it is to supervise the observance of human rights treaties are themselves representatives of nation-states who are usually the last instance deciding whether a grievance is legitimate or not.[xiv] Save for the 1,500 or so applications per year which do reach the judgment stage at the Strasbourg tribunal, most claims against state authorities, both the severe ones and those seemingly banal, never become the topic of discussions in the chambers of the Court (Dembour 2011, Çali 2007). The discussions in the meeting rooms of the Council are more wide-ranging than the strictly legal proceedings of the Court, but only rarely do

they lead to formal censure of a state. The question of whose conscience is dirtier, who ought to be shamed and made to repent is ultimately one not of law but of politics. Every intervention on behalf of any group of sufferers, much as it might be expressed in the language of rights, is a political act in competition with other such acts, motivated by different conceptions of rights, violations and fault. The stakes in this competition are multiple, and vary depending on the situation. Members of the Assembly are elected representatives in national parliaments whose domestic agendas influence their CoE work. For some, the vindication of their position may be equally or more important than progress in a human rights cause that they support. The parliamentarians have a habit of glancing out the windows of the Committee meeting rooms toward the scales-like building of the Court visible on the other side of the street, as if referencing some ultimate source of justice. Most human rights matters in Europe could in theory be decided at the ECtHR. In practice, few ever will, but the proximity of the last instance lends the debates in the Council additional gravity.

This was the case on the 25th of June of 2013, when Senator Strik, already set to pursue her continued inquiry into the case of the boat, convened a hearing at the Migration Committee. She invited Abu Kurke, who is one of the survivors, along with a panel of legal experts. Introduced by Strik, Kurke, who currently lives as a refugee in the Netherlands, spoke to twenty-odd parliamentarians of the initial phase of his escape (prior to boarding the dinghy), the beginning of the boat's journey and the attempts to make contact with Rome. He mentioned the helicopter sighting and his desire for justice before being thanked for his contribution to the hearing. Well accustomed to giving this testimony (to reporters, to the filmmaker Emiliano Bos, during asylum proceedings and on other occasions), Kurke appeared weary but hopeful, in all

probability significantly buoyed by the presence of the lawyers representing him in the case.[xv] One of them was Gonzalo Boye, the Spanish human rights lawyer who acquired wider fame for attempting to use Spanish law to charge members of the Bush administration for their participation in war crimes against citizens or residents of Spain who were held in US extrajudicial detention (Simons 2009).[xvi] He was asked to speak because in the aftermath of Strik's first report in mid-2012 the fate of the boat's passengers has become the subject of two criminal lawsuits, in Spain and in France. Boye is the lead lawyer in a criminal case against the captain of the Spanish frigate Méndez Núñez and others who may be responsible in the case (similar cases have also been filed in Italy and France).[xvii] In his statement, he described the boat's abandonment as a war crime, discussed the lawsuit filed in the National Court of Spain and outlined the possible further course of action:

> If the Spanish judicial process doesn't work, at the end of the day we will end up for sure here in Strasbourg, [points out the window at the Court building] at the European Court of Human Rights ... [T]he real problem of this case is that there are witnesses. A case without witness is not a case and we don't know how many cases apart from this we have been ignoring because our armed forces haven't given us sufficient information. And just one more question: what would have happened if in that boat would have escaped Gaddafi instead of him [points to Abu Kurke]. For sure the helicopters and the boats would have gone and would have taken the people of board. As they were African migrants, that was not a problem for the armed forces or at least for the people who took the decisions.[xviii]

Alongside Boye spoke Emiliano Giovine, a legal scholar of the European Commission DG Joint Research Centre, who brought in the maritime law perspective.[xix] He discussed his research on such legal controversies pertinent to the case as the question of what constitutes "distress," but also reminded the audience of the fundamental principle of rescue at sea enshrined in international custom, the 1974 Safety of Life at Sea Convention (SOLAS) and the 1979 Search and Rescue Convention (SAR) and the 1982 UN Convention on the Law of the Sea (UNCLOS).[xx] Moreover, the recent Hirsi v. Italy judgment of the Strasbourg tribunal affirmed that people rescued at sea must not be pushed back to a country where there is a risk that they would be treated in violation of Article 3 of the European Convention.[xxi] For all its merits, none of the legal commentary broached the issue of national and EU borders, or paused on the fact that the determination of European states to keep migrants out of their territories renders maritime rescue basically an act of subversion.

Maritime distress can be included in what Elaine Scarry describes as the category of "emergencies where the diminution of injury is at stake" (Scarry 2011: 77). In such instances, Scarry argues,

> all deliberative habits are directed toward determining *how* to minimize the injury, not *whether* we ought to minimize the injury. If a fire has broken out in a grain elevator, we do not wonder whether to put it out but how to put it out in the most efficient and damage-minimizing way. If a swimmer has stopped breathing, no one deliberates whether we

ought to help him start breathing, but only the sequence of acts that will bring his breath

back. (Scarry 2011: 77-78)

Like administering cardiopulmonary resuscitation (CPR), whose knowledge and practice, as

Scarry persuasively argues, ought to be vigorously promoted everywhere, search and rescue at

sea should have the status of a "serviceable habit" (Scarry 2011: 80). In Scarry's framework, in

an emergency, such habit is a thought out and rehearsed in advance set of precautions and

procedures, with clearly delineated responsibilities vested in particular self-authorizing agents.

Confronted with an emergency, people equipped with such habit will in most cases undertake

coherent action, maximizing the chances of the victims' survival. But there are two key obstacles

to the formation and practice of such habit: immobilization and incoherence (2011: 79).

Immobilization is Scarry's term for the situation where people are incapable of initiating their

own actions in an emergency and "highly susceptible to following orders imposed by someone

else" (2011: 14). Incoherent action results from the application of the wrong habit to an

emergency situation, usually as a result of a lack of a prior effort to anticipate, understand and

prepare for how a dangerous situation may unfold (2011: 17). In the case of the boat, as Strik's

inquiry has shown, we see only vestiges of serviceable habit at work, accompanied by

immobilization, incoherence and, possibly, elements of an outright malicious intent.

Who is responsible?

Prior to the launching of criminal cases in European states, prior to the renewing of

Strik's mandate and the hearing in June of 2013, the Parliamentary Assembly approved Strik's

first report. It adopted, on April 24, 2012, with 108 votes for, 36 against and 7 abstentions, a resolution which made specific recommendations to member States concerning how search and rescue operations should be carried out in the future. The resolution also called on NATO to "provide a comprehensive reply to the Assembly's outstanding requests for information" (par. 14.1). The passing of these documents however was preceded by a debate which starkly revealed the tensions between ideas of sovereignty and human rights on the one hand, and different conceptions of responsibility (duty vs. guilt) on the other.

Upon providing general background (the situation on the Mediterranean after the Arab Spring), outlining her methodology and recounting the facts of the case (as established based on available sources), Strik organizes the reminder of her report as "Seven *questions* of responsibility" (pars. 51-136, emphasis mine). The questions include, firstly, failure in the coordination of search and rescue, which the report traces down to the Rome Maritime Rescue Coordination Center (MRCC). As the documents and audio records show, the MRCC did undertake several steps upon receiving, from Father Zerai, the information about the boat in peril. Its location was identified as falling within the Libyan SAR zone. MRCC staff attempted and failed to make contact with the boat itself (the migrants' satellite phone ran out of battery). They also sent out a number of messages to vessels in the area, to the Maltese MRCC, to the NATO headquarters allied command in Naples, and to Frontex, operating at the time in the vicinity of Lampedusa. The report asserts that "the Rome MRCC … kept sending this DISTRESS message every four hours for 10 days. Many boats must have therefore received it" (par. 61). There was however no clear follow up, the case apparently drowning among many

other calls for assistance coming from within Italy's SAR zone (and whose outcome was more fortuitous).[xxii] Nevertheless, no blame is directly attributed to the Rome MRCC.

Rather, its mistakes are connected to, what the report calls "a void of responsibility" (pars. 63-73) created by other failures, such as the second failure, which was the failure of legal norms to delimit clearly whose duty was it to conduct a search and rescue operation. In normal circumstances, according to the SAR Convention (i.e. they key pertinent instrument of maritime law) it would be Libyan authorities, as for the duration of its drift the boat was mostly in their waters.[xxiii] The report found however a legal ambiguity concerning the duty to coordinate and conduct a search and rescue when the state does not control its designated SAR zone, as was the case with Libya at the time.[xxiv]

Third in the "catalogue of failures" was the failure to intervene by a helicopter which communicated with the boat's passengers early in their ordeal, but never returned to help. The failure to intervene is ascribed also to at least two separate commercial vessels which crossed the boat's path, and a large military vessel, presumably under NATO command, which passed it around day 10 of their journey (par 92-104). Fourth was the failure by NATO to respond to the fax from Rome MRCC informing it of the situation of the boat, in spite of the fact that according to Strik's evidence NATO assets were in the area, and thus by law would have been expected to react. Of special concern here is the Méndez Núñez, today the object of the criminal case filed in Spain (pars. 105-124). The fifth identified failure was the fact that when authorizing the intervention in Libya, the UN did not anticipate or plan for the consequences of the Libyan conflict, particularly in terms of preparations for a large exodus of refugees (pars. 125-129). The sixth failure was attributed to the Libyan authorities who did not protect migrants on their

territory. "Even in times of war," the report asserts, "a State has the responsibility for the safety of civilians, be this on land or at sea" (par. 130). Finally, the seventh failure was ascribed to the human smugglers who neglected to observe even the most basic safety measures when sending the boat off to Lampedusa. This last point deserves additional consideration. The entire business of smuggling people across the sea is founded on irresponsibility as the very condition of profit.[xxv] It thrives in conflict. Why then consider the smugglers standard practice a "failure"? Are not those in power responsible for combating human smuggling in the first place, and addressing the structural problems that create the conditions for this criminal practice to flourish?

These questions notwithstanding, the inclusion of the responsibility of smugglers into the report, although initially puzzling becomes more understandable in light of Assembly politics. As the discussion that followed the presentation of the report shows, some Assembly Members would like to see *all* of the responsibility for the deaths in the Mediterranean ascribed to human smugglers.[xxvi] Rather than recognizing the criminal activities of this group as rooted in conflict, lawlessness, and poverty, some frame smuggling as *the* cause of migrant boat disasters. In all likelihood, without a nod to such views, the report's chances of passing would be much diminished.

In the section titled "who is responsible," the report concludes that the failure was collective, "at every step of the way and by all key actors" (pars. 133-149). The faults are not ordered hierarchically, although there is admission that some actors' errors or inaction carried more weight than others (Strik writes: "What concerns me most, however, are the allegations that the boat was ignored by a helicopter and a military vessel," par. 134). Important questions, particularly regarding the involvement of NATO are still unresolved, as the Alliance

continuously denies that any of the ships under its command have records of sightings of the boat.[xxvii] The identities of the helicopter that communicated with the boat early in the journey, and of the military vessel that saw it ten days into the drift remain officially unconfirmed. Follow-up queries directed to NATO and flag states are on the agenda for Senator Strik's renewed mandate, as is research into the extent to which the lessons of the case were learned and gaps in responsibilities closed.[xxviii] What is outside the formal competences of the rapporteur, and what the Assembly appears not to be interested in pursuing is responsibility in the retrospective sense. The knowledge gathered in the course of the PACE inquiry may, and in all probability will assist criminal and civil proceedings before national courts, but no explicit calls for accountability are made at the international level. During the presentation of the original findings to the PACE plenary session, Strik made a telling comment: "Finding out who was responsible," she said, "is not about wanting to blame someone but about learning lessons for the future."[xxix] In spite of this disclaimer, in the discussion that followed many speakers voiced their disapproval of the findings, precisely on the grounds that in their view the rapporteur did engage in what she was not supposed to, that is pointing fingers and naming the guilty.

And thus an MP from Malta (displeased with the presentation of the Maltese MRCC as implicated in the case) rejected the very framing of the report:

> While I acknowledge the depth of the investigations, I beg to differ on their presentation and interpretation. The title of the report does not refer explicitly to a particular incident, but treats the issue as if all the 1500 deaths during 2011 happened in the same manner. The very question in the title, "Who is to blame?", sets a pre-judgmental tone.[xxx]

It is significant that the MP twisted Strik's key phrase (it was *Who is responsible?* not *Who is to blame?*). At stake for the Assembly Members was precisely the issue of blame implied in the double meaning of responsibility. Some praised the report for "not set[ting] out to pillory anyone" and for "finding solutions, not blaming people." Others, notably those representing states with direct interest in the case, felt that blame had in fact been apportioned and unfairly so, particularly to Malta, Italy and Spain. Statements defending the maritime rescue authorities and the militaries of these countries underscored high rates of successful rescue operations and rejected any culpability on their part. Speakers sought firstly to portray these actors as unconditionally faithful to their international obligations, and secondly to shift the attention to the human smugglers and the Gaddafi regime. These defensive reactions show that Strik's inquiry had a "public reputational" effect, which is an important element of all accountability mechanisms (Keohane 2002: 1133). The fact that PACE inquiries can cause negative publicity only highlights their political nature.

As the rapporteur later told me, acknowledging some degree of "political thinking," care went into avoiding direct finger-pointing in the final report. She suggested (as did some other rapporteurs I spoke to) that blaming anyone too hard in a report makes them feel cornered and defensive. Instead, it is important to "address omissions with precision," although in this case NATO, Italy and Malta all responded defensively, with the latter two "eager to show how they cope with pressure at sea."[xxxi] As I was able to observe on the occasion of other reports under discussion in the Committee of Migration, Refugees and Displaced Persons, "balanced" and "fair" are the terms of praise lavished on relatively

uncontroversial reports, whereas the controversial ones (e.g. where one group may be held responsible for the disadvantage of another), may be accused of "bias," "partiality" and "unfairness."

"The rapporteurs are politicians," I was reminded by a civil servant involved in PACE work. "They decide what issues they take on, and how they approach them." All of Council of Europe reports are to some extent political statements, but some Assembly members chose to use the rapporteur's mandate to express controversial or unpopular opinions. For example, a parliamentarian may volunteer to investigate an issue of their interest and end up producing a document which, deliberately or otherwise, upsets particular national delegations.[xxxii] In such cases the report may never be approved by a committee, but the statement will have been made. Strik's report does not fall in this category. Despite opposition voiced in the discussion, and the vigorous pushing of amendments which sought to dilute some of the points of the draft resolution, *Lives lost in the Mediterranean Sea* ultimately passed the vote. Likewise, there was political support in the Committee for Strik's continued work on the case.

Ultimately, the political objective behind both past and present work on the case is to supply further facts and bolster the case for implementing the recommendations of the original report, especially the creation of "a binding European Union protocol for the Mediterranean region," which would comprehensively "tackle the issue of responsibility sharing, particularly in the context of rescue services, disembarkation, administration of asylum requests, setting up reception facilities and relocation and resettlement." As things stand, "the heavy burden placed on frontline States leads to a problem of saturation and a reluctance to take responsibility" (par. 13.6).

The left-to-die boat constitutes a case where this *reluctance* played out to its tragic, but predictable conclusion. Nevertheless, the reactions to the report show that *responsibility* remains elusive. On the one hand, as we can see from the report's reception in the Assembly that it remains identified with blame. This is paradoxical, because while it is unsurprising that no one wants to accept any blame, the rapporteur is likewise not eager to cast it. In the report responsibility is instead proposed as a duty, one which extends to a range of different actors and agencies. On the particular occasion under investigation these responsibilities went unmet, but the account stops short of direct attribution of fault. Instead, ample use is made of the concept of "failure."

Failure, as opposed to a *violation* or *abuse* suggests that something just broke down, rather than that there is a guilty party, or parties, that could be held to account in a court of law or another comparable forum. Such framing is symptomatic of the diplomatic (or, some would say, tepid) language characteristic of the quasi-legal human rights discourse. Not wanting to blame anybody means that there is no call to punish those responsible, nor a way to demand that they provide any kind of compensation to the survivors of the left-to-die boat or the families of the dead. There is in other words neither a retributive nor a reparative justice element in the report, or for that matter in the rapporteur's mandate. Instead there is a pedagogy of learning from failures and a call to rethink and redistribute responsibility for the lives of vulnerable others. This mode of responding to harm is consistent with what Ricoeur calls the shattering of the traditional juridical concept of responsibility, that is the reframing of responsibility from an obligation to make amends for deeds or omissions already committed, to a future-oriented duty towards abstract others (Ricoeur 1995, Kelty 2008).

Ricoeur is suggesting that in fact responsibility as guilt and responsibility as duty are not coeval, but that we are witnessing a historical shift from the former to the latter. He notes that "the recent history of what is called the law of responsibility, in the technical sense of the term, has tended to make room for the idea of a responsibility without any fault, under the pressure of concepts such as solidarity, security and risk, which have tended to take the place of the idea of fault. It is as though the depenalization of civil responsibility must also imply a total loss of a sense of culpability" (Ricoeur 1995: 25). This account points towards a progressive diminishing of the significance of guilt, but in international human rights law both concepts—fault and obligation—are present simultaneously. In fact, juridical responsibility is being strengthened in some limited areas, even as the broader human rights movement overwhelmingly relies on the idea of responsibility as duty. Juridical responsibility of states and other subjects of international law is triggered by a breach of a specific legal obligation. Since the subjects of international law are states, not individuals, traditionally international law has attributed the actions of individuals on behalf of state organs exclusively to the state (Nollkaemper 2003, see also Koskenniemi 2001). Yet this customary understanding is beginning to change. With the establishment of the International Criminal Court and a number of international criminal law treaties a limited number of human rights *violations* (genocide, terrorism, torture and certain war crimes) can now lead to individual responsibility under international law.

But to the majority of human rights *failures* in Europe today, including the left-to-die boat, these criteria do not apply, despite the fact that faults can be attributed both to individuals and to institutions empowered by states to carry out certain tasks (such as rescue at sea). Some legal scholars who have written on this case, and on boat migrations more generally, nevertheless

invoke the framework of responsibility of states for internationally wrongful acts.[xxxiii] Efthymios

Papastavridis shows that flag and coastal states can incur responsibility in two distinct ways.

Firstly, they can do so for violations of the rules concerning rescue at sea under the law of the

sea, and secondly for failing to meet obligations under international human rights law

(Papastavridis 2012). In this case the most obvious breach was of the obligation to provide

rescue at sea. Francesco Messineo argues also that NATO member states which are also ECHR

signatories would probably be violating Article 2 (the right to life) and possibly 3 (prohibition of

torture and degrading or inhuman treatment or punishment) of the European Convention if they

came into contact with a vessel in distress and let people die of starvation and thirst instead of

helping them.[xxxiv] This reasoning, although consistent with the jurisprudence of the ECtHR, will

remain speculative until actual proceedings unfold in national courts. As Gonzalo Boye

suggested in the passage quoted above, an application to the European Court of Human Rights

alleging a violation by one or more states of their obligations under the European Convention

could be a way to pursue a judicial remedy, although formal requirements associated with this

route could prove difficult.[xxxv]

Conclusion

In the face of states guarding their sovereignty and shielding themselves from the

scrutiny and interventions of the international human rights machinery, the Council of Europe is

left with the quasi-legal mechanisms of supervision which lack the teeth of legal sanctions, but

which help develop and advance human rights norms and standards. The Strik inquiry is clearly a

contribution to this tradition of human rights work. Most cases of migrants who die trying to

enter Europe go unaccounted for. In this instance the PACE process has produced a detailed investigation and as comprehensive an account of what happened as the circumstances allowed. This has unquestionable value. The defensive responses of Italy, Malta and Spain and other parties responsible in "left-to-die" boat case on the other hand present us with nothing more than another instance of the state not wanting to be supervised.

But settling on unenforceable "lessons for the future" as the best and final word that institutions like the Council of Europe can give us is unsatisfactory. Thinking with Scarry (2011) on emergency, and with Ricoeur (1995) and others on responsibility, opens up some additional questions. What is the relationship between emergency and the two facets of responsibility, that is duty and blame? When disaster strikes, is it sufficient to know what a particular agent ought to be doing in the moment? Does it matter that in the past, someone, somewhere else failed to come to rescue? Does guilt play a part in an emergency?

It does, or such seems to be the answer of the President of PACE who chastised Europe for "looking on" as the boat's passengers were dying. But whose guilt? Surely claiming that every single European was at fault would be as preposterous as attributing all blame to only one agent. The language of "omissions" and "failures" may be diplomatic, but ultimately it perpetuates ideas of collective responsibility, that is obligations distributed so widely that no one agent can be held to account. Without a clear naming of those who failed in their duties, it is difficult to pinpoint who exactly is responsible for implementing "lessons for the future," or to see how anybody could be held to account if the report's goals do not materialize. With the expansion of the scope of responsibility in time and space and in the context of complex international systems and organizations which deal with dynamic crises, as Kelty writes, "the

question of 'who' becomes impossible to answer" (Kelty 2008: 13).

Thinking and planning for an emergency (or creating "serviceable habits") clearly does involve developing a clear grasp of one's obligations, which requires learning from the specifics of past mistakes and their tragic outcomes. Those mistakes may involve technical errors such as bad communication and poor planning, and ethical lapses, for example the deliberate avoidance of duty on the grounds that taking migrants onboard will only invite further problems for the crew. I shall now address those two categories of fault.

Planning to avoid technical errors may be a complex task, but ultimately effective models do exist. As Scarry underscores in her discussion of mutual aid contracts, which are one of her four models of emergency thinking, a very specific assignment of duty, down to the issue of who will bring which tool to the site of a flood or fire is critical to the successful responses to crises, as tested in many locations around the world where some form of mutual aid contracts are in existence (2011: 34-51). In this regard, the report on the "left-to-die" boat provides a preliminary toolkit which could aid reforming the procedures of rescue in the conditions of complexity created by maritime migrations on a busy sea of intersecting jurisdictions, legal mandates and commercial interests.[xxxvi]

The second problem, that is the one of ethical lapses, comes down to question of *whose* survival is at stake. Do we collectively believe that *everyone* is entitled to a chance at survival, or only selected few? "A democracy must guarantee 'equality of survival'" writes Scarry in her discussion of the Swiss shelter system, which she regards as a model of emergency thinking where the survival of an entire population is at stake. She points out that the system is based on the premise that in an event of a nuclear emergency it must provide equal chances to all

inhabitants, not just *citizens* of the country (2011: 52-53). This principle of equality of survival is also implicit in the obligation to provide rescue at sea which remains in force regardless of the legal status of the victims. It is bolstered by the idea, embraced by the Strasbourg court, that human rights do not cease to operate at sea. And yet, as the increasing death toll on the Mediterranean shows, practice fails to meet aspiration. This leaves us with the question of justice.

The nine survivors of the left to die boat, as the Strik report notes, "have to live with physical or psychological scars from the traumatic trip and build new lives" (par. 156). The report acknowledges their pain and appeals to Council of Europe member states that "in view of the ordeal of the survivors [states] use their humanitarian discretion to look favorably on any claims for asylum or resettlement coming from these persons" (par. 15). ("They are traumatised and have experienced more than enough" Strik added in her statement to the PACE plenary.) Save for these comments, the Draft Resolution included in the report makes no mention of the survivors and the dead. Any form of redress is off the table, as if taboo in the non-confrontational discourse of supranational human rights oversight.

Indeed, delivering justice of any kind is not in the mandate of the Council of Europe and that is simply a fact of international relations. Left in the competence of national courts, retrospective responsibility may or may not in the end be established in the course of what is set to be an arduous legal battle. But the question remains whether human rights oversight could bear out an alternative way to frame responsibility that would make room for some concept of guilt. In this way it could open the possibility of addressing the harm, thus drawing the ethical connection between past lapses and the commitment to better outcomes in the future.

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[i] The following account is based on factual data collected in PACE 2012, Shenker 2011 and Heller et al.

2012. See also Sunderland 2012.

[ii] According to UNHCR spokesperson, "estimates were based on interviews with migrants who reached

Europe by boat, telephone and e-mail communication from their relatives, as well as reports from Libya

and Tunisia from survivors whose boats either sank or were in distress," see

http://www.un.org/apps/news/story.asp?NewsID=41084&#.UiCq8BY70wE, accessed on August 30,

2013. To the author's knowledge, no total estimate of migrant deaths at sea has been published for 2012

or for the first half of 2013.

[iii] As described by Tineke Strik, while introducing her report on the case to the Parlimentary assembly of

the Council of Europe, April 24, 2012 (verbatim record available at www.assembly.coe.int).

[iv] The Arendtian theme of "the right to have rights" that is the problem of claiming rights and enforcing

their protection beyond territorial boundaries of sovereign states runs through much of the

literature on contemporary European migrations. Human rights transcend citizenship, yet people

who migrate across national borders experience extraordinary difficulty when it comes to

receiving the protection they are entitled to through human rights law. At the heart of the

problem, as Robert McCorquodale observes, is the fact that "the present international legal

system is so determined to protect the interests of states and their territorial boundaries that any

people who seek to move across those boundaries are seen as intruders. If they can enter at all,

they enter at their own risk." (McCorquodale 2001: 152; see also Arendt 1951, Benhabib 2004,

Dembour and Kelly 2011, Good 2006, Morris 2010, Weissbrodt 2008).

[v] This was not the deadliest such event in 2011. In 2011, the most severe incident took place on 6 April,

when more than 220 Somali, Eritrean and Ivoirians drowned when their boat capsized 39 miles

south of Lampedusa (Fundamental Rights Agency 2013: 31)

[vi] For careful ethnographic analyses of CSR see Benson and Kirsch 2010 and Rajak 2011.

[vii] The most highly developed international judicial mechanism of human rights enforcement is the European Court of Human Rights which hears complaints of violations of the European Convention on Human Rights.

[viii] The allegation that the ship in question was Charles de Gaulle is denied by the French Ministry of Defense (PACE 2012, par. 98)

[ix] For a thought-provoking discussion of the intervention in Libya as a contested instance of the application of the Responsibility to Protect principle see Çubukçu 2013.

[x] The version of the article currently available online appears under the title "Aircraft carrier left us to die, migrants say" and carries the following correction: "This article was amended on 9 May 2011. The original version referred throughout to a NATO ship. This has been changed to European units pending further clarification." See http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants accessed June 2, 2012

[xi] See http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6619 accessed August 12, 2013

[xii] Committees formally appoint rapporteurs who "drive forward any inquiry into matters referred to the committee by the Assembly" (Evans and Silk 2012: 308). The rapporteurs do not have any special investigatory powers and depend on the good will of national governments and relevant authorities for access to information. Their fact-finding missions operate on a restricted budget (see PACE 2013c) and involve official letters of inquiry, studying documents, travel to relevant sites, and interviews with relevant parties as well as collaboration with experts and NGOs. Committee staff assist in the preparation of reports which are then presented to the Assembly for debate and adoption. The rapporteurs steer the reports through the process of consideration and adoption, which in many cases is thoroughly political task.

xiii In 2005 the ECtHR ruled in Öcalan's favor by declaring that the imposition of death penalty following an unfair trial was a violation of Article 3 of the European Convention (Öcalan v. Turkey, Application no. 46221/99, 2005).

xiv This applies to the political institutions, not the European Court where the judges sit in their independent capacity and not as representatives of their member states. At the same time the procedures for nominating candidates for judicial appointments in many countries have been criticized for being highly politicized (see e.g. Interights 2003, Voeten 2008).

xv To avoid exacerbating the burden of repeated testimony, I decided against interviewing Kurke in person.

xvi Boye's quest was portrayed in the documentary film The Gunatanamo Trap directed by Thomas Wallner (2011).

xvii See http://www.fidh.org/63-migrants-left-to-die-in-the-mediterranean-survivors-continue-their-13484 accessed on August 20, 2013

xviii Transcript of expert statement, "Left-to-die Boat" Hearing, Committee on Migration, Refugees and Displaced Persons, PACE, CoE, Strasbourg, June 25, 2013.

xix The third speaker was Jeanne Warnet of the FIDH Legal Action Group, involved in the "left-to-die" boat litigation in France.

xx I thank Emiliano Giovine for sharing his speaking notes.

xxi Hirsi Jamaa and Others v. Italy, Application no. 27765/09, 2012. See also Human Rights Watch 2009.

xxii According to the ROME MRCC, "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." (par. 69)

[xxiii] The report by Heller et al. (2012) provides a map showing the trajectory of the drift across the territorial waters and SAR zones of Libya, Italy and Malta.

[xxiv] As Emiliano Giovine explained to the Committee later, "IMO Guidelines provided further clarification and interpretational guidance for exceptional situations like the one of our case in which Libyan MRCC, theoretically responsible, was not able to co-ordinate and lead the search and rescue operations and could not even stipulate agreements with other rescue centers in order to be replaced within its duties. It is in cases like this one that the first MRCC contacted should have then acted taking the lead of the operations until another competent authority would have clearly assumed responsibility." Emiliano Giovine, speaking notes, 25 June 2013, on file with author.

[xxv] We read that "the smugglers showed reckless disregard for the lives of the migrants. To make money, they overloaded the boat, they took away food and water, they did not provide sufficient fuel and they did not provide adequate means of communication in case of distress. Furthermore, the so-called 'captain' of the boat was clearly unqualified to get the boat to Lampedusa" (par. 132). But given the known predatory and exploitative nature of the people smuggling business, the implied expectation that the owners of the boat would somehow concern themselves with safety seems misplaced. Other reports on the problem of boat migrations show that such recklessness is routine. Boats are overloaded as a matter of course. Water, provisions and spare fuel are left behind because they take up space which could otherwise be occupied by a paying passenger. Communication devices represent a risk for smugglers who fear being tracked down through satellite networks (Sunderland 2012, see also Andersson 2012).

[xxvi] See transcript of morning debate on April 24, 2012 available at www.assembly.coe.int under Verbatim Records, especially Mr. Jim Sheridan.

xxvii The letter from NATO to Senator Strik is available at

http://www.nato.int/nato_static/assets/pdf/pdf_2012_03/20120329_120327-letter-NATO-CoE.pdf

accessed on March 7, 2013

xxviii The results of the follow up inquiry are due to be presented to the Committee on Migration, Refugees

and Displaced Persons in April of 2014.

xxix See transcript of morning debate on April 24, 2012 available at www.assembly.coe.int under Verbatim

Records.

xxx Francis Agius, Nationalist Party, Malta. See transcript of morning debate on April 24, 2012 available

at www.assembly.coe.int under Verbatim Records. For more on maritime migration in Malta see

Debono 2011.

xxxi Author's interview with Senator Tineke Strik, April 23, 2013.

xxxii For example, I witnessed a heated debate in the Committee around a report in preparation on an

immigration-related issue, where the rapporteur was accused of unfairly representing a particular

host country as victimizing a particular group of immigrants.

xxxiii The relevant international document is the Articles on Responsibility of States for Internationally

Wrongful Acts. It does not currently have the status of a binding international treaty.

xxxiv See the blog of the European Journal of International law for a record of an online discussion

between Papastavridis and Messineo on the case: http://www.ejiltalk.org/the-left-to-die-boat-

whose-responsibility-for-the-death-of-63-migrants-in-the-mediterranean/ accessed on February

26, 2013.

xxxv The case brought before the Strasbourg court (a) must be brought by a victim of a violation of one of

the provisions of the convention; (b) the victim must have exhausted all domestic remedies in

pursuit of a resolution of the case; (c) the application must not be anonymous; (d) it must not be

manifestly ill-founded; (e) the case must be lodged within six months of the last relevant

domestic decision (and this limit is now set to be reduced to four months); (f) it must not be incompatible with the provisions of the convention or constitute an abuse of the right to individual petition. As Dembour points out, these "conditions of admissibility are far from being a mere formality: the great majority of applicants are disappointed at the admissibility stage" (Dembour 2006).

[xxxvi] Other relevant recent documents produced within the Council of Europe include PACE 2013a, PACE 2013b.

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