

Not a Safe Place?

Vera Magali Keller

2020-04-14T13:58:00

In an unprecedented move, the Italian government has [declared Italy's ports "unsafe"](#) due to the COVID-19-pandemic. It did so by issuing an [executive decree](#) late Tuesday last week, seemingly in response to the [rescue of 150 shipwrecked by the Sea-Eye's Alan Kurdi](#). This is not the first time that the Italian government has [used decrees to close its borders](#) for sea-rescue ships. However, given the extraordinary circumstances of this case in the midst of the on-going Corona-crisis and the novel argument made by the Italian government, the decision warrants closer examination.

The Situation of the 'Alan Kurdi'

In response to the Coronavirus pandemic, sea-rescue operations in the Mediterranean [have come to a halt](#), leaving the migrant route in a proverbial [blackbox](#), uncertain of the number of [people dying en route to Europe](#). On 30 March 2020, the Alan Kurdi, operated by the German NGO Sea-Eye, [embarked on a mission to the Libyan Search and Rescue Area](#) (SAR Area), to end this status-quo. On 6 April 2020, shortly after reaching the SAR Area, the Alan Kurdi rescued 68 and 82 people respectively [in two rescue operations](#). After an unsuccessful attempt to transfer some of the rescuees to another ship, the Alan Kurdi made its way to the next safe port: Lampedusa.

On 7 April 2020, the Italian government issued an executive decree declaring the entirety of Italy an unsafe port. The decree states that for the entire duration of the national health emergency, resulting from the spread of the Coronavirus, Italian ports do not ensure the necessary requirements for the classification and definition of 'Place of Safety' for rescues carried out by foreign-flagged vessels outside the Italian SAR area. On 10 April 2020, the Italian coast guard [evacuated one person](#) from the Alan Kurdi in immediate medical distress and provided basic food supplies to the people remaining onboard. The Italian Ministry of Transport [decided to put the migrants on another ship](#) for quarantine on Sunday, however, this decision is [yet to be implemented](#). The ship currently remains in international waters off Sicily.

On the Right to Disembark and Places of Safety

The duty to deliver assistance to those in peril at sea is a long-standing [principle of international maritime law](#). The concepts of 'Place of Safety' and the 'Right to Disembark', however, were only introduced in the legal framework governing maritime search and rescue in the aftermath of the [Tampa affair](#) in 2001 by the adoption of [amendments](#) to the International Convention on Maritime Search and Rescue ([SAR Convention](#)) and the International Convention for the Safety of Life at Sea ([SOLAS Convention](#)).

The 'Right to Disembark' states that the duty to rescue at sea is not exhausted by the mere act of rescue but involves the accessory and consequent obligation to disembark them in a 'Safe Place' (see 3.1.9. of the [SAR Convention Annex](#)). This Right has recently been [recognised by the Italian Court of Cassation](#) (see also [here](#)).

For its definition of a 'Place of Safety', the Italian Court explicitly cited paras. 612 – 6.15 of the [Guidelines on the Treatment of Persons Rescued at Sea](#) developed by the International Maritime Organization (IMO). These provide that a 'Place of Safety' is *a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.*

How to Ascertain Safety

Determining whether a particular location is a 'Place of Safety' must therefore necessarily account for the particular factual circumstances of the case. These circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs and availability of transportation or other rescue units. Each case is unique, and selection of a 'Place of Safety' may need to account for a variety of important factors ([IMO Guidelines para. 15](#)).

According to the Italian Court of Cassation, it is the foremost duty of the SAR Authority in coordination with the Ministry of Home Affairs to provide a safe place to any vessel in need ([p. 9 of cited judgment](#)). However, lacking any such action by the SAR Authority, it is the duty of the shipmaster to identify, in autonomy and according to his or her own evaluation of the context, the 'Place of Safety' and disembark the shipwrecked there ([p. 10 of cited judgment](#)). Hence, shipmasters may take responsibility in cases where too much time has passed waiting for a political solution.

For this assessment, a distinction must be made for the *ex-ante* determination a shipmaster and the *ex-post* determination a court may make. An *ex-post* determination, like any determination in international law, must be done objectively, considering the facts of the case, and is not subject to the choice of any party. A State cannot deny its own security in defiance of the factual circumstances, in order to determine whether a place is safe, to avoid obligations under international law.

The Current Situation in Italy

To assess whether Italian Ports can still be considered as 'Places of Safety', one has to assess the situation on board the assisting ship, the medical needs of the shipwrecked and the on-scene conditions on land.

The condition on the ground is different than it was in June 2019, when the [Sea-Watch 3 was stranded](#) off the Italian coast. The coronavirus pandemic [piled extraordinary pressure on Italy's health system](#) and Italy now does not only want to show a clear edge in migration policy, it also wants to prevent infection routes via the

landing of ships. More than that, the impulse to not strain the already battered health system with an influx of cases is a valid argument.

Nevertheless, as developed before, the medical situation on the ground is not the only aspect to consider in assessing whether a place can be considered safe. The obligation for sea-rescue also applies in times of crises and the total blockade of ships must remain *ultima ratio* in light of Italy's international legal obligations. It may only be considered if other possibilities are excluded and alternatives are presented. In this context, it is important to note that other sea rescue NGOs like [Sea-Watch](#), [Mediterranea](#), [Open Arms](#) and [MSF](#) have all pledged to [assist the Alan Kurdi in the event of disembarkation](#) with supplies and medical aid.

As for the situation on board the Alan Kurdi: it is especially critical, since with 150 rescued people on board, the vessel carries [more people](#) than it has ever carried before and is at the limit of its capacity – a testament to the [ongoing need for search and rescue operations](#) in the Libyan SAR Area. Food, medical supplies and fuel on board are limited, meaning the Alan Kurdi can only provide shelter to so many people for a few days.

The Effect of Unilateral Determinations by a State

In any event, as the security situation on the ground must be determined objectively, the executive decree issued by the Italian government has no bearing on the fact that Italian ports are 'Places of Safety'. In the present context it has no further significance than the expression of a legal assessment by the Italian Government.

As a ministerial decree, it is enacted by executive powers according to their own administrative competences. In this case, the decree is enacted by the Transport minister in cooperation with the Ministry of Interior, Ministry of Health Care and the Ministry for Foreign Affairs. Being of an executive nature, the decree remains an act that is not subject to the usual checks of other political and constitutional actors, as it goes through no parliamentary legislative procedure and only requires a notification to the President of the Council of Ministers of its adoption. Furthermore, unlike legislative and ordinary decrees, it does not need the signature of the President of the Republic. This act is not only formal because the President of the Republic can exercise pressure on the government for changes of the decree compatible with the constitution. Therefore, a disturbing discrepancy between the instrument chosen to act and its impact emerges with striking evidence, as one of the side effects of emergency-based decision-making. Italy's obligation to respect overriding principles of international law cannot be suspended by what is usually classified as a second-level norm in the hierarchy of sources (below constitutional law, international treaties and ordinary law), nor can it deprive the people onboard of rights that they are entitled to.

The Hypocrisy of the Decree

By declaring itself an “Unsafe Place”, Italy tried to deprive its ports of the connotation of “Safe Places” that is typical of all EU ports, equating itself with countries at war or countries that are regularly criticized for their recurrent and massive human rights violations. This assessment seems especially questionable when one recalls that recently there have been increasing calls within the EU [to classify Libya as a safe place](#). Libya, a country that has been [repeatedly denounced by the United Nations](#) for its treatment of migrants, where independent NGOs report on [rape, slavery and torture of migrants](#) and that refugees often describe as “[hell on earth](#)”. If Italy were to be allowed to discharge its obligations under international law by a simple executive decree, it would be up to each – only indirectly democratically elected – executive officer to thwart the application of international treaties.

In its decree, the Italian government justifies its decision to prevent the Alan Kurdi from entering Italian ports with the fact that the rescue was carried out by foreign-flagged units that have conducted operations in the absence of coordination by the Maritime Rescue Coordination Centre Rome ([MRCC](#)). This argument does not pass muster. Sea-Eye asked for coordination by the MRCC Rome but it refused to help, ignoring its duty to coordinate the disembarkation of the vessel under international law, and referring the Alan Kurdi to its flag state.

Lastly, the Italian government used the legal framework of the ministerial decree and framed it (as it had to, given the nature of the instrument) in general and abstract terms. Nonetheless, it actually is directed *ad navem* and fails to hide its clear intent to specifically prevent the Alan Kurdi from disembarking, since it was only adopted when the news of the Alan Kurdi moving toward Lampedusa had reached Rome.

The EU as a ‘Place of Safety’

Could the situation that the [Sea-Watch 3 faced](#) repeat itself? Yes. If Italy continues to block the Alan Kurdi from entering its ports and Germany does not perform its duties as flag state to assist the people aboard, [international law allows for the shipmaster](#) of the Alan Kurdi to enter an Italian port.

Yet, it is important to note that this is not the sole responsibility of Italy. Instead, the EU needs to live up to its aim of solidarity. Furthermore, the flag State Germany should fulfil its obligation to assist in the reception of the rescuees. The German Federal Government lately proved that it is able to provide quick and flexible solutions, when it [exempted harvest workers](#) from Eastern Europe from immigration restrictions. The EU must not leave Italy and other Mediterranean countries alone to fend for themselves and rather advocate alternative solutions for further sea-rescue. Making sure that every Member State is, and remains, a ‘Place of Safety’ is a joint EU obligation – one that cannot and must not rest on Italy’s shoulders alone. Instead, the EU must urgently step up common efforts in receiving refugees from search and rescue vessels – in order to become the haven for human rights it claims to be.

