



Analysis

Italy's redefinition of sea rescue as a crime draws on EU policy for inspiration

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1. Introduction

On the evening of 18 March, an ongoing conflict between the Italian government and civil sea rescue initiatives was reignited following the rescue of 49 people in international waters north of Libya by the ship *Mare Jonio*, of the Italian citizen-funded sea rescue initiative *Mediterranea - Saving Humans*.¹ Matteo Salvini, the interior minister, reacted to the rescue operation and the ship's request for a safe harbour for disembarkation by issuing a directive which seeks to subordinate the infrastructure and transport ministry's competences for port-related issues to security concerns. Amongst these, fighting illegal immigration figures prominently. With this directive, Salvini is attempting to prevent the application of international law and in doing so, he has cited the European Agenda on Migration as a justification. In fact, examined alongside recent Council proposals, it appears that the approaches of the Italian government and the EU institutions to unauthorised sea arrivals are not necessarily that different.

2. The Italian interior ministry's directive

The directive was issued as a circular from the interior ministry (no. 14100/141(8)) to the heads of the police and public security, the *carabinieri*, the *Guardia di Finanza* (customs police), the port authorities' general commander, the Navy and the Defence chiefs of staff. After highlighting that the fight against trafficking of migrants is a priority, Salvini's directive cites the EU's 2015-2020 plan of action in this field:

¹ The *Mediterranea* initiative came about following a year of attempts by the Italian government to deny rescue boats the possibility of disembarking the people saved, with the flag flown by the vessels amongst the governments' pretexts for doing so. While the issue of flag states is irrelevant in this context, it has been used to justify diplomatic crises, notably with Malta, France, Spain and the Netherlands.

*“The Agenda set the goal to transform migrant smuggling networks from ‘low risk, high return’ operations into ‘high risk, low return’ ones”.*²

It is just one of several strategic choices made in this field since 2015, whose official jargon attempts to conceal the fact that the “high risk” concerns migrants and their lives far more than it does smugglers (who are referred to as traffickers by the minister). The clearest example is that of the government’s strategy of withdrawing rescue capabilities and equipping the Libyan coast guard to perform ‘pull-back’ operations to Libya. This is likely to guarantee either death at sea or *refoulement* to Libya’s notorious detention centres, in violation of international law.

The subject of the instructions issued by the interior ministry is the “unified coordination of maritime borders surveillance activities” and those to “counter illegal immigration”, in the context of the internal dimension of immigration policy, the protection of the EU’s external borders and actions to fight migrant trafficking.

The directive highlights that stopping trafficking is a public interest, which also serves the “primary interest of saving human life at sea”. A comprehensive approach for migration by sea to discourage departures is deemed necessary, while guaranteeing an effective coordination of rescue operations by national and European state rescue vessels,³ and sometimes by private national or foreign vessels. The directive highlights that while life at sea must be safeguarded, even beyond a state’s region of competence when distress messages are received, this only applies until the relevant national Maritime Rescue Coordination Centre formally assumes coordination of the rescue and responsibility for these operations.

This preamble is followed by a lengthy explanation of why applicable legislation should be subordinated to concerns and pretexts linked to immigration policy, public order and security. Salvini lists the relevant legislation as the 1974 SOLAS Convention (on the safety of life at sea), the 1979 SAR Convention (on search-and-rescue activities) and the 1982 Convention on the law of the sea (UNCLOS or the Montego Bay Convention). According to Salvini, the requirement to apply these international norms should be tempered by the need:

“to prevent the possible instrumental use of international obligations set in these same agreements and the methodical violation of national and European norms on the surveillance of maritime borders and to counter illegal immigration”.

An overall analysis of the rescue operation is hence necessary, according to the directive, to safeguard the different public interests that are in play, while lending immediate assistance and help to the people whose lives are at risk remains the priority. At the same time, behaviour that explicitly aims to contravene the international normative framework for rescues and national and European norms on immigration must be codified and punished, particularly as it has been undertaken over time and methodically. According to the ministry, people arriving may be involved in terrorism, or be a concern for public order and security. Thus, the National

² EU Action Plan against migrant smuggling, COM(2015)285 final, 27 May 2015,

https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf

³ These were of course withdrawn on 31 October 2014 with the end of Italy’s Mare Nostrum operation. Even the EU’s Operation Sophia, which has saved thousands of lives as an incidental aspect of its “anti-smuggling” mission, no longer has any boats deployed which could help save lives, following a decision taken at the end of March 2019.

Authority for Public Security (ANPS) should conduct risk analyses from available information on specific rescue events. This should be followed by the issuing of directions and measures to guarantee respect for the general national, EU and international legal framework to protect public security.

The directive by the interior ministry interprets the exception to the general application of the UN Convention on the law of the sea – whereby a vessel’s passage may be deemed “innocent” if it is “not prejudicial to the peace, good order or security of the coastal State” – as a *carte blanche* for states to act discretionally, because this should be decided by national authorities.

Thus, in concrete terms, rescue operations enacted by NGOs since 2015, when the EU and Italy knowingly decided that leaving people to die at sea was useful to discourage departures, are viewed as involving various elements that point to the “instrumental use by traffickers of the dutiful rescue activity” to enable illegal entrances into the national territory. Fulfilment of this “ultimate purpose” or “objective” is viewed as necessary to achieve the unlawful profits that underlie this criminal activity. The ANPS must therefore evaluate such elements and, while timely rescue remains a priority, it must immediately verify if there has been a preordained and unlawful violation of norms on rescues in order to circumvent the rules that govern regular immigration, thereby “endangering the internal public order and security of the coastal state”. This appears a rationale to justify Italy’s continued obstruction of life-saving activities and delays to disembarkation of the rescued people and rescue crews on spurious grounds, contrary to the SAR Convention’s prescriptions.

The document outlines how the Maritime Rescue Coordination Centre (MRCC) operates in coordination with port authorities and the National Coordination Centre (involving the border police authority and public security department) on the basis of a 2003 inter-ministerial decree in cases involving rescues in international waters or a foreign state’s SAR zone. The latter two authorities will be informed of every aspect that may be relevant for countering irregular immigration, so that the ANPS may evaluate whether it should adopt “initiatives or measures deemed urgent, necessary and impossible to postpone in view of the normative framework that is in force”

The directive claims that there have been concrete cases of ships flying foreign or Italian flags rescuing vessels in SAR zones that are not Italian but that had migrants on board, undertaking rescues on their own initiative and then heading for the European sea borders, in violation of the international law of the sea and instructions by competent SAR authorities coordinating the event. The Hamburg Convention establishes that such operations must be coordinated by the internationally recognised authority recognised as an MRCC for a declared SAR zone which has not been contested by neighbouring states. These specifications seem geared at protecting a minister (Matteo Salvini) who has been charged with crimes including kidnapping and abuse of power leading to rights violations, in relation to cases of rescued people and rescuers being held on board of ships, or even turned away, by subordinating laws on rescues and of the sea to security concerns.⁴

⁴ Massimo Frigo, ‘The Kafkaesque “Diciotti” Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?’, *Opinio Juris*, 28 August 2018, <http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/>

In reference to the *Mare Jonio* case, the document stresses that although the rescue took place in waters that were not Italian responsibility, and Italian authorities were not coordinating the event, it asked them for a place of safety. Despite these authorities informing the ship's captain, on the basis of international conventions that are in force, that the requirements for assignment of a place of safety in Italy did not apply, the vessel travelled "independently and deliberately" towards the EU's external borders, specifically the island of Lampedusa. These were not the only possible landing points for rescue events, "considering that the Libyan, Tunisian and Maltese ports can offer adequate logistical and medical assistance" and, in terms of nautical miles, they were also closer. This is an interesting point given that the Italian interior ministry has previously forced vessels carrying vulnerable people, including children and people who had been tortured before nearly drowning, to navigate for days and even weeks as a form of blackmail, inviting boats to head to France or Spain. The ministry now admits that "in principle", disembarkation should take place near to the coordinates of the rescue event.

The directive then affirms the right of coastal states to regulate passage through their territorial waters on the basis of their sovereignty and "full legislative and executive jurisdiction" on all relevant matters, including the power to regulate foreigners' access to territorial waters. This supposedly "translates into a general power to regulate and, if necessary, exclude the access of ships" to these waters. Unlike in other sea areas, the freedom of navigation envisaged in the UN Convention on the law of the sea (UNCLOS) does not apply in a coastal state's territorial waters and nor does a right of access. UNCLOS's article 2(3) and international law in general regulate the exercise of a coastal state's sovereignty and power in its territorial sea, meaning that they represent an exceptional regime in relation to the norm that the coastal state fully exercises its sovereignty in its waters and, hence, "it may refuse to allow foreign ships into its internal waters and ports".

The directive claims that to apply these considerations to the matter at hand, if, on the initiative of the rescue vessel, a rescue occurred in waters for which the Libyans have responsibility, without coordination from the Rome MRCC, the necessary criteria for Italy to assign a place of safety have not been fulfilled. The ship's captain could not have been unaware of the lack of competence of Italian authorities under applicable international law, but he nonetheless navigated towards the Italian coast.

UNCLOS envisages that states may also deem that the passage of a boat through its territorial waters may not be innocent or "not inoffensive", particularly as regards loading or unloading materials, currency or people in violation of national laws and rules on customs, tax, health or immigration that may be in force. Hence, the cases detailed of rescue and navigation activity seem to have had the purpose of transferring irregular migrants (the minister presumes an absence of refugees) rescued in the Mediterranean into Italian territory, instrumentally using conventions on the law of the sea while violating their provisions in the same context. Such behaviour is not occasional and was not organised by a competent rescue centre of the responsible coastal state for that sea area, but rather, it is a "wilful *modus operandi* that – in concrete terms – facilitates the illegal entry" of rescued migrants into European territory. This *modus operandi* is then deemed the cause for the arrival of thousands of irregular migrants in Italy in the years 2016, 2017 and 2018, in violation of immigration legislation in force. However, the practice is described as comprising:

“rescue, using ships, of irregular migrants in waters that are not under Italian responsibility and in the successive deliberate transfer of the same migrants, although the Command of the Italian port authorities had not coordinated the event”.

The final passages of the directive conclude that the behaviour described is the expression of a rescue activity undertaken in an “inappropriate” modality, violating the law of the sea, which therefore causes “prejudice to the good order and security of the coastal state”. This is because its purpose is to enable people to enter in violation of its immigration laws. Such a reading is deemed inevitable, all the more so as they lack identity documents (again, this is stated as a truth although it had not been verified at the time), and partly come from “foreign countries at risk of terrorism” due to widespread past and present terrorist activities in those countries. One may hasten to add: “... because the interior minister says so.”

The authorities to which this circular is addressed are invited to scrupulously comply with it, issuing the relevant operative instructions “to safeguard the Italian State’s order and public security” and “the illegal entrance of immigrants in the national territory”.

Some comments are in order here:

- 1) most events involving sea rescues before, and sometimes after, the new government took office in mid-2018 announcing that “the ports are closed”, were in cooperation with the Italian coastguard;
- 2) despite Italy and the EU’s best efforts, Libya is not a safe country and following the Libyan coast guard’s instructions would entail a violation of human rights, international law, the law of the sea and, in the presence of refugees, the Geneva Convention;
- 3) European vessels are not allowed to disembark people they rescue in places where they will endure torture and/or inhuman and degrading treatment, which have not signed the Geneva Convention and/or do not apply it to refugees;
- 4) the Libyan SAR zone and coordination centre are a fiction that Libya has asserted (and the IMO has accepted), and with which Italy, Frontex and the EU Commission are apparently content with, but Italy carries out coordination functions which the Libyans are not yet equipped to undertake, making the “rescues” by this force legally similar to the *refoulements* for which Italy was condemned (see below);
- 5) any order to return people to Libya, even under instructions from the Italian MRCC or interior ministry, would be an invitation to act against the law in view of the conditions there. However, such concerns do not appear to matter, because the interior minister deems that the rule that should be respected at the expense of an entire legal framework is that foreigners must not enter Italy without authorisation.

When the *Mare Jonio* approached Lampedusa on 19 March, it was first authorised to land by the coast guard, before being halted by the *Guardia di Finanza* (customs and excise police, GdF), which also boarded the vessel. After a stand-off lasting several hours, the passengers were allowed to disembark in the evening and the ship was confiscated to acquire evidence and investigative material. Salvini called for arrests to be made as illegal activities had obviously taken place.

Essentially, the directive subordinates the infrastructure and transport minister's competence over ports to the interior ministry's expansive reading of security, meaning that people's disembarkation may be delayed or prevented in violation of rescue norms rather than running the risk of an "illegal" migrant entering.

3. Reactions and criticism: "a ministerial directive against the law"

Reactions to the directive were plentiful and many of them argued it was an invalid document, because state actions in this field are subordinated to the international legal framework. Criticism was voiced by Rear Admiral Vittorio Alessandro of the Italian navy, who spoke to *Avvenire* newspaper to describe the directive as "anomalous, clearly unlawful and vitiated by an abuse of power". He also argued that:

"The measure to close the territorial sea signed by minister Salvini definitively pushes sea rescue activity towards its pure instrumental use for political purposes, risking to create, in operative reality, unmanageable situations of confusion and danger".

The Rear Admiral's key points concern the directive's premise, as the fact that conventions to safeguard of life at sea may be used instrumentally to elude rules on immigration does not suspend or diminish rescue duties, and the same hypothetical risk may apply to every principle to protect fundamental freedoms without leading to their suspension (although the Commission and Frontex systematically push this line), for instance in plans to recast the returns directive by interpreting its safeguards as undermining the goal of restoring credibility to the EU's return system under the European Agenda on Migration.

Likewise, concern over the "the peace, good order or security of the coastal State" is a mere unverified hypothesis that can be dealt with after disembarkation, and the measure is formally unlawful because authority to block transit in territorial waters is an exclusive competence of the infrastructures ministry. Further, Salvini wrote to authorities including armed forces in a communication that should have been duly addressed to the infrastructures minister; and the distance between theory and reality was obvious when the GdF asked the captain to switch off the ship's engines at a time when there were large waves at sea. The captain refused to do so, because it could have endangered the craft and people on board. Alessandro described the order as "inconceivable".

Fulvio Vassallo Paleologo, a jurist from Palermo University and the *Associazione Diritti e Frontiere* (A-Dif), bluntly described the circular as a "ministerial directive against the law". The reasons for this stem from the fictional nature of the Libyan SAR zone, which has been declared and recognised by the International Maritime Organization (IMO) without fulfilling the necessary requirements, including a functioning Libyan Operative Coordination Central Office, as confirmed by an IMO representative in London. He notes that international jurists agree that establishing such a zone "is inherently subordinated to the circumstance that the state party to the Convention must be able to guarantee the continuous operation of SAR services in its area of competence". This includes central offices, resources and technical and staffing means, as well as adequate naval and airborne crafts to undertake this mission.

As recently as December, Libyan coast guard authorities acknowledged that rescue activities in the Libyan SAR zone were undertaken with Italian coordination, as they had done previously when the coordination was entrusted to Italian ships deployed in Tripoli until June 2018 as

part of the NAURUS operation. Vassallo Paleologo argues that, since then, the coordination mode has changed in line with a war against NGOs, disengagement of the Italian Coast Guard vessels often left in ports, “indifference” by EUNAVFOR MED (Operation Sophia) and Frontex missions avoiding trouble spots and sometimes not intervening promptly on the basis of air reconnaissance mission information.

Further, he views the directive as contravening several international conventions, refugee law and the Geneva Convention, IMO and UNHCR documents on sea rescues, while UNHCR representatives have been warning about Libya not being a safe disembarkation point for some time. As refugee or asylum seeker status cannot be verified at sea, and UNHCR certifies this, the people on board are not illegal immigrants, but shipwreck victims who must be taken somewhere safe, before subjecting them to procedures to sort them for this purpose.

Vassallo Paleologo fears that the directive may be used to try to crush the migrants and humanitarian operators on board of the *Mare Jonio*, but he argues that rescues by private ships cannot be criminalised, all the more in the context of a lack of SAR coordination in international waters:

“Their swift disembarkation in a safe harbour cannot be impeded or postponed for the sole purpose of opposing irregular immigration or in order to conduct possible negotiations between different European governments or authorities”.

Even UN Protocols against international trafficking in human beings and trafficking, the UN Convention against transnational crime and its additional Protocol against organised transnational crime, used as legal cover for agreements with Libya, clearly state that international human rights and refugee law are prevalent over the fight against traffickers.

Vassallo Paleologo views the directive as an attempt by the minister to protect himself from charges laid against him for the *Diciotti* case, another example of how the interior and infrastructures ministries are violating key principles of the rule of law and the duty of search and rescue enshrined in international conventions. He hopes the judicial system and judges will be able to resist this onslaught against international law and its firmly established principles on people’s life, freedom and physical integrity.

4. Italy v Europe, or Italy and Europe?

The extraordinary thing about the situation in Italy under the right wing-populist government that is presented as a clash between the EU and Italy, is that the cruelty which has become its trademark is what the European Council, the Commission and Frontex have pushed for four years under the European Agenda on Migration. Salvini, rather plausibly, considers that his abuse of power and harassment of shipwreck survivors, NGOs and other vessels saving them are authorised by the EU’s outlook and policies for the purpose of making journeys riskier, thus reducing traffickers’ economic incentives.

Internally, Salvini justifies this on the basis of his defence of the national interest, and this argument was used to spare him prosecution for criminal offences including kidnapping and abuse of power by his coalition partners and erstwhile electoral coalition partners of the right

and centre-right.⁵ While the apparent context is of a clash between the Italian government and the EU and other member states, their policy outlooks and their logical consequences seem identical: illegalised migrants should not exist, they are not full persons who enjoy human rights, and what leads to their death, return and/or suffering contributes to correct policy implementation. They cannot complain because they left their home countries and headed towards the EU without authorisation.

5. The European Parliament's Legal Service clarifies matters

Some enlightening information to contextualise Salvini's directive issued during the *Mare Jonio* incident comes from the European Parliament's Legal Service. In November it replied to the LIBE Committee's request for an opinion on the legality of Council proposals to set up "controlled centres" and "regional disembarkation platforms", which emerged in the conclusions of a June 2018 Council meeting. Those conclusions, citing the need "to prevent a return to the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes," state:

"In order to definitively break the business model of the smugglers, thus preventing tragic loss of life, it is necessary to eliminate the incentive to embark on perilous journeys. This requires a new approach based on shared or complementary actions among the Member States to the disembarkation of those who are saved in Search And Rescue operations. In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor."

And:

"On EU territory, those who are saved, according to international law, should be taken charge of, on the basis of a shared effort, through the transfer in controlled centres set up in Member States, only on a voluntary basis, where rapid and secure processing would allow, with full EU support, to distinguish between irregular migrants, who will be returned, and those in need of international protection, for whom the principle of solidarity would apply. All the measures in the context of these controlled centres, including relocation and resettlement, will be on a voluntary basis, without prejudice to the Dublin reform."

The Parliament Legal Service's response is relevant to the issues addressed by the directive, at the same time as it reveals the similarity in the EU's and Salvini's instrumental reasoning. Transparent mystification is prominent in both cases: they describe the creation of a SAR void off the Libyan coasts and support for the Libyan costaguard as lawful, despite Libya not being

⁵ Salvini's coalition partners, the Five Star Movement (M5S) asked their members a question through their internal 'Rousseau' decision-making platform in order to direct their vote over whether the minister should be prosecuted. That question said – in a case involving charges of kidnapping and human rights violations against vulnerable subjects – "Did the delay in disembarking people from the Diciotti ship, to redistribute the migrants in various European countries, occur to safeguard an interest of the state?", allowing a yes or no answer.

a port or place of safety, while the violation of existing norms is deemed an effective way to stop people arriving, to the benefit of both Europe and Italy.

The Council's proposals were ambiguous and lacked detail, according to the Legal Service. Nevertheless, it accepted that it was theoretically possible to set up both kinds of facilities, as noted in point 58:

“(i) ...controlled centres and/or disembarkation platforms of a similar nature could be, in principle, lawfully established in the European Union territory, that is to say in the territory of the Union's Member States; if and when established, these structures shall fully respect the applicable laws and regulations;

(ii) in principle, disembarkation platforms, as considered by the European Council in its Conclusions of 28th June 2018, could lawfully be established outside of the European Union, in order to receive migrants rescued outside the territory of the Union's Member States, as long as specific conditions are met; in particular, those migrants should benefit from the guarantees provided for in the 1951 Geneva Convention Relating to the Status of Refugees and in the European Convention of Human Rights.”

In its customary fashion, the Council portrayed these options as involving full compliance with legal and human rights frameworks, although this was not apparent in the prototypes of controlled centres that were set up in Greece and Italy since late 2015 under the name of hotspots. The claim that controlled centres sort refugees and economic migrants, which the Commission still pushes, is belied by their functioning for people's systematic exclusion from relocations in both Italy and Greece, and for denial of access to asylum procedures, in early phases in Italy and in the long-term in Greece in application of the 2016 EU-Turkey deal.

As for regional disembarkation platforms, these refer to centres to be set up to legalise the routine established by an EU state relinquishing or diminishing their search and rescue activities outside of territorial waters and entrusting them to third countries, to whose border control capabilities it is contributing. This is most obvious in the Italian-Libyan case, in which Italy is aggressively trying to impose the return of torture and shipwreck survivors to the camps where they are abused and ill-treated in the north African country. It can also be seen in the Greek-Turkish case, and Spain is now reaching agreements with Morocco to strengthen the latter's coast guard authority (which is a component of the military).

The opinion contains information relevant to different typologies of sea rescues, as well as the conditions which must be fulfilled to disembark people inside and outside of the EU's territory. These read like indirect criticism of practices enacted over the last few years to stop people reaching Europe. If the centres and/or regional platforms were to be in EU territory, they would be subject to EU law, the people rescued at sea must have access to asylum procedures if they so request, and people rescued in international waters or outside of EU member states' territories may hypothetically be taken into such centres and disembarkation platforms. If they were set up outside of EU territory, “the crucial element to take into account to assess their conformity with International Law and with EU Law is the place of rescue of migrants who would be brought in these structures”. Three cases are considered: rescues in a third country's territorial waters; in international waters; or in a member state's territorial waters.

In the first case they do not fall within an EU state's control and jurisdiction, nor within the scope of EU asylum law, but they are subject to the third country's law and the international conventions it has ratified. If the EU or one of its states takes part in any form of formal or informal cooperation agreement to establish swift procedures to decide a place of disembarkation, such agreements must respect relevant international law. Such agreements may theoretically include rules on SAR operations at sea, but international law is not clear on this point, although it does impose disembarkation in a place of safety (PoS), leaving wide margins for assigning such a location.

Therefore, while it may be argued that it is lawful to strike agreements with third countries for the sake of clarity in designating such locations, even outside the EU, the Geneva Convention forbids *refoulements* to third countries, or the creation of platforms or centres there, if people are at risk of suffering inhumane and degrading treatment or torture. Any such platforms should guarantee application of the guarantees envisaged by the Geneva Convention and the ECHR. Considering Italy's cooperation in coordinating the Libyan coast guard's activities, it appears that these conditions are currently being breached, all the more so as aggressive measures are being adopted to prevent rescue needs from being met by commercial vessels, sea rescue NGOs and even the Italian coast guard. **If the directive examined above were applied in practice, such a breach would become a systematic, routine practice.**

In the second case (rescue in the high seas in international waters), people are not theoretically subject to EU law although the legal situation for rescues carried out by vessels flying the flag of an EU state is examined. Moreover, on the granting and refusal of international protection, Directive 2013/32⁶ introduced a limited definition of a member state's territory, even excluding from its scope requests submitted in foreign consular offices, while it does not say much about migrants on vessels flying a member state's flag.

International law points to national jurisdiction normally being exercised on flag vessels to make laws applicable to their activities, to the relationship and statuses of the people on board, under the authority of their courts, and to impose respect for or punish non-compliance with their laws. If the vessel is in the territorial waters of a third country (especially one of its ports), the two jurisdictions clash and, even on the high seas where the jurisdiction of the flag state prevails, there are situations in which the jurisdiction of the port state limits that exclusive jurisdiction. Hence, a state's vessel is not the same as the state's territory over which it exercises full jurisdiction, with the exception identified in the European Court of Human Rights judgment in the *Hirsi Jamaa* case, which found Italy to be in violation of the ECHR when an Italian Navy ship (which, as a military craft, was Italian territory in law and in fact) carried out *refoulements* to Libya.⁷

The same does not apply with regards to any boat because a state jurisdiction is mainly territorial, even insofar as the scope of application of Directive 2013/32 is concerned. Hence, **in principle, vessels flying a member state's flag are allowed to take the migrants they have on board to the flag state or an EU territory, and also to disembark them in a third**

⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013L0032>

⁷ Opinion of the Legal Service, 9.11.2018, doc. SJ-0601/18 DW/as D(2018)36472.

country, provided the safeguards outlined above apply. The same applies for migrants saved by a boat flying a third state's flag, who may be taken to a "disembarkation platform" outside the EU.

The third case of migrants rescued in a member state's territorial waters falls within the scope of EU asylum law and the guarantees it provides. Following rescue (or subsequently after they are taken into the EU's territory), they cannot be sent to platforms outside the EU without having access to EU asylum procedures and without the possibility to await full examination of their application, if submitted in accordance with procedures established by EU law. Otherwise, the transfer would be like a *refoulement*, expressly forbidden by the Geneva Convention and in breach of EU law. Platforms outside the EU may be deemed to comply with applicable rules:

*"only if a specific condition is met: migrants should be able to access to EU asylum procedures (or at least to similar procedures offering equivalent guarantees) under the same conditions as in the EU. **Even assuming that this is theoretically possible, it would be legally and practically very difficult to fulfil this condition, let alone for the fact that it would require some important modifications to the current EU asylum legal framework.**" (emphasis added)*

This opinion is important for three reasons:

- 1) it confirms mystification as a key feature of the official communications of the Commission and of the Council, also at the internal level among European institutions, in order to advance reforms that are almost subversive due to the way in which they subordinate rules and laws to this field's strategic objectives;
- 2) the Council and Commission seek the Legal Service's and EP's consent to systematically violate the law by using the classic formulae of formal respect for human rights and procedures in the centres or platforms that are proposed, when violations of rights are a prime substantive feature of the prototypes for such facilities (hotspots). The 2016 agreement with Turkey is an example of such practices drawn from a similar context, and even this legal opinion indirectly points to its problematic nature, in view of the conditions that must be met to prevent transfers towards centres and platforms in third countries being considered akin to *refoulements*.
- 3) annoyance with the wording of the proposals emerges in the references to the "*undetermined character*" and "*limited*" nature of available information, at the same time as the legal advice provided allows margins for the EU to enact proposals but defines existing practices as technically unlawful. This applies especially to assistance lent by Italy to the Libyan coastguard's SAR operations, including coordination by an Italian navy ship in Tripoli's port and plans to strengthen operational coordination between EU, member state and Libyan operations and units,⁸ considering the conditions that should be met for any agreements in this area to be lawful.

⁸ The seizure of the Open Arms boat as a paradigm of the European Union's war against human rights, Statewatch news online, original by Osservatorio Solidarietà della Carta di Milano, April 2018, <http://www.statewatch.org/analyses/no-327-open-arms-seizure.pdf> ; A-Dif, Fulvio Vassallo Paleologo, 18.4.2018, "Accordi tra Italia e il Governo di Tripoli, responsabilità SAR e salvaguardia della vita

Applied to the case at hand, what emerges is that **the Commission, the European Council and the current Italian government are acting in similar fashion in their efforts to instrumentally mystify reality and subordinate the rule of law and human rights systematically to the strategic objectives in this policy field, as part of a drive to assert states' authority.**

Sources

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Fulvio Vassallo Paleologo, '[La guardia costiera di Tripoli conferma il coordinamento italiano delle intercettazioni in alto mare](#)', 17 December 2018

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[European Council conclusions, 28 June 2018](#)

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