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Straightjacketing migrant rescuers? The code of conduct on maritime NGOs

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ABSTRACT

In July 2017, Italy drafted an EU-sponsored code of conduct aimed at regulating non-governmental migrant rescuing NGOs offshore Libya. The code makes permission for NGO vessels to disembark migrants in Italian ports conditional on collaborating in the fight against smugglers and accepting the presence of law enforcement personnel on board. This article investigates the inception, content and likely consequences of the Code, arguing that most of its provisions are either redundant or counterproductive. As suggested by scholarship on civil–military cooperation and maritime rescuing, the code as it stands would only violate humanitarian principles without increasing existing rescuing capabilities.

Introduction

Non-governmental organizations (NGOs) have provided a crucial contribution to mitigating the loss of life along the Central Mediterranean migratory route. Since 2014, 10 different NGOs have deployed boats at sea to conduct Search and Rescue (SAR) operations, rescuing over 100,000 migrants. NGO vessels have become the largest provider of SAR in the Mediterranean, rescuing around 38% of the total number of migrants departing from Libya between January and June 2017.

The non-governmental provision of migrant rescuing, however, has become increasingly contentious. Italian frustration with the lack of EU-wide solidarity in the reception of asylum seekers and the growing criticism against of NGOs' activities, accused of being a pull factor of migration and a catalyst of human smuggling, have resulted in an ongoing effort to impose limitations of non-governmental migrant rescuing, epitomised by the drafting of a code of conduct (hereinafter simply referred to as the Code) to be signed by maritime NGOs.

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As repeatedly stressed by the Italian Ministry of Interior, failure to abide by its provisions may entail serious consequences, including the refusal to authorize the disembarkation of migrants in Italian ports. Five out of the nine migrant rescuing organizations operating offshore Libya in the summer of 2017 have signed the Code at the time of writing. One of the non-signatory organizations, Jugend Rettet, is now under investigation for abetting illegal immigration.

As I wrote in a previous study, while international waters may ostensibly appear as an ideal humanitarian space, migrant rescuing has already forced NGOs to compromise on the principles of neutrality, impartiality and independence that underlie humanitarian action (Cusumano 2017). The newly drafted Code further encroaches upon these principles, compromising NGOs' ability to conduct humanitarian relief at sea free of political interference.

This article argues that the code of conduct on migrant rescuing is either redundant or problematic. As it stands, the Code only infringes on humanitarian principles without either increasing NGOs' rescuing effectiveness or strengthening law enforcement organizations' ability to combat human smugglers. To this end, the ensuing sections briefly review the reasons underlying the tightening grip over maritime NGOs, examine the provisions of the code and explore its problematic implications.

From praise to delegitimization: The Italian and European approach to migrant rescuing NGOs

In the summer of 2014, when the Migrant Offshore Aid Station (MOAS) launched the first non-governmental SAR campaign, rescuing migrants from drowning had been established as a priority by Italian decision-makers. Even when the Italian SAR mission Mare Nostrum was interrupted due to Italian frustration with the lack of EU burden sharing and other states' criticism that the operation was a pull factor of illegal migrations, the belief that SAR remained a legal and ethical imperative, however, was never called into question. Consequently, when it became clear that Frontex operation Triton did not have the resources and mandate to replace Mare Nostrum in addressing the humanitarian crisis, Italian authorities welcomed NGOs as an important multiplier of their SAR capabilities.

Eventually, however, Italian authorities' approach to non-governmental rescuing became more ambivalent. The 2016 increase in arrivals from Libya, together with EU failure to provide Italy with meaningful burden sharing in the reception of asylum seekers, created growing migration crisis fatigue among the Italian public. Consequently, the activities of NGOs – grown from 3 to 9 between 2015 and 2016 – have increasingly been seen as suspicious and problematic. As aptly described in a recent analysis of Italian media coverage of migrant rescuing, the Mediterranean angels 'lost their wings' (Barretta et al. 2017).

Statements from Frontex, which repeatedly criticized NGOs as a pull factor of migration and a catalyst of smuggling – reinforced the impression that non-governmental maritime rescuing was responsible for a dramatic increase in migrant

arrivals which Italy was being left to face alone. In this climate, the accusations made by Catania's attorney general Carmelo Zuccaro – who denounced that some charities could be colluding with human smugglers – further contributed to delegitimizing non-governmental migrant rescuing. While these accusations were partly retracted as 'working hypotheses', populist parties like the Northern League and the Five Stars Movement called for a crackdown on NGOs activities. In April 2017, the Italian Senate Defence committee investigation acknowledged that maritime rescuing remained a duty and no evidence of rescuers' misbehaviour existed, but simultaneously called for ensuring that all NGOs would follow clear rules in order to preserve Italy's control over its borders.

At the June 2017 European Council meeting in Tallinn, Italian requests for greater solidarity in the reception of migrants fell once again on deaf ears. While EU institutions praised Italian efforts, no EU country allowed for the disembarkation of migrants in their ports. The Italian Government only obtained EU support for the writing of a code of conduct disciplining non-governmental SAR. Drafted by officials in the Italian Ministry of Interior in consultation with the EU Commission, the Code purportedly endeavours to achieve 'greater rescuing effectiveness'. As the next section explains, however, most of its provisions are either redundant or problematic. The Code as it stands both encroaches upon the humanitarian space and weakens existing non-governmental rescuing capabilities.

The code of conduct: Compass or shackles?

A first draft of the Code started to circulate in mid-July 2017. Slightly amended in response to humanitarian organizations' concerns, the final version of the document was submitted for NGOs to sign on the 1 August. The Code is based on 13 provisions, briefly examined below.

Firstly, NGOs should not enter Libyan territorial waters unless in exceptional circumstances and under previous authorization. The Code justifies this measure as necessary not to encroach upon the sovereignty of Libya. However, since migrant boats rescued by Libyan authorities are taken back to Libya, such a request also reflects Italian and EU willingness to rely on the EU-trained Libyan Coast Guard as a migrant interdiction force. Due to widespread evidence that those taken back to Libya would be subjected to inhumane treatment, NGOs do not consider Libya as an appropriate place of safety for migrants. Consequently, NGO vessels have frequently tried to reach boats in distress before the Libyan Coast Guard to ensure that migrants would be taken to a place of safety in Italy instead. However, due to the often aggressive behaviour of Libyan Coast Guard units, NGOs entered Tripoli's territorial sea only in very sporadic circumstances and after consulting the Italian Maritime Rescue Coordination Centre (MRCC). Consequently, this measure appears to be largely redundant.

Secondly, NGOs should not interfere with vessel satellite tracking devices. In the past, these geolocation systems were sometimes turned off by merchant

ships in order to render themselves invisible to MRCCs and avoid being obliged to participate in SAR (Aarstad 2015). It is therefore ironic that NGOs that have migrant rescuing as their *raison d'être* are being accused of following the same practice. NGOs have denied the accusation of deliberately turn off their vessel tracking devices to avoid showing that they were operating too close to Libyan coasts, stating that the occasional failure of the system to track their position is only due to insufficient satellite coverage. Whether these accusations are factually correct or not, turning satellite tracking devices off is already an offence under maritime law and can be prosecuted by vessels' flag state. Hence, this provision too appears unnecessary.

NGOs should also commit 'not to make communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants'. Although the effort to prevent rescuers from inadvertently facilitating smugglers is understandable, the appropriate use of light signals and sirens at sea is an obligation under international maritime law and is vital to ensure the safety of navigation and the conduct of SAR operations. As migrant boats have no navigation lights, dinghies departing from Libya at night can only be spotted by means of spotlights aboard rescuing vessels. When SAR operations occur at night, rendering themselves visible may be necessary for rescue vessels to save lives. For this reason, the Code concedes that the commitment to not signal NGO vessels' presence should occur without prejudice to preserving the safety of life.

NGOs should also demonstrate that their personnel are trained to conduct rescuing operations and the vessel meets all the technical conditions necessary to conduct SAR. As many NGOs are small charities relying on reconverted fishing vessels manned by volunteers, ascertaining their ability to conduct rescuing operations appears justified. However, NGOs have always acknowledged that their presence at sea is a second-best option exclusively motivated by the absence of more effective state-led SAR missions. While volunteers operating on old, small vessels are not ideal maritime rescuers, their activities are still preferable to the lack of any SAR assets other than merchant vessels occasionally transiting through the region, often ill-equipped for large-scale rescue missions. Indeed, as the Code acknowledges, even vessels that are ill-suited for SAR can remain involved in rescue missions in cases of *force majeure* such as distress situations.

The Code also asks NGO vessels' shipmasters to notify their involvement in SAR operations to their flag state. This measure arguably reflects Italians' attempt to internationalize the crisis and obtain greater burden sharing from the international community. However, the flag states of NGO ships are presently Italy itself (as in the case of MSF's *Prudence* and *Save the Children's Vos Hestia*), northern European states located too far away from distress situations like the Netherlands (as in the case of the *Sea-Watch 2*, *Sea-Eye* and *Jugend Rettet's Iuventa*), or states used as convenience flags like Belize and Gibraltar (as in the *MOAS' Phoenix* and *SOS-Méditerranée's Acquarius*). Notifying rescuing activities

to flag states' MRCC only adds to NGOs' obligations without translating into a greater involvement of these countries in the conduct of SAR operations.

NGOs are also expected to constantly inform the Italian MRCC and execute its instructions. As stressed by the Code itself, these are already obligations under international maritime law. Moreover, such commitments appear to have already been followed. As consistently acknowledged by the Italian Coast Guard, all migrant rescuing NGOs have established an effective working relationship with the MRCC. While miscommunications have sometimes occurred, these are unlikely to be solved by merely signing a code. Smoother communication and coordination can only be achieved by concrete actions such as joint training, the exchange of best practices and the standardization of communication platforms.

Finally, NGOs are expected to declare all their sources of financing to both the flag state and the Italian Government. As stressed by several NGOs' spokespersons, since all migrant rescuing NGOs are registered charities, all their budgets are publicly available. Consequently, all organizations are already in compliance with this provision. Reinstating this request in the Code may only further delegitimize NGOs by conveying the impression that their operations lack transparency or are guided by obscure financial and political motives.

All the commitments listed above have been accepted by NGOs, which stressed they are already following both these provisions and all other relevant international and domestic legal obligations. Hence, while most of these provisions appear redundant or insinuating, none of them is inherently problematic. The Code, however, also contains three provisions that are either in danger of reducing rescuing effectiveness or blatantly violate the principles of independence, neutrality and impartiality that underlie humanitarian action.

The seventh provision of the Code expects NGOs 'not to transfer those on rescued vessels... NGO vessels should as a rule complete the operation by disembarking survivors in a safe port'. Non-governmental rescuing operations presently follow two models: while organizations with larger vessels both rescue migrants and shuttle them to a place of safety, charities with smaller ships simply spot migrants in distress, temporarily hosting migrants on board until a larger vessel transports them to land (Cusumano 2017). The coexistence of these two models allows for a healthy division of labour, ensuring that the departure of larger NGO ships to Italian ports does not create a gap in rescuing capabilities offshore Libya. Obliging NGOs with small and slow ships to conduct disembarkations may only create a gap in existing rescuing capabilities and place additional strain on non-governmental rescuing assets. Disembarking migrants in Italian ports may be too demanding and too costly for small organizations, ultimately making their presence offshore Libya impossible.

The Code also obliges NGOs to loyally cooperate with the public security authorities of their intended place of disembarkation, transmitting all relevant information in advance. For most part, providing this information beforehand

allows for a smoother disembarkation and providing timely medical care where needed. Sensitive information like the presence of suspect smugglers, however, may result in prosecutions and impact on certain people's prospects for asylum. As such, NGOs see this requirement as a violation of the principle of impartiality, which obliges them to treat all people in need equally. Furthermore, NGOs are requested to collect the makeshift boats and engines of migrant boats. This provision obliges NGOs to conduct a law enforcement role they are neither trained for nor equipped to conduct, encroaching upon the humanitarian principle of neutrality. As smugglers, facilitators and armed fishermen often venture close to rescue operations to retrieve engines and empty boats, this attempt to co-opt NGOs into EU anti-smuggling efforts may have serious consequences for the safety of NGO personnel.

Finally, NGOs are expected to 'receive on board, upon request by Italian authorities, judicial police officers ... conducting investigations related to migrant smuggling'. Not only is this request potentially conducive to disputes between Italy, NGO vessels' flag states, and Libyan authorities and militias, who may see in the presence of Italian police officers close to their shores a threat to their sovereignty or an opportunity for hostile actions against a former colonial power. The presence of police agents aboard vessels would clearly infringe the neutrality of the humanitarian space. Having armed personnel aboard endangers the safety of NGO ships and violates the policy of organizations like MSF, which has consistently adhered to a 'no arms' policy in all its hospitals worldwide. While the possibility to have police officers board NGO vessels unarmed has been discussed, it was ultimately discarded as incompatible with Italian police standard operating procedures. Consequently, this provision remains a major bone of contention between the Italian Government and some NGOs.

Conclusions

At the time of writing, five NGOs have accepted signing the Code. MOAS, Save the Children, and Pro-Activa have immediately signed the document, reluctantly followed by Sea-Eye. SOS-Méditerranée, too, eventually accepted to subscribe after obtaining the drafting of an additional document specifying that police personnel will only be allowed onboard if they have a warrant, and migrants' disembarkations on other boats will remain possible if authorized by the Italian Coast Guard. MSF, Sea-Watch, Jugend Rettet and LifeBoat have refused to sign the Code.

The consequences of refusing to sign the code are still unclear. The Italian Ministry of Interior itself acknowledged that the Code is not a binding legal instrument. However, the Code should not be dismissed as an empty declaration of intentions. NGOs ultimately depend on Italian authorities for the authorization to disembark migrants, and they are subjected to Italian jurisdiction when

in Italian waters and ports. Therefore, support from Italian law enforcement agencies is vital for NGOs to continue operating.

Even if the Italian Minister of Interior, backed by the European Commission, reinstated the threat of closing Italian ports to non-signatory organizations, such a measure would be illegal under maritime and refugee law, and is therefore unlikely. Italian authorities, however, would still be able to hinder NGOs' work by subtler means such as, for instance, imposing inspections on NGO ships upon entering Italian ports or requiring their ships to disembark migrants in ports located far away in mainland Italy, thereby imposing huge fuel costs and logistical hurdles on non-governmental rescuers.

Moreover, the activities of non-signatory organizations may be subjected to closer scrutiny by Italian prosecutors. At the moment of writing, Jugend Rettet's *luventa* has been confiscated by Italian authorities on suspicion that the crew was abetting irregular immigration, although, as acknowledged by attorneys, their motives were 'essentially humanitarian'. (Viviano and Ziniti 2017) Even if no evidence of unlawful behaviour is found, such investigations may stop rescue vessels from operating for long periods of time and impose costs that small organizations cannot handle. The German NGO Cap Anamur, which was prosecuted after disembarking a group of migrants to an Italian port in 2005, is a case in point. By the time they were acquitted, the organization had already suspended its activities.

Even if the Italian Government will not follow suit to its threats and the Code will remain a declaratory exercise to appease the public's migration crisis fatigue before the start of the 2018 electoral campaign, the document as it stands is counterproductive. As amply demonstrated by scholarship on civil-military cooperation, greater coordination between NGOs and law enforcement organizations can hardly be achieved through binding obligations that encroach upon humanitarians' neutrality and independence. On the contrary, meaningful cooperation is more likely to be obtained by engaging in a regular dialogue, fostering mutual trust by means of regular meetings, joint training and an exchange of best practices. Involving NGOs in initiatives such as the EU-sponsored *Shade Med* (SHared Awareness and DEconfliction) conferences and the *Una Vis* (one force) roundtables offered a valuable step in that direction. The *Una Vis* meetings chaired by the Italian Coast Guard, aimed at drafting a set of best practices in consultation with NGOs, were however discontinued once the Italian Government opted for drafting the Code.

Forcing NGOs to sign a code of conduct by threatening ill-specified consequences in case of refusal is hardly conducive to greater coordination. On the contrary, since various organizations refused to cave in but remain free to continue operating, the Code only increases coordination hurdles by generating confusion on how Italian authorities should interact with both signatory and non-signatory NGOs. By conveying the impression that NGOs have been engaging in unlawful behaviour, the Code only contributes to delegitimizing

non-governmental rescuing, which may have unpredictable consequences on public order. Since April 2017, the right-wing organization Defend Europe has endeavoured to stop NGOs by chartering a vessel to monitor humanitarians and support Tripoli's Coast Guard in returning migrants to Libya. This situation only increases confusion and creates frictions across NGOs and between NGOs, Italian authorities, and other civil society organizations, ultimately reducing the effectiveness of both rescuing and anti-smuggling operations.

Furthermore, imposing unnecessary restrictions on NGOs' activities and forcing them to compromise on humanitarian principles hardly helps Italy's appeal for greater EU involvement in asylum seekers' reception and the stabilization of Libya. To date, Italy maintained the moral high ground vis-à-vis its European partners by fully complying with maritime and refugee law in spite of the blatant lack of EU-wide solidarity. Drafting a document that imposes unnecessary restrictions on maritime NGOs only weakens Italy's position and contributes to justifying EU persisting inaction. By asking for EU sponsorship in writing the Code, Italy may simply allow its European partners to use their blessing for a non-binding document as a surrogate for the lack of any meaningful form of solidarity. Ultimately, the Code only reinforces the misleading belief that maritime migrations can be reduced by simply straightjacketing rescuers. By indulging in the temptation of scapegoating NGOs, Italy may only delay the complete overhaul of EU migration policies and the effort to stabilize the EU Southern Neighbourhood required to address large-scale migrations across the Mediterranean.

In August 2017, the EU-trained Libyan Coast Guard has claimed responsibility over a large SAR region, warning NGOs against entering the area without authorization. While Libya still lacks the capabilities to conduct effective SAR and banning NGOs from operating in international waters would be unlawful, the Libyan Coast guard already followed suit to its threats by, for instance, shooting against Pro-Activa's vessel on 8 August. As a result, various NGOs temporarily suspended their operations, criticizing the EU for condoning the Libyan Coast Guard's aggressive behaviour. The meeting between Italy, Germany, France and Spain held in Paris on 27 August suggests that large EU member states fully support Italian attempts to externalize migration management by funding countries in the Sahel region and Libyan municipalities and militias. If so, the effort to restrain maritime rescuers described in this article can be read as part of a wider EU strategy seeking to deter migrants from crossing the Central Mediterranean and rely on the Libyan Coast Guard to interdict those who do. The decrease in migrant arrivals to Italy over July and August 2017 seems to indicate that this strategy may contribute to reducing crossings. The long-term effectiveness, lawfulness and ethical appropriateness of such policies, however, remain open to question.

Disclosure statement

No potential conflict of interest was reported by the author.

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