



## Analysis

# The seizure of the Open Arms boat as a paradigm of the European Union's war against human rights

Steering group of the *Osservatorio Solidarietà della Carta di Milano*

April 2018

1. Introductory note .....	2
2. Proactiva Open Arms' search and rescue operation .....	2
3. Seizure of the boat and charges against activists.....	3
4. "Necropolitics" as a way to govern migration in Libya.....	6
5. The secret services' role in the prosecutors' investigations .....	7
6. International obligations and human rights protection .....	8
7. European policies: more economic assistance to Libya to stop migrants .....	9
8. Brief notes on the international law of the sea .....	11

## 1. Introductory note

This analysis is based on the charges levelled at *Proactiva Open Arms* and was published in the wake of the crew's interrogation and the impounding of the *Open Arms* rescue boat. It was written by the steering group (*direttivo*) of the *Osservatorio Solidarietà della Carta di Milano*, which was formally constituted in January 2018. It was originally published in Italian.<sup>1</sup> A prosecutor has now ordered the freeing of the *Open Arms*,<sup>2</sup> although judicial proceedings are ongoing. *Statewatch* will be publishing further information on the case.

## 2. *Proactiva Open Arms*' search and rescue operation

On 15 March 2018, *Open Arms*, the humanitarian rescue boat of the Spanish NGO *Proactiva Open Arms*, intervened in the operation to rescue 218 people in distress 73 nautical miles away from the Libyan coast, in international waters. Following customary practice, it was alerted by the Maritime Rescue Coordination Centre in Rome (itMRCC), which had identified the boat that was closest to the scene of the shipwreck. The *Open Arms* became active immediately, taking on board the 117 people who were crammed on the first dinghy. After finding a second empty vessel, the crew was preparing to rescue a third one which had 101 people on board, distributing life vests and loading people into speedboats, starting with women and children, when a Libyan coastguard patrol boat which had arrived in the meantime cunningly positioned itself between the migrants' vessel and the Spanish rescue speedboats, attempting to prevent them from recovering anyone. The Libyans threatened the crew with weapons, demanding that the migrants be "returned" to them: they were people who, *de facto*, were already in European territory - which is what a vessel flying a Spanish flag in international waters is.

Journalist Cristina Mas, who was on board of the *Open Arms*, claims that the commander of the Libyan patrol boat threatened to kill the crew. "A man who claimed he was the captain of the Libyan coastguard's boat ordered the *Proactiva* crew members to hand over the women and children, leaving them a few minutes to decide and threatening to kill the crew. He literally said: 'I am the captain, give me the migrants or we'll kill you'. He repeated this three times. What I saw while I was on board is that the migrants would have preferred to die rather than board the Libyan patrol boat".<sup>3</sup>

The Spanish ship's crew managed to avoid handing over the people they had rescued to the Libyans, after a stand-off lasting two hours during which the crew repeatedly informed the Italian authorities without anyone intervening. Through senator Luigi Manconi, the information eventually reached Graziano Delrio, the minister for Infrastructures, which is the authority under whose auspices the Italian coastguard operates. In the end, the Libyans left the scene of the rescue. Hence, it was possible to complete the rescue operations without any further disruptive acts by the Libyans.

At that point, the Italian authorities were meant to inform the captain of the *Proactiva Open Arms* boat of the port in which to disembark. There was also a medical emergency on board. After a lengthy negotiation, the *Open Arms* was allowed to head towards Malta, where a Maltese patrol boat only took charge of a woman with her three-month-old baby son, who was in a critical condition. Nobody else was allowed to disembark, neither was the NGO given permission to dock in Malta, in accordance with the Maltese government's explicit position over the last few years. One cannot forget that it was precisely because of a conflict of

---

<sup>1</sup> 'Il sequestro della nave *Open Arms* come paradigma della guerra dell'Unione Europea ai diritti umani', <http://osservatoriosolidarieta.org/open-arms-le-valutazioni-dellosservatorio/>

<sup>2</sup> [https://politica.elpais.com/politica/2018/04/16/actualidad/1523871692\\_947502.html](https://politica.elpais.com/politica/2018/04/16/actualidad/1523871692_947502.html)

<sup>3</sup> <http://it.euronews.com/2018/03/20/open-arms-testimone-minacce-di-morte-dalla-guardia-costiera-libica->

competences between the Maltese and Italian authorities on 11 October 2013 that several hundred people died at sea due to a case of delayed rescue for which a penal trial is underway before the Rome tribunal in which high-ranking Italian Navy officials are facing charges. Subsequently, since the start of operation Mare Nostrum, all the people rescued in the SAR zone which is formally Maltese, but in international waters, have disembarked in Italian ports, apart from very few exceptions resulting from emergencies. After all, the same was done, for as long as they were present, by the ships of Frontex's operation Triton, which always disembarked the shipwrecked people they rescued in the very vast Maltese SAR zone in Italian ports.

After almost two days' navigation with 216 people on board in the stormy sea, awaiting coordination between the Italian and Spanish navies, the *Viminale* [seat of the Italian interior ministry] eventually assigned Pozzallo (Ragusa) as the official disembarking destination. For the first time, by interpreting the provisions in the Code of Conduct signed by NGOs like *Proactiva* and the interior ministry in a "restrictive" way, Rome asked for the Spanish authorities to assume responsibility for asking Italy to lead the shipwreck victims to the Sicilian coasts. It was an impracticable solution considering the obligations arising from the international law of the sea and the serious situation of the people on board of the Spanish boat, who were especially tested by the abuses they were subjected to in Libya.

It was precisely in Pozzallo, only a week earlier, that the *Open Arms* had disembarked a group of shipwreck victims who were practically reduced to skeletons. They had set off from Libya and were recovered at sea, and included Segen, a 22-year-old who had fled Eritrea and was held in slavery for a year and a half in a Libyan prison, only to die of hardship in the hospital of Ragusa.

At midday on 17 March, the *Open Arms* arrived in Pozzallo with its 216 shipwreck victims. Upon arrival, the captain had to hand in his navigation papers. The captain and the head of mission were transferred to the hotspot centre where they were interrogated for several hours without any lawyers present and without an official interpreter. In the evening, news of the seizure of the rescue boat emerged: the Catania prosecuting magistrate Fabio Regolo - one of the magistrates of the DDA (*Dipartimento Distrettuale Antimafia*) headed by the Catania prosecutor Carmelo Zuccaro - requested the issuing and validation of an order to preventively seize the *Open Arms*.

The alleged offence is criminal association for the purpose of illegal immigration. According to the measure's underlying rationale, the crew members should have left their "load" to the militias from the Libyan patrol boat, thus sending men, women and children back to the camps which have already been criticised in several reports by different United Nations agencies and have more recently also been placed under investigation by the International Criminal Court.

Lawyers from *Proactiva*'s defence team claim that the transmission of the dossier to the Catania DDA was only possible because they were accused of an offence of criminal association for the purpose of smuggling illegal migrants into Italian territory.

### **3. Seizure of the boat and charges against activists**

The three people who are under investigation risk between five and 15 years' imprisonment and fines of 15,000 euros for each of the 216 migrants who were on board. The Catania judge for preliminary investigations (*gip*) will make a decision on the preventive seizure order issued by the prosecutors' office, and has ten days from the moment of the seizure to decide whether to confirm the measure or not. *Proactiva Open Arms*' lawyers are waiting to have full access to the acts, particularly with regards to their relation with the Italian coastguard and the related navigation tracking records, to provide a more accurate defence argument. The *Open Arms* has stored on board all the recordings of the communications with the IMRCC, the Central

Command of the Italian coastguard, the self-styled Libyan coastguard and the other actors involved in the rescue operation.

“It is a preventive measure”, the director of *Proactiva Open Arms*, Oscar Camps, wrote on Twitter on 19 March:

*“the mere hypothesis of a criminal offence, but we are unfairly accused of criminal association and of encouraging illegal immigration by disobeying the Libyans, to whom we did not want to return women and children. Protecting human life at sea should be the absolute priority of any respectable civilian or military corps, whether it is called a coastguard, maritime rescue service or Navy, as is also certified by the law of the sea. Preventing people from saving lives which are at risk in the high seas, with the aim of returning people by force to an unsafe country such as Libya, is equivalent to sending them back to a hellish situation, dangerous and very tense, and it contravenes the United Nations’ norms on refugee status.”*

These are the most relevant excerpts from the prosecutor’s requests to issue and to confirm an order for the boat’s preventive seizure:

*Proceedings concerning Marc Reig Creus and Ana Isabel Montes Mier, under investigation for offences envisaged in arts. 416.6 of the penal code and 110, 12.3 letters a) and b), and 3 bis of Legislative Decree no. 286 of 1998 and subsequent modifications,*

*in association with Gerard Canals, the general coordinator of the NGO Proactiva Open Arms, committed in Ragusa on 17 March 2018.*

*Reconstruction of the events was undertaken on the basis of:*

*\* the report on the SAR events of 15 March 2018 drafted by the Port Authority of the Pozzallo coastguard;*

*\* the first investigative acts by the Ragusa police flying squad (images drawn from video recordings handed over by the crew and declarations made by the head of mission and the boat’s captain).*

*Despite receiving repeated warnings by the Rome IMRCC, containing the message that the Libyan coastguard had “assumed the direction of the operations to rescue migrants, the head of the mission and the boat’s captain nonetheless proceeded to rescue them, using the excuse that they had lost radio contact with the rescue speedboats which were twenty miles ahead of them.”*

*The people under investigation “arbitrarily decided to continue the search and then the rescue in the events for which the Libyan coastguard (the operations all occurred in Libyan SAR waters) had assumed command, and hence responsibility, explicitly asking, also in writing, that they did not want anyone in the zone which was the theatre of the events to guarantee safety in the rescue phases”*

*During the rescue phases [...] the Open Arms was reached by the Libyan patrol boat and after the hectic phases of the rescue [...] the crew was allowed to rescue all the migrants thanks to the Libyans’ consent. After rescuing a total of 218 people, at 17.30 on 15 March 2018, the Open Arms headed north and it was only at 19.30, still in international waters, that it asked for the so-called POS [port for disembarking] from the IMRCC in*

*Rome, which told them it was not competent for the matter because the coordination of the SAR operations carried out was by the Libyan state, and hence they had to ask the state whose flag the boat was flying, namely Spain, for their POS”.*

*“On the date of 16 March 2018 at around 7.30, the doctor on board reported [...] that it was necessary to urgently disembark a 3-month-old new born baby and his mother, because the child was in critical health conditions. At around 9.20, once it had reached Maltese SAR waters, the boat Open Arms was granted authorisation by the Island of the Knights [Malta] to disembark the two aforementioned migrants. The evacuation operations ended at 13.50 and the Maltese authorities asked the captain what his intentions were, and he answered that they would continue navigating, leaving their territory”.*

*“There is no doubt that the facts, as they have analytically been reconstructed, make it possible to hypothesise that the people under investigation committed an offence of illegal immigration connected to the offence envisaged and punished by art. 416.6 of the penal code”.*

*The conduct of the people under investigation “cannot be deemed to be decriminalised, as is provided in the case of an actual risk to people’s lives”, because there is no evidence that serious harm to people was inevitable, considering that the Libyan coastguard was in the zone and had assumed command of the coordination, as was reiterated by Rome. “Moreover, this behaviour violates the Code of Conduct dictated by the Italian authorities, signed by Proactiva [...] which, in any case, is binding”.*

*Once they had reached Maltese SAR waters, “when the evacuation operations of a three-month-old baby and his mother were over, they continued navigating, leaving the port”, although the Maltese authorities “had expressed their willingness to take charge of disembarking all the migrants”.*

*The IMRCC in Rome suggested that they land in Malta, but the people under investigation “obstinately continued navigating towards Italian waters”.*

*Demonstrating the “non-existence of a situation of concrete risk of life for the migrants, the captain himself declared that he did not have any critical cases on board. [...] The people under investigation acted with the sole purpose of landing in Italy”.*

*Thus, the offence of criminal association may emerge because “a subject’s membership of a criminal enterprise may be hypothesised even on the basis of a single offence in case the existence of the bond is established. In the matter at hand, the people under investigation operate professionally and structurally for the NGO Proactiva Open Arms, and they intended to knowingly and repeatedly disregard the Code of Conduct”.*

*“There are grounds to apply the real precautionary measure of the so-called impeding seizure envisaged by art. 321 of the code of penal procedure. [...] The third necessary precondition is that of *periculum libertatis*, that is, the danger that the ‘free availability’ of a good ‘may aggravate or prolong the consequences of the offence for which proceedings are underway, that is, to facilitate the commission of further offences”.*

*Therefore, the prosecuting magistrate [pm, pubblico ministero] Fabio Regolo orders the preventive seizure of the vessel M/N Open Arms, entrusted to the custody of the boat's captain himself with permission for the crew to remain on board.*

*(Catania, 18 March 2018, at 17.00)*

#### **4. “Necropolitics” as a way to govern migration in Libya**

In its conclusions, the sentence by the Permanent Peoples' Tribunal announced in its session held in Palermo (18-20 December 2017) states that:

- 1) the decision to make the Frontex and EUNAVFOR Med naval units retreat has contributed to expanding the scope for intervention by the Libyan coastguard in international waters, which blocks migrants heading for Europe, prejudicing their life and safety, taking them back to Libyan centres where they are subjected to practices of economic extortion, torture and inhuman and degrading treatment;
- 2) the activities undertaken in Libyan territory and in Libyan and international waters by the Libyan police and military forces, as well as by numerous tribal militias and by the so-called “Libyan coastguard” following the Italian-Libyan memorandum of 2 February 2017, amount – in view of their objective consequences of death, deportation, disappearance of people, arbitrary imprisonment, torture, rape, reduction into slavery and, in general, persecution against the migrant people – to a crime against humanity;
- 3) following the agreements with the “Libyan coastguard” and in its activities to coordinate various [agents'] conducts, episodes of aggression that NGOs undertaking search and rescue activities in the Mediterranean have complained about, may also be attributed to the Italian government's responsibility, at times in possible complicity with European agencies acting in the same context.

“It is entirely evident that nobody who is reasonable, in such a situation, may consider handing over shipwrecked migrants to the Libyan authorities”, commented Franco Ippolito, president of the Basso Foundation, “all the more so in the presence of the consistent jurisprudence of the European Court on Human Rights on the duty of non-refoulement by Member States”.<sup>4</sup>

The latest report on Libya by UNSMIL [United Nations Support Mission in Libya], submitted to the United Nations Security Council on 12 February 2018,<sup>5</sup> states that “the migrants have been subjected to arbitrary detention and acts of torture, including rapes and other forms of sexual violence”. In government-run centres and in irregular camps alike, there are:

*“kidnappings for ransom, forced labour and unlawful killings. [...] The perpetrators are state officials, armed groups, smugglers, traffickers and criminal gangs. [...] UNSMIL has visited four detention centres supervised by the Department for the fight against illegal immigration, and has ascertained the presence of serious overcrowding and terrible hygienic conditions. [...] The prisoners were malnourished and had either limited or no access to medical care”.*

The report also talks of summary executions in the prisons: “on 19 November [2017], during a raid in a camp in the Warshafanah area, Tajura and Zanzur militiamen, affiliates of the Department to combat illegal migration, opened fire on the migrants without any verbal warning, causing an unspecified number of deaths and injuries”.

---

<sup>4</sup> <https://www.avvenire.it/opinioni/pagine/fermati-in-mare-e-respinti-crimine-contro-lumanit>

<sup>5</sup> <https://unsmil.unmissions.org/sites/default/files/n1803952.pdf>

The report highlights the “unscrupulous and violent conduct of the Libyan coastguard during rescues and interceptions at sea” and it talks of the events on 6 November 2017, which were witnessed by Gennaro Giudetti, who was on board of the Sea Watch, when “members of the Libyan coastguard beat the migrants with a rope and pointed their firearms at them during an operation at sea”.

## 5. The secret services’ role in the prosecutors’ investigations

On 21 March [2018] in *Il Fatto Quotidiano* [a newspaper], Antonio Massari published an article entitled ‘*I servizi e il satellite militare per inseguire Ong e scafisti*’ [The intelligence services and the military satellite to pursue NGOs and sea-borne traffickers] in which he provided revelations concerning the investigation of NGOs, raising issues of a juridical, diplomatic and political order.<sup>6</sup>

### Relationship between prosecution services and intelligence services in investigations on NGOs

It is proven - Massari writes - that the security agencies have played a role in the investigations into NGOs by prosecutors’ offices. For months, intelligence and judicial police investigations have been advancing jointly. Thanks to the intelligence services’ technological resources, the judicial police can obtain pieces of information which converge into the investigation files. Newspapers have anticipated facts which are not even included in the Catania prosecutors’ office allegations, such as collusion with Libyan traffickers, of which there is no trace whatsoever in the judicial proceedings. This is a very serious and slanderous insinuation that has taken hold on public opinion, giving rise to a moral and economic prejudice which should be compensated in the appropriate venues. Last year, in an interview carried by *Il Fatto Quotidiano*, the *Lega* [formerly *Lega Nord*] representative [Matteo] Salvini used a reserved dossier from undercover intelligence agents which was used months later for the seizure of the Juventa rescue boat of the German NGO Jugend Rettet by the Trapani prosecutors’ office.

### Use of the satellite and other intelligence services’ technologies to spy on NGOs

Police officers from the Central Operative Service [SCO, *Servizio Centrale Operativo*] and investigators from the customs’ police [*Guardia di Finanza*] collect information thanks to a satellite which is available to the defence ministry and security agencies within the framework of a European programme. As reported by the press, in practice, the satellite is “subcontracted” to judicial police officers to intercept and film the boats and movements at sea and in Libyan territory.

Further, a sophisticated Israeli technology which is employed by the Italian secret services enables the reconstruction of the movements of vessels even when they switch off their transponders - a circumstance which other NGOs have been accused of in the past, of which there is no evidence in the Open Arms case. In this case, it is accepted that the rescue operation was carried out in international waters, under an initial coordination by the Italian coastguard and there is NO mention of any charges of any sort of collusion between members of the Open Arms crew and traffickers or vessel drivers. The article published by *Il Fatto Quotidiano*, due to its headlines, which are not even supported by the accompanying text carried below them, is seriously defamatory towards the Spanish NGO which has been engaged for months in rescuing thousands of people in the SAR zones abandoned by the authorities responsible for rescues that states should have prearranged.

---

<sup>6</sup> <https://www.ilfattoquotidiano.it/premium/articoli/i-servizi-e-il-satellite-militare-per-inseguire-ong-e-scafisti/>; <https://www.ilfattoquotidiano.it/premium/articoli/caso-ong-le-trame-dei-servizi-anche-nella-gestione-politica/>

### Italy pays traffickers to stop departures

Although investigative activities in a foreign country are hard to accept from a diplomatic and juridical perspective, the involvement of the Italian state and its secret services in Libya is growing in intensity.

“Qualified sources” regularly confirm to the press what the intelligence services have been denying for some time: the leading Libyan traffickers are paid to block departures and prevent engine-powered rubber dinghies laden with migrants from reaching international waters. Some of these have become an integral part of the so-called Libyan coastguard, whereas others are entrusted oversight roles in detention centres, both formally acknowledged and informal ones, in which the migrants are held. Others still have been given charge of security in ENI’s oil compounds, like in Zawia and Mellitah. The funding these subjects receive from the EU and Italy have been made public, and new funding is envisaged for this year.

### Italy provides equipment and finances the Libyan coastguard

“Italy is officially proceeding to implement Libyan capabilities in sea rescue operations” through the patrol boats donated to the Serraj government, and through a project to equip the two Libyan coastguard authorities (one of the defence ministry and the other of the interior ministry) of a real operative room (the current one consists of a satellite telephone, two radios, a fax machine and a few computers, without radar or air control equipment). This project has advanced considerably, and is currently based on the presence of a unit of the Italian Navy in the port of Tripoli, with tasks including maintenance and lending assistance to the coastguard which is defined as “Libyan”. Libyan agents also participate in the Sea Horse operation for satellite monitoring. In many cases, even according to the Libyan press, Tripoli’s patrol boats intervene in international waters after they have been alerted by the Italian and European command centres.

### NGOs accused of exchanging information with traffickers

On the basis of satellite images, the interception of satellite telephones and the reconstruction of boats’ movements when their transponders are switched off, the press hypothesises contacts between sea-borne traffickers and humanitarian workers. Specifically, they note the synchronic movement between migrants who are ready to embark on the coast and the movements of some NGOs’ boats.

In this way, according to the insinuations of *Il Fatto Quotidiano*, NGOs can carry out rescues entailing minimal risks for migrants, and traffickers can sell the migrants “risk-free” journeys, reducing their costs for vessels and fuel.

Their humanitarian purpose is taken for granted, but the accusation is that of facilitating the traffickers’ business.

There is NO evidence supporting these accusations made by *Il Fatto Quotidiano* in the allegations that the Catania prosecutors’ office has made against the three representatives of Proactiva who are being investigated.

## **6. International obligations and human rights protection**

With regards to the search and rescue activities coordinated by the Command of the Italian coastguard in the waters of the central Mediterranean, we report a statement by the Comboni Missionaries [order founded by Saint Daniele Comboni]:



*“We are convinced that the operation to rescue the 218 migrants was undertaken by the volunteers of the Spanish boat with righteous and conscientious intentions for the purpose of safeguarding the lives of people, who had been physically and psychologically tested, disobeying the orders of the Libyan coastguard which asked them, with the threat of shooting at the boat using firearms, to transfer the migrants onto their patrol boat to return them to Libya. [...] In carrying out their rescue work, the operators of the Open Arms were motivated by the certainty that if the migrants were taken back to the reception centres in Libya, they would have been subjected to inhumane living conditions and exposed to continuous violence. Even if investigations were to ascertain that laws and international agreements have been violated, we remain convinced that the Open Arms volunteers acted following their conscience. They preferred to give priority to the wellbeing of people that were in serious danger rather than obeying laws which would have almost certainly compromised the migrants’ survival. The law is for the person, and [one must] never sacrifice the person for the law.”<sup>7</sup>*

Yet, in the Open Arms case we have ascertained that human rights and international law were scrupulously respected. On the contrary, these would have been violated if the people responsible for Proactiva’s rescue boat had complied with demands to hand over the migrants by the Libyans and the Italian coastguard’s decision to relinquish their rescue responsibility to the Libyan coastguard, when this might have resulted in delaying the rescue and in the loss of many human lives. This is without reference to the inhumane fate which would have awaited the migrants once they had been returned to Tripoli.

## **7. European policies: more economic assistance to Libya to stop migrants**

Increasingly, the European Union and Italy are entrusting Libya the responsibility for collective *refoulements* of migrants, which are forbidden by international conventions.

Interviewed by ANSA [a leading Italian press agency] in Brussels, the president of the European Parliament, Antonio Tajani, stated that “Europe has been asleep for too long on the problem of migrants”, and that while Turkey has been allocated six billion euros, regarding Libya, so far, from the EU “only crumbs have arrived: this is not good enough. [...] Then one cannot be surprised by how the elections in Italy have gone”.<sup>8</sup> What he stated in Brussels shows that the European Union still remains firmly anchored to a policy based on deterrence and on the attempt, which has so far been unsuccessful, to fight “illegal” immigration while it eludes the problems of the opening of legal channels of entry and of the review of the Dublin Regulation, so as to enact a more balanced distribution between the different European countries of those asylum seekers who manage to enter the Schengen area anyway.

In the meantime, a source from the EU informed the press agencies that the European Commission deems that there has been a violation of the NGOs’ Code of Conduct by Proactiva Open Arms’ boat. The source explains that the event supposedly happened in Libyan territorial waters, after the Libyan coastguard had assumed responsibility for the sea rescue operations. The same source added that “the NGO did not follow orders”. The Commission chose not to comment on the seizure of the vessel and the investigation by the Catania prosecutors’ office. Instead, the Commission spokeswoman Natasha Bertaud asked “all the parties to respect the Code of Conduct” adopted by Italy concerning interventions by

---

<sup>7</sup> <http://www.dire.it/20-03-2018/184936-la-solidarieta-dei-comboniani-allong-open-arms-mostra-senso-di-umanita/>

<sup>8</sup> [http://www.ansa.it/europa/notizie/rubriche/altrenews/2018/03/17/tajani-chiede-a-leader-ue-segnale-forte-su-migranti\\_1d290dfb-00ef-460b-b0bb-5cdab148947c.html](http://www.ansa.it/europa/notizie/rubriche/altrenews/2018/03/17/tajani-chiede-a-leader-ue-segnale-forte-su-migranti_1d290dfb-00ef-460b-b0bb-5cdab148947c.html)

NGOs to rescue migrants in the Central Mediterranean.<sup>9</sup> These claims from the EU level cannot lend legislative value to a Code of Conduct that is merely the outcome of an agreement between the interior ministry and some NGOs and which, due to its very nature, cannot contaminate the internal normative framework and international la

**It is high time that the European Union reflects on the usefulness and the human costs of the operations entrusted to the units of the so-called “Libyan” coastguard. In fact, it appears that the new Frontex operation named Themis, which began on the past 2 February, linked to the Italian Nauras operation, envisages the strengthening of the level of operative coordination between Libyan naval units, European and Italian ones, including those involved in the operation EUNAVFOR MED.**

A Libyan SAR zone **does not** exist. It must be said that after requesting one, the Libyan government abandoned its attempt to have its own SAR zone in the central Mediterranean in December 2017, declaring that it was unable to undertake rescue operations outside its own territorial waters. Moreover, the aforementioned Code of Conduct itself - which does not have the value of law - was misinterpreted. In fact, whereas people undertaking a rescue assume the commitment to inform the authorities of the country whose flag a vessel flies, they also have a duty (which has a preeminent value in law) to guarantee people are rescued and transported to a place of safety. To put it differently, there is a vast zone in the Mediterranean which has remained without state rescue assets, and whoever passes there has a duty to undertake the rescue of whoever they may find in conditions of hardship. The first country which receives a distress call must indicate a *place of safety*, which is a wider notion than the safe port in which to disembark, also in reference to the legal conditions for entry into a territory, with the necessary promptness, in order not to worsen the conditions of the rescued shipwreck victims.

The prospect of large scale refusals of entry and expulsions still conditions the European Agenda on Migration, which is according to some observers a useless effort to counter populist and xenophobic drives which are increasingly spreading in various member states. The European Commission's intentions were already clear on 14 March, when the EU Commissioner on Migration, Dimitris Avramopoulos, reported to the EP plenary session on the implementation of the EU Agenda on Migration: “With a decrease in arrivals by almost 30 per cent in 2017 compared with the pre-crisis year 2014, the time is ripe to accelerate and intensify our efforts, to act more and more quickly on returns”. On the previous day, Segen had passed away, picked up at sea by the Open Arms before he died due to undernourishment. The result, at present, is that in an ill-fated zone of the central Mediterranean from which both the Frontex and EUNAVFOR MED assets have disappeared, only the Aquarius boat of the NGO SOS Mediterranee remains, soon to be joined by another Proactiva boat, the Astral, which is currently active in the Eastern Mediterranean.

It must be stressed that the humanitarian workers accused of “criminal association” have saved over 25,000 people in two years over 43 missions. Just as clearly, it must be clarified that since the MoU (Memorandum of Understanding) of 2 February 2017 between Italy and Libya (which, as it is a document of understanding between police forces, rather than an international treaty, has not been voted on in Parliament, nor are its details known), the number of arrivals in Italy has decreased alongside an increased percentage in the number of people who died in their attempts to reach Europe. According to representatives of the *Comitato Nuovi Desaparecidos* [Committee for the New Disappeared], while in 2016 around one migrant out of 68 used to die during the journey (including the phases of the journeys across the desert), today the percentage has risen three-fold. One out of every 28, in the first few months of 2018, is the rate of those who have perished trying and who, in any case, due

---

<sup>9</sup> [https://www.agi.it/cronaca/nave\\_ong\\_sequestro\\_catania\\_proactiva\\_open\\_arms-3643509/news/2018-03-19](https://www.agi.it/cronaca/nave_ong_sequestro_catania_proactiva_open_arms-3643509/news/2018-03-19)

to the state of crisis, be it democratic, environmental, economic, or due to ongoing conflicts which many countries are experiencing, will continue to risk their lives.

## 8. Brief notes on the international law of the sea

Regarding what happened, it is necessary to investigate whether there have been violations of the international conventions that regulate maritime law, especially the SOLAS Convention (on the Safety Of Life At Sea), the 1979 International Convention on Maritime Search and Rescue (SAR) adopted in Hamburg and the 1982 UN Convention on the Law of the Sea (UNCLOS).

It is also necessary to take into account the investigations undertaken by the International Criminal Court within the framework of the judicial proceedings which are underway to ascertain whether Libya has committed crimes against humanity. The existence of such investigations needs to be considered to confirm that there are not any safe ports in Libya. In fact, to date, as far as international United Nations reports are concerned, there are no *places of safety* in Libya for the migrants who are taken back to the mainland by the self-styled Libyan coastguard. The International Criminal Court might soon receive a documented description of the facts that took place in international waters between 15 and 17 March 2018.

Finally, it is necessary to verify whether, as a result of the judicial initiative embarked upon by the Catania prosecutors' office regarding Proactiva Open Arms, there may be any violations of the European Convention on Human Rights and of the Italian Constitution, by examining the legality of the preventive seizure of the Open Arms rescue boat, considering art. 1 of the 1st Protocol to the ECHR [protection of property], in combination with art. 7 of the ECHR [no punishment without law].

It is also very important to take into account that, if the orders issued by the Italian coastguard and the Libyan coastguard had been followed, and the rescued people taken on board of the vessel flying a Spanish flag had been handed over to the Libyans, a veritable collective *refoulement* would have been enacted, contravening art. 4 of the 4th Protocol to the ECHR [prohibition of collective expulsion of aliens], in combination with a certain breach of the prohibition of torture and other inhumane and degrading treatments, enshrined in art. 3 of the ECHR.

What has happened undoubtedly amounts to a blatant example of the criminalisation of acts of solidarity. It is worth recalling the latest report by Michael Forst, the UN Special Rapporteur on this issue, who stressed the growing international attention and concern for the problems faced by many human rights defenders as well as reiterating that international law, particularly the conventions on international maritime law, must be applied.<sup>10</sup> The report explicitly calls upon states not to criminalise actions to rescue people. Now civil society will organise to lend maximum solidarity to the humanitarian operators who are under investigation, to oppose all the human rights violations which are taking place in Libya against migrants, and the possible undermining of the right to defence which may emerge in Italy in the future.

*The original version of this article (in Italian) is available in the website of the recently formed Osservatorio Solidarietà della Carta di Milano: "[Il sequestro della nave Open Arms come paradigma della guerra dell'Unione Europea ai diritti umani](#)", Osservatorio Solidarietà, 25 March 2018. Translation by Statewatch.*

---

<sup>10</sup> [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/51](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/51)

*Statewatch does not have a corporate view, nor does it seek to create one, the views expressed are those of the author. Statewatch is not responsible for the content of external websites and inclusion of a link does not constitute an endorsement.*



Statewatch is a non-profit-making voluntary group founded in 1991. It is comprised of lawyers, academics, journalists, researchers and community activists. Its European network of contributors is drawn from 18 countries. Statewatch encourages the publication of investigative journalism and critical research in Europe the fields of the state, justice and home affairs, civil liberties, accountability and openness.

One of Statewatch's primary purposes is to provide a service for civil society to encourage informed discussion and debate - through the provision of news, features and analyses backed up by full-text documentation so that people can access for themselves primary sources and come to their own conclusions.

Statewatch is the research and education arm of a UK registered charity and is funded by grant-making trusts and donations from individuals.

**Web: [www.statewatch.org](http://www.statewatch.org) | Email: [office@statewatch.org](mailto:office@statewatch.org) | Phone: (00 44) 203 691 5227**

**Post: c/o MDR, 88 Fleet Street, London EC4Y 1DH**

Charity number: 1154784 | Company number: 08480724  
Registered office: 2-6 Cannon Street, London, EC4M 6YH