

Violation of the International Legal Framework on Rescue at Sea

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Abstract

The irregular migration routes are largely organized by smuggling and trafficking networks. Taking advantage of international obligations and human rights law, these criminalized networks have become innovative and strategic. The Central Mediterranean Sea is infamously connoted with the irregular migration phenomenon travelling in irregular means in overcrowded unseaworthy vessels often resulting in fatalities of deaths at sea. The smugglers' innovative strategy is to first cross the irregular migrants' boats from the territorial sea of Libya and then leave them stranded at sea, waiting to be rescued by Member States patrol boats or private vessels. Once stranded at sea for days or weeks, the irregular migrants have suffered from starvation, dehydration, suffocation and even violence from human smugglers. In accordance with the international legal framework on Search and Rescue (SAR), captains of vessels have the obligation to rescue them. This research argues that Italy has adopted a new irregular migrant containment strategy in the form of SAR activity discouragement. Their objective is to disengage these smuggling and trafficking networks. To discourage the irregular migrant crossing, the Italian strategy is to prevent and thus stop captains of private vessels or SAR NGOs from responding to rescue calls at sea through criminalizing SAR operations without prior authorization of the disembarking coastal state. This paper argues that the criminalization measures against captains of vessels is argued to violate the international legal framework on search and rescue, international obligations and international human rights law. This research analysis how border enforcement measures and closed border policies under the pretense of the pandemic have negatively impacted upon the rights of refugees and asylum seekers travelling in an irregular manner by sea.

Keywords: criminalization, irregular migrants, Italy, SAR activity discouragement, search and rescue.

Introduction

To stop captains of private vessels or SAR NGOs from responding to rescue calls at sea, Italy adopted a containment strategy of rescue discouragement targeting the captains of NGO vessels through the criminalization of SAR operations without prior authorization of the disembarking coastal state. Since 2018, the former interior minister of Italy, *Matteo Salvini*, targeted the rescued irregular migrants by considering them a 'threat to national security' and thereby declaring the Italian ports 'closed' to rescued migrants' ships.¹ The containment strategy consisted of criminalization measures against SAR NGOs in the form of seizure and confiscation of NGO boats, prosecutions for the facilitation of irregular migration and human smuggling, penalization for unauthorized entry to national ports, and imposition of administration fines.² Those captains of ships that refused to obey orders faced up to 50,000 euros of fine and in case of repeated offences, the ship's seizure. The underlying aim of such drastic measures were to stop rescue operations conducted by NGOs or other vessels at international waters.

As a counter response, to discourage the irregular migrant crossing and prevent massive arrivals of irregular migrants to European territory, SAR operations at sea had to stop in the name of deterrence to namely 'punishing one to discourage others'.³ Amongst other measures were the disengagement of EU coastal states in SAR operations through the suspension of Frontex Joint Maritime Operations *Themis* (launched in 2018 replacing Operation *Triton* initiated in 2014)⁴ and the withdrawal of EUNAVFOR-MED operation '*Sophia*' (launched in 2015 until march 2020) or EUNAVFOR MED IRINI (launched in 2021 and extended until march 2023), which has as its core task the implementation of the UN arms embargo on Libya through the use of aerial, satellite and maritime assets. Frontex will assist EUNAVFOR MED IRINI with crucial information on agency's risk analysis activities, such as tracking vessels of interests on the high seas, as well as data from its aerial surveillance in the Central

¹ Italy's Matteo Salvini shuts ports to migrant rescue ship, 11 June 2018, <https://www.bbc.com/news/world-europe-44432056>, accessed 14 march 2022.

² Vosyliūtė, L. and Conte, C. (2018). Crackdown on NGOs assisting refugees and other migrants. ReSOMA Discussion Brief. Online: <http://www.resoma.eu/publications/discussion-brief-crackdown-ngos-assisting-refugees-and-other-migrants>; Cuttitta, P. (2018). 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part II)'. *Border Criminologies*. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0>

³ Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019), paragraphs 520-523 and paragraphs 555, 561 and 562 <http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>.

⁴ News Release, Frontex launching new operation in Central Med, <https://frontex.europa.eu/media-centre/news/news-release/frontex-launching-new-operation-in-central-med-yKqSc7#:~:text=Frontex%20launching%20new%20operation%20in%20Central%20Med%202018-02-01,replace%20operation%20Triton%2C%20which%20was%20launched%20in%202014>, accessed 13 march 2022.

Mediterranean. These disengagement practices though added the burden on the shipping industry to rescue irregular migrants travelling in unseaworthy boats upon a distress call out in accordance with their international obligations under international maritime law.

The article is addressing the issue on taking respective measures from governments to regulate the immigrants trafficking. The main objective of the article is to argue policies on preventing irregular migration and sanctioning human smuggling activities which continue to over-burden the Italian asylum and not only but EU asylum and immigration capacities. This paper analyses the administrative measures imposing criminal liability to the captains of vessels who transport irregular migrants and the classification status of smuggled migrants as 'offenders'.

Furthermore, this paper supports the argument that the Italian law on the criminalization of rescue is not the solution to containing irregular migration. On the contrary, it contributes to exacerbating migrants' vulnerabilities and further serves to increase trafficking in persons.

The Emerging Containment Strategy of Rescue Discouragement

The publicly known 'Europe's refugee crises'¹ has become a migration and political challenge for Italy and the European Union (EU). Due to its geographic proximity with the third countries under turmoil, the external borders of Italy have been subjected to most pressure, contributing to a breakdown of their asylum and immigration systems. To minimize such damage, Italy undertook a series of measures to prevent and reduce arrivals of irregular² migrants to their external borders, such as strengthening their surveillance capacities and increased policing via interception operations at sea and land borders, referred to as 'externalization' measures of border

¹ Florian Trauner, 'Asylum Policy: the EU's "crises" and the looming policy regime failure' (2016) JEI 38(3) 311-325, 311; the UN Refugee Agency, <https://www.unrefugees.org/emergencies/refugee-crisis-in-europe/>, last accessed 14 march 2022.

² IOM defines irregular migration as 'movement that takes place outside the regulatory norms of the sending, transit and receiving countries. However, there is no clear or universally accepted definition of irregular migration'. IOM, Key Migration Terms <<https://www.iom.int/key-migration-terms>> accessed 26 October 2017; Whereas 'illegal migrant/migration' is defined as the illegal crossing of borders in violation of the immigration laws of a destination country. See UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, 2000, article 3(b); Also see IOM Glossary, 49, <<http://www.corteidh.or.cr/sitios/Observaciones/11/Anexo5.pdf>> accessed 18 May 2018; In the Mediterranean and Aegean seas irregular migration is 'mixed'. It consists of people flows moving for different reasons but which share the same route. The 'boat people' share the same vessel and cross the sea without authorisation with the aim to reach EU territory. Thus, the term 'irregular migrant' includes asylum seekers, refugees, trafficked and smuggled persons, unaccompanied children, stateless persons, economic migrants and displaced persons; see Bernardie-Tahir, N. and Schmoll, C. (2014) Islands and Undesirables: Introduction to the Special Issue on Irregular Migration in Southern European Islands (2014) JIRS 12(2), 87-102, 88-89.

control.¹ To protect its external borders, Italy has undertaken a series of legislative and administrative measures linking irregular migration with issues on security and criminalization.²³

These 'externalization measures of border control'⁴ however have not been successful into achieving their objective due to the smugglers' innovative strategy taking advantage of the international legal framework on rescue at sea. For many years now, the smugglers' innovative strategy has been to first cross the irregular migrants' boats from the territorial sea of Libya and then leave them stranded at sea waiting to be rescued by Member States patrol boats or private vessels.⁵ Smugglers teach the irregular migrants to sabotage their own vessels (self-induced distress) upon crossing over onto the high seas. They are to then call for rescue and thus oblige State authorities or private vessels to rescue them.⁶

In continuance with its containment strategy, Italy then raised the pandemic card justification to resort to overly restricted extraterritorial measures against irregular migrants arriving by sea. On 21 February 2020, Italy went into its first lockdown by declaring a national state of emergency. Under the pretense of health risks, from

¹ Veshi, D. (2020) The EU Regulatory Competition in Asylum Law, *Central European Journal of Public Policy* 14.1: 19-30; Koka, E, and Veshi D. (2019) Illicit Return Practices of Irregular Migrants from Greece to Turkey, *International Journal of Law and Political Sciences* 14.1: 45-51; Koka, E, and Veshi D. (2019) Irregular migration by sea: Interception and rescue interventions in light of international law and the EU Sea Borders Regulation, *European Journal of Migration and Law* 21.1 26-52.

² Šalamon, Neža K. (2020) Causes and consequences of migrant criminalization, Springer International Publishing; Koka, E. (2018) Irregular Migration by Sea: A Critical Analysis of EU and EU Member State Extraterritorial Practice in the Light of International Law. Diss. University of Kent, Sergio C, Roberto C, (2019) Search and Rescue, disembarkation and relocation arrangements in the Mediterranean, *Sailing Away from Responsibility* No. 10, http://aei.pitt.edu/100390/1/LSE2019-10_ReSoma_Sailing-Away-from-Responsibility.pdf.

³ IOM UN Migration, <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-77555-deaths-reach-1723#:~:text=According%20to%20the%20latest%20figures%2C%20%2C777%20irregular%20migrants.last%20year.%20Libya%20remains%20the%20main%20departure%20country> last accessed 15 march 2022.

⁴ Triandafyllidou, A (2013) Summary on EU and Member State extraterritorial policies and Dimitriadi A, (2014) Migration Management at the Outposts of the European Union *GLR* 22(3) 598-618, 600; Judith K, (2013) The Challenge of Mixed Migration by Sea *FMR* 45, 49; Bernardie-Tahir, N. and Schmoll C, (2014) Islands and Undesirables: Introduction to the Special Issue on Irregular Migration in Southern European Islands, *JIRS* 12(2), 87-102, 88-89; Bialasiewicz, L. (2012) Off-shoring and Outsourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean *Geopolitics* 17(4), 843-866; Casas-Cortes, M. Cobarrubias S. and John Pickles, (2014) Good neighbors make good fences: Seahorse Operations, Border Externalization and Extra-territoriality *EURS* 1-21, 2.

⁵ Coventry, T. A. C. (2019) Appropriate measures at sea: extraterritorial enforcement jurisdiction over stateless migrant smuggling vessels, *Maritime Safety and Security Law Journal* 7.2019/2020 5-30; Reitano, T. and P. Tinti (2015) *Survive and Advance: the Economics of Smuggling Refugees and Migrants into Europe* ISS Paper 289, 12.

⁶ Patricia, M (2009) *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers, 98.

March 2020, Italy chose once again to close its ports to rescue people. On 18 March 2020 and 15 April 2020, the Italian government issued Directives stating that ‘vessels, either with Italian or foreign flag, rescuing migrants in waters that are outside Italy’s responsibility and without the coordination of the authority internationally recognized as competent for coordinating rescue activities and subsequently entering Italian territorial waters, harm the good order and security of the Italian State’, ‘prerequisites for the designation of a place of safety in Italian ports are lacking’. The Italian government considered these private vessels to conduct their operations ‘with the aim to circumvent national legislation on border control and regular migration’, ‘a threat to public order and national security of the coastal State’.¹ On 7 April 2020, Italy declared its ports as ‘unsafe’ for the disembarkation of rescued people from boats flying a foreign flag ‘for the duration of the national public health emergency’.² This measure was supported under the argument that 1) Italy could not guarantee the safety of the individuals due to the outbreak and 2) rescued people might have contacted Covid-19.³

It is argued that these Italian Decrees were issued for the sole purpose of targeting civil society’s search and rescue activities in the Mediterranean. Before announcing the ‘closed port’ declaration, Italy was aware at that time that 10 boats carrying irregular migrants had fled Libyan waters and were in the vicinity of Italian waters.⁴ These boats were in addition to the other 2 (two) unescorted migration boats with 124 people arriving on the island of Lampedusa, rescued by NGO vessel *Sea Eye*.⁵ During the pandemic, the German NGO *Sea Eye* happened to be one of the few organizations operating its *Alan Kurdi* boat to conduct rescue operations in the central Mediterranean. The Italian government also seems to have targeted the NGO boat *Mare Jonio*, operating for the Mediterranean Platform under the Italian flag. After

¹ Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration according to Article 11 of Legislative Decree n. 286/1998, alias Ministerial Circular n. 14100/141(8), issued in March 2019; Lorenzo Tondo, Italy declares own ports ‘unsafe’ to stop migrants arriving, (The Guardian) <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking>, last accessed 5 march 2022.

² Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration according to Article 11 of Legislative Decree n. 286/1998, alias Ministerial Circular n. 14100/141(8), issued in March 2019;

[https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf?fbclid=IwAR1ND4AFGVqsfm07pzXcIdIG2NIPGcPKUgT1Mjjg6lYqsU-3cEsfPu3ovU4](https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf?fbclid=IwAR1ND4AFGVqsfm07pzXcIdIG2NIPGcPKUgT1Mjjg6lYqsU-3cEsfPu3ovU4).

³ Lorenzo Tondo, Italy declares own ports ‘unsafe’ to stop migrants arriving, (The Guardian) <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking>, last accessed 5 march 2022.

⁴ Alarm Phone 2020. The COVID-19 Excuse. 11 April 2020. <https://alarmphone.org/en/2020/04/11/the-covid-19-excuse/>.

⁵ Lorenzo Tondo, Italy declares own ports ‘unsafe’ to stop migrants arriving, (The Guardian) <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking>, last accessed 5 march 2022.

being stranded for two days at sea, *Mare Jonio*, was allowed to dock on the island of Lampedusa. All the other charity organizations had transferred their aid efforts to other urgent necessities as caused by the pandemic.

This paper analyses the administrative measures imposing criminal liability to the captains of vessels who transport irregular migrants and the classification status of smuggled migrants as ‘offenders’¹ in accordance with Articles 1, 10 and 12 of the Italian Legislative Decree² no. 286/1998³ referred to as the ‘Italian Consolidated Text on Migration’ under the argument that these provisions are in violation of Italian obligations under EU law (in contravention of Asylum Procedures Directive, the Charter of Fundamental Rights and the Schengen Border Code) and international law (UN Convention on the Law of the Sea, Article 98, SOLAS Convention, UN Palermo Protocols). The criminalization of rescue operations violates the international legal framework on search and rescue, international obligations and international human rights law.⁴ Furthermore, this paper supports the argument that the Italian law on the criminalization of rescue is not the solution to containing irregular migration. On the contrary, it contributes to exacerbating migrants’ vulnerabilities and further serves to increase trafficking in persons.

Cases of Criminalization Measures to Discourage NGO SAR Activities

On many occasions, the captains of private ships rescuing irregular migrants have been criminally charged by Italian authorities. In 2019, to disembark rescued people whose health were deteriorating, the captain of *Sea Watch 3*, Ms *Carola Rackete*, entered the Lampedusa port disobeying the Italian decree. During the captains’ attempt to enter the port, a vessel from the Guardia di Finanza tried to stop *Sea Watch 3* with the consequence of being brushed by the passing ship.⁵ The captain of *Sea Watch 3*, Ms *Carola Rackete*, was placed on house arrest ‘in connection with

¹ Cusumano, E, and Villa M. (2021) From “angels” to “vice smugglers”: the criminalization of sea rescue NGOs in Italy. *European journal on criminal policy and research* 27.1: 23-40.

² According to Article 76 of the Italian Constitution, *the exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes*. Thus, a Legislative Decree is a decree issued by the Italian Government, where the principles and criteria have been established by the Parliament that has the force of a Law.

³ National Legislative Bodies/National Authorities, Italy: Legislative Decree No. 286 of 1998, Testo Unico sull’Immigrazione, 25 July 1998, available at: <https://www.refworld.org/docid/54a2c23a4.html> [accessed 5 March 2022]

⁴ OHCHR, Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet, 41st session of the Human Rights Council, 24 June 2019, <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=24724>; OHCHR, Italy: UN Experts Condemn Bill to Fine Migrant Rescuers, 20 May 2019,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24628&LangID=E>.

⁵ Freudenberg, Zara, Mauer, Karl, Schöler, Florian; Goldoni, Marco: The Island of Hope in a Sea of Misery 2020: The Italian Court of Cassation’s Unequivocal Stance on the Right to Disembark, *VerfBlog*, /3/10, <https://verfassungsblog.de/the-island-of-hope-in-a-sea-of-misery/>.

investigations for resistance or violence against a war vessel, and for aiding and abetting illegal immigration'.¹ Administrative sanctions were also imposed against the captain, the ship-owner and the shipping company. As a result, the NGO vessel *Sea Watch 3* was impounded. The Italian judicial authorities, however, did not rule in support of the Italian government discriminate administrative measures. The preliminary investigative judge declared the prosecution order for house arrest as inadmissible by holding that the captain acted in fulfilment of her duties to rescue at sea. The prosecutor appealed the decision to the Court of Cassation, which the latter rejected it on 17 January 2020. According to the reasoning of the Court of Cassation, a ship at sea cannot be considered a 'safe place' for the purpose of rescue at sea.² In addition, the court reasoned that the obligation as laid out by the 1951 Geneva Refugee Convention requires that the rescued irregular migrants should have the possibility to apply for international protection in the flag state of the vessel.³

On 12 June 2019, the situation with *Sea Watch 3* which rescued 53 people, travelling on a rubber dinghy 47 miles off the Libyan city of Zawiya did not end well. After informing Malta, Italy, the Netherlands under the ship's flag state and Libya of the rescue, only the Libyan authorities agreed to sign off Libya as the 'safe port' of disembarkation. *Sea Watch 3* refused disembarkation to Libya on the grounds that it is not a safe place of disembarkation in accordance with international law.⁴ For more than a decade, Libya has not been a safe place to disembark rescued people at sea. According to the UN which has repeatedly emphasized that once disembarked to Libya, rescued individuals face arbitrary detention in abysmal conditions and a well-documented risk of serious abuse, including forced labor, torture, and sexual violence.⁵ Instead, the captain of *Sea Watch 3* decided to head towards Lampedusa, as the closest safe port.

Responding to the urgent filing by the representatives of the rescued people found on board of *Sea Watch 3*, the European Court of Human Rights (ECtHR)⁶ requested Italy to 'continue to provide all necessary assistance' but failed to indicate the Italian

¹ Relief web, UNHCR Italy Factsheet, June 2019, <https://reliefweb.int/report/italy/unhcr-italy-factsheet-june-2019>

² Italian Court of Cassation, Criminal Session, Session III, 16 January 2020 (deposit 20 February 2020), no. 6626, https://www.sistemapenale.it/pdf_contenuti/1582492635_sea-watch-rackete-cass-2022020-arresto.pdf last accessed 22 march 2022.

³ *Ibid.*

⁴ UNHCR, Report of the Special Rapporteur on trafficking in persons, especially women and children, 30 April 2018, A/HRC/38/45.

⁵ Berti, Carlo. "Right-wing populism and the criminalization of sea-rescue NGOs: The 'Sea-Watch 3' case in Italy, and Matteo Salvini's communication on Facebook." *Media, Culture & Society* 43.3 (2021): 532-550; Neumann, Klaus. "The Appeal of Civil Disobedience in the Central Mediterranean: German Responses to the June 2019 Mission of the Sea-Watch 3." *Journal of Humanitarian Affairs* 2.1 (2020): 53-61; Del Guercio, Adele. "Il caso della" Sea-Watch 3" tra obblighi di diritto del mare, diritti umani e tutela dell'infanzia." *Diritti umani e diritto internazionale* 2 (2019): 331-362.

⁶ ECtHR, *Rackete and Others v Italy* (application no. 32969/19)

government the interim measure as requested to order Italy to allow disembarkation. According to the court, interim measures under Rule 19 of the Rules of Court are granted only on an exceptional basis, when the applicants would otherwise face a real risk of irreversible harm.¹ The ECtHR continued to leave unanswered the question as to whether rescued individuals by NGO boats need to wait until they become 'vulnerable' onboard a ship, for a state's obligation to disembark to arise.² The ECtHR has already ruled in its landmark *Hirsi* case in 2012, their extraterritorial jurisdiction was triggered when Italian authorities exercised *de jure* or *de facto* control over the persons concerned.³ Thus, Italian authorities had the obligation to ensure an assessment of the individuals' needs was performed and access to effective legal remedies was granted before their return to Libya. It should be noted that the ECtHR has sanctioned Italy in several court decisions, such as *Khlaifia*⁴ or *Samsam Mohammed Hussein*.⁵

In March 2021, the *Sea Watch 4*, after saving more than 450 migrants, has been under administrative detention. While before the administrative detention was held in Palermo (September 2020-March 2021), now the boat is under administrative detention in Trapani. The Administrative Tribunal of Sicily has requested a preliminary ruling to the Court of Justice of the EU by referring the question whether Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control also includes the controls over a ship that has been classified as a cargo ship by the classification society of the flag State but which in practice routinely engages only in non-commercial activities such as search and rescue.⁶ Although the Court of Justice of the EU has not yet reached a decision, the conclusions of the General Advocate *Athanasios Rantos*,⁷ has underlined that despite being classified and certified as "cargo ships" by the flag State, 'private ships carrying out

¹ ECtHR, Interim Measures, factsheet,

https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf last accessed 30 march 2022.

² Ambroselli, Davide A. (2021) Dai decreti sicurezza al decreto immigrazione: spunti di riflessione sul caso Sea watch tra diritto costituzionale e diritto internazionale, *Diritto Pubblico Europeo-Rassegna online* 1

³ ECtHR, *Hirsi Jamaa and Others v Italy* (application no. 27765/09).

⁴ ECtHR, *Khlaifia and Others v Italy* (application no. 16483/12).

⁵ ECtHR, *Samsam Mohammed Hussein and Others v the Netherlands and Italy* (application no. 27725/10).

⁶ Official Journal of the European Union, Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Sicilia (Italy) lodged on 8 January 2021 — *Sea Watch E.V. v Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Palermo* (Case C-14/21) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62021CN0014:EN:PDF> last accessed 30 march 2022.

⁷ Eur-Lex, Conclusioni dell'avvocato Generale, Athanasios Rantos, presentate il 22 febbraio 2022, Cause riunite C-14/21 e C-15/21, *Sea Watch eV contro Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Palermo* (C-14/21) *Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Porto Empedocle* (C-15/21) <https://eur-lex.europa.eu/legal-content/it/TXT/?uri=CELEX:62021CC0014#Footnote1> last accessed 30 march 2022.

regular search and rescue activities at sea may be subject to a control of compliance with international standards, ensured by the port State which, under Union law, can adopt detention measures when detected irregularities present a manifest risk to safety, health or the environment'. It remains to be seen what the decision of the Court of Justice of the EU will be on the interpretation of the Directive 2009/16/EC.

The Italian efforts to stop NGO efforts of rescue at sea have continued. *Médécins Sans Frontières* (MSF) has been subject to Italian authorities' criminalization measures marking the stopping of the MSF rescue ship *GeoBarents* on 2 July 2021, the 13th time in the last 3 years that Italian authorities detained an NGO search and rescue (SAR) ship.¹ Only in the first three months of 2022, the *GeoBarents* in two different rescues: on 27th January 2022, the *GeoBarents* saved 439 migrants,² and on 6th March 2022, the *GeoBarents* saved 31 migrants.³

In both these cases, after staying for more than a week in the open sea, the boat had the permission to port in the port of Augusta, in Sicily. Grave concerns have been voiced by scholars and academics on the aggressive Italian ministry of interior policy against SAR NGO activities, used as an oppressive tool to oblige captain of ships to disengage from assisting people in distress at sea and from bringing them to Italy, considered the safest place of disembarkation according to the international legal framework on search and rescue, UNCLOS, international law and obligations, as well as EU law.⁴

Their voices prompted the UN Security Council to ask the 'Prosecutor of the International Criminal Court to initiate *proprio motu* an investigation into high-ranking Italian authorities as regards their complicity in the crimes against humanity taking place in Libya; and it asked Council of Europe members to file an inter-state complaint against the Italian government before the European Court of Human Rights'.⁵ The Italian prosecution have accused former interior minister *Matteo Salvini*

¹ Press Release Point, Italy: Port Authorities Detain MSF's Search and Rescue Ship, 4 July 2021, <https://www.pressreleasepoint.com/italy-port-authorities-detain-msfs-search-and-rescue-ship>, last accessed 15 march 2022; MSF is Determined to Return to Sea to Save Lives After GEO Barents Detained in Italy, 4 July 2021, <https://www.msf.org/msf-determined-return-sea-save-lives-after-geo-barents-detained-italy>, last accessed 12 march 2022.

² Fanpage, Geo Barents, 439 migranti ancora in mezzo al mare senza un porto sicuro, <https://www.fanpage.it/attualita/geo-barents-439-migranti-ancora-in-mezzo-al-mare-senza-un-porto-sicuro/> last accessed 30 march 2022.

³ Ansa, Migranti: altri 31 soccorsi dalla nave Geo Barents https://www.ansa.it/sito/notizie/cronaca/2022/03/06/migranti-altri-31-soccorsi-dalla-nave-geo-barents-di-msf_1000c32c-ce98-4ca0-954a-675728209f61.html last accessed 30 march 2022.

⁴ Statewatch, Statement by 29 academics on Italy seizing the rescue boat Open Arms, retrievable from <http://statewatch.org/news/2018/mar/open-arms-statement.pdf> last accessed 30 march 2022.

⁵ *Ibid.*

to have illegally detained migrants at sea in July 2019.¹ The Italian Senate agreed to lift the immunity of the far-right leader *Matteo Salvini*, thereby, allowing the magistrates in Sicily to press charges over his decision to keep more than 100 irregular migrants on board a coastguard ship for 6 days.² Until now, the tribunal of first instance of Palermo has not yet decided, given that court proceedings have commenced on 17 October 2021.

In October 2020, the UN Special rapporteur on human rights defenders have criticized and called on Italy to stop the criminalization of rescuers for humanitarian purposes.³ Attention was brought to Italy for impounding the rescue ship of *Médécins Sans Frontières* in September 2020; the open cases of *Carola Rackete*, the captain of a *Sea Watch* ship; and 10 crew members of the *Iuventa* rescue ship. According to the Special Rapporteur, Ms *Mary Lawlor*, reminded Italy that these rescue vessels at sea, are to be considered 'human rights defenders, not criminals.'⁴ Also, the message sent by the Palermo court on February 6, 2020, ordering the release of the NGO *Mare Jonio* rescue vessel and dismiss all charges against Commander *Marrone* and Mission Chief *Casarini*, is a clear message that this law must be repealed.⁵

Administrative Measures in Violation of the International Legal Framework on Rescue at Sea

Italy is a party to the UN Convention against Transnational Organised Crime 2000 and its Protocols (Palermo Protocols),⁶ which requires in Article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air⁷ that the State adopts 'such legislative

¹ AlJazeera, Italy Strips Immunity From Far-right Salvini, <https://www.aljazeera.com/news/2020/2/12/italy-strips-immunity-from-far-right-salvini>, last accessed 15 march 2022.

² AlJazeera, Italy Strips Immunity From Far-right Salvini, <https://www.aljazeera.com/news/2020/2/12/italy-strips-immunity-from-far-right-salvini>, last accessed 15 march 2022.

³ OHCHR, Italy: UN Expert Condemns 'Criminalization' of Those Saving Lives in the Mediterranean, 8 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26361&LangID=E>, last accessed 16 march 2022.

⁴ OHCHR, Italy: UN Expert Condemns 'Criminalization' of Those Saving Lives in the Mediterranean, 8 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26361&LangID=E>, last accessed 16 march 2022.

⁵ Desiderio, E. (2019) Palermo Court Orders Release of Rescue Vessel Mare Jonio, <https://www.infomigrants.net/en/post/22596/palermo-court-orders-release-of-rescue-vessel-mare-jonio>, last accessed 3 march 2022.

⁶ UN Convention against Transnational Organized Crime 2000 and its Protocols, Resolution A/RES/55/25 of 15 November 2000 (New York, 15 November 2000) UNTS 12, Volume 2225, 209.

⁷ UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, United Nations, (Resolution 55/25 of 15 November 2000) United Nations, Treaty Series, Volume 2241, 507 (Migrant Smuggling Protocol) article 6.

and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (a) The smuggling of migrants' Italy complied with its obligations under the Palermo Protocols through the implementation of Article 12 of the Italian Consolidated Text on Migration (Criminalizing the facilitation of illegal entry)¹ and Article 601 of the Italian Criminal Code (Criminalizing trafficking in human beings).² The provisions of Article 12 of the Italian Consolidated Text on Migration added to the national criminal code to regulate the irregular migration issues from a criminal law management perspective. These provisions criminalize the smuggling of migrants in its various forms including the smuggling within the territory and cross-border smuggling.³ The basic form of smuggling is defined in Article 12(1) of the Consolidated Text on Migration as the 'the promotion, management, organization, support, or conduct of the transportation of a third-country national in the territory of the State, of which the person is not a citizen nor a permanent resident, against the provisions of the Testo Unico'.⁴

For the crime of migrant smuggling, state authorities must prove two legal elements, that of the 1) act embodied in the procurement of the illegal entry and 2) the purpose including a financial or other material benefit to be gained by the smuggler.⁵ The aim behind these two legal elements as included by the UN legislator were to clearly exclude from criminal liability humanitarian actors or family members who assist the illegal crossing of borders for non-material reasons. Thus, the UN legislator's intention was to simultaneously ensure the interest of a state's protection of its migration policy but also to protect the rights of migrants and the exclusion of criminal liability of the humanitarian actors. The same intention was preserved by the EU legislator in the context of the EU Refit Evaluation in 2017 when it excluded liability amid financial gain in its assessment of the EU Facilitators Package.⁶ Following the same logic, Italy incorporated the inclusion of the 'financial gain

¹ Legislative Decree 286/1998 (referred to as the Consolidated Text on Migration); Italian title "Disposizioni contro le Immigrazioni clandestine".

² Legislation Penal Code law no. 228/2003 of 11 August 2003: "Measures against Trafficking in persons" (Legge 11 agosto 2003 n.228 Misure contro la tratta di persone) (in Italian)

³ Paragraphs (1), (3) and (3ter) of Article 12 of the Consolidated Text on Migration regulate illegal entry in the territory.

⁴ Legislative Decree n.286 dated 25 July 1998, Consolidated Act of Provisions Concerning Regulations on Immigration and Rules about the Conditions of Aliens, article 12(1), unofficial translation.

⁵ Fitzpatrick, J. (2002) Trafficking and a human rights violation: The complex intersection of legal frameworks for conceptualizing and combating trafficking." *Mich. J. Int'l L.* 24.

⁶ Ricci, Chiara M. 2020 Criminalizing Solidarity? Smugglers, Migrants and Rescuers in the Reform of the 'Facilitators' Package', *Securitising Asylum Flows*. Brill Nijhoff. 34-56; Mitsilegas, V. 2019 Decriminalisation in the Law of the European Union. The Future of EU Criminal Justice Policy and Practice. Brill Nijhoff. 106-118; Minetti, M. (2020) The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy." *New Journal of European Criminal Law* 11.3 335-350.

element' as an 'aggravating circumstance' in its paragraph 3 of Article 12 of the Italian Consolidated Text on Migration rather than a 'constitutive element' of the crime.

Although the inclusion of the financial gain element was reflected as a downgrading aggravating circumstance of the Italian facilitation of illegal entry, it is worth noting that the provisions require a mere commission of the action as sufficient for criminal liability to arise.¹ Thus, paragraph 3 of Article 12, of the Italian Consolidated Text on Migration expands its scope to virtually anyone assisting in any form the illegal crossing of borders to Italian territory. Paragraph 3 of Article 12 of the Italian Consolidated Text on Migration does not distinguish between the intention of the facilitators contrary to the intention of the UN and EU legislators. This paper argues that the codification of the Italian Smuggling Legislation has failed in its transposition of the dispositions of the UN Smuggling Protocol and the European Legal Framework on the facilitation of smuggling and trafficking networks.

The wrongful transposition of the Italian smuggling legislation is not only in incompliance with international law in terms of the UN Smuggling Protocol and the European Legal Framework, but it has also raised concerns as to its incompatibility with the International Law of the Sea, International Refugee Law and international human rights law and obligations. According to the substantive transposition of the codification of the Italian smuggling legal framework, Search and Rescue activities carried on by NGOs operating in the Mediterranean Sea complying under their obligation to rescue people in danger according to international law conventions such as UNCLOS, SOLAS and SAR Convention, fall under the scope of Article 12 of the Italian Consolidated Text on Migration. According to paragraph 1 of the Article 12 of the Italian Consolidated Text on Migration, the mere transporting of irregular migrants in Italian territory is punished with 'imprisonment from one to five years and with a 15,000 Euro fine for each person'.

Furthermore, the systematic interpretation of Articles 10 and 12 of the Italian Consolidated Text on Migration criminalizes any person that enters the State irregularly. These provisions are interpreted that Italian authorities should prosecute, fine and punish the smuggled migrant for the illegal crossing of national borders. According to paragraph 1 of Article 10 of the Italian Consolidated Text on Migration, any person infringing the provisions of the Consolidated Act as well as those mentioned under Article 1 of law no. 68 dated 28 May 2007, is punished with a sanction from 5,000 to 10,000 euros. It may be considered that this type of interpretation punishes the status of the person and not the act *per se*.

Through their actions, Italian authorities seem to justify such interpretation under the argument that the international law gives the state freedom to decide on the criminal law status of the smuggled migrant, be that of victim, material object of the crime or

¹ Veas, Javier E. (2018) Il fine di profitto nel reato di traffico di migranti: analisi critica della legislazione europea, *Journal of Migration and Law* 5.2 259.

an offender. Thus, the codification of the Italian legal framework on migrant smuggling treats the smuggled migrant as an offender. However, these provisions though are incompatible with the UN legislators' protocol on Human Trafficking which provides that the migrant smuggling in trafficking situations should be recognized as victims and hence be granted protection and compensation.¹ Such, the decision of the Italian legislator to classify the criminal law status of the smuggled migrant as offenders instead of victims is incompatible with international law.

Although Italy justifies these measures based on meeting the overall object and purpose of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Italy is violating Article 5 of Smuggled Migrant Protocol, which prohibits the 'criminalization' of migrants, specifying that smuggled migrants should not be subject to criminal prosecution if they are the object of conduct related to migrant smuggling as set forth in Article 6 of the same Protocol. It should be noted that such an obligation is similar to that of Article 31 of the Refugee Convention. The legislative guide for the implementation of the Protocol expressly provides that sanctions should not apply to migrants 'even in cases where it involves entry or residence that is illegal under the laws of the State concerned'.² It has been acknowledged since 1949, that people fleeing from persecution and other forms of hardship do not usually have the required travel documents, as they often have no choice but to cross international borders irregularly.³ Otherwise, potential asylum seekers leaving their country might also be persecuted or criminalized. Such interpretation derives from international refugee law providing asylum seekers with the implicit right to reside in the host country until the asylum procedures have been completed. This approach has been confirmed by the UNHCR,⁴ the General Assembly of UN,⁵ other regional organizations,⁶ and academic scholars.⁷ Thus, although refugees do not have a right to seek asylum,

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

² UNODC Legislative Guides for the Implementation of the UN Convention against Transnational Organized Crime and the Protocols Thereto' (UN 2004) 340.

³ UN Economic and Social Council, 'Study on Statelessness' (UN doc E/1112/Add.1, 1949) 24.

⁴ UNHCR (2007) *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January; EXCOM Conclusion on Safeguarding Asylum No. 82 (XLVIII), 1997; UNHCR EXCOM General Conclusion No. 90 (LV), 2004.

⁵ The UN, the Declaration on Territorial Asylum, 1997.

⁶ Organization of African Unity (OAU) Convention Governing Refugee Problems; Asian-African Legal Consultative Organization; European Convention on Human Rights and the Committee of Ministers of the Council of Europe in 1967.

⁷ Hathaway, James C., and William S. Hicks. (2004) Is There A Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear. *Mich. J. Int'l L.* 26 505, Coleman, N. (2003) Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law. *European Journal of Migration and Law* 523-68; Lauterpacht, E, and Bethlehem D. (2003) The scope and content of the principle of non-refoulement: Opinion. *Refugee protection in*

national states have the duty to provide access to claiming this right.¹ As a consequence, States cannot legitimately prosecute migrants who use fraudulent documents to leave their country.² These measures disregard the mixed migration pattern in the Central Mediterranean routes which consist of refugees and economic migrants.³

Furthermore, the Migrant Smuggling Protocol not only protects refugees but also covers the contemporary reality of the broad category of migrant smuggling. As Andreas Schloenhardt and Hadley Hickson have argued, the immunity granted by Article 5 of the said Protocol must extend to any administrative measure punishing smuggled migrants. Holding otherwise would result in states being allowed to impose 'punitive measures under the guise of administrative immigration processes' even though they are precluded from imposing criminal sanctions.⁴ This view is supported by the *travaux préparatoires* which confirm that Article 6(1)(b) applies even when an individual knowingly possesses fraudulent documents for the purpose of migrant smuggling within the meaning of Article 6(1)(a).⁵ Administrative measures such as fines pose a greater threat to smuggled migrants' rights due to the limited involvement of the courts. Although states have a sovereign right to impose administrative measures on smuggled migrants, in effect they are sanctioning them contrary to Article 5 and the good faith principle,⁶ rendering this obligation ineffective.⁷ A State cannot invoke provisions of its national law to justify its failure to

international law: UNHCR's global consultations on international protection Guy S. Goodwin-Gill, and Jane McAdam. (2007) *The Refugee in International Law.*" 2-11; Hurwitz, Agnès G. *The collective responsibility of states to protect refugees.* Oxford University Press on Demand, 2009. On the **contrary**: Grahl-Madsen, Atle. *The status of refugees in international law.* Vol. 2. Leyden: AW Sijthoff, 1972; Calamia, Antonio Marcello. *Ammissione ed allontanamento degli stranieri.* A. Giuffrè, 1980.

¹ Goodwin-Gill, Guy S., Jane McAdam, and Jane McAdam. 1996 *The refugee in international law.* Vol. 12. Oxford: Clarendon Press.

² Colin Harvey and Robert Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) *IJRL* 19(1), 1-21, 16.

³ Triandafyllidou A, (2013) *Disentangling the Migration and Asylum Knot, Dealing with Crisis Situations and Avoiding Detention* (RSCAS PP 2013/19 Policy Papers, 1.

⁴ Schloenhardt A. and Hickson H, (2013) *Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air* *IJRL* 25 (1), 39-64, 47.

⁵ UN GAOR, Report of the Ad Hoc Committee, *Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions*, 55th Session, Addendum, 'Interpretative Notes for the Official Records' (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (Travaux Préparatoires) (UN Doc. A/55/383/ Add.1, 14, paragraph 93.

⁶ *Free Zones (Switzerland v France)*(Merits) [1930] PCIJ (ser A/B) No 46.

⁷ Schloenhardt A. and Hickson H, (2013) *Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air* *IJRL* 25 (1), <https://doi.org/10.1093/ijrl/eet003>

carry out the terms of a treaty.¹ Nor do the Palermo Protocols permit border controls to interfere with the free movement of people whilst discovering trafficking and smuggling.² Articles 14 of the Trafficking Protocol and Article 19 of the Smuggling Protocol expressly state that the measures taken under these protocols must not affect human rights and refugee law obligations.

These disengagement measures are argued to be wrongful acts acting in violation with international obligations, human rights and maritime law. Moreover, criminalization actions against SAR civil society actors are incompatible with the human rights principles and the fundamental principles set forth in the UN Declaration on Human Rights Defenders on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.³ The UN Declaration on Human Rights Defenders refers in its Article 1 of the Declaration that 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels' and in Article 2(1) underlines that 'Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms'.⁴ Therefore, in accordance with Article 2(2) of the Declaration, Articles 14 of the Trafficking Protocol and Article 19 of the Smuggling Protocol and Article 31 of the Refugee Convention, Italy has the obligation to adopt its legislation or administrative acts in accordance with the rights and freedoms.

Conclusion

Declaring its ports as 'unsafe', Italy attempts to withdraw its coastal authorities from coordinating rescue operations, failing to respond to boats found in distress at sea and ensuring disembarkation in a safe port contrary to its obligations under international obligations and human rights law, and the international framework on search and rescue. The Italian 'closed ports' policy and its refusal to allow NGO ships to conduct SAR operations, entry and disembarkation into Italian ports, has resulted

¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Volume 1155, 331 (VCLT) article 27.

² UN Office on Drugs and Crime, International Framework for Action to Implement the Smuggling of Migrants Protocol (2011), 43 '[w]ithout prejudice to international commitments in relation to the free movement of people'; Migrant Smuggling Protocol, article 5; Colin Harvey and Robert Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) IJRL 19(1), 1-21, 14: States can control departure of migrants within the limits of the ICCPR, article 12(3).

³ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>.

⁴ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>.

into Italy committing grave human rights violations towards irregular migrants attempting to cross the Mediterranean Sea. These restrictive measures will not have the effect of restricting boat departures, on the contrary, it will only force the irregular migrant boats to travel longer distances to reach European territory.

The Italian policy of a 'contained mobility' of rescue at sea is a disengagement strategy for SAR activities of coastal authorities and NGO humanitarian SAR operations to stop after confronted with increased penalization measures under the stigmatization of criminalization and security issues. Simultaneously, the penalization and disengagement of NGO SAR operations through the prevention of entry to Italian ports oblige captain of ships to disembark the rescued irregular migrants to Libya, an unsafe and a known gross human rights violator. Once under Italian territory or jurisdiction, the rescued migrants should be identified as potential victims of trafficking in which Italy has the obligation to protect and assist victims of trafficking. As provided in Guideline 2 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, a failure by the State to identify a trafficked person correctly 'is likely to result in a further denial of that person's rights'.¹ To conduct a proper identification of vulnerabilities and protection needs, the rescued migrants must be disembarked in a safe place. Such a practice is contrary to the prohibition of collective expulsions and the *non-refoulement* principle.

It cannot be accepted that a legislative decree is used as a justification to suspend or override principles of international law. This particular action cannot be accepted, as otherwise, any executive act would be used to thwart the application of international treaties or discharge state obligations under international law at any time. National governments cannot evade or bypass their obligations under international maritime, human rights and refugee law, as well as EU treaties and their constitutional laws with a simple executive act under the grounds of public security or health protection.

Considering the above legal analysis, this paper recommends that Italy in collaboration with other EU Member States should implement a coherent, human rights-based response to maritime migration from Libya. But most importantly, whilst the Italian right to conduct controls on private vessels carrying out regular search and rescue activities at sea is not denied nor reject, it is argued in this paper that these controls shall not be conducted in violation of national, EU and international legal frameworks. Hence, Italy should respect and implement its international obligation to save lives at sea, while upholding the principle of *non-refoulement* under international human rights, refugee and humanitarian law.

¹ OHCHR, OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 2, p 4, <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>

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