



# **POLICING SEARCH AND RESCUE NGOs IN THE MEDITERRANEAN**

**Does justice end at sea?**

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**CEPS IN-DEPTH ANALYSIS**

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# SUMMARY

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The policing of NGOs and human rights defenders providing humanitarian assistance to asylum seekers and immigrants, as well as search and rescue (SAR) in the Mediterranean has reached a new low due to the current far-right Italian government.

This CEPS In-Depth Analysis paper examines the Italian government's practices of responsibility evasion and selective disembarkation of SAR NGO vessels, the ensuing diplomatic row with the French government over the 2022 Ocean Viking affair, and the introduction of a Code of Conduct sanctioning SAR NGOs in January 2023. The paper argues that upholding justice at sea is not a 'pick and choose' game for governments and migration policymakers. Some of the human rights at stake are absolute in nature, and therefore accept no derogation or weighing with other policy interests. Policing the work of civil society actors and a policy of selective disembarkation run contrary to EU law and constitute clear indicators of a systematic threat to national and EU constitutional principles. This calls for effective and timely EU enforcement measures, to uphold a justice-centred approach that fully respects the dignity of every person and the safeguarding of the rule of law, democracy and fundamental rights.



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The cover image shows the Royal National Lifeboat Institution (RNLI) Memorial sculpture by Sam Holland in Poole, UK, which is designed to be a beacon of hope. According to the RNLI website "the sculpture bears the motto of Sir William Hillary: 'With courage, nothing is impossible.' It's a beacon of hope, honouring those who continue to save lives at sea, as well as those lost in the act of lifesaving."

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## EXECUTIVE SUMMARY

The policing of civil society actors conducting Search and Rescue (SAR) operations in the Mediterranean Sea has exposed long-standing unresolved controversies that reveal responsibility evasion strategies by some EU Member States which are incompatible with their obligations under international human rights, refugee, and maritime law. They also contradict the EU's foundational principles, chiefly those related to the rule of law and justice.

The hostility against non-governmental organisations (NGOs) and human rights defenders providing humanitarian assistance to asylum seekers and immigrants is not a new phenomenon across several Member States. Nonetheless, policing humanitarianism has reached a new low due to the systematically hostile policy introduced by the current far-right Italian government.

This CEPS In-Depth Analysis paper examines the Italian government's practices of selective disembarkation of SAR NGO vessels in Italian ports between October and November 2022, the ensuing diplomatic row with the French government over the *Ocean Viking* affair, and the introduction of a Code of Conduct targeting SAR NGOs in January 2023.

The legal and political arguments advanced by Italian authorities reveal an instrumental, politicised and strategic misuse of existing international, regional and EU standards – including the wrongful interpretation of the Law of the Sea and EU law. This paper shows that the imposition of undue operational requirements and disproportionate sanctions, the practice of selective disembarkations of only those rescued people deemed to be 'vulnerable', or the attempt to claim that vessels' flags states are responsible for disembarking or assessing protection needs are both legally unsound and manifestly unfounded. The Italian policies reveals a clear indicator of bad faith and insincere cooperation, which in turn leads to mutual mistrust in European cooperation and a serious threat to the rule of law.

The paper argues that upholding justice at sea in the central Mediterranean is not a 'pick and choose' game for governments and migration policymakers. Member States have unnegotiable obligations to provide, coordinate and facilitate the rescue of any person found in distress at sea, irrespective of their status. Some of the rights at stake in this context – such as the rights to life or the prohibition of inhuman and/or degrading treatment – are absolute in nature, and therefore accept no derogation or weighing with other policy interests. Migration priorities don't constitute legitimate grounds for policymakers to strategically disapply higher legally binding norms and principles

embedded in their national constitutions as well as in relevant international and EU Treaty instruments.

The independence of civil society actors, and their freedom of association, constitutes an essential pillar of democratic and pluralistic societies. EU governments must refrain from any policy – which has the purpose or effect of – interfering with their activities and nurturing a climate of mistrust and stigmatisation. Despite the existence of clear EU competences in these domains, this paper underlines the current ambivalence characterising the European Commission’s responses to these developments. It puts forward a set of policy recommendations for upholding a justice-centred approach to SAR and civil society actors who are working to support those who are unlawfully excluded based on their migration status.

## 1. INTRODUCTION

Following the Italian general election on 25 September 2022, an extreme right-led government took office on 22 October 2022. Since Day One, it has implemented an openly hostile policy towards civil society actors or non-governmental organisations (NGOs) providing humanitarian assistance and civilian search and rescue (SAR) operations for people seeking asylum and safety in the central Mediterranean Sea.

In late October-early November 2022, two NGO-operated SAR ships – *Humanity 1* of the NGO SOS Méditerranée and the *Geo Barents* of Médecins Sans Frontières (MSF) – were stranded at sea for several days before being allowed to dock in Catania, Sicily. The Italian Minister of the Interior, Matteo Piantedosi, later issued two decrees allowing only people considered to be ‘vulnerable’ by the national health authorities to disembark. The ships were then ordered to leave Italian territorial waters with many people remaining onboard. The crews disobeyed these orders, and everyone aboard the two vessels were eventually allowed to disembark on 8 November.

During the same period, a third ship, the *Rise Above* of the NGO Mission Lifeline, was also stalled for days – eventually all those aboard were permitted to disembark in Reggio Calabria. A fourth rescue vessel, the *Ocean Viking*, operated by SOS Méditerranée, was left waiting in Italian territorial waters with 234 rescued people aboard. After two weeks of stalemate, with the Italian authorities refusing to allow the ship to dock, it was eventually allowed to disembark its passengers in Toulon on 11 November 2022.

This last episode sparked a diplomatic row with France. Criticising the Italian government’s disregard for international and EU law, the French authorities announced they were suspending their pledge to relocate 3 500 asylum seekers from Italy under the June 2022 [‘Declaration on a Voluntary Solidarity Mechanism’](#). In retaliation against Italy, the French authorities declared that they would strengthen internal border controls along the Franco-Italian border to counter the unauthorised crossing of third-country nationals.

While the hostility against NGOs providing humanitarian assistance to third-country nationals is certainly not a new phenomenon in Italy, the current government’s official policy has been to systematically reinvigorate this approach and scale it up. This was confirmed by the Code of Conduct under the [Decree 1/2023](#), adopted on 2 January 2023<sup>1</sup>, which establishes highly restrictive rules that NGOs must respect while carrying out SAR missions. The decree also introduced disproportionate administrative sanctions and fines for non-compliance.

The Italian government’s policy needs to be viewed as the unlawful ‘policing’ of civil society actors. The Code of Conduct aims to act as a deterrence measure against SAR

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<sup>1</sup> DECRETO-LEGGE 2 gennaio 2023, n. 1. Disposizioni urgenti per la gestione dei flussi migratori. (23G00001) (GU Serie Generale n.1 del 02-01-2023).

NGOs activities, undermining humanitarian principles and the independence of human rights defenders and their freedom of association. It furthermore creates rules that violates well-established international and European legal standards, and ultimately hinders the obligation to rescue any person in distress at sea.

At the same time, the Italian government's approach differs from the past in some noticeable ways. Allowing only those considered to be 'vulnerable' to disembark is different from the 'closed ports' policy adopted by the former Minister of the Interior, Matteo Salvini, in summer 2018. Similarly, the current argument that the responsibility for assessing the protection needs of people on board and for taking decisions on whether to allow them to disembark should rest on the vessel's flag state is not supported in either conventional or customary law – in short, it constitutes a biased interpretation of the EU's [Dublin system](#).

This paper argues that justice does not end at sea, nor does it end in the scope of migration policies. EU Member States have unnegotiable legal obligations and the responsibility to provide, coordinate and facilitate the rescue of any person – and in some cases to also allow them to disembark – found in distress or danger at sea, irrespective of nationality or migration status.

EU Member States are also required not to criminalise and police the activities of NGOs and civil society actors involved in SAR. They must ensure their independence and neutrality as a *sine qua non* for effectively upholding democratic standards, the freedom of association and human rights defenders' own rights. Justice is not a 'pick and choose' game for EU governments; nor does it allow them to strategically waiver their responsibilities in favour of other policy interests or priorities, such as those related to migration governance<sup>2</sup>.

Migration policies do not constitute legitimate grounds for policymakers to forfeit or instrumentally 'choose not to apply' higher legal norms embedded in their national constitutions and the foundational principles of EU membership. These principles guarantee justice to every individual because of their human dignity. They are also prerequisites for mutual trust and the principle of mutual recognition of administrative and judicial decisions in the Area of Freedom, Security and Justice (AFSJ), including in EU policies dealing with asylum. The existence of a state-wide systematic policy designed to be hostile to SAR civil society that also seeks to police NGOs constitutes bad faith and insincere cooperation. Mutual trust, therefore, no longer holds and timely enforcement actions must follow.

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<sup>2</sup> For this paper, justice goes beyond a law enforcement rationale and instead refers to a system where injustice resulting from states' actions or inaction 'is fought by respecting the rule of law, fundamental rights and freedoms, and the principle of non-discrimination'. P. Boeles (2001), *Introduction: Freedom, Security and Justice for All*, in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Hart Publishing: Oxford, page 11.

## 2. EU COASTAL STATES' POLICIES TOWARDS SAR NGOS

During the 2022 Italian election campaign, the new prime minister, Giorgia Meloni, called for an array of restrictive and highly symbolic measures to contain the unauthorised arrival of asylum seekers by sea to Italy. She [expressed](#) the need for 'a European mission in agreement with North African authorities' to block arrivals to Italy and the opening of 'hotspots' at departure points in North Africa to identify and screen migrants there. These would then be coupled, in her view, with stricter measures for NGOs operating SAR ships, including higher fines and the confiscation of vessels.

The Italian extreme right had previously advanced similar proposals. In 2018-2019, Matteo Salvini adopted a 'closed ports' policy preventing rescue NGOs from entering Italian ports and introduced fines against NGOs that refused to comply. Justice is however catching up with the inhumane effects that this policy inflicted on people rescued at sea. Salvini is [currently on trial](#) for kidnap and the abuse of office for refusing to allow the SAR ship *Open Arms* to dock to disembark the 150 people onboard in August 2019. He often lamented the lack of EU-wide relocation mechanisms, despite his party being among those [blocking any progress](#) on the legislative reform of the EU Dublin Regulations, which included a relocation initiative that softened the first irregular entry criterion for the inter-state sharing of responsibility.

While the Italian government's agenda is putting this issue right at the centre of the national and EU policy debates, the criminalisation and policing of NGOs continues to be a widespread phenomenon in several EU countries. Previous research has shown that such policing extends beyond clear-cut cases of criminalisation and judicial harassment by some national prosecutors<sup>3</sup>. It includes wider practices, such as administrative rules undermining NGOs' independence and the application of stringent onboard inspections at ports of entry. They also entail acts of intimidation and harassment, such as increasing financial transparency demands.

These practices contribute to creating a generalised climate of suspicion and stigmatisation, as well as the spreading of non-evidence-based discourses that artificially associate humanitarian work with crimes such as 'human smuggling'. In June 2022, the European Union Agency for Fundamental Rights (FRA) [reported](#) that, since 2016, 60

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<sup>3</sup> S. Carrera, V. Mitsilegas, J. Allsopp and L. Vosyliute (2019), *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society*. Hart Publishing; S. Carrera, L. Vosyliute, S. Smialowski, J. Allsopp and G. Sanchez (2019b), '[Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update](#)', Study for the European Parliament, DG IPOL, December 2018; L. Vosyliute and C. Conte (2019), '[Crackdown on NGOs and volunteers helping refugees and other migrants](#)', ReSOMA, June 2019; M. Gionco and J. Kanics (2022), '[Resilience and Resistance: In Defiance of the Criminalisation of Solidarity Across Europe](#)', PICUM.



administrative or criminal proceedings against SAR NGOs were initiated by Germany, Greece, Italy, Malta, the Netherlands, and Spain. The FRA also found that SAR ships in the central Mediterranean continue to face lengthy delays in finding a safe port, putting the safety and physical wellbeing of the rescued people at risk<sup>4</sup>.

These policing methods have now been ramped up to an unprecedented scale in Italy. Between the end of October and November 2022, several rescue episodes at sea by NGO vessels represented an opportunity for the newly-elected Italian government to substantiate its ‘hard stance’ against NGOs carrying out SAR missions. On 5 November 2022, Interior Minister Matteo Piantedosi (who had previously acted as Salvini’s Head of Cabinet) [sketched out](#) the distinctive features of its ‘strategy’ towards third-country nationals and asylum seekers rescued by NGO vessels.

First, he stated that only children and ‘vulnerable people’ rescued at sea should be allowed to disembark in Italian ports, while those remaining – referred to as ‘economic migrants’ – would be ‘assisted’ to leave Italian waters. Second, in several public statements, he argued that the flag states of vessels operating SAR operations should be considered responsible for disembarking migrants rescued at sea, as well as assessing their asylum claims.

The first argument indicates that some Italian policymakers seem to be aware of their responsibilities – including those stemming from the European Court of Human Rights (ECtHR) case-law – and that justice standards do apply. Piantedosi’s use of these standards is, however, both misleading and disingenuous. The second argument is not only flawed due to the prevailing interpretations of governments’ responsibilities following SAR activities but it is also incompatible with EU law and the recent jurisprudence of the Court of Justice of the EU (CJEU).

## 2.1 THE HUMANITY 1, GEO BARENTS AND RISE ABOVE

In late October and early November 2022, SOS Humanity’s *Humanity 1* and MSF’s *Geo Barents* were [stranded at sea](#) for almost two weeks before being allowed to dock in Catania, Sicily, on 5 and 6 November. They were respectively carrying 179 and 568 people.

By means of individual [decrees](#) targeting each NGO, Piantedosi, together with the Italian Minister of Defence and the Minister of Infrastructure, forbade the two ships to remain in Italian waters longer than necessary to disembark their passengers most in need of assistance as stated by the competent authorities<sup>5</sup>. Only 144 people from the *Humanity*

<sup>4</sup> European Union Agency for Fundamental Rights (FRA), June 2022 Update – ‘Search and Rescue (SAR) operations in the Mediterranean and fundamental rights’.

<sup>5</sup> Ministero dell’Interno, Decreto Humanity 1. 4 November 2022.

1 and 357 from the *Geo Barents* were allowed to disembark. The decrees ordered the two ships to leave Italian waters with their 'residual load', as Piantedosi [defined](#) those remaining on the ships.

The strategy of selective disembarking was highly criticised. The doctor on the *Humanity 1* released a [statement](#) saying that she regretted doing her job well because 'the healthier people were, the less likely they were to disembark'. The UN's Refugee Agency (UNHCR) and the International Organisation for Migration (IOM) launched an [appeal](#) 'for the urgent disembarkation of all stranded refugees and migrants in [the] central Mediterranean'. They called for *all people*, and not only the most vulnerable, to be 'disembarked swiftly without any further delay'. While reaffirming that 'rescue at sea is a humanitarian imperative' based on international law and the Law of the Sea, they stressed that 'lifesaving EU state-led SAR mechanisms are urgently needed' and EU Member States should 'boost resources and capacities to effectively meet their responsibilities'.

As an act of protest, [several people](#) left on the *Geo Barents* jumped overboard into the water and refused to eat or drink. [Some of those](#) left on the *Humanity 1* did the same. Due to the psychological and physical conditions of those left on the ships, the health authorities in Catania [allowed](#) the people remaining onboard to disembark on 8 November. During the same period, 89 people rescued by Mission Lifeline's ship *Rise Above* were also [held at sea for a week](#) before being allowed to dock in Reggio Calabria on 8 November. Unlike the other two ships, all people were allowed to disembark.

## 2.2 THE OCEAN VIKING CASE: DIPLOMATIC TENSIONS BETWEEN ITALY AND FRANCE

While these cases were dealt with domestically, the refusal to allow another NGO vessel, the *Ocean Viking*, to disembark escalated into a diplomatic row between the Italian and French governments. The ship was carrying a total of 234 people rescued between 22 and 26 October in three operations within the Libyan Search and Rescue Region (SRR) and three operations within the Maltese SRR.

According to a [statement](#) issued in October 2022<sup>6</sup>, SOS Méditerranée called repeatedly on Italy and all other European countries to respect their legal obligations under international law. The NGO claimed it had followed all the required procedural rules and argued that the national authorities contacted only acknowledged the information

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<sup>6</sup> SOS Méditerranée, [STATEMENT] '234 survivors on Ocean Viking must disembark swiftly in a Place of Safety as per Maritime law', 27 October 2022.

provided but did not coordinate the SAR operations in good faith, as they would be legally required to do.

On 7 November 2022, SOS Méditerranée took part in an [appeal](#) made by 20 civil society organisations-advocating for the ‘immediate disembarkation of all survivors’ on the *Ocean Viking* and the other SAR ships waiting for a port in Italy<sup>7</sup>. On the following day, given the lack of a response from previously contacted Maritime and Rescue Coordination Centres (MRCCs), the NGO called on France, Spain and Greece to assign a port where the ship could dock. Between 22 October and 10 November, the *Ocean Viking* sent a total of [46 requests](#) to the French, Greek, Italian, Maltese, and Spanish MRCCs<sup>8</sup>.

The Italian media reported that Prime Minister Meloni and French President Macron struck an [informal deal](#) concerning the *Ocean Viking* at the margins of the COP27 summit in Sharm El Sheikh. Relations between the two governments deteriorated though when Matteo Salvini and other Italian politicians [celebrated](#) the ‘agreement’ as a positive ‘change of pace’ for Italy. Meloni herself also followed suit, thanking the French government for its cooperation before the deal had been formally concluded.

The *Ocean Viking* was allowed to dock and disembark in Toulon on Friday 11 November 2022. In France, the extreme right parties did not miss the chance to exploit these events. The President of the *Rassemblement National*, Marine Le Pen, [tweeted](#) that the decision was ‘a dramatic sign of laxity’ by the French government. Similarly, Éric Zemmour, leader of the *Reconquête* party, [stated](#) that the disembarking was ‘irresponsible, immoral, against the popular will’. France’s Minister of the Interior, Gérald Darmanin, reacted by [labelling](#) the Italian government’s behaviour as ‘unacceptable’. The French government’s spokesperson, Olivier Véran, also denounced the Italian government’s ‘lack of humanity’.

[Citing](#) the Italian authorities’ disregard for international and European legal obligations, the French government announced its decision to suspend its contribution to the Declaration on a ‘Voluntary Solidarity Mechanism’ adopted during the French Presidency of the Council in June 2022. The French government also [invited](#) other countries to do the same, even though it had previously pledged to relocate 3 500 asylum seekers from Italy under that mechanism.

The French government also dispatched 500 additional border guards to the Franco-Italian border between Menton and Ventimiglia to [strengthen controls](#) against the risk of

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<sup>7</sup> SOS Méditerranée, [PRESS RELEASE] ‘Urgent call from over 20 civil society organisations to allow all rescued persons to reach safety’, 7 November 2022.

<sup>8</sup>SOS Méditerranée, Onboard SOS Méditerranée: ‘Activities and Observations of Our Rescue Ship in the Central Mediterranean’.

any unauthorised movement of third-country nationals. In contrast with, and contrary to, the time limits and grounds allowed for by the [Schengen Borders Code \(SBC\)](#) for Member States to exceptionally re-introduce internal border controls, France has unlawfully done so [since 2015](#).

There is extensive evidence that the French authorities regularly carry out pushbacks and deprive third-country nationals intercepted at the border between Italy and France of their liberty in the Hautes-Alpes region. They have also engaged in [acts of intimidation](#) against people and activists involved in solidarity activities. The current reinforcement of internal control at its border with Italy signals France's political use of 'internal border controls' as an inter-state penalisation measure.

### 2.3 A NEW 'CODE OF CONDUCT' FOR SAR NGOS

Following its diplomatic row with France and the failure of selective disembarking, the Italian government seemed to adopt a more cooperative approach with SAR NGOs. In early December 2022, for example, the ships *Louise Michel*, *Geo Barents*, and *Humanity 1* [were assigned Places of Safety](#) in Italy. This approach though was short-lived.

On 2 January 2023, the government approved Decree n.1/2023 containing 'urgent dispositions for the management of migratory flows'. The decree establishes a set of rules – a 'Code of Conduct' – that private SAR actors must follow. This includes provisions that severely hinder the abilities and capacity of NGOs to save lives in the Mediterranean. Controversially, the decree requires ships to proceed to a port 'without delay' right after rescuing people, implying that NGOs cannot carry out multiple rescue missions during the same voyage.

As of now, due to the lack of state-run SAR missions, private SAR ships usually spend several days at sea carrying out multiple rescues to save the highest possible number of people in one of the world's deadliest stretches of sea. Human Rights Watch has [noted](#) that prohibiting multiple rescues would be in breach of international legal provisions, as well as EU law<sup>9</sup>.

To make matters worse, between December 2022 and January 2023, the Italian government [assigned ports in central and northern Italy](#) to private SAR ships, adding costs for the NGOs and increasing the suffering of those onboard. The distance between the place of rescue and the assigned port, together with the new rules of conduct, is imposing unnecessary hurdles on humanitarian actors. These tactics show the Italian government's

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<sup>9</sup> G. Tranchina, 'Italy's Anti-Rescue Decree Risks Increasing Deaths at Sea: New Policy Obstructs Lifesaving Work of Rescue NGOs, Violates International Law', 9 January 2023.

intent is to keep NGOs away from the central Mediterranean, delay their return to SAR activities, and ultimately reduce the number of third-country nationals reaching its territory. Additionally, the Italian opposition parties [have criticised](#) the government's actions because a great majority of the coastal cities chosen are ruled by the centre-left, possibly revealing a political agenda behind the government's decisions.

The decree also introduces an obligation for the crew to inform those aboard about the possibility of applying for international protection. NGO staff would be required to collect the personal data of those who intend to apply for asylum and share it with the competent authorities. In a previous draft circulated on 28 December, the decree stated that the crews should inform those aboard about a possible asylum application 'within the EU'. This could be [read](#) as a reference to the government's argument that flag states should be responsible for receiving and examining asylum applications<sup>10</sup>.

Nonetheless, the collection of sensitive information that can determine an asylum application's outcome cannot take place on a ship during an emergency context and should be carried out by the competent authorities and not the humanitarian staff. Furthermore, the information and evidence-sharing between NGO workers and official authorities would severely compromise the principles of neutrality and independence at the core of these organisations' mission and ethos.

The new decree introduces disproportionate sanctions on the SAR NGOs who fail to comply with the new Code of Conduct. In the case of a violation, they would be fined anywhere between EUR 10 000-50 000 that could also be extended to the vessel's owner, as well as the vessel itself being impounded for up to two months. The vessel may be confiscated entirely if the violation is repeated with the same ship. If the crew fails to provide the information requested by the authorities or abide by their instructions, the consequences would be a fine of between EUR 2 000-10 000 and the detention of the vessel for 20 days.

The threat of lengthy legal proceedings and administrative fines against civil society organisations act as a [deterrence](#) for NGOs engaging in legitimate SAR missions. On 5 January 2023, a group of SAR NGOs released a [joint statement](#) expressing their concerns for the new code of conduct and highlighting its incompatibility with international law<sup>11</sup>. MSF is [currently appealing](#) against the decree.

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<sup>10</sup> F. Vassallo Paleologo, 'A sostegno del decreto contro le ONG riparte la macchina del fango', 30 December 2022.

<sup>11</sup> MSF, 'New decree obstructs lifesaving efforts at sea and will cause more deaths', 5 January 2023.

### 3. THE AMBIVALENCE IN EU POLICY RESPONSES

On 9 November 2022, the European Commission released a [statement](#) on the situation in the central Mediterranean, calling for the immediate disembarking, in the nearest place of safety, of all persons rescued by the *Ocean Viking*. The statement reiterated that *'the legal obligation to rescue and to ensure the safety of life at sea is clear and unequivocal, irrespective of the circumstances that lead people to be in a situation of distress'*<sup>12</sup>. Vice-President Margaritis Schinas added, in an [interview with Politico](#), that *'we cannot allow two member states fighting each other in public and creating yet another mega political crisis over migration'*. Together with the Czech Presidency of the Council, he [called for an extraordinary meeting](#) of the Member States' Ministers of the Interior to be held on 25 November<sup>13</sup>. He [added](#) that if Member States can develop *'a more structured framework like a code of conduct, we'll support it'*.

In this Extraordinary Justice and Home Affairs (JHA) Council, the EU ministers [discussed](#) *'the current situation along all migratory routes, taking stock of the urgent challenges and joint way forward'*<sup>14</sup>. Regarding SAR, they reiterated their *'efforts in building sustainable migration and asylum systems, resilient to abuse and able to also address the consequences of disembarkation after search and rescue operations and secondary movements and their intention to 're-launch the European Contact Group on Search and Rescue to, among other, develop a coordination and cooperation framework with all actors involved in search and rescue operations'*. The ministries taking part in the June 2022 Solidarity Declaration for the Mediterranean called for accelerating its implementation.

On 21 November 2022, the Commission released an ['EU Action Plan for The Central Mediterranean'](#) laying down a set of 20 operational measures to address challenges in the central Mediterranean. It rests on two main components – working with partner countries and international organisations, and a more coordinated approach to search and rescue (*Section 3.1.* below) and reinforcing the implementation of the Voluntary Solidarity Mechanism and the Joint Roadmap (*Section 3.2.*).

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<sup>12</sup> European Commission, 'Statement by the European Commission on the situation in the Central Mediterranean', 9 November 2022.

<sup>13</sup> Council of the EU, Extraordinary Justice and Home Affairs Council (Home Affairs), 25 November 2022.

<sup>14</sup> Council of the EU, Extraordinary Justice and Home Affairs Council on the situation along all migratory routes and a joint way forward – Presidency Summary, 25 November 2022

### 3.1 SAR AND DISEMBARKATION

Referencing the recent controversies surrounding the Italian government's actions against rescue NGOs, the Commission has committed to promoting discussions on a 'specific framework and guidelines for vessels having a particular focus on search and rescue activities'. In parallel, Cyprus, Italy, Greece, and Malta released a [Joint Statement](#) expressing their position on the SAR controversy. It denounced rescue NGOs as acting with total autonomy from the competent state authorities. It revolved around the idea that every state shall effectively exercise its jurisdiction and take responsibility in accordance with their international obligations<sup>15</sup>.

Interestingly, the Action Plan stated that aiding persons in distress at sea is an obligation on Member States resulting from international customary and conventional law 'as well as Union law' (see *Section 4* of this Paper). It also calls for a relaunch of the European Contact Group on SAR, an informal platform for the exchange of information and discussion among Member State authorities launched in the framework of the Commission's 2020 [Pact on Migration and Asylum](#). Since its inception, civil society actors have [criticised](#) the SAR Contact Group for its lack of transparency and for its focus on SAR NGOs rather than on the irresponsive national authorities.

One of the specific objectives of the SAR Contact Group should be to assist the Commission in monitoring the implementation of its 2020 [Recommendation](#) on cooperation among Member States concerning operations carried out by vessels taking part in search and rescue activities. Together with other legislative measures – such as the proposal for a [Regulation on Asylum and Migration Management](#) – as well as non-legislative measures, notably the Commission's [Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#), the Commission aimed to lay the groundwork for a 'sustainable common approach on SAR'.

The 2020 SAR Recommendation did not include any concrete binding measure to increase SAR capacity in the Mediterranean. Instead, and problematically, it acknowledged Member States' strategic policy of disengagement from SAR operations in the central Mediterranean. The Recommendation takes a prevailing migration governance lens to the SAR issue, underling how '*migrant smuggling by sea is a criminal offence*', and it is thus '*essential to avoid a situation in which migrant smuggling or human trafficking networks, (...) take advantage of the rescue operations conducted by NGOs vessels in the Mediterranean*'. Controversially, the Communication endorsed the Code of Conduct for NGOs carrying out search and rescue activities adopted by Italy in 2017,

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<sup>15</sup>Joint statement of the governments of Italy, Greece, Malta, and Cyprus, 13 November 2022.

which has been [widely criticised](#) for negatively impacting the independence of NGOs engaged in SAR.

Limited progress has been made at EU level to address the widespread evidence concerning the criminalisation and policing of rescue NGOs<sup>16</sup>. In the 2020 Guidance on facilitation and humanitarian assistance to migrants, the Commission underlined that criminalising NGOs carrying out operations at sea is in breach of international law only in the case of rescue operations conducted ‘while complying with the relevant legal framework’.

This last sentence is characterised by profound legal uncertainty. It leaves the door open to some Member States continuing the wider policing dynamics of SAR NGOs which, among other restrictive measures, are obliging them to sign Codes of Conduct or act exclusively ‘under the coordination’ of national coastal and law enforcement authorities. This is at the [expense](#) of their being able to continue their humanitarian activities without fearing deferential, disciplinary or sanctioning criminal and non-criminal penalties<sup>17</sup>.

### 3.2 EU MEMBER STATES’ FAILURE TO SHARE RESPONSIBILITY ON ASYLUM

Long-standing controversies on SAR have been closely linked with debates concerning (the lack of) intra-EU solidarity and the sharing of responsibilities in the area of asylum. In June 2022, the then-French Presidency of the Council relaunched action in this area with the [Declaration on a ‘Voluntary Solidarity Mechanism’](#). Under this inter-governmental arrangement, 10 000 asylum seekers (with priority accorded to those in clear need of international protection, particularly the most vulnerable) should be relocated within a year from southern Mediterranean states to other Member States that agreed to participate in the relocation schemes.

In the above-mentioned Action Plan, the Commission underlined the need to ‘accelerate the implementation of the mechanism addressing the bottlenecks that have been identified so far, enhancing flexibility, and streamlining processes’. In a [September 2022 meeting](#) of the so-called Solidarity Platform gathering participating Member States and the Commission, it was acknowledged that only around 1 000 transfers were expected to take place between then and December, ‘falling short of achieving the political goal of relocating 3 000 persons by the end of this year’. Delays in implementation were

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<sup>16</sup> D. della Porta and E. Steinhilper (2021), *Contentious Migrant Solidarity: Shrinking Spaces and Civil Society Contestation*. Abingdon: Routledge; Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliute (2019), *Policing Humanitarianism: Policies against Migrant Smuggling and Their Impact on Civil Society in the EU*, Hart Publishing.

<sup>17</sup> V. Moreno-Lax, ‘A New Common European Approach to Search and Rescue? Entrenching Proactive Containment’, [eumigrationlawblog.eu](http://eumigrationlawblog.eu), 3 February 2021.



apparently motivated by operational and political factors, including the application of narrow selective criteria by Member States based on security considerations and the explicit preference for candidates with specific nationalities.

In the meantime, the Czech Presidency of the Council, which took place during the second half of 2022, tried to carve out a [political compromise](#) on the key aspects of solidarity and responsibility within the proposed Asylum and Migration Management Regulation. The plan sought an agreement on a minimum annual threshold for relocation, specifying that Member States would be able to participate with 'alternative forms' of solidarity other than relocation, including financial support to other Member States.

Member States' contributions, relocation and other permitted forms would be determined by an agreed-upon formula. As a supplementary form of solidarity for situations where Member States do not undertake enough relocation pledges, Member States under pressure [would be allowed to apply](#) for a 'reduction of the Dublin cases under the Dublin rules for which they would be otherwise responsible', shifting responsibility to Member States providing solidarity.

EU institutions are currently confronted with the daunting task of adopting all the proposals under the Pact before the end of February 2024. In September 2022, the Council and the European Parliament agreed on a [Joint Roadmap](#), with the co-legislators committing to make the necessary effort and work together 'in a spirit of sincere cooperation' to finalise negotiations on a total of nine legislative proposals by the indicated timeline. This allowed for the resumption of work on five legislative proposals under the Pact on Migration and Asylum, but not on the reform of the Dublin rules under the AMMR proposal.

## 4. RESPONSIBILITY OVER SAR AND DISEMBARKATION: OLD AND NEW CONTROVERSIES

### 4.1 INNOCENT PASSAGE AND FUNDAMENTAL RIGHTS: A NON-POLICY DILEMMA

On 9 November 2022, Prime Minister Meloni [affirmed](#) that *'the ban on NGO-operated ships in Italian waters – together with the necessary time to assure rescue and aid operations for vulnerable subjects – is justified and legitimate'*. She also went on to say that *'aboard these ships, there are no shipwrecked people but migrants'*.

On 16 November 2022, during a hearing at the Italian Chamber of Deputies, Minister Piantedosi [said](#) that the Italian government had no intention of disregarding its reception duties; rather, it was seeking to block 'illegal entries' into Italy, to govern 'migration flows' and not be passively subjected to them, and to reaffirm that the selection of migrants should not be done by 'traffickers' but by the receiving state. As [reported](#) by The Guardian in November 2022, Meloni had already affirmed in 2019 that 'the illegal transport of human beings' should not be considered 'inoffensive passage'.

In article 19(2), the UN Convention on the Law of the Sea (UNCLOS) provides a list of so-called non-innocent activities that can be considered 'prejudicial to the peace, good order or security' of a state and, as such, constitute grounds to block the transit of a foreign vessel through a state's territorial waters. One of these activities is the 'loading of persons contrary to the coastal state's immigration law'. Article 19 of UNCLOS was misused by the Italian Ministry of the Interior to block the *Ocean Viking* and the other ships from entering Italian territorial waters on 25 October 2022. The ships' conduct was [considered](#) 'not in line with the spirit of European and Italian regulations on security and border control and the fight against illegal immigration'.

These arguments are legally incorrect and unfounded, however. As Gombeer and Fink (2018) have underlined, if interpreted in good faith and considering the 'humanitarian objectives of UNCLOS' which enshrines the overall primacy of the right to life, this norm does not apply to SAR ships. SAR must not be in any way or form considered by governments as 'non-innocent'<sup>18</sup>. Regardless of what the Italian government claims, the people onboard were *rescued* and not 'smuggled' by the NGOs.

The Human Rights Commissioner of the Council of Europe (CoE) has [emphasised](#) that humanitarian assistance is purposefully excluded from the UN's [Human Smuggling Protocol](#) which criminalises the facilitation of entry, transit and residence – for financial

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<sup>18</sup> K. Gombeer and M. Fink (2018), 'Non-Governmental Organisations and Search and Rescue at Sea'. *Maritime Safety and Security Law Journal*, Issue 4, pp. 12.

gain – of irregular immigrants in states parties’ territories. In the same report, the CoE’s Human Rights Commissioner also underlined that *‘the effective protection and promotion of human rights of refugees, asylum seekers and migrants, at sea and on land, should always prevail over any dilemma or uncertainty that the interaction of different legal regimes, practices and policies may cause.’*

In July 2022, the UN Special Rapporteur on the situation of human rights defenders released a [thematic report](#) focusing on human rights defenders working on the rights of refugees, migrants and asylum seekers. She openly criticised laws that enable the prosecution and criminalisation of defenders advocating for the rights of migrants and noted that a number of these cases in the EU stem from a wrongful application of the so-called [‘Facilitation Directive’](#). She recommended that states should not target, criminalise or harass human rights defenders engaged in migration and asylum issues.

SAR missions must be considered to fall within the scope of the ‘innocent activities’ protected by UNCLOS. The SAR Convention obliges states to ‘ensure that assistance be provided to any person in distress at sea (...) *regardless of the nationality or status* of such a person or the circumstances in which that person is found’ (emphasis added)<sup>19</sup>. Hence, labelling those rescued as ‘irregular migrants’ does not take away governments’ responsibilities to them.

Under these conditions, the Law of the Sea [requires](#) Member States to allow ships in distress to access a safe port or another place of safety. The fact of being ‘in distress’ makes the ship immune to any enforcement measures by coastal states and should therefore lead to port access and the ability to disembark passengers. Based on Article 18 of UNCLOS<sup>20</sup>, this is fully in line with the special protection that vessels are granted under the Law of the Sea<sup>21</sup>.

The framing of these inter-state SAR controversies through the lens of so-called hard policy dilemmas is therefore misleading. Baubock, Mourao Permoser and Ruhs have developed the concept of ‘policy dilemmas’ to define ‘hard choices between competing moral goals and conflicting courses of action’ by migration policymakers<sup>22</sup>. The

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<sup>19</sup> SAR Convention: Chapter 2.1.10.

<sup>20</sup> Article 18 UNCLOS states that boats may exceptionally stop in the territorial sea of a state party when it is necessary by *‘force majeure* or situations of distress or to provide *assistance to others’* (Emphasis added).

<sup>21</sup> E. Papastavridis (2022), ‘Sea Watch cases before the EU Court of Justice: An analysis of International Law of the Sea’, eumigrationlawblog.eu, 12 December 2022.

<sup>22</sup> These authors have developed the concept of ‘hard ethical policy dilemmas’ as involving ‘a persistent conflict of morally-worthy goals or values that cannot be easily ‘resolved’ and that is grounded in facts and embedded in political institutions. Hard ethical policy dilemmas differ thus from other types of difficult choices faced by policy actors’. See R. Baubock, J. Mourao Permoser and M. Ruhs (2022), ‘The Ethics of Migration Policy Dilemmas’, *Migration Studies*, Vol. 10, No. 3, pp. 427-441. Furthermore, the utilitarian framing of ‘migration governance’ as a moral or even ‘ethical’ value remains widely contested and finds a

underlying assumptions are first that the choices in policymakers' hands are all 'morally worthy goals', and that a migration governance rationale constitutes the prevailing approach and a legitimate moral goal. However, these assumptions prove to be misplaced when assessing the SAR controversies analysed in this paper.

First, key provisions of international maritime law take precedence over – and are therefore of a higher value than – any state-centric migration management priorities. This goes together with the need to read the Law of the Sea and understand notions such as 'safety' or 'port of safety'. This is in combination with human rights and international refugee legal standards and a set of rights which are of an absolute nature and where any watering-down or 'balancing' by states with other policy goals is not acceptable, including those related to migration governance.

This includes, for instance, the [human right to life](#) for people rescued in distress or danger at sea. The policy choice not to allow rescued people to disembark co-creates further safety risks and can result in inhuman or degrading treatment prohibited by international law, Article 3 of the European Convention of Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (CFREU).

The prohibition against torture and inhumane or degrading treatment is another core principle of international customary law and it does not accept any softening of this in light of states' migration policy interests<sup>23</sup>. Therefore, the 'moral equality' between these goals simply does not stand, which in turn makes it clear that 'migration policymakers' face no such dilemma. They instead have an unequivocal legal commitment and responsibility to abide by these prevailing human rights obligations, otherwise they will face legitimacy and liability costs<sup>24</sup>.

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questionable historical justification in international law. See for instance A. McMahon (2016), *The Role of the State in Migration Control: The Legitimacy Gap and Moves towards a Regional Model*, Brill Nijhoff: Leiden; and J. Torpey (2000), *The Invention of the Passport: Surveillance, Citizenship and the State*, Cambridge Studies in Law and Society.

<sup>23</sup> Framing as key 'policy dilemmas' a non-evidence based argument alluding to the potential complicity of NGOs with human smuggling, or the indirect role of civil society actors in the implementation of unjust policies by coastal Member States fails to consider, first, that humanitarian assistance by SAR NGOs does not qualify as human smuggling either in international or EU law; and second, the different sequences of NGOs' engagement in civil SAR in the Mediterranean since 2014, and the contentious mobilisation and confrontational stances by different civil society actors in response to the policing by Italian and EU actors since 2017. I. Mann and J. Mourao Permoser (2022), 'Floating sanctuaries: The ethics of search and rescue at sea,' *Migration Studies*, Vol. 10, No. 3, pp. 442-463; for a historical analysis of the progressive deployment of SAR NGOs in the Mediterranean refer to C. Heller (2021), (Un)Contentious Solidarity at Sea: The Shifting Politics of Nongovernmental rescue activities in the Mediterranean, in D. della Porta and E. Steinhilper (eds), *Contentious Migrant Solidarity: Shrinking Spaces and Civil Society Contestation*, Chapter 2, Routledge, pp. 19-43.

<sup>24</sup> This conclusion has been confirmed by Italian courts in a case dealing with the prosecution of NGOs active in the Mediterranean. In 2017, the Italian High Court of Cassation dealt with the issue of juxtaposing

## 4.2 COORDINATION AND ADMINISTRATIVE SANCTIONS FOR POLICING SAR NGOS

The Italian government has also officially accused NGO vessels involved in SAR activities of conducting rescue operations ‘on their own initiative’ and without following the instructions provided by national authorities responsible. This argument is not new – since 2017<sup>25</sup>, NGO vessels have been accused of not ‘coordinating’ their activities and not respecting the instructions given by the Italian MRCC to collaborate with the Libyan coastguard. The 2017 [Code of Conduct](#) introduced by the Italian government aimed to prevent NGOs from interfering with Libyan authorities.

The Code of Conduct was highly criticised, with several NGOs refusing to sign up, arguing that some of the provisions included – such as refraining from entering Libyan territorial waters or accepting the presence of a police officer onboard for evidence gathering – impacted on the humanitarian principles of neutrality and independence at the core of these organisations’ role and ethos<sup>26</sup>. As states cannot claim any sovereignty over the high seas, no jurisdictional powers, except those explicitly recognised by the UNCLOS or other relevant international treaties, can be established with legal effect on foreign ships.

In the context of SAR interventions, the [International Convention for the Safety of Life at Sea](#) (SOLAS) makes clear that no ‘other person [...] shall [...] prevent or restrict the master of the ship from taking or executing any decision which, *in the master’s professional judgement*, is necessary for the safety of life at sea’. The level of discretion left to shipmasters is considered essential for responding promptly and adequately to changing circumstances. Regarding the content of any SAR instructions given by rescue coordinating authorities, this implies that any such instructions cannot contravene the purpose of the SAR regime – to preserve human life at sea – nor violate rescued people’s fundamental rights.

The Italian government’s requirements for NGOs to ‘coordinate’ with the MRCC and comply with existing regulations and the 2023 Code of Conduct – including the obligation

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between the duty of rescue at sea and the state migration governance authority. As Minetti concludes, ‘*the relevance of this judgment lies on the fact that it established a series of legal principles, the most relevant of which is undoubtedly the one establishing the prevalence of the duty to rescue over the one to defend the national borders*’. The duty to rescue should and must therefore prevail. M. Minetti (2020), ‘The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy’, *New Journal of European Criminal Law*, Vol. 11(3), pp. 335-350, on page 348.

<sup>25</sup> P. Cuttitta (2020), Search and Rescue at Sea, Non-Governmental Organisations and the Principles of EU’s External Action, in Carrera, S., D. Curtin and A. Geddes (2020), ‘20 year anniversary of the Tampere Programme: Europeanisation Dynamics of the EU area of Freedom, Security and Justice’, European University Institute’ (EUI) Book, Robert Schuman Centre of Advanced Studies (RSCAS), Florence: Italy, pp. 123-143.

<sup>26</sup> E. Cusumano and M. Villa (2021), ‘From “Angels” to “Vice Smugglers”’: the Criminalization of Sea Rescue NGOs in Italy’. *European Journal on Criminal Policy and Research*, 27, pp. 23-40.

to share sensitive information and the possibility to apply administrative sanctions and fines – can be read as *policing* civil society actors providing humanitarian assistance at sea.

The concept of policing includes a wider set of punitive, coercive or control-oriented measures – beyond cases of formal criminal prosecutions or criminalisation – targeting the work of civil society actors and the provision of humanitarian assistance, including SAR<sup>27</sup>. Such a blurring of the boundaries between civil society and state law enforcement actors can be expected to lead to a chilling effect on the NGO community's engagement and activities at large, particularly those engaging in activism and a human rights watchdog role<sup>28</sup>. It could also lead to a generalised climate of mistrust between civil society, people in need of humanitarian assistance and state authorities.

On 26 January 2023, in a [letter](#) to the Italian Interior Minister, the CoE's Commissioner for Human Rights expressed similar concerns regarding the Code of Conduct. She expressed doubts about the compatibility of Decree no.1/2023 with Italy's obligations under human rights and international law and called for the withdrawal of the text or its modification. She voiced her concerns on the obligation for ships to reach the assigned (and far) port assigned without delay and the ban on multiple rescues, and the vague notion of 'compliance with technical requirements' which could lead to lengthy administrative proceedings.

Minister Piantadosi replied by [arguing](#) that the aim is not to hinder NGOs' activities but to '*avoid the systematic rescue of migrants in the waters off the Libyan and Tunisian coasts with the purpose of bringing them to Italy, without any form of coordination*'. He also stated that assigning ports in central and northern Italy is part of a plan to distribute third-country nationals across the country and relieve pressure on the southern regions. These justifications however fail to respond to the Commissioner's concerns.

Codes of Conduct, administrative regulations and sanctions can be expected to have strong deterrent effects or strongly discourage some NGOs from continuing to engage in legitimate humanitarian assistance and SAR activities. The above-mentioned 2020 European Commission Guidance on the implementation of the EU Facilitators Package by EU Member States did not help in this regard. It called on Member States not to criminalise SAR NGO operations – in line with the non-binding humanitarian clause envisaged in Article 1.2 of [Directive 2022/90/EC](#)<sup>29</sup> – as long as 'they comply with the

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<sup>27</sup> Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliute (2019), *Policing Humanitarianism: Policies against Migrant Smuggling and Their Impact on Civil Society in the EU*, Hart Publishing.

<sup>28</sup> On the notion of the 'shrinking civil society space' and the broad range of physical, legal, administrative and discursive forms of repression by state and non-state actors restricting civil society actors' activities see D. della Porta and E. Steinhilper (eds), *Contentious Migrant Solidarity: Shrinking Spaces and Civil Society Contestation*, Chapter 1, pp. 1-18, Routledge.

<sup>29</sup> For a critical assessment refer to V. Mitsilegas (2019), *The Normative Foundations of the Criminalisation of Human Smuggling: Exploring the Fault Lines between European and International Law*, 10 NJECL, pp. 68-85.

relevant legal framework'. This fails though to acknowledge that this 'legal framework' often fundamentally undermines NGOs' independence, freedom of association and humanitarian assistance and solidarity efforts.

A mandatory 'Code' aiming at disciplining NGOs is incompatible with several international legal instruments. These include the UN Protocol against the Smuggling of Migrants and the 1999 UN [Declaration on Human Rights Defenders](#) which draws inspiration directly from the International Covenant on Civil and Political Rights (ICCPR) and the partnership and 'whole-of-society' principles enshrined in the United Nations Global Compacts on [Refugees](#) and [Migration](#)<sup>30</sup>.

It is also contrary to Member States' obligation to uphold the freedom of association enshrined in Articles 11 and 12 of the EU Charter of Fundamental Rights. In the 2020 case C-78/18 [European Commission v. Hungary \(Transparency of Associations\)](#), the CJEU underlined the critical role played by civil society and the right to freedom of association as '*one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life*'. It upheld the independence of civil society from any undue interference or pressure by governments and highlighted the need for any restrictions to pursue legitimate goals and be 'necessary in a democratic society' so as not to create 'a generalised climate of mistrust or to stigmatise them'.

A government's decision to not allow SAR NGOs to disembark people saved at sea while under its jurisdiction also means refusing assistance from civil society actors for third-country nationals to have access to the administrative safeguards envisaged in the Schengen Borders Code (SBC) in the scope of [border surveillance activities](#), and the right to asylum envisaged in Article 18 of the EU Charter of Fundamental Rights, which is expressed in EU secondary law, in particular [Directives 2013/32](#) on asylum procedures and [2013/33](#) on reception conditions.

This is in line with the CJEU's conclusions in case C-821/19 [European Commission v Hungary](#), of 16 November 2021. It held that the Hungarian government had failed to fulfil its obligations under EU asylum law by criminalising the actions of anyone who, in connection with an organising activity, provides humanitarian assistance in making or lodging an asylum application on its territory. In the same case, the CJEU clarified that it was irrelevant whether the envisaged national legal sanction had led to actual convictions. The mere existence of the law constituted an unjustified restriction of EU rights.

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<sup>30</sup> Refer to paragraph 33 of the UN Global Compact on Refugees; and Paragraph 44 of the UN Global Compact on Migration.



### 4.3 'SELECTIVE DISEMBARKATION' AND CLOSING PORTS TO ASYLUM

Instead of an outright rejection of allowing people rescued by NGO SAR ships to disembark, the Italian government initially adopted a selective approach to allow only minors, pregnant women, and people with illnesses or disabilities to disembark. The assumption that not all people saved at sea are 'vulnerable' reflects a selective and discriminatory use of the concept of vulnerability. The dynamics of human mobility across the central Mediterranean imply that all people rescued at sea find themselves in a situation of 'structural vulnerability'. Unnecessarily prolonging waiting times between rescue and disembarking increases not only the risks of those rescued but *everyone* onboard.

SOS Méditerranée also [denounced](#) the professional medical and psychological evaluation conducted on its ships, revealing severe issues that eventually led to everyone disembarking. Accordingly, a restrictive selection based on those *deserving* to disembark is ethically dubious and raises issues of discrimination. Such a policy also runs contrary to the principle of non-discrimination, non-*refoulement* and the prohibition of collective expulsion, as ruled by the ECtHR<sup>31</sup>. An assessment of each person's circumstances is necessary to prevent arbitrariness by states' authorities and to ensure an individualised assessment of asylum and personal protection needs, as well access to justice and effective remedies by every individual<sup>32</sup>.

In June 2019, when the then-Minister of the Interior Matteo Salvini blocked the ship *Sea Watch 3* from entering Italian waters, the ECtHR [decided not to intervene](#) with an Interim Measure allowing for those onboard to disembark. The Court nonetheless insisted that Italian authorities should 'continue to provide all necessary assistance to those persons on board *Sea Watch 3* who are in a situation of vulnerability as a result of their age or state of health'. The ECtHR however [did not answer the question](#) of whether those rescued by NGO ships need to go through the painful suffering of waiting indefinitely at sea and become 'vulnerable' until a government is forced to allow them to disembark. In

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<sup>31</sup> In *Hirsi Jamaa v. Italy, Sharifi and others v. Italy and Greece, and N.D. and N.T. v. Spain*, the ECtHR reaffirmed that the prohibition of collective expulsion under Article 4 of Protocol No. 4 to the ECHR establishes procedural guarantees such as 'the duty to provide for an individual, fair and effective refugee-status determination and assessment procedure'. See also Court of Justice of the European Union, Judgement of the Court (Fifth Chamber) Case C-166/13, [Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis](#), 5 November 2014.; Court of Justice of the European Union, Judgement of the Court (Fifth Chamber) Case C-249/13, [Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques](#).

<sup>32</sup> As argued by Carrera, 'This individualised approach aims at securing access to essential protections such as legal representation, interpretation, appropriate medical and psychological treatment or care, best interests of the child assessments, etc.' See S. Carrera (2020), *The ECtHR Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?*, EUI Working Paper RSCAS 2020/21, Florence.



the most recent cases under consideration, however, the two ships had already entered Italian waters and docked in Catania. Therefore, it is clear that the ECHR is fully applicable.

#### 4.4 EU COASTAL STATES' RESPONSIBILITIES

The Italian government suggested that, under the Law of the Sea, Italy had no direct responsibility for allowing rescued people to disembark as they had been rescued either in the Maltese or Libyan SRR regions. While requiring cooperation and coordination among states, it is true that *a priori* relevant international legal instruments, including the UNCLOS, SOLAS and SAR Convention, do not include provisions explicitly requiring a coastal state to accept rescued third-country nationals to disembark on their territory.

Amendments to the SOLAS and SAR Conventions introduced in 2004 specify that the state responsible for the SAR region where assistance has been rendered is primarily responsible for '*ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety*'. The MRCC of the relevant SAR state is also required to initiate the process of identifying the most appropriate place for persons in distress at sea to disembark<sup>33</sup>.

[Non-binding guidelines](#) adopted by the Maritime Safety Committee of the IMO in 2004 clarify that the above-mentioned amendments should establish the responsibility to provide a 'place of safety', or to ensure that a place of safety is provided, falling on the Contracting Government or Party responsible for the SAR region where the survivors were recovered. While the interpretation of the SOLAS and SAR Conventions based on the IMO Guidelines would substantiate the existence of a '[residual obligation](#)' to allow for disembarking on their territory, coastal states in the Mediterranean continue to flout this.

Regarding the notion of a 'place of safety', the already-mentioned 2004 IMO Guidelines include the requirements for cooperating states '*to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea*'. Equally, UNHCR has [underlined](#) that the place of safety concept must correspond with a place where rescued persons are not at any risk of persecution and where asylum seekers have access to fair and efficient asylum procedures and reception conditions. UNHCR has also stated that in the specific case of where an MRCC coordinates a rescue operation that involves private or public vessels flagged to another state, the

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<sup>33</sup> See IMO (Maritime Safety Committee), amendments to both the International Convention on Maritime Search and Rescue (SAR) and the International Convention for the Safety of Life at Sea (SOLAS) (adopted May 2004, entered into force 1 July 2006). Resolutions MSC.155 (78) and MSC.153 (78), 20 May 2004.

coordinating MRRC should seek as far as possible to promote a course of action that is most consistent with the preservation of human life at sea and avoid rescued persons being put at risk of serious human rights violations.

Along the same lines, the United Nations Human Rights Committee made this aspect clear in its [Communication](#) on *A.S., D.I., O.I., and G.D. against Italy* (2021). The case concerned the death of around 200 people following a shipwreck within Malta's SRR in 2013. Both Italy and Malta's respective MRCC were aware of the vessel's critical condition but failed to act to prevent the deaths of those onboard. The Committee found that – despite Malta being responsible for the rescue operation – Italy still had an obligation to intervene due to the existing 'special relationship of dependency'. This relationship was based on the initial contact made by the vessel in distress, the proximity of an Italian naval ship to the vessel in distress and the ongoing involvement of the Italian authorities in the rescue operation. The Committee therefore considered that the individuals on the vessel in distress were directly affected by the decisions made by the Italian authorities and as such, they were subject to Italy's jurisdiction.

This implies that, when it comes to respecting the right to life at sea and the absolute prohibition of *refoulement*, the specific SRR where people are rescued is of secondary relevance when determining responsibility. A state that is found to exercise 'effective control' over people in distress at sea cannot consider itself free from obligations. Furthermore, ensuring the effective protection of fundamental rights in the context of SAR operations lends support to the conclusion that EU coastal states involved in the coordination of a SAR episode may have an *obligation of result* to allow third country nationals rescued at sea to disembark 'if no other option ensuring the safety of the rescued people and the swift conclusion of the disembarkation operation exists'.

[Regulation No. 656/2014](#) regarding joint missions carried out by the European Border and Coast Guard Agency (Frontex) states in Article 10 that in the case of a SAR situation coordinated by Frontex, and when it is not possible to arrange for the participating unit to be released of its obligation to disembark, the participating unit 'shall be authorised to disembark the rescued persons in the host Member State'.

The Regulation also provides for the concept of a 'place of safety' which includes fundamental rights protection as a key feature. While Frontex was not involved in the specific cases analysed in this In-Depth Analysis paper, the above provisions nevertheless provide a key EU legal benchmark that should inform how Member States operate in the context of SAR operations.

## 4.5 FLAG STATES' AND THE EU'S RESPONSIBILITIES

[According](#) to Minister Piantedosi, NGO ships should be considered as 'temporary safe spaces', and flag states should assume full responsibility for rescued third-country nationals. He appears to be suggesting that ship captains have the authority to receive asylum applications on behalf of the flag state.

If this were the case, flag states would be responsible for examining asylum applications under the EU Dublin Regulation. This is however an instrumental reading of the Dublin Regulation. Despite being under the flag state's jurisdiction, a ship does not comprise the formal territory of a state and the crew of a private vessel cannot act as public officials. While the European Commission has strengthened the role of flag states regarding the monitoring of requirements for registering SAR vessels – as we have seen in *Section 3* – the Italian government's position on flag states' responsibility contradicts both established international and European standards<sup>34</sup>.

Soon after Italian authorities adopted this new position, UNHCR issued [legal considerations](#) that clarify states' roles and responsibilities regarding SAR. They stress that, in ordinary circumstances, flag states of assisting vessels, especially commercial or other private vessels, *'could not ordinarily be said to come under a clear legal obligation [...] to assume responsibility in the first instance for receiving rescued persons, admitting them to an asylum procedure on their territory, and affording international protection'*. UNHCR further states that, as a general rule, the state where the rescued people disembark is responsible for providing access to international protection, adding that *'claims to international protection by rescued persons are best assessed in fair and efficient procedures on dry land, once disembarkation in a safe place has been secured and the immediate needs of rescued people, including those with specific vulnerabilities, have been addressed'*.

It is also unclear how the transfer of rescued people to the flag state would take place in the scenario proposed by Minister Piantedosi. The *Ocean Viking* and *Geo Barents* were flying Norwegian flags, while the *Humanity 1* and *Rise Above* were flying German flags. Due to the physical distance between the central Mediterranean area and these countries, it would be unfeasible to safely bring the rescued people to Norway or Germany and could lead to flagrant human rights violations.

The Italian government's arguments are based on a wrong reading of the existing responsibility-sharing mechanisms currently in place between Member States. The idea

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<sup>34</sup> C. Favilli (2022) ['La stagione dei porti semichiusi: ammissione selettiva, respingimenti collettivi e responsabilità dello Stato di bandiera'](#), *Questione Giustizia*

that being rescued by a private SAR NGO ship could be considered as an 'entry' or 'irregular crossing of an EU external border' for the purposes of assessing the asylum application under the Dublin system is flawed. The act of rescuing persons at sea by private vessels and bringing them aboard does not qualify as having irregularly entered or crossed a border. This reading finds no place in any of the relevant provisions dealing with the irregular entry criterion under Article 13 of the Dublin III Regulation.

In a recent judgment, the CJEU made it clear that NGO ships engaged in SAR activities cannot be considered as activities carried out by the sovereign authorities of the flag state. In its judgment in cases [C-14/21](#) and [C-15/21](#) *Sea Watch eV*, issued on August 2022, the CJEU addressed the legality of onboard inspections and the detention orders issued by the Italian authorities to two NGO ships *Sea Watch 3* and *4*, both flying a German flag, in the summer of 2020. Italian harbour authorities justified the use of coercive measures on the grounds that these two ships were not officially certified for assisting migrants at sea and that there were safety concerns, including their taking on board a higher number of rescued persons than they had the capacity for.

The CJEU held that EU Member States' actions of control over private humanitarian assistance ships fall within the scope of EU law, and more precisely the [EU Directive 2009/16](#) on port state control. The Court confirmed that EU law must be read in conformity with relevant provisions, in particular the UNCLOS and the SOLAS, which is binding upon all Member States. This, the Court concluded, reflects Directive 2009/16's goal of increasing Member States' compliance with SOLAS.

The CJEU found that SAR NGO ships do not fall under the notion of 'state or government vessels' under Directive 2009/16. Italian authorities were therefore not entitled to require the NGOs to submit certificates other than those issued by the flag state (i.e. Germany), or to 'control' (inspect and apply corrective measures) the vessels on the mere basis that they had engaged in SAR while not certified or had exceeded the number of persons onboard, therefore causing safety concerns.

While the coastal state has a large degree of discretion in determining the grounds to inspect ships under its jurisdiction, the CJEU held that the burden of proof shifts to the state to substantiate and justify, both in law and in fact, the necessity, proportionality and on the basis of evidence for any restrictive measure to be enforced. Finally, in light of the EU's general principle of sincere cooperation, Member States must consult and assist each other and cooperate sincerely to undertake their obligations under EU Directive 2009/16 and the international Law of the Sea. The Italian government's policy covering disembarking and the policing of SAR NGOs, and the diplomatic row with the French authorities, show a resounding failure to uphold the EU's objectives and commitments under the international Law of the Sea.

Furthermore, on 31 December 2023, *Agence Europe* [reported](#) that, when speaking about the 2022 Italian Code of Conduct, the European Commission confirmed knowledge about ‘the concerns expressed by NGOs’ on not being able to carry out SAR operations due to the Code’s obligations. The Commission insisted that it is ‘not competent’ to coordinate these activities.

This position is surprising. As *Section 4.2* of this paper has shown, Italian authorities’ policy objectives are officially presented as a migration governance strategy falling squarely within the scope of both EU borders and asylum law. While it could be argued that the administrative nature of the Code of Conduct’s sanctions have not been formally framed as ‘human smuggling’ and may not qualify as criminal law penalties under the scope of the 2002 Facilitators Package, the equivalent effects of the envisaged penalties for NGOs facilitating entry to Italian ports can be hardly ignored or denied<sup>35</sup>. Furthermore, the Italian Code of Conduct’s obligation for NGOs to collect data from rescued people about their intention to apply for asylum runs contrary to Article 4 of the [2013/32 EU Asylum Procedures Directive](#), which grants this task to state authorities.

Moreover, as the CJEU Case C-14/21 and C-15/21 *Sea Watch eV* ruling demonstrates, the European Commission is certainly legally competent in enforcing Directive 2009/16 on port state control. The set of restrictive measures outlined in the Code of Conduct not only directly contradict the Law of the Sea, which this Directive seeks to safeguard, they also fail to pass the necessity and proportionality test demanded by the CJEU in this judgment. The Commission is also fully competent to monitor and enforce EU Treaty principles, including within the scope of the Annual Rule of Law Report. These principles cover the freedom of association and the civic society space as key components of ‘democracy’ in the EU Treaties<sup>36</sup> and [European governance more broadly](#).

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<sup>35</sup> Article 3.1 of the Framework Decision – dealing with sanctions of legal persons – envisages Member States using “effective, proportionate and dissuasive sanctions” including both criminal or non-criminal fines.

<sup>36</sup> Refer to the [European Commission, Staff Working Document, 2022 Rule of Law Report Country Chapter on the rule of law situation in Italy, SWD\(2022\) 512 final, 13.7.2022](#), which acknowledged under the heading ‘Other Institutional Issues related to Checks and Balances’ on page 25 that ‘The civic space remains narrowed, in particular for civil society organisations dealing with migrants... Stakeholders reported that forms of intimidation against civil society organisations (CSOs) dealing with migrants’ rights persist. No developments have been reported as regards the complexity of the registration process for NGOs and delays in the implementation of the law harmonising rules on the non-profit sector’. Yet it is remarkable that the Country Report did not include any specific recommendation to the Italian government on how to address this crucial issue and stop policing civil society actors. Refer also to the EU Fundamental Rights Agency (FRA) country research on [‘Legal environment and space of civil society organisations in supporting fundamental rights and the rule of law’](#) on Italy.

## 5. CONCLUSIONS: TOWARDS A JUSTICE-CENTRED APPROACH TO SAR

The Italian government's recent policies against NGOs conducting SAR civilian missions in the central Mediterranean, and the 2022 diplomatic row with the French government, have once more revealed unresolved controversies on evading responsibility, directly contradicting Member States' obligations.

These cases first show an increasing degree of policing NGOs and civil society actors engaging in SAR missions at sea by the Italian authorities. The Italian government's practices of no or selective disembarking in Italian ports, and the recently adopted Code of Conduct, constitute disproportionate sanctions and unjustified interferences that seriously affect human rights defenders' right of freedom of association and international safeguards. They also run counter to the international obligation not to criminalise humanitarian assistance provided by NGOs to those seeking asylum and safety in the EU.

The European Commission should effectively and timely enforce existing EU legal standards against the 2023 Italian Code of Conduct, such as those related to port state control and the unauthorised entry by SAR NGO ships into Italian ports. The Commission should ask the Italian authorities to withdraw the Code of Conduct and publicly condemn *'any form of harassment, smearing, stigmatization, criminalisation and scapegoating of civil society actors'* providing assistance to asylum seekers and immigrants and those involved in SAR<sup>37</sup>.

The Commission's EU Rule of Law Report should feature a specific thematic section dealing with 'the shrinking space for civil society', which should include specific follow-up enforcement actions – including infringement proceedings – and recommendations to counter policies that allow for the policing of civil society actors and deliberately limit the civic space. This should be coupled with the assessments and follow-up actions carried out under the [rule of law conditionality applying to EU funds](#). The EU should also adopt 'Human Rights Defenders Guidelines' aimed at safeguarding UN norms within the scope of EU internal policies<sup>38</sup>.

This paper has shown that all the arguments used by the Italian authorities to evade or escape from their responsibilities are flawed and show an instrumental misuse of existing legal standards under international and European law. Contrary to what has been argued

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<sup>37</sup> Refer to paragraph 3 of European Parliament [resolution on the shrinking space for civil society in Europe](#) (2021/2103(INI)), 8 March 2022.

<sup>38</sup> As previously recommended by PICUM et al. (2020), Civil society inputs to the forthcoming European Commission guidelines on preventing the criminalization of human rights defenders, February 2020; See also L. Vosyliute and C. Luk (2020), [Protecting Civil Society Space: Strengthening Freedom of Association, Assembly and Expression and the Right to Defend Rights in the EU](#), European Parliament Study, Brussels, pp. 89-92. This could be inspired by the European External Action Service (EEAS), ['Ensuring Protection - European Union Guidelines on Human Rights Defenders'](#), 2004, exclusively applied to EU external relations policies.

by the Italian government, SAR NGOs fall within the notion of ‘innocent activities’ under Article 19 of the UNCLOS. The migration status of people rescued at sea is irrelevant when determining access to safety and dignity. Furthermore, several of the human rights at stake in the context of SAR operations – such as the right to life, the prohibition of inhumane or degrading treatment and the principle of non-*refoulement* – are of an absolute nature and accept no exception. A migration governance approach to SAR is therefore not only unlawful in this context, it also lacks any meaningful legitimacy.

The International Law of the Sea, international human rights and refugee law, as well as EU legal standards, apply in the context of people who are rescued at sea being able to disembark. An *integrated* reading of these legal regimes supports the conclusion that coastal states must allow rescued people to disembark and grant them access to asylum procedures. The Search and Rescue Region (SRR) where people are taken onboard does not determine the state responsible for disembarkation. The Law of the Sea establishes a duty for all states to cooperate and coordinate in good faith to facilitate disembarking. In the cases examined here, the SAR ships were all in Italian territorial waters, making Italy’s jurisdiction over the people onboard clear.

Crucially, the policy of ‘selective disembarkation’ is equally opposed to existing rules. In a rescue context, a distinction between ‘vulnerable’ and ‘non-vulnerable’ individuals is legally unsound and practically unrealistic. This approach is underpinned by a migration control rationale, which undermines equal access to safety and the right to asylum enshrined in the EU Charter of Fundamental Rights. The Italian government’s policing of NGOs, along with its flagrant disregard of international and European legal standards, constitutes a violation of the EU’s principle of sincere and loyal cooperation, showcasing the Italian authorities’ bad faith regarding their obligations. This in turn leads to the emergence of mistrust regarding their role in – and contribution to – the functioning of EU asylum policies.

The policies adopted by the Italian authorities should therefore not be read through the lens of a migration governance approach. Instead, a justice-centred approach should be prioritised as all these policies run counter to the democratic rule of law and the EU’s fundamental principles. This is a clear instance where these principles – chiefly [the rule of law](#) – function as ‘sensors’ for the exclusionary practices exercised in their name. The European institutions should therefore focus all their efforts on operationalising and effectively enforcing this ‘recapturing capacity of the rule of law<sup>39</sup>’ against national governments which are intentionally and systematically putting the EU’s founding principles and mutual trust in jeopardy.

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<sup>39</sup> J. Habermas (2001), *The Postnational Constellation: Political Essay*, MIT Press: Cambridge, p. 120.



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