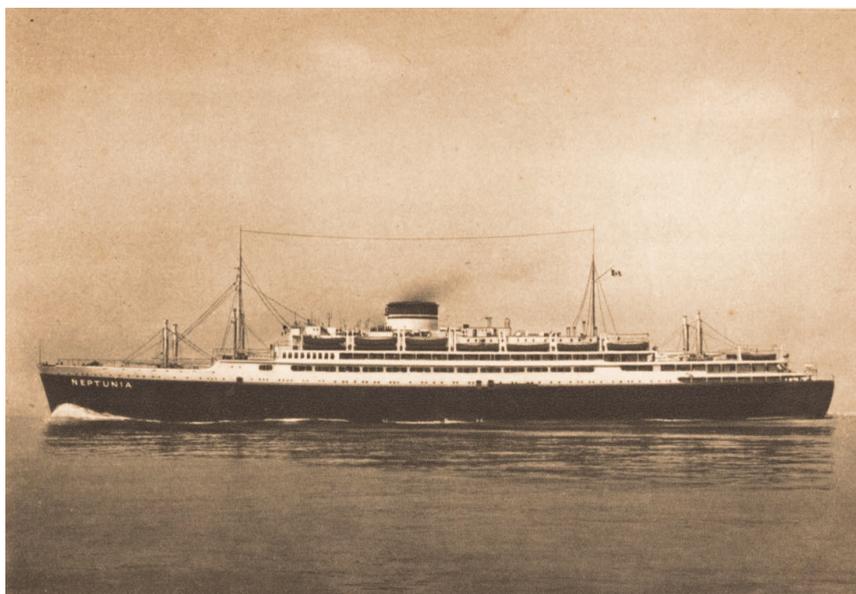


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UNCERTAINTY, ALERT AND DISTRESS: THE PRECARIOUS POSITION OF NGO SEARCH AND RESCUE OPERATIONS IN THE CENTRAL MEDITERRANEAN

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CRISIS AND RESPONSES – III- OPPOSITION TO NGO DEPLOYERS – IV.
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ABSTRACT: The international framework for maritime search and rescue relies on state actors establishing regions of responsibility supported by private shipmasters acting in compliance with traditional duties to rescue persons in distress at sea. Despite revisions to the framework's foundational treaty, questions persist about the extent of state responsibilities and the interaction between those responsibilities and international human rights law. Over the past three years, non-governmental organizations (NGOs) have provided significant support to the efforts of sovereign actors responding to the migration crisis in the Central Mediterranean. Regional governments and civil society initially praised NGO operations, but in recent months these groups have come to criticize and challenge such operations. Italian authorities have threatened criminal prosecution of NGO deployers and proposed closing national ports to them. Libyan authorities have harassed NGO vessels and sought to exclude them from international waters. These actions are consistent with non-entrée strategies employed by Mediterranean states in recent years, but are in certain cases of questionable legality. Although controlling irregular migration is properly the responsibility of state actors, recent policies are inconsistent with principles of rule of law and good governance.

KEYWORDS: irregular migration; maritime law; Search and Rescue regime; NGOs; Italy; Libya; human rights.

INCERTIDUMBRE, ALERTA Y PELIGRO: LA POSICIÓN PRECARIA DE LAS OPERACIONES SEARCH AND RESCUE DE LAS ONG EN EL MEDITERRÁNEO CENTRAL

RESUMEN: El marco de referencia internacional para la búsqueda y el salvamento marítimos se basa en entidades estatales que establecen regiones de responsabilidad apoyadas por capitanes privados que actúan en cumplimiento de las obligaciones tradicionales de rescatar a las personas en peligro en el mar. A pesar de las revisiones del tratado fundacional del marco, persisten cuestiones sobre el alcance de las responsabilidades estatales y la interacción entre esas responsabilidades y

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los derechos humanos internacionales. Durante los últimos tres años, las organizaciones no gubernamentales (ONG) han prestado un apoyo significativo a las operaciones de las entidades con soberanía en responder a la crisis migratoria en el Mediterráneo Central. Los gobiernos regionales y la sociedad civil inicialmente elogiaron las operaciones de las ONG, pero en los últimos meses estos grupos han venido a criticar y desafiar estas operaciones. Las autoridades italianas han amenazado con enjuiciar a las ONG desplegadas y han propuesto cerrar los puertos a las mismas. Las autoridades libias han hostigado buques de ONG y han tratado de excluirlos de aguas internacionales. Estas acciones son congruentes con las estrategias de no entrada utilizadas por los estados regionales en los últimos años, pero son en ciertos casos de una legalidad cuestionable. Aunque el control de la migración irregular es propiamente la responsabilidad de los actores estatales, las políticas recientes son incompatibles con los principios del estado de derecho y buen gobierno.

PALABRAS CLAVE: inmigración irregular, Derecho del Mar, Régimen de asistencia y salvamento marítimo, ONG, Italia, Libia, Derechos Humanos.

INCERTITUDE, ALERTE ET DÉTRESSE: LA POSITION PRÉCAIRE DES OPÉRATIONS SEARCH AND RESCUE DES ONG EN MÉDITERRANÉE CENTRALE

RÉSUMÉ: Le cadre international pour la recherche et le sauvetage maritimes repose sur des acteurs étatiques qui créent des régions de responsabilité soutenues par des capitaines privés agissant dans le respect des obligations traditionnelles de sauvetage des personnes en détresse en mer. Malgré les révisions apportées au traité fondamental du cadre, des questions persistent quant à l'étendue des responsabilités de l'État et à l'interaction entre ces responsabilités et le droit international des droits de l'homme. Au cours des trois dernières années, les organisations non gouvernementales (ONG) ont apporté un soutien important aux efforts des acteurs souverains répondant à la crise migratoire en Méditerranée centrale. Les gouvernements régionaux et la société civile ont initialement fait l'éloge des opérations des ONG, mais ces derniers mois, ces groupes sont venus critiquer et contester ces opérations. Les autorités italiennes ont menacé de poursuivre pénalement les navires déployant des ONG et ont proposé de fermer les ports nationaux. Les autorités libyennes ont harcelé des navires d'ONG et ont cherché à les exclure des eaux internationales. Ces actions sont conformes aux stratégies non-entrées utilisées par les états méditerranéens ces dernières années, mais dans certains cas de légalité douteuse. Bien que le contrôle de la migration irrégulière relève de la responsabilité des acteurs étatiques, les politiques récentes sont incompatibles avec les principes de l'état de droit et de la bonne gouvernance.

MOTS-CLÉS: migration irrégulière; loi maritime; Le régime de recherche et de sauvetage; Les ONG; Italie; Libye; droits de l'homme.

I. INTRODUCTION

The following evaluates the current legal and policy challenges facing non-governmental organizations conducting search and rescue (SAR) operations in the Central Mediterranean. Since late 2014, non-governmental organization (NGOs) have conducted significant operations in response to the ongoing humanitarian crisis, providing aid to vessels in distress and transporting rescued individuals to Europe. In the past nine months, however, dramatic

policy shifts by both Libyan and Italian authorities have put the future of these operations in significant jeopardy. This paper examines the legality and policy implications of those shifts and evaluates the likelihood that these operations will be able to continue.

Part II provides background on the framework for provision of SAR services under international law and the response to the current Mediterranean crisis from state, regional and private actors. Part III describes the significant shifts in policy towards NGO deployers that have occurred since 2016 including Libya's declaration of an exclusionary SAR zone and Italy's seizure of an NGO vessel and investigation into possible NGO collaboration with migrant smugglers. Part IV evaluates the legality and implications of these policies as well as Italy's possible closure of its ports to some or all NGO vessels. Part V offers conclusions and observations.

II. INTERNATIONAL SAR FRAMEWORK, CURRENT CRISIS AND RESPONSES

1. OVERVIEW OF INTERNATIONAL SAR FRAMEWORK AND TERMINOLOGY

Under the existing international legal framework, primary responsibility for the provision of search and rescue services in the world's seas lies with coastal states, which are required to offer such services so as to respond to vessels in distress. This obligation is enshrined in the United Nations Convention on the Law of the Sea² (UNCLOS) and is further expressed in the International Convention on Maritime Search and Rescue (the SAR Convention) which states:

Parties shall, as they are able to do so individually or in co-operation with other States... participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea. On receiving information that any person is, or appears to be, in distress at sea, the

² *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF. 62/122, Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter "UNCLOS"), Art. 98(b) ("Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea, and where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose.")

responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided.³

Under the SAR Convention, coastal states are directed to establish national SAR regions in cooperation with neighboring states and take primary responsibility for responding to SAR incidents that occur within their region, either through deploying national vessels, coordinating response with other states, or tasking non-state actors to respond and render assistance.⁴ In order to effectuate this provision of service, states are directed to establish national rescue co-ordination centers (RCCs) and sub-centers as necessary.⁵

The SAR Convention defines “distress” as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.”⁶ Given the lack of specificity in this definition, in 2014 the European Union Parliament established ten factors that RCCs should consider when determining if rescue is necessary in the context of FRONTEX operations.⁷ While this framework has been criticized as not requiring rescue in cases where a vessel truly is

³ *International Maritime Organization, International Convention on Maritime Search and Rescue*, Art. 1, April 27, 1979, 1403 U.N.T.S. 97 (revised version entered into force Jan. 1, 2000) (hereinafter “SAR Convention”), at Annex 2.1.1

⁴ SAR Convention, at Annex 2.1.3

⁵ *Ibidem*, at Annex 2.3.

⁶ *Ibidem*, at Annex 1.3.13.

⁷ Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operation Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, PARL. EUR. DOC. (SEC 656) 9(f) (2014) (“Participating units shall, for the purpose of considering whether the vessel is in a phase of uncertainty, alert or distress, take into account and transmit all relevant information and observations to the responsible Rescue Coordination Centre including on: (i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts.”). See DI FILIPPO, M., “Irregular

unseaworthy, it is also sufficiently broad to allow a coastal state to justify interdiction operations in virtually any case of irregular migration.⁸

In its 1998 Amendments, the SAR convention defines “rescue” as: “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver to a place of safety.”⁹ This concept is refined further in the guidelines to the SAR Convention promulgated by the International Maritime Organization’s Maritime Safety Committee in 2004 (2004 IMO Guidelines), which define a “place of safety” as the location where rescue operations terminate and where the “survivors’ safety of life is no longer threatened.”¹⁰ The 2004 IMO Guidelines specify that what constitutes a “place of safety” will differ depending upon the “particular circumstances” of each case and in some cases may include another vessel.¹¹

The 2004 IMO Guidelines also impose specific responsibility on the coastal state in whose SAR region assistance is required to co-ordinate rescue efforts and arrange a “place of safety” for survivors.¹² Importantly, this is not explicitly an obligation to permit the disembarkation of rescued individuals within a coastal state’s territory.¹³ In 2009, the Facilitation Committee of the

Migration across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea,” *Paix et Sécurité Internationales*, 1, 2013, at 60.

⁸ See COPPENS, J., “Lampedusa: The Impact of Seaborne Migration on States and Shipping,” *Mededelingen Koninklijke Belgische Marine Academie: Communications Academie Royale de Marine de Belgique*, Vol. 39, 2015, at 34-5 (discussing possibility of commercial actors failing to provide assistance to vessels); MORENO-LAX, V., “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea,” *International Journal of Refugee Law*, 23(2), 2011, (hereinafter “MORENO LAX, 2011”) at 16; see also MORENO-LAX, V. “The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia,” Policy Brief for Kaldor Centre for International Law, 2017, (hereinafter “MORENO-LAX, 2017”), at 9 (arguing for development of SAR operations that are distinct from interdiction operations).

⁹ SAR Convention, at Annex 1.3.2.

¹⁰ MSC, “Guidelines on the Treatment of Persons Rescued at Sea”, MSC Resolution 167(78) (20 May 2004), (hereinafter “2004 IMO Guidelines”) at 6.12.

¹¹ 2004 IMO Guidelines at 6.12-6.14.

¹² 2004 IMO Guidelines at 6.7-6.9

¹³ *Id.* But see 2004 IMO Guidelines at 6.5 (“The responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in with the survivors were recovered.”)

IMO adopted additional principles regarding disembarkation which clarified that the government of the responsible RCC should accept disembarkation of rescued individuals if it is not possible to coordinate disembarkation in a third country.¹⁴ These principles have not, however, been incorporated into the SAR convention.¹⁵

While the SAR Convention establishes a primary role for coastal states in conducting maritime rescue operations, it explicitly acknowledges that state-provided rescue units are insufficient to assist all persons in distress at sea.¹⁶ As such, the convention's framework relies on the traditional duties of all shipmasters to respond to vessels in distress and provides mechanism for non-state actors to participate in rescue efforts at the direction of state RCCs.¹⁷ Although the SAR Convention applies directly only to state actors, the 2004 IMO Guidelines are directed as well at private shipmasters; the guidelines remind them of the role their traditional obligations and provide operational guidance on complying with those obligations.¹⁸

2. REVISIONS AND PERSISTENT UNCERTAINTIES

¹⁴ Int'l Maritime Org., 194 (3), *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (Jan. 22, 2009) at 2.3 (“If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.”)

¹⁵ PASTAVRIDIS, E., “Rescuing Migrants at Sea: The Responsibility of States Under International Law (September 27, 2011), p.13. Available at <<https://ssrn.com/abstract=1934352>> (last accessed 28 August 2017); DI FILIPPO at 70 (discussing IMO negotiations on this issue).

¹⁶ 2004 IMO Guidelines, at 5.1

¹⁷ *Ibidem*, at 5.1, Appendix 1.

¹⁸ 2004 IMO Guidelines, at 5.1. The IMO also produces the International Aeronautical and Maritime Search and Rescue Manual, Volume III of which is to be carried aboard private vessels and which provides guidance on how such vessels should operate in response to SAR incidents. The International Convention for the Safety of Life at Sea also requires ships to carry an up-to-date copy of Volume III. *International Conventions for the Safety of Life at Sea*, Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113. (hereinafter “SOLAS Convention”), at Ch. V, Regulation 21.

Since adoption of the SAR Convention in 1979, the convention has been amended to address emerging practical concerns. In the face of limited adoption of the convention by state parties, an amended Annex—which includes the current definition of rescue—was adopted in 1998 and entered into force in 2000.¹⁹ Following a high visibility incident in 2001 in which a Norwegian vessel that had recovered 438 irregular migrants in distress was denied entry into Australian ports, the Convention was amended to clarify state responsibilities in cooperating to coordinate disembarkation.²⁰ This revision also included the issuance of guidance defining place of safety.²¹

Notwithstanding these revisions, however, questions remain regarding fundamental elements of the international SAR system. First, the full scope of the duty on coastal states has not been defined as the SAR convention provides limited guidance on what constitutes sufficient provision of services. Both national resources and demand for SAR services vary significantly between states, and the language requiring states only to provide services “as they are able” makes a failure to meet this duty difficult to enforce.²² For instance, despite the language in the SAR convention suggesting that states should seek to “ensure that assistance is rendered to any person in distress at sea,” there is no expectation that coastal states perform complete, comprehensive tracking and monitoring of all vessels within their SAR regions at all times.²³

Additionally, the extent of coastal states’ obligation to disembark migrants rescued in their SAR regions in the absence of any other state accepting them is unclear.²⁴ Although some states interpret the 2004 IMO Guidelines as

¹⁹ “International Convention on Maritime Search and Rescue (SAR),” International Maritime Organization, 2017, <[http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx)>.

²⁰ PAPANASTAVRIDIS, *loc. cit.*, at 11; *see generally* KENNEY, F. & TASIKAS, V., “The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea,” *Pacific Rim and Policy Journal*, Vol. 12.1, 2003; 2004 IMO Guidelines, at 6.7-6.9

²¹ 2004 IMO Guidelines, at 6.12

²² Papanastavridis suggests that SAR convention imposes obligations on conduct but not of result. PAPANASTAVRIDIS, *loc. cit.*, at 11.

²³ SAR Convention, at Annex 2.1.1; COPPENS, at 47-55.

²⁴ GALLAGHER, A. & DAVID, F., *The International Law of Migrant Smuggling*, 2014, Cambridge University Press, at 460.

requiring disembarkation, others do not, and still others do not recognize the guidelines at all.²⁵ As such, differences in interpretation and differences in applicable law leave this area ill defined.

Finally, the framework leaves an unclear gap between the concept of “place of safety” as defined under the 2004 IMO Guidelines and the human rights law principal of *non-refoulement*. For while the 2004 IMO Guidelines say that states should consider whether the “lives and freedoms” of refugees would be threatened in a port of disembarkation, the language is qualified and does not textually or functionally incorporate the full obligations under human rights law.²⁶ This discrepancy may represent an exploitable gap for states seeking to evade such obligations in favor of other national interests.

3. CURRENT CRISIS AND RESPONSES: STATE, REGIONAL AND COMMERCIAL ACTORS

As has been well reported, over the past four years, the number of people seeking to enter Europe via irregular maritime migration across the Central Mediterranean from Libya to Italy has increased dramatically.²⁷ The increase has been traced to persistent political, economic and social instability in sub-Saharan Africa as well as the failure of the Libyan state following the fall of Qaddafi in 2011.²⁸ The increase began in 2014 when irregular entrants more than tripled, increasing to 170,760 from 45,298 the year before. Arrivals decreased slightly to 153,946 in 2015 but then reached a new high in 2016 with 181,459. Parallel to these numbers of arrivals are the numbers of

²⁵ COPPENS, *loc. cit.*, at 37.

²⁶ 2004 IMO Guidelines, at 6.17

²⁷ Given the specific dynamics at play in the Central Mediterranean and the prevalence of NGO deployers there, this paper will concentrate on that region. See generally, Joint Communication to the European Parliament, the European Council and the Council, “Migration on the Central Mediterranean route: Managing flows, saving lives,” 25 January 2017 (hereinafter, “Joint Communication”) <http://eur-lex.europa.eu/resource.html?uri=cellar:6e6590bbe2fa-11e6-ad7c-01aa75ed71a1.0001.02/DOC_1&format=PDF>; Frontex, *Annual Risk Analysis 2017* <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf>, p. 19.

²⁸ “Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges,” UNHCR, July 2017 <<http://www.unhcr.org/news/press/2017/7/595a03bb4/insecurity-economic-crisis-abuse-exploitation-libya-push-refugees-migrants.html>>.

deaths of migrants at sea. In 2014, 3,092 deaths were recorded in the Central Mediterranean; in 2015, that number dropped slightly to 2,876, but then increased to 4,581 in 2016.²⁹ Through June of 2017 both arrivals and deaths in the region were greater than at the same time in the previous year.³⁰ As of this writing, however, both arrivals and deaths in the Central Mediterranean are slightly lower than this time last year, due to a significant decrease in arrivals beginning in July 2017.³¹

The state response has been well documented.³² In October 2013, following the deaths of 359 migrants off the coast of Lampedusa, the Italian Navy instituted a large scale search and rescue initiative, *Mare Nostrum*, with the goal of engaging migrant vessels in distress outside the Italian SAR region and transporting them to Italy.³³ Though credited for saving more than 130,000 people, this operation was discontinued in 2014 due to lack of funds and under criticism that it constituted a “pull factor” incentivizing irregular migrations.³⁴ In March 2015, Italy began a smaller scale operation *Mare Sicuro* concentrating on disruption of smuggling networks nearer to the

²⁹ Missing Migrants, “Focus on Mediterranean,” International Organization for Migration, August 2017, <<https://missingmigrants.iom.int/region/rmediterranean>>.

³⁰ Missing Migrants, “Mediterranean migrant arrival reach 116,692 in 2017; 2,405 deaths,” International Organization for Migration, 8 August 2017, <<https://missingmigrants.iom.int/mediterranean-migrant-arrivals-reach-116692-2017-2405-deaths>>.

³¹ Missing Migrants, “No Migrant Deaths at Sea in Last 20 Days as Mediterranean Arrivals Reach 121,517 for 2017,” International Organization for Migration, 29 August 2017, <<https://www.iom.int/news/no-migrant-deaths-sea-last-20-days-mediterranean-arrivals-reach-121517-2017>>.

³² See e.g., CUTTITTA, P., “From the *CAP ANAMUR* to *MARE NOSTRUM*: Humanitarianism and Migration Controls at the EU’s Maritime Borders, Cleer Working Papers, 2014 (hereinafter “Cuttitta, From the CAP ANAMUR to MARE NOSTRUM”); CUTTITTA, P., “Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean,” *Geopolitics*, 2017, (hereinafter “CUTTITTA, Repoliticization Through Search and Rescue”) at 6-8. State coverage has also been extensive in the international press.

³³ TAYLOR, A., “Italy Ran An Operation that Saved Thousands of Migrants from Drowning in the Mediterranean. Why did it stop?” *The Washington Post*, April 20, 2015, <<https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/>>.

³⁴ *Idem*.

Libyan coast.³⁵ Italy continues to conduct SAR operations via its Navy and Coast Guard, which in 2016 were among the three entities rescuing the most migrants in distress.³⁶

When Italy launched *Mare Nostrum* in 2013, it assumed responsibility for coordinating search and rescue efforts throughout what had been designated as the Libyan SAR region.³⁷ Since 2016, however, following the United Nations recognition of the Libyan Government of National Accord (GNA) in Tripoli, the Libyan coast guard has resumed operations and is increasingly conducting operations to interdict irregular migrant vessels.³⁸ Italy has provided explicit support for these efforts including providing economic support to the Libyan government and training to the Libyan coast guard.³⁹ It has also provided the Libyan coast guard four speedboats and has promised to deliver six more, and has deployed a patrol boat to assist the Libyan coast guard as part of a proposed larger plan to provide naval support to Libya in order to stop migrants within Libyan territorial waters.⁴⁰ Italy has also expressed support for Libya's declaration on 10 August 2017 of a SAR exclusionary zone.⁴¹

³⁵ "Operazione Mare Sicuro," Ministero della Difesa, <<http://www.marina.difesa.it/cosa-facciamo/operazioni-in-corso/Pagine/MareSicuro.aspx>>.

³⁶ The third entity rescuing the most individuals was NGO deployers considered as a group. Amnesty International, *A Perfect Storm: The Failure of European Policies in the Central Mediterranean*, 2017, at 1.5, (hereafter "Amnesty International, A Perfect Storm") <<https://www.amnesty.org/en/documents/eur03/6655/2017/en/>>.

³⁷ CUTTITTA, *Repoliticization of Search and Rescue... cit.*, at 17; Amnesty International, *A Perfect Storm*, at 21; CUTTITTA, *From CAP ANAMUR to MARE NOSTRUM... cit.*, at 26.

³⁸ Amnesty International, *A Perfect Storm*, at 2.2.

³⁹ BACZYNSKYA, G. & SCHERER, S., "Italy vows to help Libya seal borders, urges EU to do same" *REUTERS*, 2 February 2017, <<http://uk.reuters.com/article/uk-europe-migrants-eu-libya-idUKKBN15H19T>>.

⁴⁰ AMNESTY INTERNATIONAL, *A Perfect Storm*, at 2.1; "Italy impounds NGO rescue ship and sends navy patrol boat to Libya" *The Guardian*, 2 August 2017, <<https://www.theguardian.com/world/2017/aug/02/italy-impounds-ngo-rescue-ship-sends-navy-patrol-boat-to-libya-migrant-refugee-route-europe>>.

⁴¹ GONZALEZ, R., "El Gobierno libio prohíbe a las ONG entrar en sus aguas," *El País*, 12 August 2017, <https://elpais.com/internacional/2017/08/11/actualidad/1502454171_609107.html>; MARCIANO, C. & FITZPATRICK, M., "Italy applauds Libya's decision on migrant 'search and rescue' zone," *Yahoo News*, 13 August 2017, <<https://www.yahoo.com/news/german-ngo-halts-migrant-rescue-operations-off-libya-093725692.html>>.

The European Union's response to the increased migration flows in the Central Mediterranean over the past three years has concentrated on increasing border security and disrupting criminal smuggling networks with search and rescue as a secondary objective. In the fall of 2014 following the discontinuation of *Mare Nostrum*, the EU border control organization FRONTEX initiated *Operation Triton* with the express goal of increasing border security and surveillance.⁴² Initiated with limited funds and concentrating only on the area immediately surrounding Italian territorial waters, the budget was increased threefold in 2015 in order to extend the area of operation 138nm south of Italy into the SAR regions of both Italy and Malta.⁴³ Separately, EUNAVFORMED *Operation Sophia*, begun in June 2015, has the primary goal of dismantling the business model of human traffickers in the region, though again search and rescue is considered an important secondary goal.⁴⁴ Like Italy, the European Union has also provided financial support to Libya to training and capacity building of its coast guard.⁴⁵

Notwithstanding the dramatic increase in migration from Libya and the disorder of the Libyan state, it is important to note that no action has been taken to limit Libya's sovereign authority over its territorial waters. In October 2015, the United Nations Security Council approved resolution 2240 (UNSCR 2240), which expanded the rights of member states to engage vessels suspected of migrant smuggling in international waters off the

⁴² "Joint Operation Triton," FRONTEX, (hereinafter "Joint Operation Triton") 10 October 2016, <<http://frontex.europa.eu/pressroom/hot-topics/joint-operation-triton-italy--ekKaes>>.

⁴³ Joint Operation Triton; "EU Operations in the Mediterranean Sea," European Commission, 4 October 2016, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf>.

⁴⁴ Joint Operation Triton; Presentation by CF Carlos Posada Novoa at University of Cadiz, Faculty of Law, 20 February 2017; BULMAN, M., "EU refugee anti-smuggling mission is driving deaths in the Mediterranean, finds report" Independent, 11 July 2017, <<http://www.independent.co.uk/news/world/europe/eu-refugee-rescue-mission-mediterranean-people-smuggling-north-africa-report-migrant-crisis-european-a7835631.html>>.

⁴⁵ Joint Communication, at 6-8; Press release, "EU Trust Fund for Africa adopts €90million programme on protection of migrants and improved migration management in Libya," European Commission, 12 April 2017, <http://europa.eu/rapid/press-release_IP-17-951_en.htm>.

coast of Libya but did not permit the engagement of vessels within Libya's territorial waters.⁴⁶ The Security Council renewed UNSCR 2240 via resolution 2312 (UNSCR 2312) for a further twelve-month period in October of 2016.⁴⁷

During the first years of the crisis, commercial ships were relied upon heavily to provide rescue services given the significant merchant traffic through the Central Mediterranean, and in 2014 these vessels performed approximately 25% of all maritime rescues there.⁴⁸ Rescue operations can impose significant costs on merchant vessels and can be very dangerous as commercial ships are not generally equipped or trained for such a mission.⁴⁹ Unsurprisingly, the commercial shipping industry has been vocal since the beginning of the crisis encouraging state actors to devote more resources to search and rescue. In 2015, the European Community Shipowners Association called upon the European Union to develop a comprehensive search and rescue mission equal to the scope of Italy's *Mare Nostrum*.⁵⁰ Likewise at a meeting in 2015 of the International Maritime Organization on mixed sea migrations, representatives of International Chamber of Shipping (ICS) emphasized the dangers and unsustainability of reliance on

⁴⁶ Security Council Res. 2240 (2015) (Oct. 9); *See also* Press Release, Security Council, Adopting Resolution 2240 (2015), *Security Council Authorizes member States to Intercept Vessels off Libyan Coast Suspected of Migrant Smuggling*, UNITED NATIONS, Oct. 9, 2015, <<http://www.un.org/press/en/2015/sc12072.doc.htm>>. *See* WILSON, B., "The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council," *Harvard National Security Journal*, 1 (2015), <<http://harvardnsj.org/2015/10/mediterranean-migrant-crisis/>>.

⁴⁷ Meetings Coverage, "Adopting Resolution 2312 (2016), Security Council Extends Authorization to Intercept Vessels Suspected of Illegal Smuggling from Libya, 6 October 2016, <<https://www.un.org/press/en/2016/sc12543.doc.htm>>.

⁴⁸ Strategic Note, "Irregular Migration via the Central Mediterranean," European Commission European Political Strategy Center, 22, 2 February 2017, (hereinafter "Irregular Migration via the Central Mediterranean") <https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf>, at 4; *See* CUITTITA, *Repoliticization of Search and Rescue... cit.*, at 6-8 (discussing state posture towards commercial rescue prior to 2013).

⁴⁹ KILPATRICK, R. & SMITH, A. "The International Legal Obligation to Rescue During Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis," *U.S.F. Maritime Law Journal*, Vol. 28 No. 2, at 149-159.

⁵⁰ European Community Shipowners' Association "EU Mediterranean Crisis Summit 'Appears to Fall Short', says Merchant Shipping Industry," 2015, <<http://www.ecsa.eu/9-latest-news/199-eu-mediterranean-crisis-summit-appears-to-fallshort-says-merchant-shipping-industry>>.

commercial shipping.⁵¹ At the same time, representatives have stressed that commercial vessels will continue to abide by their legal obligations.⁵² In 2015, the ICS produced a guide for shipping commercial vessels on their roles and obligations in performing rescues at sea.⁵³ Since 2015, however, reliance on commercial vessels has decreased following an increased provision of state resources and an increased role of NGO deployers.⁵⁴

4. OPERATIONS OF NGO DEPLOYERS

In contrast to the state and commercial actors for whom SAR is generally a secondary concern, a significant number of non-governmental organizations have deployed vessels in the Central Mediterranean with the specific goal of providing aid and rescue services to migrants in distress during the current crisis. Beginning with the Maltese group Migrant Offshore Aid Station (MOAS) which launched its first vessel in August 2014, by the summer of 2017 these NGOs included Médecins Sans Frontières (MSF), SOS Méditerranée, Sea-Watch, Sea-Eye, Jugend Rettet, Refugee Boat Foundation, Pro-Activa Open Arms, and Save the Children.⁵⁵

⁵¹ See “High-Level Meeting to Address Unsafe Mixed Migration by Sea (4-5 March 2015), International Maritime Organization, <[http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-\(March-2015\).aspx](http://www.imo.org/en/About/Events/Pages/High-Level-Meeting-to-Address-Unsafe-Mixed-Migration-by-Sea-(March-2015).aspx)>

⁵² International Chamber of Shipping, *Shipping Industry Calls on EU Leaders to be Decisive and Immediately Increase Mediterranean Search and Rescue Resources*, April 22, 2015, <<http://www.ics-shipping.org/news/press-releases/view-article/2015/04/22/shipping-industry-calls-on-eu-leaders-to-be-decisive-and-immediately-increase-mediterranean-search-and-rescue-resources>>. See also SAUL, J., *In Mediterranean, Commercial Ships Scoop Up Desperate Human Cargo*, Reuters, Sept. 21, 2015, <<http://www.reuters.com/investigates/special-report/europe-migrants-ship/>>.

⁵³ INTERNATIONAL MARITIME ORGANIZATION, U.N. HIGH COMMISSIONER FOR REFUGEES, and INTERNATIONAL CHAMBER OF SHIPPING, *Rescue at Sea: A Guide to Principles and Practice As Applied to Refugee and Migrants*, 2015.

⁵⁴ See Irregular Migration via the Central Mediterranean, at 6-7 (arguing that reliance on commercial vessels has decreased in part since 2014 as SAR operations by state and NGO vessels have moved closer to the Libyan shore and away from the main traffic routes of commercial vessels through the Strait of Sicily).

⁵⁵ Irregular Migration via the Central Mediterranean, at 2. See also, CUSUMANO, E., “Emptying the sea with a spoon? Non-governmental providers of migrant search and rescue in the Mediterranean,” *Marine Policy* 75, 2017, at 92-94.

Over the course of their operations through August 2017, NGO deployers had come to perform a significant share of total migrant rescues in the Central Mediterranean. In 2014, their contribution was negligible when compared with the Italian Navy's *Mare Nostrum* operation, the Italian Coast Guard, and merchant vessels.⁵⁶ By 2015, however, their operations had surpassed merchant vessels in number of search and rescue responses, and by 2016, they had surpassed the Italian Coast guard as well, making them the second most active provider of SAR services in Central Mediterranean—rescuing fewer people than the Italian Navy but more than of the Italian Coast Guard, EUNAVFORMED, FRONTEX and merchant vessels.⁵⁷

NGO deployers have two primary models for support to migrant vessels in distress. The model of larger NGOs is to conduct full-fledged SAR operations, rescuing migrants at sea, transferring them to their own vessels and transporting them to Italian ports of safety.⁵⁸ Smaller groups, however, have provided mainly on-site aid to migrants in the form of water, life jackets, and emergency medical care while state vessels or larger NGOs conduct the actual rescue and transport.⁵⁹ These different strategies are driven both by resource constraints and institutional politics.⁶⁰ While some NGOs such as MOAS have accepted public funds to support their efforts, others such as MSF have rejected government funds so as to maintain their independence.⁶¹

NGO deployers have, until recently, operated in explicit cooperation with state authorities and sovereign vessels. NGOs in the Central Mediterranean coordinate their operations with the Italian RCC and are in constant contact both to receive and pass along information regarding possible vessels in distress.⁶² NGOs that make initial contact with migrant vessels often transfer

⁵⁶ *Idem*.

⁵⁷ *Id.*; see also Amnesty International, *A Perfect Storm*, at 16, (indicating that this trend of significant NGO participation continued through April 2017).

⁵⁸ CUSUMANO, *loc. cit.*, at 92.

⁵⁹ *Idem*.

⁶⁰ *Id.* See also CUTTITTA, *Repoliticization of Search and Rescue*, at 8-12 (discussing political orientations of MOAS, MSF and Sea-Watch).

⁶¹ “Doctors Without Borders Says It Won’t Take E.U. Money for Refugees,” *New York Times*, 17 June 2016. <https://www.nytimes.com/2016/06/18/world/europe/doctors-without-borders-says-it-wont-take-eu-money-for-refugees.html?_r=0>.

⁶² CUTTITTA, *Repoliticization of Search and Rescue*, at 14-15.

them to other NGO vessels or to state vessels for transport to Italy.⁶³ It has been common practice for state vessels participating in *Operation Sophia* to position themselves behind NGO deployers in order to allow the humanitarian vessels to engage migrants first and then to respond only where migrant vessels passed through their lines.⁶⁴ In July 2016 the US Navy guided-missile destroyer *USS Carney* responded to a migrant vessel in distress in the Central Mediterranean and provided aid to the migrants via rigid-hull inflatable boats until the migrants were rescued and taken to safety by a SOS Méditerranée vessel.⁶⁵

III. OPPOSITION TO NGO DEPLOYERS

Through the end of 2016, NGO deployers enjoyed broad support from both governments and civil society.⁶⁶ Beginning in late 2016 and over the course of 2017, however, a dramatic shift in rhetoric and policy towards NGO deployers has occurred. In Italy and the EU, rhetoric regarding NGOs has shifted from praise and support to allegations that NGOs have contributed to the humanitarian crisis in the Central Mediterranean and have perhaps colluded with migrant smugglers. Policy shifts include the opening of investigations on NGO operations and funding, the introduction of a Code of Conduct for NGO deployers and the seizure of a NGO vessel. Likewise, Libya has increased its coast guard patrols and has recently excluded NGO deployers from a large area off its coasts. As of this writing, NGO operations have decreased dramatically and the prospect of their continued operations is bleak.

⁶³ Id. See also “Aid groups snub Italian code of conduct on Mediterranean rescues,” *The Guardian*, 31 July 2017 <<https://www.theguardian.com/world/2017/jul/31/aid-groups-snub-italian-code-conduct-mediterranean-rescues>> (discussing opposition to proposed Code of Conduct which would prohibit NGOs from transferring migrants between vessels).

⁶⁴ PEZZANI, L. “Blaming the Rescuers,” *Goldsmiths*, 9 June 2017, <<http://blamingtherescuers.org/>>.

⁶⁵ JONES, W. “USS Carney Aids in Rescue of 97 Migrants in Mediterranean Sea,” *U.S. Naval Forces Europe and Africa*, 30 July 2016, <http://www.navy.mil/submit/display.asp?story_id=95950>.

⁶⁶ CUSAMANO, *loc. cit.*, at 94-5; Amnesty International, *A Perfect Storm*, at 17.

1. CRITICISM, ACCUSATIONS AND REGULATIONS BY ITALY

The initial criticism leveled against NGO deployers is that they, along with any SAR operations that transport rescued migrants to Europe, constitute a “pull factor” for irregular migration, encouraging migrants to attempt the dangerous journey with the goal of entering Europe illegally.⁶⁷ In February 2017, FRONTEX asserted: “Migrants and refugees — encouraged by the stories of those who had successfully made it in the past — attempt the dangerous crossing since they are aware of and rely on humanitarian assistance to reach the EU.”⁶⁸ Similarly, FRONTEX suggested that SAR operations effectively accomplish the mission of migrant smugglers, specifically providing maritime transport to Europe.⁶⁹ This was echoed in a strategic note on migration patterns published by the European Commission the same month which stated:

The majority of irregular immigrants and refugees not arriving in Italy are actually being transported most of the way on vessels provided by European navies, coast guards, and NGOs— thereby facilitating the work of the smugglers.⁷⁰

While these criticisms could apply to all entities performing SAR services, additional allegations have been lodged against NGO deployers that they may have acted in collusion with migrant smugglers. In December 2016, the *Financial Times* reported that it had received a confidential internal FRONTEX document in which the organization stated that it had “clear indications” that migrants had been directed by smugglers how to engage NGO vessels.⁷¹ The document purportedly looked at a period in October

⁶⁷ Blaming the Rescuers at “Toxic Narratives”; see also Amnesty International, “Italy: Losing the moral compass: Innuendos against NGOs which rescue lives in the central Mediterranean,” 28 April 2017, <<https://www.amnesty.org/download/Documents/EUR3061522017ENGLISH.pdf>>.

⁶⁸ FRONTEX, *Annual Risk Analysis 2017*, at 32.

⁶⁹ *Idem* (“... all parties involved in SAR operations in the Central Mediterranean [including NGO deployers] unintentionally help criminals achieve their objectives at minimum cost, strengthen their business model by increasing the chances of success.”).

⁷⁰ Irregular Migration via the Central Mediterranean, at 7.

⁷¹ “EU border force flags concerns over charities’ interaction with migrant smugglers,” *Financial Times*, 15 December 2016. <<https://www.ft.com/content/3e6b6450-c1f7-11e6->

2016 when migrant distress signals had decreased and when NGO rescue had increased as evidence of coordination between NGOs and smugglers. Additionally, it suggested that NGOs had worked to attract migrant vessels by positioning highly illuminated vessels near Libyan waters. A week later, the Financial Times issued a correction stating that FRONTEX had “raised a number of concerns about [NGOs’] interactions with migrant smugglers... but had not itself made a direct accusation of collusion.”⁷²

Italian authorities, however, made such accusations shortly thereafter. In February 2017, the chief Prosecutor in Catania, Sicily, Carmelo Zuccaro, announced that he had begun an investigation into whether there has been any coordination between NGO deployers and migrant smugglers and specifically suggested that NGOs may have received funds from migrant smugglers.⁷³ In April of 2017 the Defense committee of the Italian parliament initiated an investigation into the operations and finances of NGOs performing SAR operations in the Central Mediterranean.⁷⁴ Although these investigations ultimately did not reveal any misconduct, in May 2017 the committee issued a series of recommendations concerning the increased regulation of NGOs in order to avoid the creation of a “humanitarian corridor” between Libya and Italy.⁷⁵ In the same month, a Trapani court indicated it was investigating

9bca-2b93a6856354>.

⁷² “Correction: Charities in the Mediterranean,” Financial Times 22 December 2016, <<https://www.ft.com/content/eae123e2-c840-11e6-9043-7e34c07b46ef>>.

⁷³ CINELLI, A. & SCHERER, S. “Italian court investigates whether smugglers finance rescue boats,” Reuters, 17 February 2017, <<http://www.reuters.com/article/europe-migrants-italy-ngo-idUSL8N1G24W2>>; *see also* GOPALAKRISHNAN, M. “NGOs deny Italian lawyer’s accusation of aiding traffickers,” Deutsche Welle, 28 March 2017, <<http://www.dw.com/en/ngos-deny-italian-lawyers-accusation-of-aiding-traffickers/a-38154061>>.

⁷⁴ GRIGNETTI, F. “Ora anche il Parlamento indaga sulle navi delle Ong Mistero sui finanziamenti,” La Stampa, 24 March 2017, <<http://www.lastampa.it/2017/03/24/italia/cronache/ora-anche-il-parlamento-indaga-sulle-navi-delle-ong-mistero-sui-finanziamenti-s6I9Ls9j1JoSQ5CB0TWq1I/pagina.html>>.

⁷⁵ BALMER, C., “Italian commission says more controls needed on aid groups rescuing migrants,” Reuters, 16 May 2017, <<http://uk.reuters.com/article/uk-europe-migrants-italy-idUKKCN18C2DC>>.

the operations and funding of NGOs as well as possible connection with smugglers.⁷⁶

In July 2017, Italy released a Code of Conduct for NGOs performing SAR operations in the Central Mediterranean.⁷⁷ The Code outlined a number of obligations to which NGOs would agree including: not entering Libyan territorial waters; not making communications or sending light signals that would function to facilitate contact with migrants smuggler and traffickers; not transferring rescued individuals to separate boats after taking them on board; allowing police and government officials to board vessels for inspections; and complying with other logistical requirements in terms of communication, reporting and tracking with the RCC in Rome.⁷⁸ The document was signed by some NGOs but rejected by others who suggested that it would interfere with their independence and would limit their ability to provide services.⁷⁹ On 13 August 2017, SOS Méditerranée signed an amended version that allowed for the transfer of rescued persons and limited the ability of police authorities to carry weapons onboard vessels.⁸⁰

⁷⁶ ZINTI, A., “Pm di Trapani: ‘Singoli membri di Ong indagati per favoreggiamento di immigrazione clandestine,’” *Repubblica*, 10 May 2017, <http://www.repubblica.it/cronaca/2017/05/10/news/il_pm_di_trapani_membri_delle_ong_indagati_per_favoreggiamento_dell_immigrazione_clandestina_-165076853/>. Although the prosecutor did not announce which NGO was under investigation, reports indicated that it was MSF. “Report: Italy investigating MSF’s Mediterranean rescues,” *Deutsche Welle*, 11 May 2017, <<http://www.dw.com/en/report-italy-investigating-msfs-mediterranean-rescues/a-38797112>>.

⁷⁷ “Aid groups snub Italian code of conduct on Mediterranean rescues,” *The Guardian*, 31 July 2017, <<https://www.theguardian.com/world/2017/jul/31/aid-groups-snub-italian-code-conduct-mediterranean-rescues>>.

⁷⁸ “Italy’s code of conduct for NGOs involved in migrant rescue: text,” Euronews, 3 August 2017, <<http://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue>>.

⁷⁹ Save the Children, MOAS, and Proactiva Open Arms signed the initial code of conduct, while MSF, Sea-Watch, Sea-Eye, Jugend Rettet and SOS Mediterranée initially rejected it. See “Q&A: Why MSF didn’t sign the Code of Conduct for Search and Rescue,” *Médecins Sans Frontières*, 2 August 2017, <<http://www.msf.org/en/article/qa-why-msf-didn%E2%80%99t-sign-code-conduct-search-and-rescue>>.

⁸⁰ “SOS Mediterranée signs amended version of the Code of Conduct During Meeting in Rome,” SOS Mediterranée, 11 August 2017, <<http://sosmediterranee.org/sos-mediterranee-signs-code-of-conduct/?lang=en>>.

Although early statements from Italian authorities indicated that a failure to sign the Code of Conduct would result in NGO vessels being denied entry into Italian ports, as of this writing there have been no reports of such denials.⁸¹ On 2 August 2017, however, Italian authorities also seized the Jugend Retter vessel *Inventa* in the port of Lampedusa on suspicion that members of the ship's crew had had contacts with migrant smugglers.⁸² Although no charges have been brought, the investigation is ongoing and Jugend Rettet's operations are suspended.⁸³ On 5 August 2017, Italian prosecutors in Trapani confirmed that they were investigating MSF for assisting illegal entry by rescuing migrants in cases where there was no immediate risk of danger.⁸⁴

This criticism of SAR operations conducted by NGO deployers has been amplified by Italian right-wing groups who view immigration as a challenge to national European ethnic identity. In July 2017, the group Defend Europe acquired the vessel *C-Star* to deploy in the Central Mediterranean for the purpose of observing and disrupting NGO deployers performing SAR operations.⁸⁵ The vessel's mission has been beset with difficulty, struggling to pass through the Suez Canal, having crew member request asylum in Cyprus, losing access to crowd funding, and ultimately breaking down off the Libyan coast.⁸⁶

⁸¹ See "Aid groups snub Italian code of conduct on Mediterranean rescues."

⁸² "Italy impounds German NGO migrant rescue ship, lawmakers boost support for Libyan coastguard," *Deutsche Welle*, 2 August 2017, <<http://www.dw.com/en/italy-impounds-german-ngo-migrant-rescue-ship-lawmakers-boost-support-for-libyan-coastguard/a-39940881>>.

⁸³ DEARDEN, L., "Italy seizes refugee rescue ship accused of having contact with Libyan smugglers," *Independent*, 3 August 2017, <<http://www.independent.co.uk/news/world/europe/eu-refugee-rescue-mission-mediterranean-people-smuggling-north-africa-report-migrant-crisis-european-a7835631.html>>.

⁸⁴ "Italian prosecutors widen investigation to include MSF over migrant rescues: source," *Reuters*, 5 August 2017, <<https://www.reuters.com/article/us-italy-migrants-medecins-sans-frontier-idUSKBN1AL0HZ>>.

⁸⁵ YORK, C., "Defend Europe Ship, The C-Star, Breaks Down in Mediterranean, NGO Sent to Rescue," *HUFFPOST United Kingdom*, 11 August 2017, <http://www.huffingtonpost.co.uk/entry/defend-europe-ship-the-c-star_uk_598d9042e4b08a247273a9a1>.

⁸⁶ HOROWITZ, J., "Ship Monitoring Rescues of Migrants Refuses to be Rescued," *The New York Times*, 11 August 2017, <<https://www.nytimes.com/2017/08/11/world/europe/migrant-ship-monitor-mediterranean.html>>; FARRELL, J., "Defend Europe: Anti-immigrant

2. HARASSMENT AND EXPULSION BY LIBYA

Over the same period that Italy has shifted its rhetoric and policy towards NGO deployers, Libyan authorities have increased their own operations in the Central Mediterranean and have engaged in specific disruption of NGO SAR operations. Although Libya has acceded to the SAR convention it has never established a RCC, and Italy has assumed de facto responsibility for monitoring its SAR region since 2013.⁸⁷ Operations of the Libyan coast guard resumed, however, following the establishment and recognition of the GNA in early 2016 and have received significant support from Italy and the EU.⁸⁸

These operations have included progressive harassment and intimidation of NGO vessels. In April 2016, Sea Watch reported that individuals claiming to be from the Libyan Coast Guard boarded its vessel and fired shots in the air before leaving.⁸⁹ In August 2016, MSF reported that a Libyan navy vessel had approached their ship *Bourbon Argos*, fired at least 13 shots at the ship (some of which hit the bridge), and boarded the ship for approximately 50 minutes.⁹⁰ In October 2016, the Sea-Watch said a vessel marked as Libyan coastguard interrupted its provision of aid to a vessel of 150 migrants, which resulted in four deaths.⁹¹ On 5 May 2017, the Libyan Coast Guard cut across the bow of a Sea-Watch vessel preventing it from providing aid to approximately 500 migrants and subsequently returning the migrants to

ship trying to block refugees from crossing Mediterranean has funding cancelled,” *Independent*, 14 August 2017, <<http://www.independent.co.uk/news/world/europe/defend-europe-finding-patreon-refugee-boats-mediterranean-sea-c-star-migrants-right-wing-ngo-rescue-a7891946.html>>.

⁸⁷ AMNESTY INTERNATIONAL, *A Perfect Storm*, at 21.

⁸⁸ CUTTITTA, “Repoliticization of Search and Rescue... *cit.*”, at 7.

⁸⁹ “10 most tragic moments of 2016 at sea,” *Sea Watch*, 31 December 2016, <<https://sea-watch.org/en/10-most-tragic-moments-of-2016-at-sea/>>.

⁹⁰ While Libya denied boarding the vessels, it did admit to firing warning shots. See “Libyan navy admits confrontation with charity’s rescue boat,” *The Guardian*, 28 August 2016, <<https://www.theguardian.com/world/2016/aug/28/libyan-navy-admits-confrontation-charity-rescue-boat-msf>>.

⁹¹ REUTERS, “‘Libyan coastguard’ speedboat attacked migrant dinghy, says NGO,” *The Guardian*, 21 October 2016, <<https://www.theguardian.com/world/2016/oct/21/men-on-libyan-coastguard-boat-reportedly-attack-dinghy-of-refugees-and-migrants>>.

Libya.⁹² On 8 August, ProActiva Open Arms reported that a Libyan coast guard vessel fired warning shots at it while it was in international waters.⁹³

This trend culminated on 10 August 2017, when Libyan authorities announced that they were establishing a national SAR zone from which they intended to exclude all foreign vessels, including NGO deployers.⁹⁴ Although the statement did not specify the exact size of the region, Italian officials supporting the establishment of a Libyan SAR region advised NGO vessels to stay 60nm from the country's shore.⁹⁵ In response, Save the Children and Sea Eye have suspended operations, and MSF has suspended the operation of its vessel *Prudence* although its teams continue to operate onboard the SOS Méditerranée vessel, *Aquarius*.⁹⁶ Libya has indicated that it is prepared to back up its declaration with force, and on 16 August 2017 it temporarily detained a vessel operated by Proactiva Open Arms while it was 27nm from the Libyan coast.⁹⁷

⁹² ELUMAMI, A., "Libyan coastguard turns back nearly 500 migrants after altercation with NGO ship," 10 May 2016, *Reuters*, <<http://www.reuters.com/article/us-europe-migrants-libya-idUSKBN1862Q2>>.

⁹³ FOX, K. & D'AGOSTINO, L., "Libyan coast guard fires warning shots as rescue boat patrols off coast," *CNN*, 8 August 2017, <<http://edition.cnn.com/2017/08/08/europe/libya-italy-mediterranean-migrant-crisis/index.html>>.

⁹⁴ YORK, C., "Libyan Navy Orders NGO Ships to Stay Out of Mediterranean Search and Rescue Zone," *Huffpost United Kingdom*, 11 August 2017, <http://www.huffingtonpost.co.uk/entry/libyan-navy-orders-ngo-ships_uk_598d7666e4b0909642962d06>.

⁹⁵ GONZALEZ, R., "El Gobierno libio prohíbe a las ONG entrar en sus aguas," *El País*, 12 August 2017, <https://elpais.com/internacional/2017/08/11/actualidad/1502454171_609107.html>; MARCIANO, C. & FITZPATRICK, M., "Italy applauds Libya's decision on migrant 'search and rescue' zone," *Yahoo News*, 13 August 2017, <<https://www.yahoo.com/news/german-ngo-halts-migrant-rescue-operations-off-libya-093725692.html>>.

⁹⁶ "Hindrance of humanitarian assistance will create a deadly gap in the Mediterranean Sea," Médecins Sans Frontières, 12 August 2017, <<http://www.msf.org/en/article/hindrance-humanitarian-assistance-will-create-deadly-gap-mediterranean-sea>>.

⁹⁷ SANCHEZ, R., "Libyan coastguard threatens Spanish NGO ships as tensions rise in Mediterranean," *The Telegraph*, 16 August 2017, <<http://www.telegraph.co.uk/news/2017/08/16/libyan-coast-guard-threatens-spanish-ngo-ships-tensions-rise/>>.

3. RESPONSES BY THE NGO COMMUNITY

Even before the shift in rhetoric towards NGO deployers, the human rights community had sought to clarify their legal status and regularize their operations. In September 2016, Human Rights at Sea published a report discussing the rights and possible liabilities for NGO deployers performing SAR operations.⁹⁸ In February 2017, the same organization, in conjunction with nine other groups, released a Voluntary Code of Conduct for NGO deployers stressing the principles by which they should operate and suggesting that the document serve as a first step in an ongoing process of developing comprehensive policy for NGO deployers.⁹⁹

As implied criticism shifted to explicit allegations, the response by the NGO community has shifted in tone as well. In April 2017, Amnesty International released a report directly criticizing the rhetoric of the Italian state towards NGO deployers.¹⁰⁰ In June 2017, researchers at Goldsmiths and the University of London published a report specifically refuting what it described as “toxic narratives” implicating NGO activity as a cause of increased migration or as a contributor to shifting tactics used by smugglers.¹⁰¹ In July 2017, Amnesty International released an additional report criticizing European policies in the Central Mediterranean and the harassment of vessels by Libyan authorities and defending the position of NGOs.¹⁰² Human rights observers and NGO deployers themselves have also offered criticisms of both the Italian Code of Conduct and recent actions by Libya.¹⁰³

⁹⁸ “Volunteer Maritime Rescuers: Awareness of Criminalization,” *Human Rights at Sea*, 2016, (hereinafter “Volunteer Maritime Rescuers”) <https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-Voluntary-Maritime-Rescuers-Awareness-of-Criminalisation_2016-SP-LRSecured-.pdf last accessed 31>.

⁹⁹ “Voluntary Code of Conduct for Search and Rescue Operations undertaken by civil society Non-Governmental Organizations in the Mediterranean Sea,” *Human Rights at Sea*, 2017, (hereinafter “Voluntary Code of Conduct”) <<https://www.humanrightsatsea.org/wp-content/uploads/2017/03/20170302-NGO-Code-of-Conduct-FINAL-SECURED.pdf>>.

¹⁰⁰ See Amnesty International, Italy: Losing the Moral Compass

¹⁰¹ See Blaming the Rescuers

¹⁰² See Amnesty International, A Perfect Storm

¹⁰³ See Press Release, “Planned EU NGO Code of Conduct threatens life-saving search and rescue operations,” *Human Rights at Sea*, 6 July 2017, <<https://humanrightsatsea-news.org/2017/07/11/updated-planned-eu-ngo-code-of-conduct-threatens-life-saving-search->

IV. LEGAL EVALUATION OF ANTI-NGO POLICIES, CURRENT AND EXPECTED

In this context of increasing opposition to NGO SAR operations, the following examines the legal implications of the tactics already adopted by Libya and Italy towards NGO vessels, as well as those that have been proposed or that might be expected in the future. Current actions include Libya's declaration of an exclusionary SAR zone and harassment of NGO vessels and Italy's criminal investigation of NGO deployers for migrant trafficking. Possible actions include Italy closing its ports to some or all NGOs and directing such vessels to return rescued individuals to North Africa.

1. LIBYA'S EXCLUSIONARY SAR ZONE

Libya's declaration of a SAR zone should be seen in the context of *non-entrée* strategies adopted by southern European states over the past twenty years to limit irregular migration.¹⁰⁴ Although destination states have significant interests in regulating irregular immigration, the human rights law principle of *non-refoulement* prohibits them from returning individuals to states where they have a well-founded fear of persecution.¹⁰⁵ European states have

and-rescue-operations/>; see also “‘Nonsensical,’ ‘Dishonest,’ ‘Illegal’: the ‘Code of Conduct’ interview with Dr. Violeta Moreno-Lax,” *Sea-Watch*, 24 July 2017 <<https://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct/>>; “Italy and Libya violate the ‘human right to leave one’s country,’” *Sea Watch*, 15 August 2017, <<https://sea-watch.org/en/international-law-italy-libya/>>.

¹⁰⁴ See generally JATHAWAY, J. & GAMMELTOFT-HANSEN, T. “Non-Refoulement in a World of Cooperative Deterrence,” *University of Michigan Law School Law & Economics Working Papers*, 2014. CARRERA, S., “The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands,” *Centre for European Policy Studies*, 1, 2007, at 22.

¹⁰⁵ Article 33(1) of the 1951 Convention and Protocol Relating to the Status of Refugees (Refugee Convention), to which Italy is a signatory states: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Convention and Protocol Relating to the Status of Refugees*, UN General Assembly, 28 July 1951, United Nations, Treaty Series, vol. 189, <<http://www.unhcr.org/3b66c2aa10.html>>. The principle has also been codified in Article 19(2) of the Charter of Fundamental Rights of the European Union (“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or

sought to navigate these competing interests by enlisting the assistance of coastal transit/departure states in controlling the exit of migrant vessels from their territorial waters where those states maintain jurisdiction.¹⁰⁶ Under these agreements, a destination state will provide economic support and training to a transit/departure state and its coast guard, and that state will control departure from its territorial waters through its domestic laws on maritime safety.¹⁰⁷

The clearest example of this strategy is Spain, which has implemented this strategy most effectively via bilateral agreements with Morocco and a number of West African countries from which migrants have traditionally departed for the Canary Islands.¹⁰⁸ In the mid-2000s, Italy entered into a similar agreement with Libya with the goal of stopping irregular migration in the Central Mediterranean.¹⁰⁹ The failure of the Libyan state in 2011 undermined these efforts, but the framework was explicitly resuscitated by the February 2017 agreement between Italy and the UN-backed Government of National Accord.¹¹⁰ This model also serves as the basis for the EU-Turkey agreement reached in March 2016.¹¹¹

punishment.”), and Article 3 of the European Convention on Human Rights (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”). There is also broad consensus that the principle has been accepted as customary international law. *See e.g.* FARMER, A. “Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection,” *Georgetown Immigration Law Journal*, Vol. 23, 1 (2009).

¹⁰⁶ KILPATRICK & SMITH, at 178-82.

¹⁰⁷ CARRERA, at 21.

¹⁰⁸ *See* KILPATRICK & SMITH, *op. cit.*, at 178-82.

¹⁰⁹ GIUFFRÉ, M., “State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-Backs to Libya?”, 24(4) *International Journal of Refugee Law*, 2012, at 692.

¹¹⁰ EL-GAMATY, G., “Italy and France are playing a dangerous game in Libya,” *Aljazeera*, 21 August 2017, <<http://www.aljazeera.com/indepth/opinion/2017/08/italy-france-playing-dangerous-game-libya-170815105230759.html>>; full text of agreement available at <<http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>>.

¹¹¹ *See* Eur. Commission, *EU-Turkey Joint Action Plan*, 16 October 2015, <http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm> (on interests underlying EU-Turkey negotiations); *See also* EU-Turkey Statement, Council of the European Union, March 18, 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

Libya's declaration of an exclusionary SAR zone represents a departure from previous practice of allowing NGO vessels, along with Italian state vessels and sovereign vessels operating within EUNAVFORMED, to operate in the area outside its territorial waters.¹¹² When announcing the exclusionary zone, Libyan authorities stated that they wished to make it clear that such a zone was an extension of Libyan sovereignty and would be patrolled by its coast guard and navy.¹¹³ NGO deployers have taken those statements to be threats of violence especially in the context of recent acts of aggression by the Libyan coast guard including the detention of an NGO vessel it claimed was inside its territorial waters.¹¹⁴

Italian authorities appear to have perceived the statement as threatening violence as well. Although the announcement did not specify the dimensions of the declared SAR region, representatives from MSF reported that Italian authorities had advised them to remain at least 60nm from the Libyan coast.¹¹⁵ The government also has been supportive of the declaration. On 13 August 2017, Italy's Foreign Minister stated that the move indicated "balance was being restored in the Mediterranean."¹¹⁶

Although a coastal state exercising national authority to restrict the exit of irregular migrants is itself not illegal, an exclusionary zone of the size claimed by Libya is completely inconsistent with applicable international law, and as of this writing Libya has provided no legal justification for its claim. Under UNCLOS, a coastal state can claim a region up to 12nm from its established baseline as its territorial seas over which its sovereignty extends.¹¹⁷ Although

¹¹² GONZALEZ. Libya first negotiated the dimensions of its SAR region with Malta in 2009, as part of a plan to initiate joint patrols with Italy within its territorial waters to combat irregular migration. AMEEN, J., Libya finally declares search and rescue area," *Times of Malta*, 22 March 2009, <<https://www.timesofmalta.com/articles/view/20090322/local/libya-finally-declares-search-and-rescue-area.249830>>.

¹¹³ GONZALEZ, *loc. cit.*

¹¹⁴ "Hindrance of humanitarian assistance will create a deadly gap in the Mediterranean Sea," *Medecins Sans Frontieres*, 12 August 2017 <<http://www.msf.org/en/article/hindrance-humanitarian-assistance-will-create-deadly-gap-mediterranean-sea>>; "Libyan Coastguards kidnapped Rescueboat of Spanish NGO," *Sea Watch*, 21 August 2017 <<https://sea-watch.org/en/breaking-news-der-woche>>.

¹¹⁵ *Idem.*

¹¹⁶ MARCIANO & FITZPATRICK, *loc. cit.*

¹¹⁷ UNCLOS, Art. 2

foreign vessels are generally allowed to enter territorial seas under the right of “innocent passage,” UNCLOS provides states broad latitude to exclude vessels where passage is determined not to be innocent.¹¹⁸ UNCLOS specifically mentions “the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State” as conduct not constituting innocent passage.¹¹⁹ As such, within 12nm of Libya’s coast, it would likely be permissible for Libya to exclude NGO deployers.¹²⁰

In the 12nm band adjacent to its territorial waters, Libya might also be able to justify engagement with NGO vessels, although under a different basis. UNCLOS classifies this region as a coastal state’s contiguous zone and provides that the state may “exercise control necessary... to prevent [and punish] infringement of... customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”¹²¹ As such, should Libyan authorities suspect an NGO deployer of intending to violate domestic law upon arrival in its territorial seas, they might arguably be able to take action to exclude it from the contiguous zone.

Beyond the contiguous zone, however, a state has extremely limited authority to prohibit the passage of a vessel. The right of “hot pursuit” allows state vessels to follow vessels beyond the contiguous zone but applies only in cases where a vessel has already violated its laws and pursuit has begun—not as a preventative measure.¹²² UNCLOS also provides for a “right of visit” of stateless vessels and vessels suspected of piracy, participating in the slave

¹¹⁸ UNCLOS, Art. 19

¹¹⁹ *Idem*.

¹²⁰ It has generally been the policy of NGOs and state actors providing SAR services to operate further than 12nm from Libya’s coast, and with very limited exceptions, all SAR events in the Central Mediterranean have occurred beyond the 12nm line which separates territorial waters from international waters. Irregular Migration via the Central Mediterranean. Representatives from Proactiva Open Arms whom Libyan officials accused of having entered their territorial waters, defended their actions on the ground that they were beyond 12nm from the Libyan coast. FOX & D’AGOSTINO. *See also*, video posted via Twitter by ProActiva Open Arms, “Sucedó ayer 8:30am en aguas internacionales. Patrullera guardacostas Libios, formados y financiados #UE, amenaza y dispara #OpenArms. 8 August 2017, <https://twitter.com/openarms_fund/status/894835757675933697>.

¹²¹ UNCLOS, Art. 33

¹²² UNCLOS, Art. 111.

trade, and certain unauthorized broadcasting, but none of those conditions would apply to an NGO conducting SAR operations.¹²³ Even the expansion of the right of visit via UNSCR 2240 and UNSCR 2312 only allow Libyan authorities to board an NGO vessel it suspected of human smuggling—not exclude such a vessel from an area of international waters.¹²⁴ As such there is simply no legal basis for the wholesale exclusion of NGO vessels from any area outside the contiguous zone.

2. ITALIAN CRIMINAL PROSECUTION OF NGOS

The seizure of the *Jugend Rettet* vessel and the announcement of an investigation of MSF personnel in Trapani—both less than a week before Libya’s declaration of its exclusionary SAR zone—raise the possibility of criminal prosecution of NGO deployers. Although as of this writing, no charges have been brought in either case, it is important to note that Italian criminal law provides broad basis for prosecution for assisting illegal entry and a conviction could result in stiff penalties. Any evidence that an NGO had in fact coordinated with migrant smugglers would make a conviction significantly more likely, and prosecution would likely be financially devastating to the NGO even in the case an acquittal.

Italian domestic legislation provides for prosecution of anyone who acts to “promote, manage, organize, finance or carry out the transportation of aliens in the territory of the State or commits other acts in order to produce their illegal entry in the territory of the State.”¹²⁵ This crime is punishable by in imprisonment from one to five years and a fine of 15,000 euros for each person smuggled.¹²⁶ Performing such acts for the purpose of direct or indirect profit constitutes aggravating circumstances which increase the prison

¹²³ UNCLOS Art. 110.

¹²⁴ UNSCR 2240(2015) and UNSCR 2312(2016). See Meetings Coverage, “Adopting Resolution 2312 (2016), Security Council Extends Authorization to Intercept vessels Suspected of Illegal Smuggling from Libya,” United Nations, 6 October 2016, <<https://www.un.org/press/en/2016/sc12543.doc.htm>>.

¹²⁵ Decreto Legislativo 286/1998 Art 12(1); translation found in RAGAZZI, S., “Europe’s Crisis: What future for immigration and asylum law and policy?” delivered at 2016 *Migration and Law Network Conference*, 27 June 2016.

¹²⁶ See Id.

time to five to fifteen years.¹²⁷ The law provides for no express exception for humanitarian actions.¹²⁸

The principle historical example of state prosecution of NGO deployers is the *Cap Anamur* case, which arose out of events that occurred in 2004 and was ultimately decided by an Italian court in Agrigento, Sicily in 2009.¹²⁹ There, the vessel *Cap Anamur* (belonging to a German NGO of the same name), while conducting “rescue and support” activities in Mediterranean, encountered a vessel with 37 migrants, the majority of whom claimed to be from Sudan which at the time was undergoing a civil war.¹³⁰ Given the condition of the vessel, the ship embarked all persons onboard and attempted to transport them to the nearest place of safety, Porto Empedocle, Sicily.¹³¹ The Italian government denied the vessel entry claiming that Malta should take responsibility for disembarking the passengers since the rescue occurred in the Maltese SAR region.¹³²

After eight days at sea, the vessel ultimately entered the Porto Empedocle where it was immediately seized by Italian authorities who seized the ship, arrested the crew and transferred the 37 migrants to immigration detention

¹²⁷ See *Id.*

¹²⁸ PROVERA, M., “The Criminalisation of Irregular Migration in the European Union,” *Liberty and Security*, No. 80 (February 2015), 40 (discussing domestic legislation of European states regarding assistance to irregular migrants.).

¹²⁹ See e.g. CUTTITTA, P., “From the *CAP ANAMUR* to *MARE NOSTRUM*: Humanitarianism and Migration Controls at the EU’s Maritime Borders, *Cleer Working Papers* (2014) (hereinafter “CUTTITTA, From the *CAP ANAMUR* to *MARE NOSTRUM*”) 7; BASARAN, T., “Saving Lives at Sea: Security, Law and Adverse Effects,” *European Journal of Migration and Law* 16 (2014), (hereinafter “BASARAN, Saving Lives at Sea”); BASARAN, T., “The saved and the drowned: Governing indifference in the name of security,” *Security Dialogue* 1-16 (2015), (hereinafter “BASARAN, The Saved and the Drowned”) 7; PIERLUIGI U., “Is it a crime to help people to survive? *Cap Anamur* and other cases” Speech made at Migrants- Outlaws Everywhere/The Alien as an Enemy? Homeless, Excluded. 4 May 2013, text available at <http://www.eldh.eu/fileadmin/user_upload/ejdm/publications/2013/Pierluigi_Umbriano_-_Speech.pdf>.

¹³⁰ *Id.*

¹³¹ Case N. 3267/04 R.G.N.R. <https://www.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2009/case_n._326704_r.g.n.r..html?lng=en&tmpl=sherloc>.

¹³² *Ibidem.*

facility.¹³³ Chargers were brought against the shipmaster, the first officer of the vessel, and the CEO of the Cap Anamur organization for assisting illegal entry with the aggravating fact of doing so to procure a profit.¹³⁴ At trial, the Italian prosecutors argued that the aggravating element was satisfied since the *Cap Anamur* had conducted the rescue with the intent to procure a profit via “advertising and international publicity obtained in the sale of third-party images and information relative to the facts of the process.”¹³⁵

Ultimately, the court acquitted the defendants.¹³⁶ Italian law provides for an exclusion of criminal responsibility for cases where otherwise criminal action is committed through the performance of a duty imposed by law.¹³⁷ The court found that the obligations enshrined in international law and the Italian Code of Navigation obligated the vessel to take the migrants on board and effectuate their transfer to a place of safety, and as such found that defendants had committed no criminal act.¹³⁸

Should the members of the Jugend Rettet of MSF be taken to trial, they would likely argue that their activities as part of SAR operations were also driven by a duty imposed by law and point to the *Cap Anamur* case as precedent. To support this position further they might look to a recent series of Italian prosecutions of organized criminal smuggling networks which have emphasized the strength of obligation to rescue under Italian law.¹³⁹ In these cases—prosecuting the heads of smuggling networks who are themselves located outside of Italian territory—Italian courts have found that the mere

¹³³ BASARAN, “Saving Lives at Sea... *cit.*”, at 374-8.

¹³⁴ CUITTITA, “From the CAP ANAMUR to MARE NOSTRUM... *cit.*”, at 22-23. *See* C.P. Article 110, D.L. 286/1998, Article 12(1), 12(3).

¹³⁵ BASARAN, “Saving Lives at Sea... *cit.*”, at 375.

¹³⁶ *Ibidem.* at 376.

¹³⁷ *Ibidem.* at 377-78.

¹³⁸ Case N. 3267/04 R.G.N.R... *cit.*

¹³⁹ RAGAZZI, at 5. *See also* Judgment N. 18354/14- Italian Supreme Court, 3 November 2014, <https://www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2014/judgment_n_1835414_-_supreme_court.html?lng=en&tmpl=sherloc>; Proc. n. 292/2015 R.I.M.C., 3 March 2015, <https://www.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2015/proc_n_2922015_r.i.m.c._-appeal_against_order_of_precautionary_detention_.html?lng=en&tmpl=sherloc>; Proc. N. 675/2016 R.I.M.C. 4 November 2016, <https://www.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2016/proc_nr_6752016_r.i.m.c.html?lng=en&tmpl=sherloc>

act of directing a migrant vessel toward Italian waters can trigger criminal liability under the anti-smuggling statute since the criminal act of transport to Italy is completed by actors who are bound by recognized national and international obligations.¹⁴⁰

Notwithstanding these arguments, a prosecution may be able distinguish the *Cap Anamur* case from recent NGO practice. First, the *Cap Anamur* act of rescue occurred while the vessel was en route to deliver supplies to the Middle East rather than explicitly conducting SAR activities at the edge of Libya territorial waters, as has been the general practice of NGOs.¹⁴¹ Additionally, in the *Cap Anamur* case the court noted the specific weather concerns that made the vessel particularly unsafe at the time of rescue.¹⁴² Although the current vessels used by migrants are unquestionably precarious, it is unclear whether a court would view them with the same degree of emergency absent acute weather conditions or other sources of alarm. Most importantly, however, evidence that an NGO vessel had coordinated its operations with migrant smugglers would likely undermine a defense that the NGO was acting as a result of legal obligation.¹⁴³

A conviction would likely result in significant penalties given the presence of aggravating factors. Just as in the *Cap Anamur* case, the prosecution could argue that the rescue was performed for the purpose of direct or indirect profit through the form of publicity. Although the court in the *Cap Anamur* case acquitted the defendants, it looked favorably on the argument that the term “profit” should be interpreted broadly and speculated that publicity received from the rescue including media attention could fall within the scope

¹⁴⁰ *Id.*

¹⁴¹ Case N. 32/04 R.G.N.R., *cit.*

¹⁴² *Id.*

¹⁴³ Italian C.P. Art. 54 provides the humanitarian exception on which the court on the *Cap Anamur* relied and reads: “Anyone who has committed an act having been compelled to do so by the necessity of saving himself or others from the risk of an imminent personal injury, that was not voluntarily caused, nor otherwise avoidable ... (shall not be punished for that conduct)... as long as the action is proportional to the danger.” Translation in BASRAN, “Saving Lives at Sea... *cit.*”, at 377-78. Evidence of collaboration with migrant smugglers would undermine such a defense on the theory that the danger was voluntarily caused and avoidable. See ZINITI, (detailing statements by Italian prosecutor on relationship between humanitarian exception and migrant facilitation).

of financial or material gain sufficient to trigger this factor.¹⁴⁴ Jugend Rettet and MSF, like all NGO performing SAR operations, are funded primarily through donations and use traditional and social media coverage of their activities to raise funds.¹⁴⁵ As such, there is little doubt this aggravating factor could be established in case of a conviction.

Even if prosecution were unsuccessful, the cost of defending could be crippling to Jugend Rettet, MSF or any other NGO against which charges were brought. Although the defendants in the *Cap Anamur* case were ultimately acquitted, defending the case imposed enormous financial costs on the organization and led to the resignation of the CEO and the dissolution of the organization.¹⁴⁶ Following the announcement of the verdict in October 2009, the captain of the vessel stated, “if seafarers at sea notice a refugee boat, they know that we stood trial for three years. The acquittal then perhaps does not play an important role anymore.”¹⁴⁷

Indeed, the *Cap Anamur* prosecution appears to have been intended in part to serve as a warning to NGO deployers not to assist in the transport of migrants to Italy.¹⁴⁸ The prosecutor of the case stated explicitly that the decision to prosecute was driven by both legal and political considerations so as to “avoid the repetition of these kinds of actions, even if they happen due to a noble purpose.”¹⁴⁹ It and other prosecutions from the time period appear to have successfully deterred NGO SAR activity in the Central Mediterranean from 2004 until 2014.¹⁵⁰ In a description of the internal debate undertaken

¹⁴⁴ Id.

¹⁴⁵ See “FAQs: Why Do we Accept Private Donations Only?” *Jugend Rettet*, 2017, <<https://jugendrettet.org/en/>>; “Donate,” Médecins Sans Frontières, 2017, <<http://www.msf.org/en/donate>>.

¹⁴⁶ BASARAN, “The Saved and the Drowned... *cit.*” at 7

¹⁴⁷ Id.

¹⁴⁸ Id. at 8; “Italy’s Refugee Policies Should Be Put on Trial,” *Spiegel Online*, 8 Oct 2009, <<http://www.spiegel.de/international/germany/the-world-from-berlin-italy-s-refugee-policies-should-be-put-on-trial-a-653989.html>>

¹⁴⁹ BASARAN, “The Saved and the Drowned... *cit.*”, at 8.

¹⁵⁰ The other significant case related to human smuggling under Italian law is *Morthada and El-Hedi* in which seven Tunisian fishermen were prosecuted under Italian anti-smuggling statute after taking onboard 44 individuals they had rescued from a shipwreck near Lampedusa and transporting them to that port. Although the crew was acquitted at trial, the ship captains were initially convicted and sentenced to imprisonment of 2 years and 6 months in

before beginning its own SAR operations in 2015, the Head of Advocacy and Operational Communications for MSF directly cited the *Cap Anamur* case as a reason why the organization did not begin SAR operations when they were “first proposed in 2011.”¹⁵¹ In much the same way, it may be that recent actions by Italian authorities towards Jugend Rettet and MSF are intended to serve as deterrents to other NGOs.

3. LIMITING NGOS ACCESS TO ITALIAN PORTS

Although as of this writing, Italy has not refused access to its ports to any NGO vessels that have recovered migrants, such exclusions may be forthcoming. In late June 2017, following a spike in migrant arrivals to Italy, the Italian government indicated that it was considering closing its ports to NGO vessels or such vessels not flying Italian flags.¹⁵² Since the introduction of its Code of Conduct in late July 2017, similar suggestions have been raised that Italy could limit access to its ports to only those NGOs who have signed the code.¹⁵³ The following discusses the central legal issues involved in such a policy shift: the obligations to disembark rescued migrants, a state’s duty to identify a “place of safety” rescued individuals, and the relationship between that responsibility and the obligation of *non-refoulement*.

addition to significant fines. Two years later, those convictions were ultimately overturned on appeal. See BASARAN, “The Saved and the Drowned... *cit.*” at 7.

¹⁵¹ According to that account, the fundamental change occurred with the launch of *Mare Nostrum* and the deployment of the MOAS. See DEL VALLE, H., “Search and Rescue in the Mediterranean Sea: Negotiating Political Differences,” *Refugee Survey Quarterly*, 2016, 35, 22-40, 26. See also, CUTTITTA at 8 (arguing that *Mare Nostrum* shifted away from a previous policy of state opposition to private SAR actions even by commercial vessels).

¹⁵² WINTOUR, P., “Italy considers closing its ports to boats carrying migrants,” 28 June 2017, *The Guardian*, <<https://www.theguardian.com/world/2017/jun/28/italy-considers-closing-its-ports-to-ships-from-libya>>; McMAHON, S., “Italy’s bluff to close its ports to migrant boats heightens tensions in the Mediterranean,” 4 July 2017, *The Conversation*, <<http://theconversation.com/italys-bluff-to-close-its-ports-to-migrant-boats-heightens-tensions-in-the-mediterranean-80428>>.

¹⁵³ “Another NGO Signs Italy’s Rules,” *Suryaa/LANS*, 11 August 2017, <<https://www.suryaa.com/16583-another-ngo-signs-italys-rules.html>>.

A. Obligation to Disembark

As discussed above, under the SAR convention, coastal states are required to establish a SAR region, promote the establishment of SAR services within that region, render assistance to vessels in distress, and coordinate the disembarkation of rescued individuals in a “place of safety.”¹⁵⁴ These obligations do not, however, clearly include an affirmative duty to accept rescued individuals within national territory.¹⁵⁵ The 2004 IMO Guidelines indicate that such a duty may exist in cases where no other state has provided a port of disembarkation, but this is not settled.¹⁵⁶ On one hand, the text tends to support the presence of such a duty by stating: “the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.”¹⁵⁷ On the other hand, the Annex to the document re-affirms a state’s sovereignty and its ability to “control its borders [and] exclude aliens from its territory” which would be inconsistent with a duty to disembark.¹⁵⁸ If such a duty exists, it is not widely recognized.¹⁵⁹

Even if Italy were to assert that it has no obligation to disembark individuals rescued in its SAR region,¹⁶⁰ it might still be required to accept NGO

¹⁵⁴ SAR Convention, at 6.1-6.11.

¹⁵⁵ PAPANASTAVRIDIS, *loc. cit.*, at 20.

¹⁵⁶ GALLAGHER & DAVID, at 460.

¹⁵⁷ 2004 IMO Guidelines, at 2.5.

¹⁵⁸ 2004 IMO Guidelines at Annex par. 5. See COPPENS, *loc. cit.* (arguing that 2004 IMO Guidelines language at 2.5 establish an obligation to disembark if no other state can be found for disembarkation).

¹⁵⁹ Indeed the fact that IMO Facilitation Committee drafted language to clarify this particular point and that such language was not accepted serves to underscore this uncertainty. See GALLAGHER & DAVID, *loc. cit.* at 460; DI FILIPPO, *loc. cit.* at 70.

¹⁶⁰ Ironically, it may be difficult for Italy to assert the conservative position on the duty to disembark, since it has asserted that such an obligation does exist in disputes with Malta. Malta’s SAR region is extensive and includes areas that are geographically closer to Italian ports than to its own. When SAR incidents occur in those regions, Italy has argued that Malta has responsibility to accept disembarkation under the 2004 Guidelines. Malta, however, does not accept the guidelines and has asserted that Italy should accept disembarkation as the “next port of call.” Parliamentary Assembly, Report Doc. 12628 The interception and rescue at sea of asylum seekers, refugees and migrants, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13141&lang=en>>.

vessels into its ports if such vessels can establish that they are forced to enter because of distress or *force majeure*. The traditional right to enter a port in cases of distress has changed significantly over time and is currently interpreted as only existing in cases to protect human life.¹⁶¹ In the *Cap Anamur* case, for instance, Italy permitted the entrance of the migrants only after the ship declared that the lives of those on board was in real danger due to precarious conditions and a possible revolt by the migrants.¹⁶² Similarly, Italy's decision to ultimately let the *MV Salamis* disembark 102 rescued Somali migrants at Lampedusa was driven in part by the presence of four pregnant women and a five-month old baby.¹⁶³ Such conditions are not always present however, and in the wake of the current shift of Italian policy, it is unreasonable to count on this humanitarian exception as a basis for entry.

B. Obligation to Delivery to a "Place of Safety"

Regardless of whether Italy recognizes an obligation to disembark, it remains obligated to coordinate the transport of any individuals rescued in its SAR region to a "place of safety." As no other European state is likely to accept disembarkation of rescued individuals, the most probable prospects would be ports in Libya, and reports about current conditions tend to suggest that at this time it cannot be reasonably considered a "place of safety" for purposes of SAR return.¹⁶⁴ That said, the express commitments made by Italy and the EU to improve migrant reception conditions in Libya indicate that

¹⁶¹ MORRISON, A., "Shelter from the Storm—the problem of places of refuge for ships in distress and proposals to remedy the problem," University of Wollongong Thesis Collection, (2011), <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=4218&context=theses>>.

¹⁶² Case N. 32/04 R.G.N.R.

¹⁶³ MALLIA, P. "The *MV Salamis* and the State of Disembarkation at International Law: The Undefinable Goal," *American Society of International Law*, 13(11), 15 May 2014, <https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal#_ednref14>; "Italy accepts migrants rejected by Malta," *Aljazeera*, 8 August 2013, <<http://www.aljazeera.com/news/europe/2013/08/20138813638173281.html>>.

¹⁶⁴ See e.g. Statement of ICC Prosecutor to the UNSC on the Situation in Libya," *International Criminal Court*, 9 May 2017, (stating that the security situation has deteriorated in previous 6 months and that the country is at risk of returning to widespread conflict) <<https://www.icc-cpi.int/legalAidConsultations?name=170509-otp-stat-lib>>.

the foundation is being laid to have Libya—or at least individuals ports within Libya—determined to be a possible destination for migrants rescued at sea.¹⁶⁵

Establishing Libyan ports as a “place of safety” and directing NGOs to deposit migrant vessels there might also provide Italy another mechanism besides the Libyan coast guard to evade its obligations of *non-refoulement*. The international human rights law principle of *non-refoulement* prohibits states from returning individuals to the borders of territories where they may face persecution or violence.¹⁶⁶ This principle was applied to the context of maritime rescue in the seminal 2012 case of *Hirsi Jamaa and Others v. Italy* before the European Court of Human Rights, arising from an incident concerning a vessel of the Italian Navy engaging a migrant vessel on the high seas and returning the migrants onboard to Libya.¹⁶⁷ The court held that because state authorities had exercised “continuous and exclusive control” over the migrants, Italy was required to take affirmative steps to determine whether those individuals’ rights would be violated upon their return to Libya.¹⁶⁸

¹⁶⁵ Perhaps most tellingly, the human rights community has responded to the Libya-Italy agreement by stressing that Libya should not be considered a place of safety. On 2 February 2017, following the announcement of the Libya-Italy agreement, the UNHCR and the IOM issued a joint statement highlighting abuses suffered by migrants in Italy and stressing that Italy should not be considered a safe country for return of migrants. The following day the MSF issued a similar statement stressing the abuse of migrants and the dangers they face on return. The report by Amnesty International regarding innuendo against NGOs also stresses that Libya is not safe. These emphatic denials may be perhaps the best evidence for legitimate concern. See “Joint UNHCR and IOM statement on addressing migration and refugee movements along the Central Mediterranean route,” *UNCHR*, 2 February 2017, <<http://www.unhcr.org/news/press/2017/2/58931ffb4/joint-unhcr-iom-statement-addressing-migration-refugee-movements-along.html>>; “MSF warns EU about inhumane approach to migration as leaders meet to discuss cooperation with Libya,” *Médecins Sans Frontières*, 3 February 2017, <<https://prezly.msf.org.uk/msf-warns-eu-about-inhumane-approach-to-migration-management-as-leaders-meet-today-to-discuss-cooperation-with-libya#>>; Amnesty International, “Italy: Losing the Moral Compass.”

¹⁶⁶ See Refugee Convention, Art. 33(1)

¹⁶⁷ See *Hirsi Jamaa v. Italy*, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012)(hereinafter “*Hirsi Jamaa*” (holding that Italy could not lawfully return Somali and Eritrean nationals to the coast of Libya without granting the opportunity to challenge their forced return by seeking international refugee protection); (For a succinct summary of this decision see David P. STEWART, *International Decision: Hirsi Jamaa v. Italy*, 107 A.J.I.L. 417 (2013))

¹⁶⁸ *Id.*, at paragraphs 77, 133.

Italy might argue, then, that these *non-refoulement* obligations apply *only* when states establish this control. In *Hirsi*, the court pointed to the rescue occurring on a military ship crewed entirely by military personnel and found that the state had established both *de jure* and *de facto* control over the migrants.¹⁶⁹ The same would not be true in the case of an NGO deployer rendering assistance and coordinating disembarkation with the responsible RCC as the SAR convention does not limit the freedom of navigation otherwise enjoyed by the rescuing master.¹⁷⁰ Italy would argue that because a non-state actor (the NGO rather than by a sovereign vessel) performed the rescue, it was bound only by the requirement to ensure that the rescued individual was delivered to a “place of safety,” not by the broader principle of *non-refoulement*.

In practice, the differences between these two obligations could allow states to return migrants via NGO vessels to places they couldn't return them via state vessels. Importantly, there are substantive differences between the standards for a “place of safety” laid out in the SAR Convention and the principle of *non-refoulement*. Under the 2004 Guidelines, a place of safety is defined as “a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.” The emphasis on safety of life and basic human needs makes the standard much easier to satisfy than the more comprehensive standards that constitute the principle of *non-refoulement*.¹⁷¹ It is not difficult to imagine a situation in which an individual could have a well-founded fear of persecution in a place where their safety of life is not threatened and where their basic needs have been met.¹⁷²

¹⁶⁹ *Id.* at paragraph 81.

¹⁷⁰ See SAR Convention Article 2. The actual authority of the RCC is somewhat distorted by common practice. Private masters are often motivated to disembark rescued individuals as quickly as possible to control the significant economic cost of delay due to rescue, and so the RCC's determination of a point of disembarkation may appear to control the master's action. Likewise, Italy's policy of accepting the disembarkation of all migrants rescued in the Central Mediterranean since 2013 has also given NGO deployers little cause to question the selection of a specific port of disembarkation. In cases of dispute, however, as in the *MV Salamis* incident, shipmasters have not hesitated to refuse the direction of RCCs.

¹⁷¹ See DI FILIPPO, *loc. cit.*, at 65.

¹⁷² Additionally, the principle of *non-refoulement* may provide broader geographic protections than a “place of safety” under the SAR Convention. The Refugee Convention prohibits return of individuals “to the frontiers of a territory” of a person who has a well-founded fear

Some observers have argued that there is not a substantive difference between the two standards and point to the language of the 2004 Guidelines as seeking to incorporate the principle of *non-refoulement*.¹⁷³ While the 2004 Guidelines do refer to the principles of *non-refoulement*, the language is weakened considerably and imposes no affirmative obligation to ensure refugees are not returned to a place where they fear persecution.¹⁷⁴ Moreover, the SAR framework as a whole provides no mechanism for shipmasters to communicate information about the risk of abuse or fear of persecution a rescued person might face to the RCC. In laying out the obligations of coastal states, the 2004 Guidelines list a specific set of information that the RCC should seek to obtain from masters of rescuing ships but makes no reference to any information about refugee status or intention to seek asylum.¹⁷⁵ Likewise the directions provided to shipmasters include no suggestion that rescued persons be asked about their fear to return to a particular place.¹⁷⁶

This distinction between procedural responsibilities in cases of rescue by state actors versus cases of rescue by non-state actors has been reinforced since the beginning of the current crisis. In 2015, the International Chamber of Shipping produced the second edition of its publication, “Large Scale Rescue Operations at Sea: Guidance on Ensuring Safety and Security of Seafarers and Rescued Persons” which explicitly disclaims any responsibility on the part of private masters concerning “listening to, acting upon or communicating information concerning the legal status of rescued persons or

of persecution, and the European Convention prohibits return to a State. No such language is present in the definition of a “place of safety.” As such, a single city or port could arguably constitute a “place of safety” even if it were located within a country or territory where an individual would otherwise face persecution or other risks. This concern may be most acute in the current context given the political divisions in Libya today. Refugee Convention, Art. 33(1); “Why is Libya so lawless?” *BBC*, 25 May 2017, <at <http://www.bbc.com/news/world-africa-24472322>>.

¹⁷³ COPPENS, *loc. cit.* at 39.

¹⁷⁴ 2004 IMO Guidelines at 6.17: “The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.” *See DI FILIPPO, loc. cit.* at 64.

¹⁷⁵ *See* 2004 IMO Guidelines, at 6.10

¹⁷⁶ *See* 2004 IMO Guidelines, at 5.1

applications for asylum.”¹⁷⁷ It concludes, “the Master has no responsibility for determining the status of those rescued.”¹⁷⁸

Additionally, neither of the primary policy documents produced by the NGO community have sought to assert any right or responsibility on the part of the NGO to assess rescued migrants for their status as refugees or asylum seekers. The Human Rights at Sea guide to Volunteer Maritime Rescuers mentions the principle of *non-refoulement* as it pertains to states but does not indicate any way its obligations can be incorporated into the NGOs’ operations.¹⁷⁹ Similarly Human Rights at Sea’s Voluntary Code of Conduct references an individual’s right to seek asylum, but provides no framework for NGOs to facilitate that process.¹⁸⁰

Italy could conceivably exploit this gap between its obligations when state vessels rescue migrants and its obligations when private actors perform the rescue. Once Libya—or any port therein—were determined to be a “place of safety,” the Italian RCC could direct NGO deployers to return rescued migrants there without having to conduct any evaluation into their refugee status and regardless of whether they had a well-founded fear of persecution. Such a model—coupled with an active Libyan coast guard patrolling its greater SAR region—would effectively externalize the European border to an even a greater degree than has been achieved in either the Western or Eastern Mediterranean.

As of this writing, all NGO deployers performing SAR operations in the Central Mediterranean are closely aligned with the international human rights community, and there is no evidence to suggest that they would allow themselves to be used by state actors to effectuate a policy of return. Indeed, an NGO that was refused entry in Italy and directed to return rescued migrants to Libya would be within its rights to refuse, as was the case with the *MV Salamis*.¹⁸¹ At the same time, a different non-state actor that supported an Italian policy of push-backs might be very willing to effectuate such returns.

¹⁷⁷ International Chamber of Shipping, at 3.

¹⁷⁸ *Id.*

¹⁷⁹ Volunteer Maritime Rescuers, at 9.

¹⁸⁰ Voluntary Code of Conduct, at 11.

¹⁸¹ Italy accepts migrants rejected by Malta,” *Aljazeera*, 8 August 2013, <<http://www.aljazeera.com/news/europe/2013/08/20138813638173281.html>>.

C. Possible Italian Liability for Return by Private Actors

Should Italy seek to implement a program of pushbacks via complicit NGOs, it might nonetheless face liability under the theory that the vessel was acting as an agent of the state, but this is uncertain. Article 8 of the UN Resolution on the Responsibility of States for Internationally Wrongful Acts provides that the conduct of a person or group may be attributed to a state if the person or group is acting under the state's instructions, direction and control.¹⁸² In the case *Prosecutor v. Dusko Tadić*, the International Tribunal for the Former Yugoslavia in explaining the doctrine of state liability for actions by private actors stated: "The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by the state."¹⁸³ In applying Article 8, international tribunals look the degree of overall control imposed by the state actor over the actions of the private actors in determining state responsibility.¹⁸⁴ In the *Nicaragua* case, the United States was found to not have responsibility for specific acts of the contras that it had not directed even though it had financed, organized, trained the group and assisted in identifying other military targets.¹⁸⁵ In the *Rajić* case, however, the court looked to overall control over the organization as the determining factor.¹⁸⁶

Whether sufficient control could be established would be a fact-specific inquiry, and a finding of responsibility is not certain.¹⁸⁷ Given the authority

¹⁸² ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Art. 8.

¹⁸³ International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Duško Tadić*, Opinion and Judgement, Case No. IT-94-1-T, 7 May 1997

¹⁸⁴ Cited in "Report of the Secretary-General, Responsibility of States for internationally wrongful acts, compilation of decisions of international courts, tribunals and other bodies" United Nations General Assembly, A/62/62, 1 February 2007, <http://www.un.org/ga/search/view_doc.asp?symbol=A/62/62>, at 35-37.

¹⁸⁵ *Nicaragua*, 1986 I.C.J. Rep., <http://www.un.org/ga/search/view_doc.asp?symbol=A/62/62>, at 35-37

¹⁸⁶ International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Ivica Rajić* ("Stupni Do"), Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, 13 September 1996, paras. 24-25.

¹⁸⁷ *But see* PAPANASTAVRIDIS, *loc. cit.*, at 39 (asserting that responsibility under Article 8 could readily be established under these circumstances).

retained by masters to refuse to follow the direction of the RCC and the fact that the coastal state is required to coordinate disembarkation, an isolated act might not be sufficient trigger responsibility for a state. Additionally, it might be possible to argue that state criminal responsibility cannot exist because the underlying act of the master—rescue of individuals in distress and transport to a place of safety—was itself not wrongful. Again, the fact that the SAR Convention provides coastal states no mechanism to ascertain a rescued persons' refugee status also tends to support a finding of no responsibility. Such responsibility would be more likely established, however, in cases where there was evidence that the state had provided financial support to the NGO or had otherwise directed its operations or the practice was widespread or systematic.

V. CONCLUSIONS AND OBSERVATIONS

The events of the past year represent a profound and aggressive shift in policy towards NGOs in the Central Mediterranean. In coordination with the GNA in Libya and with the support of the EU, Italy has undermined the efforts of NGOs through negative rhetoric, facilitated their exclusion from international waters, and threatened them with the possibility of criminal sanctions. It also appears to be laying the foundation for returns to Libya that would skirt obligations under international human rights law.

Libya's declared exclusionary zone is completely inconsistent with applicable international law. Such blatant disregard for the norms enshrined in international instruments and through customary practice demands a response, and the international community's lack of immediate condemnation is troubling. Libya's practice should be challenged in court so as to reaffirm the principles of freedom of navigation outlined in UNCLOS and customary practice, and it should also be publically condemned by the state and regional actors from which Libya's GNA is currently soliciting financial support.

The outcomes of the investigations and possible criminal prosecutions of NGOs—specifically Jugend Rettet and MSF—are uncertain and will depend on whether evidence emerges of communication or coordination with migrant smugglers. Absent such evidence, NGOs would have powerful defenses under Italian criminal law, but given the high number of actors involved it is not unreasonable to imagine the discovery of some evidence of at least

minimal contacts between NGOs and those organizing irregular migrant transport. Should evidence of such communications emerge, a conviction and significant penalties could very likely result. In light of past practice and the timing of recent criminal actions, Italy's real intent may be to deter further operations or compel acceptance of the Code of Conduct.

Italy also appears to be considering closing its ports to some or all NGOs and laying a foundation to redirect them to Libya. While the difference between a "place of safety" and a place that would comply with the principles of *non-refoulement* may be limited, the specific political conditions that currently exist in Libya may make this difference exploitable. Recent Italian and EU initiatives to improve detention conditions in Libya tend to indicate that such returns are a goal in the short or medium term, and such a strategy would be consistent with current and historic efforts at border externalization. While it is unlikely that any of the NGOs currently operating in the Central Mediterranean would participate in such an effort, the emergence this summer of one anti-immigrant vessel in the region suggests that complicit actors may exist.

The most likely outcome of the recent shift in policy towards NGO deployers is that such operations will cease altogether as organizations find that their operational model is no longer sustainable. Such a result is not itself altogether negative. The crisis of migration in the Mediterranean is fundamentally a problem that must be resolved by state actors either individually or through regional organizations. The images of Spanish and American warships taking a secondary role to private rescue vessels in many ways represent an inversion of traditional state and private roles and point to a broader abdication of state responsibility. The international SAR framework establishes states as the primary actors in ensuring safety at sea, and it incumbent on these actors to take responsibility for the ongoing humanitarian tragedy in the Mediterranean.

Italy's actions must also be viewed in the context of a continued failure on the part of the EU to establish an equitable mechanism for resettling migrants, asylum-seekers and refugees. Through its sustained national SAR operations and reception and processing of over half a million individuals in the past four years, Italy has performed work that rightly should be done by other EU states and the community as a whole. This allocation of responsi-

bility is not consistent with the principle of solidarity, and Italy's recent policy response may be seen as a result of legitimate frustration. The EU's support of that policy is truly disheartening.

Recent reports indicate migrant deaths have dropped significantly since the introduction of the Libyan exclusion zone, although it is far too soon to say if this trend will persist. Given the danger associated with irregular maritime transport, it may be that a model that seeks to reduce embarkations has benefits, especially if joined with a comprehensive program of economic development in origin and transit states and increased mechanisms for legal migration. But such action must occur within a framework of laws, and current policies seek to evade the rule of law, outsource state responsibility for controlling its own borders, and intimidate organizations dedicated to the humanitarian purpose of saving lives. Such a program represents a profound failure of governance.

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