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Non-Governmental Organisations and Search and Rescue at Sea

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Abstract

Non-governmental organisations (NGOs) have become increasingly involved in search and rescue in the Mediterranean Sea in order to fill a gap in humanitarian protection. This article examines the legal framework of their search and rescue activities. The international law of the sea sets out an obligation to render assistance to persons in distress at sea. However, recent developments reveal that the relationship between NGO vessels rendering assistance and the affected coastal states is highly uncertain. This article addresses two particular questions: First, can NGOs navigate anywhere in order to render assistance at sea or can (coastal) states limit the rights of navigation of NGOs? Second, can coastal states give NGOs binding instructions concerning whether and how to conduct search and rescue and where to disembark the persons rescued? The article concludes that within their territorial sea, coastal states enjoy the power to determine, in a legally binding manner, how search and rescue operations are carried out, but that they may not deny NGOs access to distress scenes. Beyond their territorial sea, coastal states are neither entitled to issue binding instructions to foreign vessels nor limit their navigational freedom. In any case, all instructions have to comply with the substantive restrictions set out within the Search and Rescue regime and international human rights law.

Keywords: NGOs, search and rescue, UNCLOS, SAR Convention, human rights, boat migrants

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1. Introduction

Over the last two decades, the death toll of migrants attempting to reach Europe via the Mediterranean Sea has increased consistently.¹ In response, NGOs started to carry out privately funded search and rescue operations.² The first one of these was launched in the summer of 2014 by the *Migrant Offshore Aid Station* (MOAS), followed in 2015 by *Sea-Watch* and *Médecins Sans Frontières* (MSF). Whilst more NGOs became active in 2016, there was a substantial decline in 2017 due to pressure by and confrontations with public authorities.³ Some NGOs conduct fully-fledged search and rescue

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1 For continuously updated numbers see in particular the ‘Missing Migrants Project’, launched by IOM <<http://missing-migrants.iom.int/>> accessed 27 January 2018.

2 Daniela Irrera, ‘Migrants, the EU and NGOs: The ‘Practice’ of Non-Governmental SAR Operations’ (2016) 16(3) Romanian Journal of European Affairs 20, 28-30.

3 Forensic Oceanography, ‘Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean’ (May 2018) 58-62.



operations: they patrol areas likely to be the origin of distress calls in order to spot vessels in distress early on. They take the persons in distress on board, provide first aid, and disembark the rescued individuals at a place of safety. Other NGOs focus on first response to emergencies by providing life vests, drinking water, and urgent medical treatment. Often, these smaller NGO vessels do not take migrants on board but wait for larger ships to transport them to dry land.⁴ According to data of the Italian Coast Guard, in 2016 NGOs rescued 46,795 migrants out of the total of 178,415 persons rescued under the coordination of the Italian Maritime Rescue Coordination Center (MRCC).⁵

The relationship between NGO vessels rendering assistance and the relevant coastal states is highly uncertain. Two questions in particular have given rise to controversy: First, it is unclear whether NGOs are free to navigate the seas, including the territorial sea of coastal states, in order to search for and rescue migrant vessels in distress. Coastal states seem to assume a possibility on their part to pose certain limits on NGOs in this respect. The Libyan Coast Guard, for example, on 26 September 2017, attempted – on the high seas – to push back the NGO vessel *Lifeline*, flying the Dutch flag, further away from the Libyan coast and transfer the migrants rescued by the *Lifeline* to a Coast Guard vessel.⁶ In a similar vein, the Code of Conduct for NGOs that carry out search and rescue operations in the Mediterranean drawn up by Italy in summer 2017 requires NGOs to refrain from entering Libyan territorial waters, except in situations of grave and imminent danger.⁷ Second, it is uncertain whether NGOs have to follow instructions from coastal states on whether and how to conduct search and rescue operations and where to disembark the persons rescued. On several occasions, NGOs were at or near to a distress scene, but given instructions by MRCC Rome to leave their position or to refrain from assisting due to the expected arrival of the Libyan Coast Guard. This occurred, for example, on 23 and 24 November 2017 to a vessel of SOS Méditerranée, the *Aquarius*.⁸ Many coastal states seem to assume that private vessels have to abide by instructions of the relevant coastal authorities and have adopted legislation explicitly setting out such obligations.⁹ Also the Italian Code of Conduct for

4 Eugenio Cusumano, 'Emptying the sea with a spoon? Non-governmental providers of migrants search and rescue in the Mediterranean' (2017) 75 *Marine Policy* 91, 92-94.

5 Italian Coast Guard, 'Search and Rescue (SAR) activity in the central Mediterranean Sea from January 1st to December 31st 2016' <www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2016/ANNUALE%20ENG.pdf> accessed 27 January 2018.

6 Steve Scherer, 'Rescue ship says Libyan coast guard shot at and boarded it, seeking migrants' *Reuters* (Rome, 26 September 2017) <www.reuters.com/article/us-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUSKCN1C12I4> accessed 27 January 2018.

7 On the Code of Conduct, see Section 2.2.1 below.

8 SOS-Méditerranée, 'Woman Found Dead at Bottom of Rubber Boat After Rescue Operation in Central Mediterranean' (24 November 2017) <<http://sosmediterranee.org/woman-found-dead-at-bottom-of-rubber-boat-after-rescue-operation-in-central-mediterranean/?lang=en>> accessed 27 January 2018; SOS-Méditerranée, 'Dramatic Week in the Mediterranean: More Than 800 People Rescued by SOS Méditerranée, Whilst Crew Witnesses Interceptions at Sea by the Libyan Coast Guard' (26 November 2017) <<http://sosmediterranee.org/dramatic-week-in-the-mediterranean-more-than-800-people-rescued-by-sos-mediterranee-whilst-crew-witnesses-interceptions-at-sea-by-the-libyan-coast-guard/?lang=en>> accessed 27 January 2018.

9 See Section 4.1 below.



NGOs stipulates that they have to follow instructions of the competent national authority.¹⁰

Against this background, this article analyses two specific legal questions: The first concerns navigation under the law of the sea: Can NGOs navigate anywhere in order to render assistance at sea or can (coastal) states limit navigation? This is addressed in Section 3. The second question concerns the relationship between NGO vessels and the state responsible for the coordination of a maritime Search and Rescue Region (SRR): Can a competent national authority give binding instructions to NGOs when it comes to operational aspects and the venue for disembarkation? This is discussed in Section 4. Before addressing these two questions, Section 2 maps the basic legal regime concerning search and rescue (in the following 'SAR regime') in the Mediterranean (Section 2.1) and the practices of Italy and Libya (Section 2.2).

2. The SAR regime in the Mediterranean

2.1 The legal framework for search and rescue at sea

Two prescriptions constitute the building blocks of the legal framework on search and rescue at sea. First, Article 98(1) of the United Nations Convention on the Law of the Sea (UNCLOS) obliges states to require the master of every ship that flies their flag to render assistance to any person found at sea in danger of being lost.¹¹ The duty to assist is widely considered to reflect customary international law and therefore also binds states that have not ratified the treaties in question.¹²

Second, Article 98(2) UNCLOS obliges coastal states to organise search and rescue services and capacities (in the following 'SAR services') and to enter into regional arrangements where necessary. In this context, more precise legal obligations are set out in the 1979 International Convention on Maritime Search and Rescue (SAR Convention). The aim of the SAR Convention is to have every maritime space covered by search and rescue services. To this end the oceans and seas are divided into SRRs by agreement among the SAR Convention parties. These agreements are to be sent to the International Maritime Organization (IMO) which then publishes them as SAR.6 Circulars.

Under the SAR Convention, each coastal state is responsible for establishing a SAR service with-

¹⁰ On the Code of Conduct, see Section 2.2.1 below.

¹¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 98(1); similarly see International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 118 (SAR Convention) as amended in 1998 and 2004, section 2.1.1.; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 277 (SOLAS Convention) Chapter V, regulation 33; International Convention On Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165, art 10.

¹² ILC, 'Report of the International Law Commission on the Work of its Eighth Session' (23 April – 4 July 1956) UN Doc. A/3159, 281; see also Aldo Chircop, 'The Customary Law of Refuge for Ships in Distress' in Aldo Chircop and Olof Linden (eds), *Places of Refuge for Ships* (Martinus Nijhoff 2006) 163-229; Guy Goodwin-Gill and Jane McAdam, *The refugee in international law* (OUP 2007) 278; Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 134.



in their SRR. Aside from basic elements like search and rescue resources (e.g. rescue vessels and equipment) and communication facilities in order to receive distress calls and coordinate search and rescue operations, a SAR service must have a legal framework which clarifies which authorities are responsible for search and rescue and which rules apply to their organisation and operations.¹³ The IMO has developed manuals, guidelines, and principles on search and rescue, the most important of which are the 2016 IAMSAR Manuals and the 2004 Guidelines on the Treatment of Persons Rescued at Sea.¹⁴ While these instruments are as such not legally binding, states have to, as far as practicable, follow these minimum standards and guidelines in their implementation of the SAR Convention.¹⁵

2.2 State practice

2.2.1 Italy

Italy is party to both UNCLOS and the SAR Convention.¹⁶ It has established a SAR zone and an MRCC.¹⁷ Against the background of the increased presence of NGOs in the Mediterranean and the legal questions associated with it, Italy proposed drafting a Code of Conduct with the explicit aim to ensure that NGO vessels ‘operate within, and abide by, a set of clear rules’. With the backing of the EU Commission, a ‘Code of Conduct for NGOs undertaking activities in migrants’ rescue operations at sea’ was adopted in summer 2017.¹⁸

The Code of Conduct envisages that NGOs undertake a number of commitments, which are presented in Table 1 (below), based on two categorisations. On the one hand, the commitments are categorised according to the types of commitments they contain (Table 1, horizontal axis). They include: (1) commitments to abstain from certain conduct, (2) commitments to actively cooperate with state, sub-state, or other public authorities, and (3) information duties. On the other hand, the commitments are categorised according to the types of concern they may give rise to (Table 1, vertical axis).

¹³ SAR Convention, section 2.1.

¹⁴ The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR) is developed by the ICAO and the IMO and addresses the organisation, management and operation of the SAR system; IMO Resolution MSC.167(78) Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004) MSC 78/26/add.2.

¹⁵ SAR Convention, section 2.1.2 *in fine*.

¹⁶ Italy ratified UNCLOS on 13 January 1995 (entered into force for Italy on 12 February 1995) and acceded to the SAR Convention on 2 June 1989 (entered into force for Italy on 2 July 1989).

¹⁷ IMO Global SAR Plan, see <<https://gisis.imo.org>> accessed 27 January 2018; Italian SAR Decree (*Decreto del Presidente della Repubblica del 28 settembre 1994, n. 622*).

¹⁸ Code of Conduct for NGOs undertaking activities in migrants’ rescue operations at sea (no author, undated); for the European Commission’s endorsement see Commission, ‘Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity’ (Brussels 4 July 2017) SEC (2017) 339. Neither the draft nor final Code of Conduct was ever officially published by EU or Italian authorities. Different versions, all of them undated, were made public by news outlets and NGOs. The Draft Code of Conduct leaked after the JHA Ministers Meeting in Tallinn was made public *inter alia* by Human Rights Watch, see <www.humanrightsatsea.org/wp-content/uploads/2017/07/2017070516-EU-Code-of-Conduct.pdf> accessed 27 January 2018; a later (probably final) version was published on 3 August 2017 by *Euronews*, see <www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue> accessed 27 January 2018. In the following, ‘Code of Conduct’ refers to the latter version.



One group of commitments raises questions of compatibility with international law, in particular international law of the sea or human rights law. A second group of commitments risks limiting the effectiveness of search and rescue, thus jeopardising the protection of human lives at sea. A third group of commitments may compromise the independence of NGOs from states, a fundamental principle they are based on.¹⁹ Finally, a fourth group of commitments *prima facie* does not raise any specific concerns. Importantly, some commitments may appear more than once within Table 1, if they give rise to more than one concern.

¹⁹ See also Eugenio Cusumano, 'Straightjacketing migrant rescuers? The code of conduct on maritime NGOs' [2017] *Mediterranean Politics*; Eugenio Cusumano, 'The Sea as a Humanitarian Space. Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route' [2017] *Mediterranean Politics*.



Table 1: Overview of Commitments in the Code of Conduct

	Commitment to abstain	Commitment to cooperate	Commitment to inform
Compatibility with Public International Law	<ul style="list-style-type: none"> ▪ No entering Libyan territorial waters ▪ No obstructing SAR by Libyan Coast Guard (in Libyan territorial waters?) ▪ No transfers of rescued to other vessels unless authorised by MRCC 	<ul style="list-style-type: none"> ▪ Follow instructions of competent MRCC ▪ Allow police officers on board to conduct investigations ▪ Collect vessels and engines used by traffickers/smugglers 	<ul style="list-style-type: none"> ▪ Report SAR events occurring outside SRR zones to flag state and MRCC competent for nearest SRR ▪ Keep (foreign) flag state informed on all activities
Effectiveness of SAR	<ul style="list-style-type: none"> ▪ No entering Libyan territorial waters ▪ No transfers of rescued to other vessels unless authorised by MRCC 	<ul style="list-style-type: none"> ▪ Follow instructions of competent MRCC ▪ Collect vessels and engines used by traffickers/smugglers 	N/A
NGO independence	<ul style="list-style-type: none"> ▪ No transfers of rescued to other vessels unless authorised by MRCC 	<ul style="list-style-type: none"> ▪ Follow instructions of competent MRCC ▪ Allow police officers on board to conduct investigations ▪ Collect vessels and engines used by traffickers/smugglers 	<ul style="list-style-type: none"> ▪ Transmit information relevant for investigation purposes to state of disembarkation
Prima facie no concern	<ul style="list-style-type: none"> ▪ No turning off vessel tracking systems ▪ No (pre-SAR) communication facilitating departure of migrant vessels 	N/A	<ul style="list-style-type: none"> ▪ Communicate SAR suitability of vessel, equipment, and staff to MRCC ▪ Constantly update competent MRCC on ongoing SAR events ▪ Declare SAR financing to NGO's state of registration and (upon request) Italy ▪ Notify Frontex Operation Triton [now Themis] after rescue



For present purposes, two commitments are of specific relevance. The first is the commitment not to enter Libyan territorial waters. The second is the commitment to follow instructions of the competent MRCC. The extent to which international law permits states to restrict the rights of navigation of NGOs and to oblige them to follow state instructions, will be analysed in Sections 3 and 4 respectively.

It is important to note that, in any case, there is no certainty as to the legal nature and thus the consequences of non-compliance with the Code of Conduct. Its legal nature depends on a number of factors, including, first, the amount and type of parties (unilateral/bilateral/multilateral; private/public signatories) and, second, the legal order under which it was adopted (national/international). Neither of these aspects is addressed within the Code of Conduct itself, or otherwise made clear, which renders its legal status highly uncertain.

The Code of Conduct was drawn up by the Italian Ministry of the Interior and presented to the relevant NGOs for signature in the end of July 2017. It is not a (quasi-)legislative act adopted by Italy because that would not require signature by those potentially bound by the document in question. It also does not seem to be an agreement between Italy and the signatory NGOs, since it is signed only by NGOs but not by Italy or specific Italian authorities and contains only commitments by NGOs who are themselves not beneficiaries of reciprocal commitments entered into on the part of Italy (or any other public authority). In this light, the Code of Conduct is most likely a unilateral declaration made by each NGO that signs it.

This raises the question whether a unilateral declaration is capable of producing legal effects. In particular, are NGOs legally bound by their unilaterally made commitments? The Code of Conduct itself largely leaves this matter open. It merely sets out that both a failure to subscribe to the Code and a failure to comply with the commitments therein may result in the adoption of 'measures addressed to the relevant vessels' by Italian authorities. These 'measures', however, seem to be unrelated to the legal consequences the signature of the Code of Conduct possibly triggers, since they may also be taken against NGOs that do not sign at all. Whilst the concept that unilateral behaviour may create legally binding obligations is familiar under public international law, NGOs are not commonly considered to have legal personality on the international plane, and may thus also not create obligations binding on them as a matter of public international law.²⁰ Thus, the Code of Conduct is not binding under international law. However, it is conceivable that it creates legally binding obligations under Italian national law for those NGOs that sign it. This ultimately depends on the existence of the legal concept

²⁰ See in particular *Nuclear Tests Case (Australia v France, New Zealand v France)* (Judgment) [1974] ICJ Rep 253; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' in 'Report of the International Law Commission on the Work of its Fifty-eighth Session (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Ch IX, 160-177; for more detail on the contentious question of NGOs' international legal personality see Ingrid Rossi, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 48-65.



of unilateral declarations under Italian law and the conditions under which Italian law affords them legally binding character.

2.2.2 Libya

Libya is not party to UNCLOS, but did accede to the SAR Convention in 2005.²¹ Whilst no Libyan SRR or MRCC officially exist yet, Libya is in the process of establishing them. In August 2017, the Libyan authorities declared their SRR and submitted the necessary documents to IMO. However, the declaration was withdrawn in December 2017 only to submit a new one a few days later. It is unclear when the Libyan SRR may be expected to be fully functional.

Neighbouring coastal states usually enter into bilateral agreements regarding cooperation and co-ordination with regard to search and rescue. These agreements are then published in the IMO database. They are important to ensure that there is clarity of who is responsible for the coordination of search and rescue incidents and that the transfer of such coordination from one authority to another runs smoothly. The absence of an agreement creates the risk of gaps in the provision of search and rescue (see for example Section 4.2.1). No such formal agreement exists between Italy and Libya. Instead, Italy and Libya have substituted this standard cooperation within the IMO framework with a rather unorthodox cooperative framework.

The national authority in charge of search and rescue in Libyan waters is the Libyan Coast Guard. It officially functions under the authority of the Government of National Accord and operates – given the fragmentation of power in Libya – only in the Western sector of the Libyan coast. On the basis of Memoranda of Understanding, the Libyan Coast Guard has received vessels, financial support, and training from Italy and the European Union since 2016.²² In addition to this support, Italy has dispatched some of its own war ships to Libyan territorial waters in order to support the Libyan Coast Guard.²³ Italy has, moreover, used its MRCC in Rome to relay information concerning distress incidents occurring within the yet to be established Libyan SRR.

Whilst officially conducting search and rescue, the operations of the Libyan Coast Guard have practically had the effect of preventing migrants from leaving Libyan waters. Estimates suggest that in 2017 the Libyan Coast Guard retrieved over 80,000 persons off its coast and returned them to Libyan territory.²⁴ In addition, its activities were reported to have frequently limited the ability of NGOs to provide effective SAR services off the Libyan coast.

3. The rights of navigation under the law of the sea

This section analyses NGOs' rights of navigation when conducting search and rescue operations.

21 Libya acceded on 28 April 2005 (entry into force for Libya on 28 May 2005), see IMO, SAR/Circ. 77 (17 May 2005) Ref. A1/W/2.03.

22 For more detail, see Forensic Oceanography (n 3) 40-46.

23 *ibid* 48-49.

24 Safa Alharathy, 'Libyan and Italian officials discuss joint cooperation to combat illegal immigration' *The Libya Observer* (Tripoli, 9 December 2017) <www.libyaobserver.ly/news/libyan-and-italian-officials-discuss-joint-cooperation-combat-illegal-immigration> accessed 27 January 2018. Forensic Oceanography speaks of 20,335 people (n 3) 57.



The central question is whether NGOs are free to navigate anywhere, including the territorial sea of a coastal state, in order to provide assistance at sea. To what extent may Italy or Libya restrict NGO vessels' access to distress scenes in the Libyan territorial waters or on the high seas?

Two rights, recognised in the law of the sea, are of particular relevance in this respect. The first is the right of innocent passage that allows foreign vessels to pass through the territorial sea of coastal states. Thus, Section 3.1 discusses the right of NGO vessels to access the Libyan territorial sea and the extent to which Libya may restrict it whilst complying with the regime for innocent passage. The second is the right for vessels flying any flag to freely navigate on the high seas. In this light, Section 3.2 analyses the extent to which Libya or Italy may limit the freedom of navigation of NGO vessels on the high seas.

It should be noted that a right to enter the territorial waters of a coastal state may also exist outside the regime of innocent passage. In particular, the SAR Convention stipulates that coastal states should authorise immediate entry into their territorial sea of rescue units of other states if their sole purpose is search and rescue.²⁵ Neighbouring coastal states often insert an admission clause in their bilateral search and rescue agreements to that end. Some of these admission clauses require prior authorisation,²⁶ others allow immediate entry.²⁷ Private foreign vessels – such as search and rescue vessels of NGOs – are, however, not covered by these bilateral agreements. Therefore, in the absence of a specific rule, the rights of navigation of NGOs in the territorial sea of a third state are governed by the regime of innocent passage under UNCLOS.

3.1 Access to the territorial sea: the right of innocent passage

Coastal states have a right to establish a territorial sea up to a limit of 12 nautical miles from their coast, of which both Italy and Libya took advantage.²⁸ The territorial sea, as the name suggests, forms part of the territory of a state within which a coastal state enjoys full sovereignty.²⁹ Thus, in principle,

25 SAR Convention, section 3.1.2.

26 See e.g. IMO, 'Agreement concluded between Italy and Slovenia on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4. of the Annex to the SAR Convention, 1979, as amended' (25 January 2010) SAR.6/Circ.44, art 7; IMO, 'Agreement concluded between Bulgaria and Turkey on Search and Rescue Regions and coordination of search and rescue services in accordance with paragraph 2.1.4. of the Annex to the SAR Convention, 1979, as amended' (25 April 2005) SAR.6/Circ.24, art 5.

27 See e.g. IMO, 'Arrangement for Cooperation between the New Zealand Civil Aviation Authority and the United States Coast Guard concerning Search and Rescue' (April 2017) SAR.6/Circ.57, art 3.6.

28 UNCLOS, arts 3 and 4; Article 2 of Italian Law No. 359 of 24 August 1974 *Gazzetta Ufficiale. Anno 115° - Numero 218*, 5542; Libyan Act No. 2 of 18 February 1959 concerning the delimitation of Libyan territorial waters. UN Doc, Legislative Series, ST/LEG/SER.B/16, 14.

29 UNCLOS, art 2(1); Richard Barnes, 'Article 25: Rights of protection of the coastal State' in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea. A Commentary* (C.H. Beck – Hart – Nomos 2017) 223. Pre-World War II, the sovereignty of the state over its territorial sea was contested. Since the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 UNCLOS, this is, however, explicitly accepted. Louis B Sohn and others, *Law of the Sea* (2nd edn, West 2010) 209.



coastal states may determine who enters their territorial sea.³⁰

However, the sovereignty of coastal states within their territorial sea is limited by the right of innocent passage, governed by Articles 17 to 32 UNCLOS. Under the regime of innocent passage, foreign vessels, including NGO vessels flying a foreign state's flag, have a right to access to the territorial sea of a coastal state, as long as they merely 'pass', as opposed to stay, and do so 'innocently'.

In this light, there are two ways in which coastal states may limit an NGO vessel's right to navigate to, from, and through the territorial sea. The first is to argue that vessels are not 'passing' through the territorial sea in the first place. It has indeed been pointed out that the very purpose of defining passage separately from its innocence is precisely 'to confirm the authority of coastal states to expel vessels that are not engaged in passage, innocent or otherwise'.³¹ A ship is considered to be 'passing' when it traverses the territorial sea in a continuous and expeditious manner.³² That includes entering the territorial sea at one point and leaving at another without calling at a port ('lateral passage') as well as crossing the territorial sea in order to enter ('entry passage') or exit a coastal state's port ('exit passage').³³ A vessel may stop as long as this is part of ordinary navigation or rendered necessary, most importantly, for the purpose of rendering assistance to persons or ships in danger or distress.³⁴

A coastal state may argue that the entry or presence of an NGO vessel in its territorial sea does not qualify as passage because it is not the crew's *intention* to get from point A to point B, but to rescue migrants or anticipate their rescue. This argument presupposes that in order to determine whether the entry to or presence in the territorial sea constitutes 'passage' involves assessing the intention or purpose behind passing. However, the latter is assessed when determining the innocent character of the passage. Accordingly, the objectively observable navigational behaviour is the only criterion relevant to the determination of navigational movement as 'passage'. Thus, whilst NGO vessels circling around and hovering would clearly not be 'passing', NGO vessels entering or traversing the territorial sea for the purpose of rescuing migrants are.

The second way of limiting foreign vessels' right of entry to or presence in its territorial sea is to argue that their passage does not qualify as 'innocent'. Passage is 'innocent' as long as 'it is not prejudicial to the peace, good order or security of the coastal State'.³⁵ Article 19(2) UNCLOS provides a list of activities by foreign vessels considered to be not innocent.³⁶ With respect to NGO vessels that

30 International law recognises the right of every state to control entry into its territory, subject, however, to its treaty obligations. See, *inter alia*, *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 41; *Gül v Switzerland* App no 23218/94 (ECtHR, 19 February 1996) para 38.

31 Richard Barnes, 'Article 18: Meaning of Passage' in Proelss (n 29) 182 [referring to Daniel P O'Connell, *The International Law of the Sea. Volume I* (OUP 1982)].

32 UNCLOS, art 18(2).

33 UNCLOS, art 18(2).

34 UNCLOS, art 18(2).

35 UNCLOS, art 19(1).

36 UNCLOS, art 19(2); The majority view is that Article 19(2) is non-exhaustive, see Richard Barnes, 'Article 19: Meaning of innocent passage' in Proelss (n 29) 191-92 and references there.



render search and rescue services at sea, a coastal state may seek to rely on two provisions.

One is Article 19(2)(g) UNCLOS. According to that provision, passage is presumed not to be innocent when it involves the loading of persons contrary to the coastal state's immigration laws. *Loading* of persons – within the meaning of Article 19(2)(g) – is, however, not equivalent to *rescuing* persons. Whilst a rescue typically involves taking persons on board, this is necessary to save lives, but does not constitute a deliberate act to circumvent immigration laws. Thus, interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty – as required by the general rule of treaty interpretation – coastal states may not rely on Article 19(2)(g) to deny foreign vessels that conduct search and rescue operations access to the territorial sea.³⁷ In any case, Article 19(2)(g) only covers immigration laws, not emigration laws and may therefore only be relied on to address the loading of people trying to *enter* the coastal state, but not those trying to *leave*. Emigration laws were indeed explicitly excluded during the preparation and negotiation of the predecessors to Article 19(2)(g) UNCLOS because the view was that including the aspect of emigration in addition to immigration would raise serious human rights concerns (see also the analysis below in this section).³⁸

The other relevant provision is Article 19(2)(l) UNCLOS, which enables coastal states to qualify any other activity not having a direct bearing on passage as non-innocent and deny passage through its territorial sea on that basis. Two possible grounds are of specific interest in the present context. First, parallel to Article 19(2)(g) UNCLOS, a coastal state may argue that a vessel's passage is not innocent, when it loads persons contrary to the coastal state's *emigration*, as opposed to *immigration* laws (i.e. laws regulating the *exit from*, as opposed to *entry to*, their territory). Second, coastal states party to the 2000 Protocol against the Smuggling of Migrants are under an obligation to prevent and suppress the smuggling of migrants by sea as a place of departure.³⁹ Based on that obligation, a coastal state may seek to argue that they are allowed to prevent persons from irregularly leaving their shores and to prohibit vessels from picking these persons up from their territorial sea.

At the outset, it should be noted that rescue activities by NGOs are unlikely to qualify as the smuggling of migrants or the facilitation thereof pursuant to the Smuggling Protocol.⁴⁰ Importantly, how-

37 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

38 ILC, 'Summary records of the fifth session' (1 June – 14 August 1953) *Yearbook of the International Law Commission 1953 (Vol. I)* 165 and 167; ILC, 'Documents of the fifth session including the report of the Commission to the General Assembly' *Yearbook of the International Law Commission (Vol. II)* 45; ILC, 'Summary records of the eighth session' (23 April – 4 July 1956) *Yearbook of the International Law Commission 1956 (Vol. I)* 73-78. See also Daniel-Erasmus Khan, 'Article 33: Contiguous zone' in Proelss (n 29) 267-68.

39 Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime of 15 November 2000 (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol) arts 7 and 11(1).

40 cf Smuggling Protocol, arts 3(a) and 6(1). There have been recent instances in which Italian and Greek authorities have pursued criminal investigations against NGOs for allegedly smuggling migrants. It goes beyond the scope of this article to delve into Italian and Greek criminal law, but prima facie these acts of prosecution arguably find no support in the Smuggling Protocol and run counter search and rescue obligations under the law of the sea. See *inter alia* Jasmine Coppens, 'Interception of Migrant Boats at Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016) 203; Sergio Carrera and others, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (2016) Study for the European Parliament; Daniel Ghezlbash and others, 'Securitization of Search and Rescue at Sea' (2018) 67 ICLQ 315, 347-49.



ever, there are two reasons why enforcing these grounds against NGOs conducting search and rescue would in any case contravene international law.

First, it would not be in line with the object and purpose of UNCLOS. While not the central objective of UNCLOS, humanitarian considerations are 'present in the texture of its provisions'.⁴¹ Arguably, the provisions on innocent passage, interpreted and applied in good faith and in light of the humanitarian objectives of UNCLOS, in particular Article 98 UNCLOS, require the primacy of saving lives over enforcing domestic laws of the coastal state.⁴²

Second, it would conflict with international human rights law. Article 31(3)(c) VCLT requires to take into account 'any relevant rules of international law applicable in the relations between the parties' for the interpretation of a treaty. Also called the principle or method of systemic integration, Article 31(3)(c) is said to allow bringing into consideration obligations even when flowing from other treaties, when they relate to the subject matter.⁴³ Moreover, Article 293 UNCLOS itself stipulates that a court or tribunal having jurisdiction to adjudicate shall also apply 'other rules of international law not incompatible with [the] Convention'.⁴⁴ Therefore, the UNCLOS Articles on innocent passage should be interpreted and applied in light of international human rights law.⁴⁵

Concerns might be raised when using Article 31(3)(c) VCLT or Article 293 UNCLOS to read rules into the Convention which go well beyond matters governed by UNCLOS.⁴⁶ International human rights law may however – in addition to constituting a means of interpreting UNCLOS – apply *autonomously* and limit the possibilities of coastal states to deny foreign vessels entry to their territorial sea. This was held for example by the European Court of Human Rights in *Women on Waves v Portugal*.⁴⁷ The case concerned an NGO vessel, the *Borndiep*, that intended to enter Portuguese territorial

41 Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28(1) Berkeley Journal of International Law 1, 3; Bernard Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1998) 36 Columbia Journal of Transnational Law 399, 401-02.

42 cf Treves, *ibid* 6, who argues that the activity that entails less risk of human life should prevail when it is impossible to have simultaneously due regard to activities that are equally legal or pose issues of norm conflict.

43 Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 299; ILC, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission' (prepared by Martti Koskenniemi, 13 April 2006) UN Docs. A/CN.4/L.682, 209, para 416.

44 This was confirmed on several occasions by the International Tribunal for the Law of the Sea (ITLOS), see e.g. *M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, 10, 61-62, [155]; *M/V 'Juno Trader' Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 18 December 2004) ITLOS Reports 2004, 19, 38-39, [77].

45 For more detail see: Irini Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (Springer 2013) 535, 542; Seline Trevisanut, 'Is there a right to be rescued? A constructive view' (2004) 4 Questions of International Law 3, 9-11; Efthymios D Papastavridis, 'Is there a right to be rescued? A skeptical view' (2004) 4 Questions of International Law 17, 23-24.

46 cf Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 International and Comparative Law Quarterly 791, 802-04; Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, OUP 2007) 243; Gardiner (n 43) 320-23.

47 *Women On Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009).



waters in order to moor at the port of Figueira da Foz where it would organise activities related to the promotion of reproductive health on board the *Borndiep*. Portugal denied the *Borndiep* entry, arguing that the intended activities would render the *Borndiep*'s passage non-innocent. In particular, Portugal found them to fall under Article 19(2)(g) UNCLOS, according to which the loading or unloading of merchandise and persons contrary to the sanitation laws and regulations of a coastal state may preclude the innocence of a passing vessel.⁴⁸ The Portuguese authorities notified the captain of the *Borndiep* of the decision not to grant entry and positioned a naval vessel next to the *Borndiep* to effectively prevent entry. Even though under UNCLOS a danger to public health may be a reason to consider passage non-innocent, the Court found that by denying the vessel entry, Portugal had violated Article 10 ECHR, which guarantees the freedom of expression.⁴⁹ In a nutshell, relying on emigration or anti-smuggling laws to preclude the innocence of a foreign vessels' passage has to be assessed in light of human rights norms (whether via systematic interpretation of UNCLOS or the autonomous application of human rights law). This has a number of implications for the case at hand.

On the one hand, prohibiting persons from exiting a state, is – with the exception of a few limited permissible restrictions – contrary to international human rights law, according to which everyone is in principle free to leave any country, including their own.⁵⁰ On the other hand, the right to life imposes positive obligations on the coastal state to take adequate measures to prevent the deaths of those within its jurisdiction.⁵¹ This equally applies in the context of search and rescue.⁵² Respecting and ensuring the right to life of migrants to be rescued would – depending on the circumstances

48 *ibid* para 8.

49 *ibid* para 44. See also Barnes (n 36) 192.

50 Restrictions have to be provided by law and have to be necessary and proportional. Legitimate restrictions include securing a pending trial, protecting state secrets, recovering a large amount of unpaid taxes, or giving effect to UN Security Council sanctions. Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) art 1(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(2); Protocol No. 4 to the European Convention on Human Rights (adopted 16 September 1963, entered into force 2 May 1968) 046 ETS, art 2(2). See also Colin Harvey and Robert P Barnidge, 'Right to Leave in International Law' (2007) 19(1) *International Journal of Refugee Law* 1, 14; Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27, 54-55; Dimitry Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28(1) *Connecticut Journal of International Law* 43, 64-68; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 246-49; Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) *European Journal of International Law* 591, 609; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 341-48.

51 See e.g. *LCB v UK* App no 23413/94 (ECtHR, 9 June 1998) para 36; *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998) paras 115-16; *Berü v Turkey* App no 47304/07 (ECtHR, 11 January 2011); *Choreftakis and Choreftaki v Greece* App no 46846/08 (ECtHR, 17 January 2012) para 47; *Kemaloğlu v Turkey* App no 19986/06 (ECtHR, 10 April 2012); William Schabas, *The European Convention on Human Rights – A Commentary* (OUP 2015) 126-27.

52 See also *Leray v France* App no 44617/98 (ECtHR, 16 January 2001) where the ECtHR confirmed that the way in which maritime rescue operations are conducted are susceptible for judicial review in light of the right to life. See also Paul Tavernier, 'La Cour Européenne des Droits de l'Homme et la Mer' in Daniel-Heywood Anderson and others (eds), *La Mer et Son Droit* (Pedone 2003) 575, 586; Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Brill 2016) 236-38.



of the distress situation and the proximity of vessels able to render assistance – entail an obligation not to prevent passage of NGO vessels in territorial waters when they are able to contribute to the prevention of the loss of life.

In sum, a coastal state has no legal basis to impede NGOs from conducting search and rescue of migrants in its territorial sea. This is because entry to and presence in the territorial sea for the purpose of search and rescue does not render a vessel's passage as non-innocent. Not only do NGOs have a right to navigate territorial waters to save lives, but denying access would infringe fundamental provisions of UNCLOS and international human rights law. Even though Libya is not a party to UNCLOS, the main tenets of the right to innocent passage as codified in UNCLOS are considered to reflect customary international law, which Libya is bound to comply with.⁵³ Moreover, it should be noted that the law of the sea does not guarantee coastal states any powers to restrict foreign vessels' navigational rights in *other coastal states'* territorial sea. Thus, any attempt in that regard by Italy, e.g. by committing NGOs in the Italian Code of Conduct not to enter Libyan territorial waters (see above Section 2.2.1), has no basis in international law.

3.2 Outside the territorial sea: the freedom of navigation

Adjacent to the territorial sea are the high seas and – if declared – the Contiguous Zone and the Exclusive Economic Zone (EEZ).⁵⁴ Importantly, beyond the territorial sea, vessels of any state enjoy freedom of navigation.⁵⁵ Thus, in principle, NGO vessels outside the territorial sea are exclusively subject to the jurisdiction of their flag state and no other state may limit NGO vessels' rights to navigate within the EEZ or on the high seas.⁵⁶

There are three particular exceptions to this rule. First, there are a number of specific grounds for jurisdiction that states other than the flag state can exercise on the high seas. These are exhaustively listed in UNCLOS and include the exercise of jurisdiction or a 'right of visit' in cases of, for example, slave trade, piracy, illicit trafficking in drugs, or unauthorised broadcasting.⁵⁷ However, none of these provide a legal basis to limit the rights of navigation of NGO vessels that conduct search and rescue operations.

The second exception concerns the so-called right of hot pursuit. This allows a coastal state to pursue a foreign vessel from within its territorial waters into the high seas when it has good reason to believe that that vessel has violated its laws.⁵⁸ However, Article 111(1) UNCLOS specifies that hot

53 *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14 [214]. Note that these observations on access to the territorial sea for search and rescue purposes would apply *mutatis mutandis* for NGOs wanting to access e.g. Turkish territorial waters.

54 UNCLOS, arts 55 and 86.

55 UNCLOS, arts 87 and 58.

56 Note that a coastal state can establish a contiguous zone in which it may exercise the control necessary to prevent and punish the infringement of its immigration laws pursuant to Article 33 UNCLOS. Libya has not declared a contiguous zone.

57 UNCLOS, arts 99, 105, 108, and 109.

58 UNCLOS, art 111.



pursuit must always commence within the internal waters, territorial sea, or contiguous zone of the pursuing state.⁵⁹ Thus, it cannot be exercised against NGO vessels that were on the high seas whilst engaging in the allegedly illegal activity without ever entering territorial waters.

The third exception concerns the power to intercept foreign vessels on the high seas suspected of smuggling migrants on the basis of Article 8 Smuggling Protocol. However, search and rescue normally does not qualify as smuggling or the facilitation thereof.⁶⁰ In addition, the intercepting state would need prior authorization from the flag state of the NGO before it could take measures pursuant to Article 8 (2) Smuggling Protocol.⁶¹

In conclusion, there are typically no circumstances under which coastal states have a right to stop, board, or search NGO vessels conducting search and rescue operations beyond the territorial sea or arrest their crew. Thus, when for instance the Libyan Coast Guard intercepted the NGO vessel *Lifeline* on 26 September 2017 outside its territorial waters, it had no legal basis in international law to do so.

4. The power of coastal states to give instructions under the law of the sea

This section analyses the power of coastal states to give instructions to NGOs in the context of search and rescue operations (in the following ‘SAR instructions’). It focusses on two central questions with respect to such instructions. First, are NGOs legally bound to follow them? This essentially depends on the legal nature of the instructions, which is analysed in Section 4.1. Second, to the extent coastal states may issue SAR instructions to foreign vessels, are there limits on the content of these? This is analysed in Section 4.2, taking into account in particular the SAR Convention and human rights law.

4.1 The legal nature of SAR instructions

In order to comply with their obligations under the SAR Convention, coastal states are required to put into place facilities allowing for the efficient coordination of distress events that occur within their SRRs.⁶² For that purpose, coastal states typically afford coordination competences to the competent state authorities, in particular the MRCCs. An overview of some coastal states’ legislation in that respect reveals that approaches vary considerably. According to the extent of instruction powers af-

59 UNCLOS, art 111(1).

60 See above Section 3.1. It has, moreover, been noted that ‘the act of carrying migrants on the high seas is not an international crime as such.’ Efthymios Papastavridis, *Interceptions of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Bloomsbury 2014) 266.

61 See also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 185.

62 See Section 2.1.



forded to the competent authorities in domestic legislation, three approaches may be distinguished.⁶³

Firstly, some coastal states' domestic legislation does not at all foresee the possibility for their competent authorities to issue SAR instructions, or does, but without specifically clarifying their legally binding nature or geographical applicability. This is the case, for example, in relation to the Netherlands.⁶⁴ Secondly, some domestic legal systems of coastal states provide for competences of MRCCs to give legally binding SAR instructions within the territorial sea of that state. Examples of such schemes include those in Australia, Spain, and Italy.⁶⁵ Thirdly, some coastal states' domestic legislation provides that their competent authorities can give SAR instructions to private vessels within their entire SRR, i.e. not only within their territorial sea but also in those parts of the high seas that are part of the SRR. Canada, Belgium, and France, for example, follow this approach.⁶⁶

Whilst there are no specific rules under international law regarding the power of coastal states to issue binding SAR instructions, the law of the sea does provide some guidance. Within the territorial sea, states can exercise full sovereignty including over foreign vessels.⁶⁷ Thus, the first two approaches, i.e. domestic legislation that either does not at all provide for the possibility of legally binding SAR instructions or does so but limited to the territorial sea, do not raise any specific questions of compatibility with international law. However, no state may claim sovereignty over the high seas. All vessels on the high seas thus remain under the *exclusive* jurisdiction of their flag state.⁶⁸ The SAR regime itself only creates responsibilities but does not affect state boundaries, territorial control, or rights over navigation and, most importantly, therefore confers no new rights or grounds of jurisdiction to coastal states.⁶⁹ The third approach, i.e. domestic legislation that envisages SAR instructions to be legally binding beyond the territorial sea, interferes with exclusive flag state jurisdiction and is consequently not in compliance with the international law of the sea.

63 The sample is based on the familiarity with and linguistic accessibility of the legislation to the researchers. The sample is in no way meant to be representative for all coastal states, but serves as a *prima facie* way of looking into the kind of legislation coastal states may adopt when it comes to SAR instructions and their application *ratione loci* and *ratione personae*. Where possible, interviews via e-mail or telephone were conducted with state authorities in order to obtain the pertinent legal instruments and the interpretation thereof.

64 Dutch SAR Decision (*Regeling inzake de SAR-dienst van 26 augustus 1994*); Dutch SAR operational plan (*Operationeel Plan voor Search and Rescue*) 15 <www.kustwacht.nl/sites/default/files/2016-06-28%20OPPLAN%20SAR%20Versie%201.1.pdf> accessed 27 January 2018.

65 Australian Navigation Act, sections 246 and 183; Spanish Maritime Navigation Law (*Ley 14/2014 de Navegación Marítima*) art 367(1); Italian SAR Decree, art 5; and Italian Navigation Code (*Codice della navigazione*) arts 69-70, 1113, and 1158.

66 Canadian Shipping Act, arts 130(2)-(3) and 137(1); Flemish MRCC Decision (*Besluit van 26 Oktober 2007 van de Vlaamse Regering betreffende het Maritiem Reddings- en Coördinatiecentrum*) art 2 *juncto* Flemish MRCC Act (*Decreet van 16 Juni 2006 betreffende de begeleiding van scheepvaart op de maritieme toegangswegen en de organisatie van het Maritiem Reddings- en Coördinatiecentrum*) art 42; Flemish MRCC Decision, art 11; Flemish MRCC Act, arts 45 and 53, which does not make an explicit distinction between Belgian and foreign vessels; French Internal Security Code (*Code de la sécurité intérieure du 12 mars 2012*) art L742-5; French SAR Decree (*Décret n°88-531 du 2 mai 1988 portant organisation du secours, de la recherche et du sauvetage des personnes en détresse en mer*) arts 1 and 7(2).

67 UNCLOS, art 2(1); see also Section 3.1 above.

68 UNCLOS, arts 89 and 92(1).

69 See also IAMSAR Manual (n 14) Vol I, section 2.3.15(e).



In this vein, under international law, SAR instructions issued by national authorities to foreign private vessels beyond the territorial sea can only be considered as ‘requests for cooperation’, reminding foreign vessels to comply with their obligations under the domestic law of the flag state concerning the duty to assist. An MRCC may inform the flag state of a non-cooperative foreign vessel, but it may not itself enforce its instructions on the high seas. As such, the commitment in the Italian Code of Conduct to follow instructions of the competent MRCC (see above Section 2.2.1) can only be understood as applying to the territorial sea. Beyond that, the instructions are non-binding requests for cooperation.

4.2 The legality of SAR instructions

International law, in particular the SAR regime and human rights law, place legal limits on the permissible content of SAR instructions. The following sections analyse two types of SAR instructions that have in the past led to tensions between coastal states and NGOs: instructions concerning on-scene rescue (Section 4.2.1) and instructions concerning transfers and disembarkation of rescued persons (Section 4.2.2).

4.2.1 Instructions concerning on-scene rescue

Instructions concerning on-scene rescue generally consist of requests to proceed to a distress scene and assist the persons in danger. These raise no particular questions of compliance with international law, since all captains are indeed typically themselves under an obligation to assist persons in distress under the laws of their vessel’s flag state. However, NGOs have in the recent past reportedly received more problematic instructions, when national authorities instructed them *not* to proceed to a distress scene, or to *refrain* from assisting, even though they were near or already present at a distress scene. As noted in Section 1, this occurred, for example, on 23 and 24 November 2017 to a vessel of *SOS Méditerranée*.

The entire body of rules and guidelines of the SAR regime is designed to ensure efficient and effective search and rescue. Preventing loss of life requires speedy arrival at a distress scene.⁷⁰ This is why UNCLOS obliges captains to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance.⁷¹ This is why the SAR Convention obliges any search and rescue unit receiving information of a distress incident to take immediate action if in a position to assist.⁷² And this is also why the IAMSAR Manual advises search and rescue units to be immediately dispatched to confirm the distress position.⁷³ There may be good reasons for an authority to ask a vessel to stand-by, for instance when another vessel is in a better position to provide assistance. However, it

70 IAMSAR Manual (n 14) Vol II, sections 1.6.1 and 3.1.

71 UNCLOS, art 98(1)(b).

72 SAR Convention, section 4.3.

73 IAMSAR Manual (n 14) Vol II, section 3.8.5. See also IMO Guidelines (n 14) section 3.1.



is clear that where an NGO vessel is at or near a distress scene and able to provide prompt assistance, a coastal state's instruction *not* to proceed violates the letter and spirit of the SAR regime.⁷⁴

Further, preventing loss of life requires on-scene coordination to be effective. This is, in particular, the case when multiple actors are present at a distress scene. Questions may arise, in these instances, as to who is in charge and how to go about the on-scene rescue. For example, on 6 November 2017, the NGO *Sea Watch* arrived at a distress scene in response to a call from MRCC Rome and took on the on-scene coordination of all assets present (an Italian and a French warship, an Italian helicopter) in mutual agreement. However, when the Libyan Coast Guard arrived, it interrupted the on-scene rescue coordination and execution by the NGO. In the ensuing chaos a number of persons drowned.⁷⁵

To ensure effectiveness, the SAR Convention requires there to be a clearly designated on-scene coordinator.⁷⁶ The IAMSAR Manual advises that the person in charge of the first search and rescue resource to arrive at the scene assumes this function.⁷⁷ Due to their position in the vicinity of likely distress scenes, NGO vessels are frequently the first ones to arrive and therefore they are often most suited to assume on-scene coordination. When multiple assets are at a distress scene, the role of the on-scene coordinator must be assigned to the most capable person.⁷⁸ NGO crews typically have the operational expertise and capabilities to take on on-scene coordination responsibilities. In contrast, reports suggest that the Libyan Coast Guard does not possess the proper capabilities, expertise, and professionalism to take on on-scene coordination.⁷⁹ When the captain of an NGO vessel is appointed on-scene coordinator for multiple search and rescue providers present, instructing or otherwise obstructing its coordination or execution is in breach of the SAR regime.

In addition, instructions to stand-by or instructions undermining effective on-scene coordination may violate the right to life of those in distress. As noted above in Section 3.1, the right to life imposes positive obligations on states to take adequate measures to prevent deaths. In the present context, this means that a coastal state that should be aware of a danger to persons' lives (e.g. after a distress call), but gives instructions that are clearly detrimental to the chances of success of a rescue operation, would violate human rights law. However, there is a caveat. States are only required to guarantee the human rights of those within their jurisdiction. Whilst distress scenes within the territory (including the territorial sea) of a coastal state *prima facie* occur within the jurisdiction of that state, distress scenes on the high seas require assessing the extraterritorial applicability of human rights law.

⁷⁴ Note that the instruction not to proceed to a distress scene arguably does not contravene the SAR regime when *another* vessel is already closer to the distress scene and is sufficiently able to assist. This way, for instance, one avoids having all NGO vessels rushing towards one incident.

⁷⁵ Comprehensive video footage of the incident is available at <www.youtube.com/watch?v=_pHl-f_yFXQ> accessed 27 January 2018; for a detailed account of the incident see Forensic Oceanography (n 3).

⁷⁶ SAR Convention, section 4.7.

⁷⁷ IAMSAR Manual (n 14) Vol I, section 2.6.1. and Vol II, section 1.2.4. This guideline was enshrined in section 5.7.3 of the original 1979 SAR Convention but was removed on the occasion of the 1998 amendment.

⁷⁸ SAR Convention, section 4.7.2.

⁷⁹ Forensic Oceanography (n 3) 57-81.



A detailed analysis in this regard is outside the scope of this article. Suffice it to say, there is overall agreement that human rights obligations can be triggered on the high seas when a state exercises 'authority and control over persons'.⁸⁰ A state that takes people on board its ship⁸¹ or manoeuvres around a vessel striking it and/or causing it to capsize,⁸² thereby exercises 'authority and control' over the persons on the vessel and thus 'jurisdiction' for human rights purposes. Thus, if a coastal state engages in such practices at a distress scene, this would arguably bring those to be rescued within its jurisdiction. It has indeed been reported, that there were incidents in which the Libyan Coast Guard exercised coercion on NGO vessels in order to force their departure from a distress scene or to hand over rescued migrants. This occurred for example on 26 September 2017 to a vessel of *Mission Lifeline*, when the Libyan Coast Guard fired shots into the water and air close to the NGO vessel which had previously rescued a group of migrants and set course for Italy. Similarly amounting to an exercise of effective control may be the use of intimidation tactics, such as the positioning of a large naval vessel next to an NGO vessel.⁸³

Establishing human rights jurisdiction is more complicated when a coastal state's agents are not physically present at the distress scene on the high seas. What if all the MRCC does is using a phone call to instruct the NGO not to proceed or assist? What if the instruction or request comes from a coast guard vessel within sight but still a few miles away from the scene? Some have argued that nearby physical presence – even without using force – can constitute effective control.⁸⁴ Others have argued that being both aware of a situation and in a position to save lives activates due diligence obligations, even when the traditional legal bases for jurisdiction are missing.⁸⁵ These arguments,

80 For a general discussion, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties – Law, Principles, and Policy* (OUP 2011) 160-63, 168-69 and 193; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) *Leiden Journal of International Law* 857, 874-76. For a discussion of extraterritoriality specifically related to asylum, see *inter alia* den Heijer (n 50) 15-56 and 240-54, Moreno-Lax (n 50) Ch 8; Mariagiulia Giuffrè, 'Access to Asylum at Sea? Non-Refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations' in Moreno-Lax and Papastavridis (eds) (n 52) 248-75; Papastavridis (n 60) 302-08.

81 *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010) paras 66-67; *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, 23 February 2012).

82 *Xhavara v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001).

83 This scenario would resemble the *Women on Waves* case in which naval presence in the combination of threatening with prosecution was used to keep the NGO vessel away from Portuguese territorial waters. See *Women on Waves v Portugal* (n 47) para 9. At no point did Portugal contest that it had exercised jurisdiction.

84 Paolo Biondi, 'Italy Strikes Back Again: A Push-Back's Firsthand Account' (*Border Criminologies*, 15 December 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/italy-strikes> accessed 27 January 2018. Compare: Papastavridis (n 45) 28. See also Violeta Moreno-Lax and Mariagiulia Giuffrè, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar forthcoming).

85 Vassilis P Tzevelekos and Elena Katselli Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorial-ly)?' (2017) 86 *Nordic Journal of International Law* 427, 455 and 463.



however, have not yet been confirmed in human rights law adjudication.⁸⁶

4.2.2 Instructions concerning transfers and disembarkation

The SAR Convention requires that persons retrieved from the water are disembarked to a place of safety.⁸⁷ This, legally speaking, terminates a rescue operation. The MRCC in whose SRR the distress situation is dealt with, is primarily responsible to ensure that coordination and cooperation occurs with a view to finding a place for disembarkation.⁸⁸ However, it is unclear how much discretion coastal states enjoy in determining, first, *who* carries out the disembarkation and, second, *where*.

Smaller NGO vessels, for lack of physical space, focus on first response to emergencies by providing life vests, drinking water, and urgent medical treatment. Often, they do not take migrants on board but wait for larger and faster ships to transport them to dry land.⁸⁹ This allows them to conduct further rescue operations in the area. However, the Italian Code of Conduct, for example, envisages that NGOs do not transfer rescued persons to other vessels unless authorised by the competent MRCC (see above Section 2.2.1). Thus, the question arises whether coastal states may prohibit these transfers and instead oblige a vessel to complete a rescue operation by disembarking the persons in distress on land.

It should be noted that there exists no legal provision entitling coastal states to prohibit transfers of rescued persons. To the contrary, the SAR regime urges coastal states to release assisting vessels from their obligations as soon as possible.⁹⁰ Moreover, in some situations, prohibiting transfers risks endangering the safety of a vessel, its crew, or its passengers. This is the case, for instance, where the number of persons rescued exceeds the capacity of a vessel. Similarly, speedy disembarkation may be essential to safeguard the well-being of rescued persons, in particular where the latter need urgent medical attention. In these situations, prohibiting transfers to larger and/or faster vessels runs counter the SAR regime.⁹¹

The second ambiguity concerns the question of discretion of the coastal state in determining *where* disembarkation should take place. Can a coastal state oblige an NGO vessel to disembark persons at a place the NGO considers unsafe, for example because of human rights violations occurring within that territory? In the present context, it is noteworthy that an earlier draft of the Italian Code of Con-

86 An interesting test case in this regard is the recent application against Italy at the ECtHR of seventeen survivors of the above mentioned 6 November 2017 incident with the NGO *Sea Watch*. GLAN, 'Legal action against Italy over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse' (8 May 2018) <www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse> accessed 10 May 2018.

87 SAR Convention, section 1.3.2.

88 SAR Convention, section 3.1.9.

89 See also Section 1 above.

90 See for example SAR Convention, section 3.1.9; IMO Guidelines (n 14) section 3.1.

91 See for example UNCLOS, art 98(1), which sets out that a duty to assist exists only if and to the extent it does not endanger the safety of the vessel, the crew, or the passengers; See also IMO Guidelines (n 14) para 6.11.



duct set out that a failure to comply with the commitments set out therein ‘may result in the refusal by the Italian State to authorize the access to national ports, subject to compliance with the existing international conventions.’⁹² However, this was later modified, the final version merely setting out that failures to subscribe to or comply with the commitments in the Code of Conduct may result in the adoption of ‘measures addressed to the relevant vessels’ by Italian authorities.⁹³

The Guidelines on the Treatment of Persons Rescued at Sea specify 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.⁹⁴ In addition, human rights law creates limits on the choice of the place of disembarkation.⁹⁵ Whilst these do not apply to NGOs, they do bind states, provided they exercise jurisdiction over the rescued persons (see also above Section 4.2.1). If human rights law is applicable in a specific case, firstly, the principle of *non-refoulement* prohibits disembarking persons at a place where they may face torture or inhuman or degrading treatment or punishment.⁹⁶ Secondly, the prohibition of collective expulsion requires there to be an assessment of the individual circumstances of the persons rescued before disembarkation.⁹⁷ As a result, coastal states may not oblige NGO vessels within their jurisdiction to disembark the rescued persons in contravention of either of these prohibitions.

5. Conclusion

This article examined the legal framework of the search and rescue activities of NGOs in the Mediterranean. It set out to analyse two questions: First, are NGOs free to navigate anywhere in order to render assistance to migrants? The analysis showed that a coastal state has no legal basis to impede NGOs from conducting search and rescue of migrants in its territorial sea. Even less are states entitled to restrict NGOs’ access to the high seas or the territorial sea of another state.

Essentially, NGO vessels that render assistance to migrants in distress at sea have a right of innocent passage through the territorial sea of coastal states. In line with the regime on innocent passage, a coastal state can only limit foreign vessels’ entry to or presence in its territorial sea when the foreign vessels do not pass in a continuous and expeditious manner or do so in a way prejudicial to peace, good order, or security of the coastal state. Entry into territorial waters in order to assist vessels in distress constitutes neither of those two. Most importantly, the regime of innocent passage has to be

⁹² For the draft version, see above n 18.

⁹³ Section 2.2.1.

⁹⁴ IMO Guidelines (n 14) para 6.12; See also Jasmine Coppens and Eduard Somers, ‘Towards New Rules on Disembarkation of Persons Rescued at Sea?’ (2010) 25 *International Journal of Marine and Coastal Law* 377, 378-79.

⁹⁵ It should be noted that the IMO Guidelines (n 14) para 6.17 mentions human rights for asylum-seekers and refugees merely as a consideration. For a discussion on the effects of human rights law on options for the disembarkation of rescued migrants, see Kristof Gombeer, ‘Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean’ (2015) 10 *Irish Yearbook of International Law* 31-40.

⁹⁶ See in particular Article 3 ECHR and the case law of the ECtHR on this question, most notably *Hirsi Jamaa v Italy* (n 81). Note that *refoulement* of those risking persecution is also prohibited under the 1951 Refugee Convention.

⁹⁷ *Hirsi Jamaa v Italy* (n 81) para 166. For the requirement of individual assessment, see also *Khlaifia v Italy* App no 16483/12 (ECtHR, 15 December 2016) paras 237-40; *ND and NT v Spain* App nos 8675/15 and 8675/15 (ECtHR, 3 October 2017) paras 98-99 [referred to the Grand Chamber on 29 January 2018].



interpreted in light of the object and purpose of UNCLOS, including its humanitarian objectives, and in line with international human rights law, in particular the right to leave and the right to life. It is predominantly for that reason that the grounds on which coastal states may rely on to restrict foreign vessels' passage through their territorial sea cannot be invoked against NGO vessels conducting search and rescue operations. Unsurprisingly, if coastal states have no legal basis to prohibit NGOs from rendering assistance to migrants in distress within their territorial sea, there is also no legal basis to do so on the high seas, where vessels of any state enjoy freedom of navigation. Moreover, a coastal state may not prohibit access to the territorial sea of a third state, where the latter alone enjoys sovereignty. This means, on the one hand, that recent practices by the Libyan Coast Guard to impede NGO vessels from rendering assistance on the high seas are not in conformity with the law of the sea. In a similar vein, attempts by Italy to restrict NGO vessels' access to the Libyan territorial sea through the respective commitment in the Italian Code of Conduct have no basis in international law.

The second question analysed in this article was whether coastal states can give NGOs binding instructions concerning, on the one hand, whether and how to conduct search and rescue and, on the other, where to disembark the persons rescued. The analysis showed that national legislation that renders a coastal state authority's instructions legally binding within its territorial sea raises no particular challenges under international law, essentially because coastal states can exercise full sovereignty within that area. However, this is different outside the territorial sea. No state may claim sovereignty over the high seas, a rule which remains unaffected by the SAR regime. Since all vessels within that area thus remain under the exclusive jurisdiction of their flag state, instructions by a state assuming search and rescue responsibility are not binding under international law and can only be conceived as requests for cooperation. In this vein, regardless of the legal nature of the Italian Code of Conduct as such, the commitment requiring NGOs to abide by the instructions of the competent MRCC without stipulating a geographical limitation cannot be understood to create a legally binding obligation to follow these instructions outside the territorial sea.

The analysis also showed that international law, more specifically the SAR regime as well as international human rights law, place restrictions on the content of instructions. In other words, some instructions violate international law. This concerns in particular two types of instruction. First, NGOs have in the recent past reportedly been instructed *not* to proceed to a distress scene, or to *refrain* from assisting when already there. Both instructions are typically not in compliance with the SAR regime. This is because they run counter the body of rules designed to prevent loss of life, in particular provisions ensuring speedy arrival at a distress scene and effective on-scene coordination. Moreover, an instruction *not* to assist may additionally violate the right to life of those in distress, provided they find themselves within the territorial sea or otherwise within the jurisdiction of the instructing state.

Second, states have attempted to determine *who* carries out the disembarkation and *where*. It was found that prohibiting transfers from smaller NGO vessels to larger and/or faster vessels (as, for instance, the Italian Code of Conduct does) will often run counter the SAR regime, in particular where transfers would ensure the safety of the vessel's crew and passengers or guarantee speedy disembarkation. In contrast, coastal states have more discretion in determining the place of disembarkation, as long as this does not contravene their human rights obligations, in particular the principle of *non-refoulement* and the prohibition of collective expulsion.



Appendix: Code Of Conduct For NGOs Undertaking Activities In Migrants' Rescue Operations At Sea

Migration pressure on Italy does not seem to diminish and indeed is even more impressive than last year, as recognized by the Institutions of the European Union and its Member States.

In this context, the main objective of the Italian Authorities in rescuing migrants is the protection of human life and the rights of the people, in full respect of international conventions. Nevertheless, the rescuing activity cannot be separated from a reception path, sustainable and shared with other Member States, in accordance with the principle of solidarity referred to in Article 80 of the TFEU.

On the occasion of the Informal meeting of the Justice and Home Affairs Ministers, held on 6th July in Tallinn under the Estonian Presidency, the EU's Interior Ministers welcomed the initiative of the Italian authorities to ensure that NGO's vessels involved in Search and Rescue (SAR) activities operate within, and abide by, a set of clear rules, in the form of a code of conduct to be urgently finalised by the Italian authorities, in consultation with the Commission and in cooperation with the relevant stakeholders, including the NGOs themselves. The Italian initiative was also included in the "Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity" submitted by the European Commission on 4th July.

The Italian Authorities and the signatory NGOs carrying out SAR activities thus share the need to provide for specific arrangements to address the complexity of rescue operations in the Mediterranean Sea, in compliance with this Code of Conduct, also safeguard the security of migrants and operators.

The NGOs that subscribe to this Code of Conduct undertake the following commitments:

- **in accordance with relevant international law, commitment not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct Search & Rescue by the Libyan Coast Guard:** *with a view not to hinder the possibility for the competent National Authorities to intervene in their territorial waters, in compliance with international obligations;*
- **commitment to respect the obligation not to turn off or delaying the regular transmission times of AIS (Automatic Identification System) and LRIT (Long Range Identification and Tracking) signals, whenever on board (Chap. V SOLAS):** *in order to ensure safety of navigation and security of vessels, including those not involved in the search and rescue event but navigating in proximity of the area, where the event itself takes place;*
- **commitment not to make communications or send light signals** to facilitate the departure and embarkation of vessels carrying migrants, without prejudice to the communications that are necessary in the course of SAR events to preserve the safety of life at sea: *with the intention not to facilitate contacts with migrant smugglers and/or traffickers;*



- **commitment to communicate to the competent MRCC the technical suitability (regarding the vessel, its equipment and the crew's training) for rescuing activities, without prejudice to the applicable domestic and international provisions regarding seaworthiness of vessels and other technical conditions necessary to operate ships:** *NGOs are requested to be equipped with instruments and resort to personnel whose technical suitability and capabilities in mass rescue operations under all conditions are ascertained. This is required in order to guarantee their professional know-how in rescuing activities. Such a commitment concerns, inter alia, the need for providing the ship's master with proper information on stability, on-board reception capacity, individual and collective safety equipment, crew's specific training and relevant capability certification, security aspects, on board hygienic and habitability conditions, preservation capacity of possible corpses. All of the above is without prejudice to the provisions of Article IV (force majeure cases) and Article V (people transportation in emergency situations) of SOLAS;*
- **commitment to ensure that when SAR cases occur where no official SRR is established, the ship's master immediately notifies the competent Authorities of the flag States for security purposes and the MRCC competent for the nearest SRR as "better able to assist", except in case the latter expressly refuses or doesn't respond:** *information to the flag State qualifies more as a commitment, while notification to the competent MRCC recalls an existing obligation of international law;*
- **commitment to respect the obligation under international law to keep constantly updated the competent MRCC or the OSC (On Scene Coordinator) appointed by the latter as to the ongoing scenario and the developments of rescuing operations,** as well as all the information regarding SAR or navigation security;
- **commitment not to transfer those rescued on other vessels,** except in case of a request of the competent MRCC and under its coordination also based on the information provided by the ship's master: *after the embarkation of survivors, NGO vessels should as a rule complete the operation by disembarking survivors in a safe port under the coordination of the responsible MRCC, except in situations recalled above;*
- **commitment to ensure that the competent Authorities of the flag State are constantly kept updated** on the activities undertaken by the vessel and immediately notified of any relevant event concerning "maritime security", in compliance with the principle of flag State jurisdiction under UNCLOS and other applicable rules of international law;
- **commitment to cooperate with the competent MRCC, executing its instructions and informing** it in advance of any initiative undertaken independently because it is deemed necessary and urgent;



- **commitment to receive on board, possibly and for a period which is strictly necessary, upon request by the competent National Authorities, judicial police officers for information and evidence gathering with a view to conducting investigations related to migrant smuggling and/or trafficking in human beings, without prejudice of the ongoing humanitarian activity.** The above is without prejudice to the exclusive jurisdiction of the flag State on the vessel under UNCLOS and other applicable rules of international law, to the competences of the shipmaster and to the different mandates and competences of the legal entities involved as provided under national and international law, with which police officers do not, and shall not, interfere: *allowing access on board of their naval assets, upon request by the competent National Authorities, of police personnel who will conduct preliminary inquiries and investigations, also following specific indications by the competent Judicial Authority;*
- **commitment to declare, in conformity with legislation of the flag State, to the competent authorities of the State where NGO is registered, all sources of financing** for their rescuing activity at sea and to communicate, upon request, such information to the Italian authorities, in accordance with the principles of transparency;
- **commitment to loyal cooperation with the Public Security Authority of the migrants' intended place of disembarkation,** including by transmitting relevant information of interest for investigation purposes to the Italian Police Authorities, within the respect of international refugee and data protection law and of the different mandates and competences of the legal entities involved as provided under national and international law: *such an obligation will result, by way of example and not limited to, in a commitment to provide - at least two hours before the arrival at the port - the documents that should be completed during the phases of rescue and journey to the port, after the primary assistance activities - i.e. the "maritime incident report" (summary document of the event) and the "sanitary incident report" (summary document of health situation on board);*
- **commitment to collect, during the activities, once migrants are rescued and if possible, the makeshift boats and the outboard engines used by migrants' traffickers/smugglers and commitment to immediately notify the ICC (International Coordination Centre) of the Triton Operation; the coordinating MRCC shall anyway be informed on the aspects relating to navigation security and pollution risks:** *such a commitment is an important way of cooperating with the EU Triton Operation and the competent national Authorities against traffickers and smugglers, as well as with the MRCC for information on navigation security and pollution risks.*

Failure to subscribe to this Code of Conduct or to comply with the commitments set out therein may result in the adoption by the Italian Authorities of measures addressed to the relevant vessels, in compliance with applicable domestic and international law and as required in the public interest of saving human lives while guaranteeing shared and sustainable reception of migration flows.

Any failure to comply with the commitments set out in this Code of Conduct will be communicated by the Italian Authorities to the flag State and to the State where the NGO is registered.