



Associazione
per gli Studi Giuridici
sull'Immigrazione

POSITION PAPER ON THE PROPOSED “CODE OF CONDUCT FOR NGOS INVOLVED IN MIGRANTS’ RESCUE AT SEA”

1) PURPOSE OF THE PRESENT POSITION PAPER

This paper aims at discussing some legal issues arising from the proposed [“Code of Conduct for NGOs involved in migrants’ rescue at sea”](#) (hereinafter CoC) leaked in the past weeks.

ASGI wishes to stress from the outset that **this should not be at any rate understood as a form of support or endorsement to the process towards the approval of such document.**

Conversely, ASGI expresses its full support to the SAR action carried out by NGOs that are taking up responsibilities that the primary responsible, i.e. national governments and European institutions, are unwilling to fulfill.

ASGI also welcomes the efforts by SAR NGOs to self-regulate the operational aspects of SAR operations conducted by their boats, in order to guarantee life at sea, security of navigation and respect for international law (see the [Voluntary Code of Conduct for Search and Rescue Operations undertaken by civil society Non-Governmental Organisations in the Mediterranean Sea](#), 2017).

Furthermore, ASGI condemns the initiative that is bringing to the adoption of the CoC as a **part of a broader strategy aimed at blaming NGOs for practicing solidarity and active promotion for human rights in the context of migrations.** This falls within a consistent pattern of migration policies aimed at producing illegality, depriving migrants of the protection of the law and exposing them to unacceptable violations of their life, physical and moral integrity, and dignity.

In this framework, ASGI stresses that the very idea that SAR activities by NGOs may constitute an incentive to illegal migration, or even be colluded with smuggling by criminal organizations of migrants, lacks any factual basis.

ASGI also notes that, in their actual performance of SAR operations, NGOs always act under the coordination and responsibility of the MRCC of Rome and already comply with the conducts that are required by the rules of international navigation (such as the turning on of on-board transponders) and that the Code would aim at preventing.

2) THE ENVISAGED LEGAL NATURE OF THE PROPOSED CODE OF CONDUCT

Based on the Commission's "[Action plan](#) on Measures to Support Italy, reduce pressure along the Central Mediterranean route and increase solidarity" of 4 July 2017 (doc. SEC(2017)339), ASGI understands that the envisaged CoC is meant to be an act adopted by Italian authorities and subsequently endorsed by the Council as a political matter.

Framed as a "voluntary" and "agreed" instrument, it is in reality an **attempt at exercising regulatory power**. This is clear from its top-down genesis. Moreover, it contains a clear threat of sanction (denial of access to Italian ports) for boats of those NGOs which refuse to sign it or comply with it.

The proposed CoC thus constitutes an attempt by Italy at regulating the conduct of vessels navigating waters beyond Italian jurisdiction, including those flying third states' flags.

The attempt of doing so through a CoC is just another example of a more general and deplorable trend towards regulating migration through atypical acts, in order to shy away from judicial and democratic checks and balances that are inherent to a society based on the rule of law.

3) THE CODE OF CONDUCT IS AN EXERCISE OF JURISDICTION AT ODD WITH BASIC PRINCIPLES OF THE LAW OF THE SEA

A number of provisions contained in the CoC clearly aim at regulating the conduct of vessels flying third states' flags in Libyan territorial waters and on the high seas.

It is also clear that Italy lacks jurisdiction over those areas and that any attempt to exercise such jurisdiction by Italy would be in contrast with basic principles of international law of the sea, as codified in the 1982 UN Convention on the Law of the Sea (UNCLOS).

A ship is in principle under the jurisdiction of the coastal State when navigating in the latter territorial waters (Art. 2.1 UNCLOS). Italy is not entitled to regulate the navigation of ships in the territorial waters of Libya (see also *infra*, para. 6).

In accordance with Article 92.1 UNCLOS, a ship is subject to the flag State exclusive jurisdiction on the high seas, save in exceptional cases expressly provided for by UNCLOS or other international treaties. The exclusive jurisdiction of the flag State also covers "prescriptive" jurisdiction (see *mutatis mutandis*, ECJ, *Anklagemyndigheden v Poulsen and Diva Navigation Corporation*, Case C-286/90 [1992], ECR I-6019, at p. I-6056, para. 22; see also the position of the Italian Government in the *Enrica Lexie* case, [Notification Instituting Arbitral Proceedings](#), 26 June 2015, PCA Case No. 24, at 11, para. 29(e)).

Italy cannot claim jurisdiction on the basis of the port State jurisdiction doctrine. Port State jurisdiction is exceptional and must be considered subsidiary to the jurisdiction of the flag State, when the latter is unwilling or unable to exercise prescriptive and enforcement jurisdiction with respect to activities that may be harmful to the port state or the commons. The exercise of port State jurisdiction to activities occurring in areas beyond national jurisdiction must thus be based on a

positive entitlement provided for in a treaty (see, for example Article 218 UNCLOS) or other rules of customary international law. **No treaty or State practice underpins the existence of prescriptive jurisdiction of the port State as regards the conduct of third states' vessels performing SAR operations.**

Irrespective of its content, the enactment of any provision aimed at regulating the conduct of foreign vessels beyond the areas subjects to the jurisdiction of Italy would be contrary to international law and a violation of the corresponding rights of the flag and/or the coastal State(s)..

As far as boats flying Italian flag are concerned, the prescriptive jurisdiction of Italy as the flag State shall be exercised in accordance with the principles and rules of international law, including the law of the sea and human rights law.

4) INTERNATIONAL LAW OBLIGATIONS WITH RESPECT TO THE SAFEGUARD OF LIFE AT SEA

To the extent that Italy exercises jurisdiction in the context of a SAR operation, including by assuming the responsibility for the coordination of it, it must do so in compliance with its obligations under the law of the sea, the law of refugees and international human rights law, including the European Convention on Human Rights.

Some of the measures envisaged in the proposed CoC objectively diminish the capacity of NGOs operating at sea to save lives. This is for instance the case of the **absolute prohibitions of trans-shipment of migrants to other vessels** (even when this would put some lives at risk) and of **telephone communications or light signals** (even necessary to ensure the safety of any search and rescue operation legally undertaken).

Imposing those conducts to boats engaging in SAR operations may thus trigger the international responsibility of Italy.

5) ITALY IS UNDER SEVERAL INTERNATIONAL LAW OBLIGATIONS TO GRANT ACCESS TO ITS PORTS TO SAR NGOS' VESSELS

The proposed CoC sanctions failure to agree upon it, or to comply with it, with the possible "refusal by the Italian State to authorize the access to national ports, subject to compliance [by Italy] with the (sic!) existing international conventions."

In principle, a State may not, in principle, deny access to its ports to vessels flying its flag.

Conversely, under general international law a State is in principle free to regulate access to its ports by foreign vessels, such freedom may be limited by the operation of other rules of international law, even of a customary nature.

In particular, a generally accepted customary international law rule provides for a right to entry the ports of any states to foreign vessels in distress. A ship in distress entering a port is also exempt from local laws, including enforcement of criminal law.

Denial of access to port to ships, be them in distress or not, may result in breaches of obligations binding Italy. These include obligations under the European Convention on Human Rights: the obligation to protect persons under its jurisdiction from violations of their human rights (art. 1), in particular the right to life (art. 2) and not to be subject to torture or other inhuman or degrading treatment (art. 3).

6) ITALY CANNOT PROHIBIT FOREIGN VESSELS TO ENTER LIBYAN TERRITORIAL WATERS

The obligation to save life at sea operates in all maritime zones.

In accordance with art. 21.1 UNCLOS (which reflects general principles on the allocation of jurisdiction at sea): “The **coastal State** may adopt laws and regulations , **in conformity with the provisions of this Convention and other rules of international law**, relating to innocent passage through the territorial sea, in respect of (...): (...) h) the prevention of infringement of the (...) immigration (...) laws and regulations of the coastal State”.

The provision of an **absolute ban on entry in Libyan territorial waters** not only is an exercise of exorbitant jurisdiction by Italy, but it also aims at preventing the exercise by those foreign ships of their responsibility to protect life at sea and of their right of innocent passage under international law. It is thus not in conformity with international law.

Indeed, article 17 UNCLOS provides that “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. UNCLOS lists exhaustively the conditions for the exercise of this right. In particular, the passage must be “continuous and expeditious” (Art. 18 UNCLOS). However, “passage includes stopping and anchoring, [...] in so far as the same are [...] **for the purpose of rendering assistance to persons, ships or aircraft in danger or distress**” (*ibidem*).

As far as other conditions are concerned, the passage of SAR NGOs boats through the territorial sea of any State cannot be considered as “prejudicial to the peace, good order or security of the coastal State” (art. 19.1 UNCLOS). Indeed, Article 19.2.e UNCLOS expressly provides that **the loading and unloading of persons for the purpose of complying with the obligation to save life at sea falls within the meaning of innocent passage**.

7) ITALY CANNOT IMPOSE THE PRESENCE OF ITS ENFORCEMENT OFFICIALS ON FOREIGN BOATS

As already pointed out, the flag state has exclusive jurisdiction over ships in the high seas (Art. 92 UNCLOS). Therefore, **Italy may not impose the presence of any of its law enforcement officers on board of such vessels**, without infringing a sovereign right of the flag State.

Such right cannot be waived through a “Code of Conduct” agreed upon by the ship owner with a foreign State. The presence of any law-enforcement officer on board of any ship navigating in international waters must obtain – first and foremost – the agreement of the flag State.

8) ITALY CANNOT IMPOSE TO NGOs AN OBLIGATION TO COOPERATE WITH THE SO-CALLED “LIBYAN COAST GUARD” IN ACTIVITIES CONTRARY TO INTERNATIONAL LAW

The proposed CoC provides for an “obligation not to obstruct the search and rescue operations by the Libyan Coast Guard: with the obvious intention of leaving the control of those waters to the responsibility of the competent territorial authorities”.

The meaning of this provision is far from clear.

Firstly, it seems to imply that SAR NGOs ships actively obstruct the activities of the so-called “Libyan Coast Guard”, thus posing a threat to the safety of navigation. This is a completely wrong assumption that reverses the reality of facts: indeed, in many occasions the so-called “Libyan Coast Guard” has been reported of acting dangerously and in complete disregards of basic norms of safety at sea, within and outside the outer limit of Libyan territorial waters.

Secondly, SAR operations always take place under the coordination of a MRCC, routinely the Rome MRCC. Indeed, as explicitly recognized by the Italian Senate in its Final Document on the *Contribution of Italian Military Personnel to the Control of Migration Fluxes in the Mediterranean and the Impact of NGOs’ Activities* ([here](#), page 4): “after the collapse of Libya (...) Italy has assumed [SAR] responsibility of the entire maritime space of the central Mediterranean, up to the outer limit of Libyan territorial waters”.

Notwithstanding the clear efforts of Italy and the EU towards the reinforcement of Libyan capacity to ensure SAR services, including towards the establishment of a Libyan MRCC, this result is far from achieved. Not only the various incidents involving the so-called “Libya Coast Guard” testify of this. It is the above-mentioned Commission’s “Action plan on Measures to Support Italy, reduce pressure along the Central Mediterranean route and increase solidarity”, that implicitly admits that Libya is still not able to take responsibility for SAR operations (page 2, Part I, first point, fourth subpoint).

Moreover, many reliable sources point at the highly critical situation of migrants in Libya, involving systematic violation of their human rights, including arbitrary detention, inhumane conditions, torture, slavery, and sexual violence (see, for example, OHCHR, United Nations Support Mission in Libya, [“Detained and dehumanised”, Report on human rights abuses against migrants in Libya](#), 13

December 2016). This has prompted the Office of the Prosecutor of the International Criminal Court to consider initiating an investigation into these matters (see [Thirteenth Report to the United Nations Security Council pursuant to UNSCR 1970 \(2011\)](#), 8 May 2017).

A call on NGOs to abide by rules of international maritime safety and to follow the instructions of the Italian MRCC (that has taken responsibility for the SAR services in the Libyan SAR zone) is redundant: it is not proved that ships have acted differently so far. On the other hand, **requiring vessels of SAR NGOs to cooperate with the so-called “Libyan Coast Guard” with the clear aim of returning migrants to Libya would raise serious issues of respect for international law, and currently appear at odd with the obligation to provide a place of safety for migrants rescued at sea.**