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PROFILE



In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers

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ABSTRACT

The closure of ports to migrant rescue NGOs marked a turning point in Italy's approach to seaborne migrations across the Mediterranean. This profile article examines the legal, humanitarian and political implications of this decision. Although closing ports is not necessarily unlawful under maritime, human rights and European law, this policy entails severe humanitarian externalities and may hardly help Italy's call for structured, long-term solidarity in addressing the challenge of large-scale maritime migrations.

KEYWORDS Maritime rescue; migrations; Italy; European Union; Dublin regulations

Introduction

In June 2018, Italian Interior Minister Matteo Salvini declared Italian ports closed to NGO ships and foreign-flagged merchant vessels carrying migrants rescued off the shore of Libya. Such a decision marked a turning point in Italy's approach to seaborne migrations across the Mediterranean. This profile article sheds light on the legal, humanitarian and political implications of closing ports.

To this end, the article is divided as follows. The first section outlines the context underlying the new Italian government's stance. The second examines Italy's approach from a legal standpoint, acknowledging that the closure of Italian ports does not directly violate maritime, human rights and European law. The third section demonstrates that although not necessarily illegal, this decision deters NGOs and merchant vessels from conducting search and rescue (SAR) operations, threatening severe humanitarian consequences. The concluding section examines the consequences of the closure of Italian ports for European Union (EU) asylum and migration policy, arguing that this confrontational approach

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may not help Italy's need for long-term, EU-wide solidarity in addressing seaborne migratory flows.

From the code of conduct to the closing of ports

On 10 June, Italian Interior Minister Matteo Salvini declared that non-governmental organizations (NGOs) ships like SOS-Méditerranée's *Aquarius*, which was carrying 629 people rescued offshore Libya, would not be allowed to disembark migrants in Italy. As the arrival of large numbers of asylum seekers entails logistical challenges and can only occur where hot-spots for migrants' identification are available, the Interior Ministry effectively enjoys a veto power over the disembarkation of migrants on Italian territory. Although unprecedented, Salvini's decision did not emerge out of nowhere, but is the culmination of previous attempts to limit NGOs' activities. Since late 2016, frustration with insufficient EU-wide solidarity in shouldering the reception of asylum seekers and widespread criticism that NGOs acted as a pull factor and facilitated human smugglers turned public opinion against non-governmental maritime rescue operations, informing the misleading impression that foreign charities were responsible for a dramatic increase in migrant arrivals to Italy. In May 2017, then Democratic Party Interior Minister Marco Minniti urged NGOs to sign a code of conduct which imposed several limitations on rescuing operations, and threatened the closure of Italian ports to non-signatory organizations (Cusumano, 2017). The Democratic Party-led government, however, never followed through on this threat. Soon after his appointment as new Interior Minister, League secretary Salvini seized the first opportunity to deploy the ready-made prohibition to access Italian ports, using the ban of NGOs to showcase his hardline anti-immigration stance. Rallying the electorate against large-scale migratory flows was a crucial component of Salvini's strategy to turn a regionalist party like former secretary Bossi's Northern League into a party enjoying nation-wide support like the French Front National.

The closure of Italian ports left the *Aquarius* without any place to disembark the migrants. The newly elected Spanish prime minister Sanchez's announcement that migrants would be welcome in Valencia came as an unexpected gift to the Italian Interior minister, who had deployed the threat to close Italy's ports in the attempt of forcing Malta to open theirs. Valletta, however, refused to cave in. Due to its small size and modest resources, Malta is both firmly committed to avoid serving as a place of disembarkation and unable to provide any meaningful support in shouldering the migration crisis. Sanchez's willingness to welcome migrants in Valencia made the Italian government coalition able to claim that the decision to close ports

paid off in obtaining the EU-wide burden sharing in hosting asylum seekers that Rome had previously failed to obtain.

Unsurprisingly, the prohibition to use Italian ports for the disembarkation of migrants was soon replicated with the German NGO Mission Lifeline, which had rescued 259 migrants offshore Libya. After spending one week adrift at sea, the *Lifeline* was finally authorized entry in Valletta after the Maltese government obtained the guarantee that no future disembarkations would follow and migrants would be shared with Italy and other European countries. Even Italian armed forces' ships encountered resistance to disembark rescued migrants. Most notably, the Italian Coast Guard unit Diciotti had to wait until 27 August before receiving the authorization to disembark 177 migrants rescued 11 days before (see [Table 1](#)).

The legality of closing ports

The main legal question pertaining to the *Aquarius* and *Lifeline* incidents, as well as any future disembarkation standoffs, concerns which state bears responsibility for the disembarkation of migrants rescued at sea. Three legal regimes shed light on this question but offer no clear answer: the law of the sea, human rights law, and European Union law.

Maritime law

The main rule concerning the disembarkation of persons rescued at sea is set out in Section 3.1.9 of the 1979 Convention on Maritime Search and Rescue (SAR Convention). It stipulates that the state responsible for the SAR region (SRR) in which assistance is rendered has the primary responsibility to ensure cooperation and coordination to disembark survivors in a place of safety. If the authorities in charge of a SRR are unavailable, however, the responsibility to coordinate SAR operations is temporarily transferred to the first Maritime Rescue Coordination Centre (MRCC) that receives information on the distress situation. Since 2013, distress calls along the Central Mediterranean route were systematically redirected to Italy, which ultimately took over the responsibility of coordinating all SAR operations offshore Libya.

In December 2017, Tripoli's Government of National Accord (GNA) submitted materials to the International Maritime Organization with a view to officially establishing a SRR, a process which formally came to conclusion by the end of June 2018. The GNA, however, did not yet (and still does not) possess a fully proficient MRCC. For this reason, the rescue conducted by the *Aquarius* was still coordinated by Italian authorities. At least in the *Aquarius* case, Rome's MRCC can arguably be considered as the rescue coordination centre exercising primary responsibility in the sense of Section 3.1.9. In the past, the MRCC in Rome consistently responded to the impossibility to find

Table 1. From Mare Nostrum to the closure of ports: a timeline.

Action	Impact on disembarkation	date
Italy launches Operation <i>Mare Nostrum</i>	All migrants rescued in the Libyan SRR dare disembarked in Italy	October 2013–October 2014
End of Mare Nostrum and start of Frontex Operation Triton	Italy's MRCC continues to coordinate rescues in the Libyan SRR and identify Italian ports as places of safety	2014–2017
Code of Conduct on Migrant Rescuing	First threat to close ports to non-signatory NGOs	July 2017
The NGO ship Aquarius is denied disembarkation in Italy	629 migrants disembarked in Spain	10 June 2018
The NGO ship Lifeline is denied disembarkation in Italy	259 migrants disembarked in Malta after an ad hoc redistribution agreement among willing EU countries is reached	27 June 2018
The Italian Coast Guard ship Diciotti rescues 450 migrants	Migrants disembarked in Italy after an ad hoc redistribution agreement among willing EU countries is reached	15 July 2018
The Diciotti rescues 177 migrants	After 11 days, migrants finally disembarked in Italy even if no redistribution agreement is reached	15–27 August 2018

alternative places of safety for migrants rescued offshore Libya during operations conducted under its coordination by allowing for disembarkation in an Italian port. This course of action, however, is not strictly dictated by maritime legal obligations. When Section 3.1.9 was inserted into the SAR Convention in 2004, most states indicated they did not want any ‘residual’ rule pointing at a state that would eventually have to accept disembarkation onto its territory (Coppens & Somers, 2010, p. 392). Consequently, coordinating a SAR operation does not necessarily oblige Italy or any other country to accept rescued migrants in its territory if alternative places of safety are available.

Human rights law

Under the European Convention on Human Rights (ECHR) states have an obligation to secure the rights and freedoms of the Convention for ‘everyone within their jurisdiction’. Protection under the ECHR is relevant for the disembarkation of migrants in that denying access to ports may affect the right to life, the prohibition of inhumane treatment and the prohibition of *refoulement* for those on board (Moreno-Lax, 2017).

In the context of Italy refusing access to its ports, however, it is doubtful whether the NGO vessels came within the jurisdiction of Italy for the purpose of the ECHR. To be considered within Italian jurisdiction, the vessel and the people on board – whether *de jure*, *de facto*, or both – had to be either within an area under the effective control of Italy, or under direct Italian state agents’ control. Absent indications proving that the NGO vessels came within the jurisdiction of Italy, protection under the ECHR is less obvious. For example, giving directions to vessels – even in the absence of the legal power to give binding instructions – might constitute a contributing element of *de facto* jurisdiction, but these kinds of arguments have yet to be addressed by judges in Strasbourg or elsewhere.

EU law

The EU has no competence to regulate SAR operations. The Sea Borders Regulation contains provisions related to disembarkation, but only applies to the operations at sea of the European Border Agency Frontex. The operational plans and status of forces agreement applying to the EU maritime missions Triton and EUNAVFOR Med explicitly state that rescued migrants should be disembarked in Italy. After Italian insistence, the operational plans applying to Frontex’s new mission *Themis* no longer mention Italy as the sole place of disembarkation but stipulate that migrants should be taken to the nearest EU port. As SAR operations involving private vessels, however, the Aquarius and Lifeline incidents fall outside the scope of these rules.

A possibility for EU law to apply nonetheless is if the NGO vessels had proceeded to Italian waters. Once *de jure* in the Italian territorial sea, migrants aboard NGO vessels would have found themselves within the geographical scope of application of the EU Asylum Procedures Directive, which sets common procedures for EU Member States for granting and withdrawing international protection. Another avenue for the applicability of EU law is offered by the Charter of Fundamental Rights. The latter, however, only applies if Member States are 'implementing EU law'. This raises the question of whether Italy was implementing EU law when ordering NGO vessels not to enter its waters and refusing them a place for disembarkation. Italy's actions could be construed as a form of border control pursuant to the Schengen Borders Code and, therefore, trigger the applicability of the EU Charter, which contains similar fundamental rights as those enshrined by the abovementioned ECHR. Whether the Schengen Borders Code applies to such extraterritorial situations is, however, an unresolved issue (Fink, Gombeer, & Rijpma, 2018).

Eventually, the migrants on the *Aquarius* and the *Lifeline* were transported to Spain and Malta. This kind of arrangement leaves the application of the Dublin rules unaffected (i.e. Spain and Malta being the first EU country of arrival responsible for the asylum application).

The humanitarian implications of closing ports

Although not illegal under maritime, human rights and European law, the decision to close Italian ports has problematic humanitarian implications.

Since the launching of operation Mare Nostrum in October 2013, Italy willingly allowed for the disembarkation in its territory of all the migrants rescued in the Maltese and Libyan SRR. Even if Mare Nostrum was discontinued after 1 year, Italy's commitment to keep its ports open remained unaltered, allowing other actors to continue conducting SAR operations. NGOs too took advantage of the possibility to disembark those rescued in nearby Italian ports to fill the gap in SAR capabilities created by the insufficient presence of European Navy and Coast Guard ships offshore Libya (Cusumano, 2017). The fact that Italy has now joined Malta in making its ports unavailable for the disembarkation of migrants has ultimately made most NGOs' rescue operations impossible.

Even if Spain were to maintain ports open, its coasts are too far to provide a reliable place of safety for those rescued in the Central Mediterranean. Disembarking migrants in Valencia forced the *Aquarius* – the fastest and largest NGO vessel – to sail across the Mediterranean for several days, escorted by an Italian Navy and an Italian Coast Guard ship. Disembarkation in ports at the Northern end of the Mediterranean basin would not only impose additional hardship on migrants, but also force

NGOs to spend long periods away from the area where most distress situations occur and entail lengthy routes and large fuel costs that small organizations are simply unable to face.

By rescuing over 40% of the migrants assisted in 2017 and 2018, NGOs have become crucial providers of SAR, rescuing over 110,000 people since 2015 (Cusumano, 2017). The fact that Frontex and Italian Navy assets have been withdrawn further North made NGO presence all the more important, increasing the risk that their disappearance may translate into a surge of deaths at sea. The closure of Italian ports to merchant vessels too further magnifies this gap in SAR capabilities, causing delays and lengthy deviations that may discourage shipmasters from conducting SAR operations. Although the CSDP mission EUNAVFOR and Italian authorities have assisted the GNA in rebuilding a functioning Libyan Coast Guard and Navy (LCGN), Tripoli's forces are still unable to conduct SAR operations effectively and independently. The fact that migrants often resist being taken back to Libya makes LCGN SAR operations all the more problematic from both legal and practical standpoints, and has repeatedly translated into the loss of life and use of violence against migrants.

The current unpreparedness of the Libyan Coast Guard, the difficulties attached to safely returning migrants to Libya, and the fragility of the GNA makes NGOs' presence valuable as both rescuers and whistle-blowers of human rights violations. As forcefully illustrated by quantitative evidence, NGOs' disengagement may have already caused severe humanitarian externalities. June 2018 saw a sharp increase in the deadliness of the journey. Despite the drop in the number of crossings, recorded deaths offshore Libya between June and 19 July 2018 amounted to at least 705, more than the previous six months combined (Villa, Gruijters, and Steinhilper 2018).

The political implications of closing ports

Humanitarian concerns aside, the closure of ports may also be short-sighted in pursuing Italy's national interest. Although one might be tempted to see Italy's new policy as a successful gamble, a deeper examination of Italy's predicament suggests otherwise. Even if France were to follow Spain in opening a port on a one-off basis, the occasional disembarkation of few hundred migrants in other European countries is hardly helpful for Italy, which had over 180,000 asylum seekers disembarked in its ports in 2016 only. Rome's move came at the price of considerable diplomatic tension with Malta, France and Spain, which criticized the closure of Italian ports as illegal, cynical and even 'disgusting'. The Italian government is not entirely off the mark in dismissing European partners who showed little solidarity in sharing Rome's burden as hypocritical. A viable, long-term solution to Italy's problem, however, inevitably requires European allies' support in reforming the EU asylum system.

As epitomized by several EU member states' willingness to accept the relocation of 300 people disembarked in Sicily on 15 July, the humanitarian imperative to give rescue vessels access ports and Italy's need to offload part of the burden associated with migrants' reception to other countries are not necessarily irreconcilable. The ensuing 27 August standoff, when 177 migrants rescued by the Italian Coast Guard vessel 18 had to wait 11 days at sea before disembarking, shows that the threat of closing ports to rescuers hardly helps in obtaining EU burden sharing. Any effort to obtain solidarity on a more systematic basis, however, inevitably requires reforming the Dublin regulation, exempting countries that accept the disembarkation of migrants rescued at sea from the obligation to process all their asylum applications through the establishment of effective relocation mechanisms. As of July 2018, Italy received financial help from the EU through the Refugee Fund, but only obtained the relocation of 12,694 migrants as of 9 July 2018.

The conclusions of the European Council in 28 June show that the closure of ports hardly helped Italy's call for relocating larger number of migrants. While acknowledging the need for greater solidarity on paper, the document primarily focuses on the need for 'more effective control of the EU's external borders', and contains no concrete provisions ensuring greater burden sharing in the reception of asylum seekers. On the contrary, the Council departed from previous efforts to establish compulsory quotas for the transfer of asylum-seekers to other member states, stressing that relocations should only occur 'on a voluntary basis'. The disappearance of compulsory quotas from the Council conclusions and the lukewarm interests in reforming the Dublin system displayed by the new Italian cabinet suggests that Rome may be willing to give up on asylum seekers' relocations in exchange for greater support in the protection and externalization of EU Southern borders. As illustrated by their pledge to 'step up support' for the LCGN and the statement that 'all vessels operating in the Mediterranean must ... not obstruct operations of the Libyan Coastguard', other EU members may have already given their blessing to this strategy. Libya's state fragility and legal constraints, however, call into question both the appropriateness and the effectiveness of this course of action. North African countries' refusal to serve as ports of disembarkation and the principle of *non-refoulement*, for instance, cast doubts over the prospect to establish 'regional disembarkation platforms' in cooperation with third countries vaguely mentioned in the Council conclusions. The possibility that Italy's on-going training and financial, logistical and operational support to LCGN may be construed as a push-back by proxy by the European Court of Human Rights further hinders the viability of this strategy.

Arrivals to Italy in the first 6 months of 2018 amounted to around 17,000, plummeting by 80% compared with the previous year. This decline, which started when a large number of NGOs ships were still deployed at sea, does

not only call into question the pull factor criticism, confirming that non-governmental SAR operations had no significant impact on the magnitude of migratory flows. Such a sharp drop in migrant arrivals also makes the present closure of Italian ports at the price of diplomatic frictions and humanitarian externalities all the more unwarranted. Although the pyrrhic victory over the *Aquarius* and *Lifeline* resonated with Italians' frustration, strengthening the new government coalition, these standoffs appear little more than electoral stunts disguised as foreign policy. By alienating allies and dilapidating the political capital built by rescuing migrants despite the glaring lack of EU solidarity, Italy's new approach to seaborne migrations may only make a long-term solution to the crisis all the more unlikely, leaving Italy in deep waters like the NGO ships it closed its ports to.

Disclosure statement

No potential conflict of interest was reported by the authors.

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