



## Analysis

### The Commission and Italy tie themselves up in knots over Libya

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(June 2019)

At the end of March, the European Commission and the Italian interior minister appeared to undermine one another both respectively and collectively through a sequence of messages that emerged as part of their efforts to assert the existence of a Libyan search and rescue (SAR) zone. The entire incident demonstrates how Italy and the European Commission are trying to assert the fiction of a Libyan SAR zone – financing it, providing resources and managing it – in order to neutralise concerns over both the north African country's status as an unsafe place and their own humanitarian obligations.

#### **Background: directives against disembarkation**

Matteo Salvini faced widespread criticism at the end of March for his umpteenth attempt to obstruct disembarkation and to criminalise civilian crews undertaking search and rescue activities in the central Mediterranean, this time in a case involving the boat *Mare Jonio*. The *Mare Jonio* was put to sea by the Italian citizens' initiative *Mediterranea* in response to the government using the pretext of the flag flown by rescue vessels to obstruct landings by foreign NGO rescue missions.<sup>1</sup>

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<sup>1</sup> In its efforts to prevent vessels from landing and disembarking the people they rescued in Italy, the infrastructures and interior ministers, Toninelli and Salvini, have consistently demonised NGOs on the basis of details that technically do not matter in SAR cases, such as the flag flown by a vessel, the nationality of an NGO or the nationality of the crews. This has often resulted in invitations for them to navigate towards their flag state, or to any state other than Italy, leading to diplomatic clashes with Spain, France, Germany, the Netherlands, Switzerland and even Panama, which reacted to pressure from Italy by revoking permission for SOS Méditerranée's *Aquarius 2* to use its flag. This began just after they took office, with the *Aquarius* kept at sea for weeks before Spain allowed it to dock in Valencia. Requests that vessels waste several days or even weeks navigating to the state whose flag they fly contravene the principle that disembarkment should take place in the nearest place of safety (which Italy and the Commission have been trying to redefine as Libya for five years).

After the *Mare Jonio* rescued 49 people on 18 March, a directive produced by the interior ministry sought the wholesale criminalisation of such efforts.<sup>2</sup> Its reasoning was framed around Libyan sovereignty for its search and rescue (SAR) zone and treating the recognition of this zone by the International Maritime Organisation (IMO) as synonymous with it being a safe country in which to disembark people.

Thus, the directive said that vessels which did not return people to the north African country, or disobeyed orders from the Libyan Maritime Rescue Coordination Centre (MRCC), should be treated as people smugglers, in violation of national and EU legislation to fight irregular immigration.

One of its most significant features was its claim that authority for this hard line stance came from the Commission's own initiatives in this field, drawing on the European Agenda on Migration and its corollaries.<sup>3</sup> Yet even this notion was trumped by the form of instrumental reasoning that would enable state authorities to do anything they wished, as long as there was a strategic objective to justify it.

In this case, while the document acknowledged international norms on the safety of life at sea, on search and rescue and the international law of the sea, their application should be tempered:

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

### **Salvini calls for backup**

In the midst of the criticism directed at Salvini, the Commission appeared to have come to his rescue. Friday 29 March began with the interior ministry suggesting that a letter from the Commission supported its position. The ministry sought to demonstrate that Libya can be considered a place of safety, on the grounds of an attempt by the Commission to establish that a Libyan-run SAR zone (recognised by the IMO in London) is valid and effective within the international legal framework.

First, according to the ministry, even the Commission said that Libya can rescue and return people to its ports; second, this makes it “reliable”; third, the presence of IOM staff in landing spots was a guarantee that migrants were safeguarded; and fourth, the Libyan coast guard's performance was improving, as the letter pointed to 15,358 people who were rescued and disembarked in Libya in 2018.

Both the ideas at hand – that Libya is a place of safety and that a Libyan SAR zone is a practical reality – are of course utterly fictitious. On this latter point, international

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<sup>2</sup> Six UN special rapporteurs and independent experts have subsequently called for the withdrawal of the directive. See: UN special rapporteurs call for withdrawal of Salvini decree criminalising search and rescue activities, *Statewatch News*, 22 May 2019, <http://www.statewatch.org/news/2019/may/it-un-sr-directive.htm>

<sup>3</sup> Yasha Maccanico, 'Italy's redefinition of sea rescue as a crime draws on EU policy for inspiration', *Statewatch*, April 2019, <http://www.statewatch.org/analyses/no-341-italy-salvini-boats-directive.pdf>

jurists Umberto Leanza and Fabio Caffio, cited by Vassallo Paleologo of Palermo University, note that:

*“The establishment of a SAR zone is intrinsically subordinated to the circumstance that the State Party to the Convention is capable of guaranteeing the continuous and effective operativity of SAR services in its own area of competence. In particular, the state commits to set up a coordination Centre and coordination Sub-Centres, to designate coastal surveillance units, and to have structures, naval and aerial vessels, telecommunication rescue centres and adequate staff available (from a qualitative and quantitative point of view).”*<sup>4</sup>

### **The backup backs off**

The Commission’s spokeswoman, Natasha Bertaud, swiftly reacted to Salvini’s claim by stressing: “The European Commission does not consider Libyan ports as safe ports and this is why any ship flying a European flag cannot disembark migrants in Libyan ports”. This was because “international law applies and the Commission has always said that at present the conditions of security are lacking in Libya.”<sup>5</sup>

She was joined by UNHCR’s High Commissioner, Filippo Grandi, who told *Avvenire* newspaper that the UN “does not consider Libya a safe port, and rescued refugees and migrants should not be returned to that country.” Noting that the presence of the UNHCR and other organisations should not be used “instrumentally” to deny reception in Europe to migrants and refugees, Grandi stated:

*“Search and rescue capability in the central Mediterranean has already been reduced over the last two years through restrictive measures adopted against NGO boats... We have asked to put an end to such restrictive measures and to restore and increase search and rescue capability in the Mediterranean”.*

IOM, whose presence at disembarkation points in Libya was presented as evidence of safeguards applying to the people returned there, had already produced a damning statement on 2 February, which expressed its view in blunt terms:

*“With regard to its activities in Libya, the International Organization for Migration (IOM) would like to clarify that we follow the UN position indicating that Libya cannot yet be considered a safe port.*

*IOM in Libya is present at the disembarkation points to deliver primary assistance to migrants that have been rescued at sea. However, following their disembarkation, migrants are transferred to detention centres under the*

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<sup>4</sup> Fulvio Vassallo Paleologo, ‘Una direttiva ministeriale contro il diritto’, *A-Dif*, 19 March 2019, <https://www.a-dif.org/2019/03/19/una-direttiva-ministeriale-contro-il-diritto/>; Umberto Leanza and Fabio Caffio, ‘Il SAR Mediterraneo, La ricerca e soccorso nel diritto marittimo: l’applicazione della Convenzione di Amburgo del 1979’, June 2015, [http://www.fondazionemichelagnoli.it/files/Leanza-Caffio\\_RM.pdf](http://www.fondazionemichelagnoli.it/files/Leanza-Caffio_RM.pdf)

<sup>5</sup> ‘Per l’UE la Libia è un porto sicuro’, ma Bruxelles smentisce Salvini’, *Europa Today*, 29 March 2019, <http://europa.today.it/attualita/libia-bufala-porto-sicuro.html>; ‘Il Viminale: Libia porto sicuro anche per l’UE. Bruxelles e ONU smentiscono’, *Avvenire*, 29 March 2019, <https://www.avvenire.it/attualita/pagine/il-viminale-libia-porto-sicuro-anche-per-l-ue-l-onu-contro>

*responsibility of the Libyan Directorate for Combatting Illegal Migration (DCIM) over which the Organization has no authority or oversight. The detention of men, women and children is arbitrary. The unacceptable and inhumane conditions in these detention centres are well documented, and IOM continues to call for alternative solutions to this systematic detention.*

*The number of migrants returned to Libyan shores has reached over 16,000 since January 2018, and concern remains for their safety and security in Libya, due to the conditions in the detention centres.”<sup>6</sup>*

### **What happened: fake news or EU-Italy synergies?**

The Commission’s swift rebuttals of the interior ministry’s claims caused a degree of disquiet over their truthfulness. Subsequent inquiries led to the unveiling of a letter addressed to Frontex’s Executive Director, Fabrice Leggeri, signed by the European Commission’s Director-General for Migration and Home Affairs, Paraskevi Michou.<sup>7</sup>

Discussing the Operational Plan for Frontex’s Joint Operation Themis and operational communication for SAR-related sightings in the area (central Mediterranean), the letter asserts the validity of the Libyan SAR zone. This exists, says the letter, on the basis of Libya’s signature of the 1979 Hamburg SAR Convention and its December 2017 notification to the IMO of the Libyan Search and Rescue Region (SRR), which is valid as a “unilateral declaration with a constitutive effect”, unless objections arise from the “international maritime community” or “specific neighbouring countries”. It reads like a go-ahead and reassurance concerning Frontex’s co-operation with the Libyan coastguard, primarily through aerial surveillance.

The letter continues with comments on the Libyan Coast Guard’s improved performance “in the period 2017-2018 as direct consequence of the support EU provided both in terms of training and equipment”, leading to the rescue and disembarkation in Libya of 15,358 persons in 2018 and 779 in 2019, according to IOM data. A breakdown is provided of the ports used, noting that “cooperation is consolidated at disembarkation points with the IOM for registration and initial screening”.

The monitoring of Libyan efforts by EUNAVFOR MED Operation Sophia has provided “encouraging” results, EU-trained personnel have been employed appropriately and activity, capacities and professionalism among the Libyan coast guard ranks are all deemed to be on the rise, states Michou’s text. EU engagement with the coast guard, the UN Sanctions Committee’s recognition that it is “a legitimate structure” (following previous reports by that Committee highlighting that its membership included

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<sup>6</sup> ‘Protecting migrants in Libya must be our primary focus’, IOM, 4 February 2019, <https://www.iom.int/news/iom-statement-protecting-migrants-libya-must-be-our-primary-focus>

<sup>7</sup> Ares(2019)1755075, 18 March 2019: [http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019\)1362751%20Rev.pdf](http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf)

traffickers<sup>8</sup>) and recognition by the “international community” of the Libyan Government of National Accord (despite it not controlling the whole country and an ongoing armed conflict) are presented as elements legitimating this SAR zone. Yet, the Commission prudently notes that it “does not provide direct funding to the Libyan authorities”. Rather, this happens through the EU Trust Fund programme to improve maritime surveillance and SAR “capacities”.

The next paragraph states that:

*“The procedure outlined in your [Leggeri’s] letter to communicate sightings of, as well as initial actions regarding, “distress” situations directly to the Maritime Rescue Coordination Centre (MRCC) “responsible” for the SAR region, constitutes a procedure that is in line with the provisions of the Hamburg Convention of 19791. It is thus in conformity with international law to inform and identify as first MRCC the one which is best placed to assist, so as to avoid delay in actions and minimise loss of life at sea.”*

Hence, while the letter from the Commission that the Italian interior ministry referred to did exist, it did not support the interior ministry’s position in quite the way that was claimed. Nevertheless, it is an example of how both Italy and the EU are trying to assert their power in order to relinquish any responsibility for a large stretch of the sea (a self-damaging geopolitical and strategic retreat<sup>9</sup>) by assisting, creating and reinforcing a third country’s capabilities to return people to places where they are abused, thus preventing their arrival in the EU. This may have legal implications in view of the Commission’s own statements, as well as those of other international agencies and bodies, pointing to Libya being unsafe.

### **An own goal that damages both parties involved in asserting a fictional reality?**

The letter ends by providing details concerning the provision of services that Libya is not yet equipped to undertake for its search and rescue activities. In spite of Italy doing the lion’s share of coordination in this area on behalf of the Libyan coast guard, the Commission’s letter appears to support Italy in its quest for any other country (European and/or African) to take greater responsibility. Indeed, it can be read as a text that was written precisely for the purpose of furthering Italy’s claims in this field.

The letter seems to view Italy’s prominent role as almost unfair. It says that Italy cannot “be considered ‘a neighbouring MRCC’ because it does not border the Libyan SRR,”

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<sup>8</sup> Yasha Maccanico, Ben Hayes, Samuel Kenny, Frank Barat, ‘The shrinking space for solidarity with migrants and refugees’, *TNI*, September 2018, p.11, [https://www.tni.org/files/publication-downloads/web\\_theshrinkingspace.pdf](https://www.tni.org/files/publication-downloads/web_theshrinkingspace.pdf)

<sup>9</sup> Italy had *de facto* control of a stretch of the sea that it is now relinquishing through the greater activity the Libyan coast guard (LCG) is undertaking on its behalf. Yet the LCG is also harassing Sicilian fishermen using resources provided by Italy in that area of the sea, where there are age-old claims regarding sovereignty and the point at which international waters start. See: Alessandro Puglia, ‘La denuncia dei pescatori siciliani: “Così i libici si sono presi il Mediterraneo”’, *Vita*, 24 May 2019, <http://www.vita.it/it/story/2019/05/24/la-denuncia-dei-pescatori-siciliani-cosi-i-libici-si-sono-presi-il-med/288/>, in which Sicilian fishermen complain about the Libyan coastguard’s actions against them and about the Italian Navy shifting its attitude from protecting them to asking them to leave a given area.



yet the country “is supporting the Libyan Coast Guard a lot in particular in acting during the SAR event as a ‘communication relay’.” Notification of SAR events by the Libyan authorities should also be made to their Maltese, Tunisian and Egyptian counterparts, according to Michou.

Yet this recognition of Italy’s coordination of Libyan SAR operations may also have legal repercussions, precisely because those SAR operations lead to people being taken back to Libya. As the EP’s Legal Service argued in relation to disembarkation in third countries (in relation to proposals on “controlled centres” and “disembarkation platforms”),<sup>10</sup> stringent conditions must be met in order for such agreements and actions not to constitute *refoulements*, which do not apply in Libya, by a long way.

The letter goes on to say that:

*“Many of the recent sightings of migrants in the Libyan SRR have been provided by aerial assets of EUNAVFOR MED [Operation Sophia] and were notified directly to the Libyan RCC responsible for its own region.”*

The same reasoning as that set out above applies here. What is presented as humanitarian assistance, a contribution to saving lives at sea, is in fact turning search and rescue into capture-and-return-to-torture or, at best, to arbitrary detention in squalid conditions. That this may have serious legal implications should be obvious to all involved.

After confirming the authenticity of the letter to *Statewatch*, the Commission recalled that it had no responsibility or liability for SAR operations, which are a matter for national authorities:

*“Search and Rescue is a question of international law and a matter for national authorities – the Commission has no competence to coordinate Search and Rescue operations or to indicate places for disembarkation. The European Union as such is not a party to the International Maritime Organisation Hamburg Convention on Maritime Search and Rescue. The EU does not direct SAR operations.”*

Further information supplied by the Commission reasserted the validity of Libya’s SAR zone and plans to develop it in cooperation with neighbouring countries:

*“The Libyan authorities notified the establishment of the Libyan Search and Rescue (SAR) region to the International Maritime Organisation (IMO) on 14 December 2017. This SAR Region was formally reflected by the IMO on the Global Integrated Shipping Information System on 27 June 2018. In accordance with the international regulations, the Libyan authority has initiated the process to establish SAR bilateral agreements (the SAR Hamburg Convention requires Parties to coordinate search and rescue organisations, to ensure the closest practicable coordination between MRCCs) and proposals to that effect have been transmitted to Italy, Tunisia and Egypt.”*

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<sup>10</sup> See section 5 of ‘Italy’s redefinition of sea rescue as a crime draws on EU policy for inspiration’, *Statewatch*, April 2019, <http://www.statewatch.org/analyses/no-341-italy-salvini-boats-directive.pdf>

In this instance, both the Commission and the Italian authorities may have tried to be too clever in ways that have embarrassed both, possibly with legal implications in relation to crimes in Libya's camps. Nevertheless, the communion of outlook between Italy's statements over the last weeks and some contents in Michou's letter may point to support within the Commission for Salvini's efforts, at the same time as the Commission wants to pretend that it opposes the excesses by the Italian government at a time of right-wing/populist government. Instead, it appears that that government may be precisely what was needed to impose the European Agenda on Migration and subordinate human rights and the rule of law to migration management. The Commission appears to be encouraging a similar outlook to that of the Italian government (which it cannot officially admit to) at its technical and operative levels that are shielded from scrutiny and accountability, as the Commission reaffirmed by pointing out that such responsibility lies exclusively with member states.



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