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Why Evolving European SAR Policies Threaten Merchant Shipping

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Abstract

Operators of commercial vessels have rescued tens of thousands of migrant seafarers in the Mediterranean Sea since 2014. For commercial actors, swift disembarkation of survivors is critical to ensure safety and prevent further disruption to the rescuing vessel's primary voyage. From 2014 through 2017, European coastal states such as Italy, Malta, and Greece permitted rescued migrants to disembark into their territory. But recent policy changes reflect evolving attitudes about search and rescue (SAR) responsibility. Beginning in 2018, commercial vessels and humanitarian non-governmental organisations (NGOs) have performed large-scale rescues only to be denied immediate access to Mediterranean ports. This has created alarming scenarios in which rescued migrants and ship operators have remained at sea for days and weeks as solutions were negotiated by politicians on an ad hoc basis. Addressing the consequences of this policy transformation, this paper examines its impact on commercial vessel contributions to migrant rescues. Highlighting the intertwined legal responsibilities of private vessels and public authorities, it discusses the international SAR framework and its contemporary implementation. It then surveys reactions within the shipping industry reflecting concerns that evolving regional perspectives may drive up the risks, costs, and frequency of private participation in SAR operations.

Keywords: International Law; Maritime Law; Search and Rescue; Shipping; Political Risk; Migration

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1. Introduction

Since 2014 more than 18,000 migrant seafarers have died attempting to cross the Mediterranean Sea to reach Europe.¹ During this period, many tens of thousands of people have also been rescued by state coast guards, naval patrols, humanitarian NGOs, and commercial vessels.² These rescuers have coordinated attempts to ensure that migrant vessels in distress situations are engaged as quickly as possible and that survivors are delivered to a place of safety in accordance with international legal obligations. During the initial months of this crisis, the rescue infrastructure was under immense strain to respond to the scale and regularity of distress situations. At that time, operators of commercial

1 International Organization for Migration (IOM), 'Missing Migrants Project: Latest Global Figures' <<https://missingmigrants.iom.int>> accessed 6 December 2019.

2 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf> accessed 6 December 2019.

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vessels often served as first responders, performing over 40,000 rescues in 2014, approximately 25% of the total rescues during that period.³ These private actors provided heroic contributions despite the enhanced risks and costs of using commercial equipment and personnel to effectuate large-scale rescues.⁴ In the years that followed, other rescuing actors assumed primary SAR responsibility, which relieved commercial actors of some of the rescue burden suffered in the initial months of the crisis. But even with the emergence of alternative rescue contributions, commercial vessels have remained an essential part of the Mediterranean SAR apparatus.⁵

For these commercial actors, swift disembarkation is critical to ensure the safety of those on board and to prevent extensive disruption to the rescuing vessel's primary voyage. The infamous *M/V Tampa* incident of 2001 serves as an alarming flashpoint illustrating the potentially dangerous humanitarian consequences of delayed disembarkation, as hundreds of rescued migrants were held on the deck of a container vessel for nearly two weeks after it was denied access to the nearby Australian port.⁶ In response to the *Tampa* incident, the international maritime community revisited the legal framework governing rescues at sea and amended international legal instruments articulating SAR obligations to ensure a safe place of disembarkation is quickly determined.⁷ Under this updated framework, disembarkation of rescued persons in the Mediterranean has been performed primarily in Italy, Greece, and Malta since 2014. But recent policy changes in Europe have reflected new attitudes about SAR obligations and disembarkation responsibility. Beginning in 2018, NGO and commercial vessels have performed rescues in the Mediterranean Sea only to be denied access to nearby ports. This has created perilous situations in which rescued migrants and rescuing vessel operators have remained at sea for days and weeks while ad hoc political solutions for disembarkation were negotiated on shore.

Addressing this policy transformation regarding survivor disembarkation, this paper examines its impact on commercial vessel contributions to large-scale migrant rescues. Highlighting the intertwined responsibilities of private vessels and public authorities, it discusses the legal framework codifying the obligation to render assistance and disembark rescued persons to a place of safety. It then surveys reactions within the shipping industry reflecting concerns that evolving perspectives in Europe may drive up the risks, costs, and frequency of private participation in SAR operations.⁸

3 *ibid.*

4 Richard L. Kilpatrick Jr and Adam Smith, 'The International Legal Obligation to Rescue During Periods of Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis' (2016) 28 (2) *University of San Francisco Maritime Law Journal* 142.

5 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.

6 Jessica E. Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 *Pacific Rim Law & Policy Journal* 461.

7 The substance of these amendments are discussed in Section II.

8 For a more practice-oriented commentary on the commercial risks and costs relating to merchant vessel participation in large-scale migrant rescues, see: Richard L. Kilpatrick Jr., 'The "Refugee Clause" for Commercial Shipping Contracts: Why Allocation of Rescue Costs is Critical During Periods of Mass Migration at Sea' (2018) 46 (2) *Georgia Journal of International and Comparative Law* 403; Kathleen S. Goddard, 'Rescuing Refugees and Migrants at Sea: Some Commercial Shipping Implications' (2015) 21 *International Journal of Maritime Law* 352.



2. Public and Private SAR Obligations Under International Law

Several international legal instruments codify SAR obligations attached to public and private maritime actors. These agreements reflect a centuries-old customary duty to assist vessels in distress.⁹ The United Nations Convention on the Law of the Sea (UNCLOS), the Safety of Life at Sea Convention (SOLAS Convention), the International Convention on Salvage (Salvage Convention), and the International Convention on Maritime Search and Rescue (SAR Convention) each contribute to the modern framework allocating responsibility and compelling coordination in maritime distress situations. These instruments place distinct obligations on coastal states and private shipmasters in attempts to ensure that persons in distress at sea will receive assistance and be delivered to a place of safety.

Contracting States to UNCLOS are required to '[...] promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea [...]' in coordination with neighbouring coastal states.¹⁰ The SAR Convention goes further by obliging states to apportion their collective search and rescue responsibilities.¹¹ Operationalizing these obligations, states have divided the oceans into designated SAR regions and have established Rescue Coordination Centres (RCCs) at strategic locations around the world. These RCCs monitor distress signals, coordinate communication between distressed vessels and rescuing actors, and organize the provision of emergency medical services.¹² RCCs train and deploy state search and rescue units, but they also regularly call on ships already operating at sea (including private commercial vessels) to contribute whenever necessary.

Both the SOLAS Convention and the Salvage Convention explicitly require private shipmasters to assist persons in distress at sea. The SOLAS Convention reads at the relevant part, '[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance'.¹³ The Salvage Convention contains a similar provision which reads, '[e]very master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea'.¹⁴

While neither the SAR Convention nor UNCLOS directly address the obligations of private shipmasters, UNCLOS nonetheless obliges Contracting States to 'require' shipmasters flying their flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible

9 For a discussion on the development of this codification, see: Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) *Benedict's Maritime Bulletin* 83.

10 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 ('UNCLOS') art. 98(2).

11 International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1403 UNTS 97 ('SAR Convention') as amended, Annex 2.1.3.

12 *ibid.*

13 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) ('SOLAS Convention') 164 UNTS 113, chapter V, regulation 33.1.

14 International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (Salvage Convention), *supra* note 3, art. 10.



speed to the rescue of person in distress.¹⁵ This enforcement obligation is also reflected in the Salvage Convention, which mandates Contracting States to ‘adopt the measures necessary to enforce’ the private shipmaster’s duty to render assistance to persons in danger of being lost at sea.¹⁶ States have implemented this obligation by adopting criminal statutes that require shipmasters to render assistance at sea. These statutes, which often provide for fines and even imprisonment as a sanction, have been adopted by various jurisdictions within the Mediterranean region, including Italy, Malta, and Greece, as well as other major flag states, such as Panama, Hong Kong, and Singapore.¹⁷

These private obligations attach indiscriminately regarding the physical characteristics of the vessel. In practice, this means that even operators of large, cumbersome, and inhospitable container ships, tankers, bulk carriers, platform supply vessels, and others are required to respond to requests for assistance. As of this writing, however, there is no widely reported example from any jurisdiction in the modern era suggesting that states are willing to prosecute private shipmasters for violating such statutes.

Enforcement aside, under the applicable treaties the duty to rescue does not end with the embarkation of the rescued persons onto the rescuing vessel. The modern iteration of the SAR Convention defines ‘rescue’ to include delivery of rescued persons to a ‘place of safety’.¹⁸ The SAR Convention does not define place of safety and does not provide express guidance regarding when a state must accept rescued persons into its territory. Instead it grants the applicable RCC the liberty to ‘coordinate’ in landing the rescued persons. In practice, the place of safety determination has been administered on an ad hoc basis, which has led to considerable problems.

The disembarkation question was placed under intense scrutiny in the wake of the *Tampa* incident in August 2001. In that case, the Australian RCC called on the 44,000-ton Norway-flagged container ship, the *Tampa*, to assist a distressed vessel in the Indian Ocean. The *Tampa*, which was owned by Norwegian company Wallenius Wilhelmsen, diverted from its intended course carrying \$20 million in cargo from Freemantle to Singapore. Its operators then successfully embarked over 400 migrants at sea originating from Afghanistan, Iraq, Pakistan, and Sri Lanka. The shipmaster attempted to disembark the rescued persons at the nearest port at Christmas Island, but the Australian authorities denied the *Tampa* access. After several days waiting for authorization, the humanitarian conditions on the *Tampa* deteriorated, and the shipmaster directed the vessel towards Christmas Island even at the protest of the Australian authorities. A unit of the Australian Special Armed Services intercepted the vessel, which sparked a diplomatic row and generated major public backlash. The *Tampa* was delayed an additional eight days while an arrangement was reached to transfer the rescued persons to other countries.

15 UNCLLOS, art. 98(1).

16 Salvage Convention, art. 10.

17 See e.g. Italian Code of Navigation 1958, art. 1158; Malta Merchant Shipping Act, Chapter 234; Singapore Maritime Conventions Act, Part II, Section 6; Hong Kong Merchant Safety Ordinance, Chapter 369.

18 SAR Convention, annex 1.3.2.



The shipmaster of the *Tampa*, Arne Rinan, and his crew were later hailed as heroes for honouring moral and legal obligations under the difficult circumstances.¹⁹ The Australian government, on the other hand, was heavily criticized, not only for its apparent callousness towards the rescued migrants but also because of the difficult position in which it placed the crew of the *Tampa*. In addition to the dangers imposed on the operators of the *Tampa*, the commercial voyage was substantially delayed, which resulted in losses of several hundred thousand dollars.²⁰

In the fallout of the *Tampa* incident, stakeholders in the maritime industry began to consider whether updates to the international legal instruments were appropriate.²¹ The International Maritime Organization (IMO) Assembly, the United Nations specialized agency responsible for shipping industry matters, tasked its Maritime Safety Committee to identify ambiguities in the law for proposed updates. As part of this project, an interagency group was established to procure input from international organizations with either a maritime or migration-related mandate, including the IMO, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM) and others.²²

This resulted in resolutions at the IMO amending both the SAR Convention and the SOLAS Convention. These amendments included language designed to clarify the obligation of state actors to ensure assisting ships are released from their obligations quickly and that an appropriate place of disembarkation is determined without unreasonable delay. New paragraphs were added to both conventions requiring state parties to:

*[...] ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea.*²³

While the amendments do not unequivocally clarify the circumstances in which a state is required to accept rescued persons, they indicate that the state 'responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety [...]' The new paragraphs also require the applicable state to 'arrange for such disembarkation to be effected as soon as reasonably practicable'.

19 Eduardo Cue, 'Captain, Crew and Owner of "Tampa" Win Nansen Award for Recue at Sea' (UNHCR, 19 March 2002) <www.unhcr.org/news/latest/2002/3/3c975a254/captain-crew-owner-tampa-win-nansen-award-rescue-sea.html> accessed 6 December 2019.

20 Jessica E. Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 Pacific Rim Law & Policy Journal 461; Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) Benedict's Maritime Bulletin 83.

21 Frederick J. Kenney Jr. and Vasilios Tasikas, 'The Tampa Incident: IMO Perspectives and Responses on The Treatment of Persons Rescued at Sea' (2003) 12 (1) Pacific Rim Law & Policy Journal 144.

22 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.

23 SAR Convention, para 3.1.9; SOLAS Convention, chapter V, regulation 33, para 1-1.



Also in 2004, the IMO promulgated Guidelines on the Treatment of Persons Rescued at Sea (2004 IMO Guidelines).²⁴ Addressing particular problems related to large-scale migrant rescues, the 2004 IMO Guidelines raise relevant principles of international refugee law. The Guidelines point out that it may be necessary to consider whether the rescued persons may have their lives or freedoms threatened in a particular place of disembarkation.²⁵ If the rescued persons are in fact refugees, state actors may be prohibited from returning such persons to places in which their lives or freedoms are threatened on account of membership in a protected class.²⁶ This so-called *non-refoulement* obligation may have implications for determining an appropriate place of safety.²⁷ In practice, this means that state actors must not return migrants who may have colourable refugee status claims to locations where they are likely to face persecution. This may also have implications for private vessels participating in rescues, because vessel operators may need to coordinate with state RCCs to ensure that any rescued persons are disembarked at a location where claims to refugee status may be assessed by applicable state authorities.

Even with the SAR and SOLAS amendments and other legal directives flowing from the *Tampa* experience, the law remains unclear in some respects. Namely, it is uncertain whether a state RCC responsible for coordinating a rescue is obliged to disembark rescued persons into its own territory.²⁸ If the state coordinating the rescue cannot arrange an alternative safe place of disembarkation, there still may be a 'residual obligation' to accept the rescued persons.²⁹ However, this may place too much onus on states with expansive SAR regions. An alternative view is that survivors instead should be disembarked at the nearest safe port, regardless of which state coordinates the rescue.³⁰ Due in part to this uncertainty, some states such as Malta have persistently objected to the legal interpretations reflected in the 2004 IMO Guidelines.³¹

Acknowledging this gap in the law, in 2009 the IMO Facilitation Committee promulgated a document entitled 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' which provides further guidance on the issue. It recommends the following:

24 Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004, entered into force 1 July 2006), Resolution MSC.167(78) ('2004 IMO Guidelines').

25 2004 IMO Guidelines, para.6.1.7

26 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

27 2004 IMO Guidelines, para. 6.17.

28 *ibid*, para 6.16.

29 Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea' (2017) 15 (2) *Benedict's Maritime Bulletin* 83.

30 Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 *Journal of Maritime Law & Commerce* 219.

31 Jasmine Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (2013) 44 *Journal of Maritime Law & Commerce* 89.



*'If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.'*³²

This approach, however, is not reflected in any of the applicable treaties and is only intended to be a recommendation.³³

The international community has struggled to develop further rules clarifying the disembarkation obligation, even after the emergence of the Mediterranean crisis. Instead, rules that were developed under tamer geopolitical times remain in place, including the obligation on private shipmasters to execute large-scale rescues. As frequent demand for rescues has continued to materialize, this reliance on private ships to 'preserve the integrity of global SAR services' has been affirmed in policy and practice.³⁴ Paired with the uncertain status of disembarkation, this has understandably caused anxiety among commercial actors, which are exposed to increased risks and costs when disembarkation is delayed.

3. Evolving SAR Policies in the Mediterranean Sea

While significant levels of maritime migration from Africa to Europe has been occurring for decades, the numbers intensified in the wake of the so-called 'Arab Spring' in which governments across northern Africa and the Middle East were destabilized beginning around 2010. The Syrian civil war caused people to flee the conflict into Turkey and then into Greece over channels in the Aegean Sea. The fall of the Gaddafi government in Libya also created an ungoverned coastline along the southern central Mediterranean, which drew refugees and economic migrants from throughout the African continent to attempt sea crossings towards Malta and Italy. This surge of attempted sea crossings has caused challenges both in terms of allocating primary responsibility for coordinating and participating in rescue operations and determining which states should allow rescued persons to disembark into their territory.

3.1 Rescue coordination and contributions

Prior to the fall of the Gaddafi regime, Italy had coordinated with Libya to push migrant vessels back to Libyan shores. This approach was challenged at the European Court of Human Rights (ECtHR), which determined that this push back policy violates international law.³⁵ The ECtHR held that

³² IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea' FAL.3/Circ.194 (22 January 2009).

³³ Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligations Accruing at Sea' [2011] International Journal of Refugee Law.

³⁴ See 2004 IMO Guidelines.

³⁵ *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 February 2012).



Italy's policy of returning migrants who may have had legitimate claims of refugee status back to Libya (a country that is not a party to the Refugee Convention), contravened the European Convention's principles of *non-refoulement*.³⁶ In 2013, a large-scale incident occurred off the Italian coast of Lampedusa, causing the deaths of more than 350 migrant seafarers. In response to mounting political pressure to prevent such tragedies, Italy instituted an emergency operation called *Mare Nostrum* or 'Our Sea,' designed to prevent large-scale drownings between the coasts of Italy and northern Africa. This ambitious search and rescue initiative conducted by the Italian coast guard employed hundreds of operations, which saved thousands of lives and provided a mechanism for refugee processing under European Union (EU) immigration protocols. But *Mare Nostrum* strained Italian resources and some policy-makers claimed it incentivized dangerous sea crossings between Libya and the Italian coasts.³⁷ In 2014, it was abandoned after 12 months of operation.

After *Mare Nostrum* ended, maritime crossings in the Mediterranean continued to swell, not only in the Central Mediterranean route, but also in the Aegean Sea between Turkey and Greece. During this period, the state-sponsored search and rescue infrastructure was overwhelmed. The EU border agency FRONTEX initiated several programmes with a dual purpose of maritime border security and search and rescue, but these measures did not match the resources or scope of *Mare Nostrum*. With both state and regional resources unable to adequately respond to the demand for distressed vessel assistance, applicable RCCs often requested that commercial vessels carrying cargo in the Mediterranean Sea serve as first responders. According to data from the Italian coast guard, in 2014 commercial vessels reportedly participated in as many as a quarter of the rescue operations occurring in the Mediterranean Sea.³⁸

This put substantial pressure on shipping industry participants in the early months of the crisis. Industry organizations began to speak out, contending that too much reliance was being placed on merchant shipping to provide SAR services. These actors emphasized that using commercial vessels for large-scale humanitarian rescues is especially risky and costly. These concerns intensified in April 2015 when a migrant vessel carrying more than 800 people collided with a Portuguese-flagged con-

36 *ibid.*

37 Adam Taylor, 'Italy Ran An Operation That Saved Thousands of Migrants from Drowning in the Mediterranean. Why Did It Stop?' (*The Washington Post*, 20 April 2015) <www.washingtonpost.com/news/worldviews/wp/2015/04/20/italy-ran-an-operation-that-save-thousands-of-migrants-from-drowning-in-the-mediterranean-why-did-it-stop/> accessed 6 December 2019; Adam Taylor, 'Why Britain Won't Save Drowning Migrants in the Mediterranean' (*The Washington Post*, 28 October 2014) <www.washingtonpost.com/news/worldviews/wp/2014/10/28/why-britain-wont-save-drowning-migrants-in-the-mediterranean/> accessed 6 December 2019.

38 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf> accessed 6 December 2019; European Political Strategy Centre, 'Irregular Migration Via the Central Mediterranean: From Emergency Responses to Systemic Solutions' (2 February 2017) <https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf> accessed 6 December 2019.



tainer vessel, the *M/V King Jacob*, which had responded to its distress call.³⁹ Tragically, nearly all of the migrants on board drowned - one of the deadliest events of its kind in the Mediterranean Sea.⁴⁰

This event highlighted the dangers of relying so heavily on commercial vessels to serve as primary rescue providers. In response to such events, the International Chamber of Shipping collaborated with other industry organizations to update a guidance designed to educate industry participants on best practices for conducting large-scale rescue operations at sea.⁴¹ Industry organizations also raised the argument in political fora that while commercial vessel operators will continue to respond to their humanitarian obligations under international law, merchant ships should not be expected to serve as the primary provider of large-scale rescues.⁴²

In 2015-2016, other international and regional organizations also added to the work of FRONTEX. The EU Naval Force instituted Operation Sophia to disrupt migrant smuggling and provide SAR functions when necessary. Likewise, the North Atlantic Treaty Organization (NATO) also committed resources with a similar dual role. The EU entered into an agreement with Turkey in which Turkey committed to accept and resettle migrants who had crossed into the EU along the border between Turkey and Greece. These approaches stemmed the flow of maritime migration in the Aegean Sea, but did little to address the traffic originating off the coast of Libya along the Central Mediterranean route. While the overall numbers of maritime migration dropped significantly in 2016, the number of deaths continued to climb due to the enhanced dangers of the Central Mediterranean route and the increasing unseaworthiness of the vessels being used by migrant smugglers, which ultimately devolved into cheaply-made inflatable rubber dinghies.

Around this same period, humanitarian organizations began to voluntarily participate in SAR.⁴³ Between 2014 and 2016, organizations including Migrant Offshore Aid Station (MOAS), Médecins Sans Frontières (MSF), Sea Watch, SOS Méditerranée, Proactiva Open Arms, and others began char-

39 Manuela Mesco, 'How Migrants' Ordeal Turned Into Tragedy at Sea' (*The Wall Street Journal*, 21 April 2015) <www.wsj.com/articles/captain-error-caused-migrant-ship-to-capsize-investigators-say-1429614614> accessed 6 December 2019; Mattathias Schwartz, 'Another Mediterranean Catastrophe' (*The New Yorker*, 21 April 2015) <www.newyorker.com/news/news-desk/europes-latest-migrant-catastrophe> accessed 6 December 2019; Jim Yardley and Dan Bilefsky, 'Migrant Boat Captain Steered Toward Tragedy in Mediterranean, Authorities Say' (*The New York Times*, 21 April 2015) <www.nytimes.com/2015/04/22/world/europe/italy-libya-migrant-boat-capsize.html> accessed 6 December 2019.

40 Nick Squires, 'Teenage Survivors Tell of Terror as Migrant Boat Smashed into Rescue Ship and Hundreds Drowned' (*The Daily Telegraph*, 21 April 2015) <www.telegraph.co.uk/news/worldnews/europe/italy/11553741/Teenage-survivors-tell-of-terror-as-migrant-boat-was-smashed-to-pieces-and-hundreds-drowned.html> accessed 6 December 2019.

41 International Chamber of Shipping, *Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Person* (2nd edn, International Chamber of Shipping, 2015).

42 International Chamber of Shipping, 'Shipping Industry Calls on EU Leaders to be Decisive and Immediately Increase Mediterranean Search and Rescue Resources' (22 April 2015) <www.ecsa.eu/news/shipping-industry-calls-eu-leaders-be-decisive-and-immediately-increase-mediterranean-search> accessed 6 December 2019; Steven Erlanger, 'Ship's Captains Call for Uniform Policies on Migrants at Sea' (*The New York Times*, 22 April 2015) <www.nytimes.com/2015/04/23/world/europe/ships-captains-call-for-uniform-policies-on-migrants-at-sea.html> accessed 6 December 2019.

43 Hernan Del Valle, 'Search and Rescue in the Mediterranean Sea: Negotiating Political Differences' (2016) 35 (2) *Refugee Survey Quarterly* 22.



tering vessels to engage in humanitarian rescues to fill the void left by the insufficient level of state and regional SAR vessels.⁴⁴ These NGOs coordinated with state and regional RCCs to engage migrant vessels, often providing initial humanitarian assistance under the instructions of coast guard vessels. The contributions of these actors substantially reduced the SAR burden on operators of commercial vessels, although according to the Italian Coast Guard merchant vessels still rescued more than ten thousand migrants each year in 2015, 2016, and 2017.⁴⁵

In 2017, Europe again turned to authorities on the Libyan coasts for SAR support - this time under the auspices of the interim Libyan Government of National Accord formed after the fall of the Gaddafi regime. The EU, Italy and other regional actors provided resources to support these Libyan initiatives, which began engaging migrant vessels within Libyan territorial waters. Other state coast guards, including those supported by authorities based in Tunisia and Spain have also provided contributions as migration patterns have at times moved towards the Western Mediterranean.⁴⁶

3.2 Disembarkation of Rescued Persons

The contributions of these state, regional, and volunteer actors at least temporarily relieved pressure on operators of commercial vessels to participate in rescues. While coordination among these various SAR contributors has improved over the course of the crisis, the question of disembarkation of rescued persons has become increasingly convoluted. As discussed above, international law is not clear regarding who is responsible for accepting rescued persons on land after survivors are safely on board the rescuing vessel. Such decisions instead have been determined on a case-by-case basis.

From the beginning of the contemporary crisis, Italy has coordinated rescues between various stakeholders and allowed rescued persons to disembark at Italian ports. Under arrangements with Malta and Libya, Italy agreed to assume de facto control over the SAR zones in the Central Mediterranean through coordination administered at the Rome-based maritime rescue coordination centre (MRCC).⁴⁷ This Italian leadership facilitated rescue operations and incentivized volunteer and commercial actors to participate in rescues by ensuring efficient and predictable disembarkation of rescued persons.

44 For a thorough discussion of the contributions of NGO rescuers, see: Eugenio Cusumano and James Pattison, 'The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of State Responsibility' (2018) 31 (1) Cambridge Review of International Affairs 53.

45 Guardia Costiera, '2017 SAR Operations in the Mediterranean Sea' <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ENG.pdf> accessed 6 December 2019.

46 The New York Times, 'Dozens of Migrants Drown Off Tunisia and Turkey; Hundreds Rescued Off Spain' (3 June 2018) <www.nytimes.com/2018/06/03/world/europe/migrants-tunisia-turkey-spain.html> accessed 6 December 2019.

47 European Political Strategy Centre, 'Irregular Migration Via the Central Mediterranean: From Emergency Responses to Systemic Solutions' (2 February 2017) <https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf> accessed 6 December 2019.



NGO rescuers initially received broad support from European states involved in SAR operations, including Italy, Malta, Greece, and others.⁴⁸ During 2015 and much of 2016, NGO rescuers often assumed primary responsibility for making initial contact with distressed migrant vessels and then either transferred the rescued persons directly to Italy or to state-operated vessels. In fact, under the coordination of the Italian MRCC, state vessels often positioned themselves behind the NGO vessels, which were viewed as being better equipped to provide initial humanitarian assistance.⁴⁹

By the end of 2016, these positive views towards NGO vessels began to deteriorate. Some observers argued that the presence of the NGOs operating in the Central Mediterranean was a pull factor that incentivized migrants to engage in unreasonably risky sea crossings.⁵⁰ Allegations also began to surface that NGOs were colluding with migrant smugglers to relay their locations in order to effectively transfer migrants to Europe under the guise of search and rescue.⁵¹ The Italian judiciary responded by initiating investigations into the finances of NGO rescuers to determine any links with migrant smuggling cartels.⁵² In July 2017, Italy published a code of conduct for all NGOs participating in rescues at sea.⁵³ Some, but not all, NGO rescuers agreed to follow the code of conduct.⁵⁴ Italy threatened that it would close off port access to NGOs that refused to agree to its terms.⁵⁵

Also in the summer of 2017, Libya announced the establishment of a SAR zone and explicitly excluded NGO vessels from operating there.⁵⁶ After this announcement, the Italian MRCC began in-

48 For an overview of the legal and political issues surrounding NGO contributions to rescues in the Mediterranean Sea, see: Adam Smith, 'Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean' (2017) 5 *Paix et Securite Internationales* 29.

49 *ibid.*

50 Duncan Robinson, 'EU Border Force Flags Concerns Over Charities' Interaction with Migrant Smugglers' (*Financial Times*, 14 December 2016) <www.ft.com/content/3e6b6450-clf7-11e6-9bca-2b93a6856354> accessed 6 December 2019; Stuart A. Thompson and Anjali Singhvi, 'Efforts to Rescue Migrants Caused Deadly, Unexpected Consequences' (*The New York Times*, 14 June 2017) <www.nytimes.com/interactive/2017/06/14/world/europe/migrant-rescue-efforts-deadly.html> accessed 6 December 2019.

51 BBC News, 'Italy Migrant Crisis: Charities "Colluding" with Smugglers' (23 April 2017) <www.bbc.com/news/world-europe-39686239> accessed 6 December 2019; Jenna Belhumeur, 'NGOs Deny Collusion with Mediterranean Smugglers' (*Aljazeera*, 1 June 2018) <www.aljazeera.com/news/2017/05/ngos-deny-collusion-mediterranean-smugglers-170531111554101.html> accessed 6 December 2019.

52 Antonella Cinelli and Steve Scherer, 'Italian Court Investigates Whether Smugglers Finance Rescue Boats' (*Reuters*, 17 February 2017) <www.reuters.com/article/europe-migrants-italy-ngo/italian-court-investigates-whether-smugglers-finance-rescue-boats-idUSL8N1G24W2> accessed 6 December 2019.

53 Massimiliano Di Girgio and Isla Binnie, 'Italy Drafts Code on NGO Migrant Rescues as Thousands More Reach Land' (*Reuters*, 14 July 2017) <www.reuters.com/article/us-europe-migrants-italy/italy-drafts-code-on-ngo-migrant-rescues-as-thousands-more-reach-land-idUSKBN19Z14W> accessed 6 December 2019.

54 Isla Binnie and Antonio Denti, 'Aid Groups Snub Italian Code of Conduct on Mediterranean Rescues' (*Reuters*, 31 July 2017) <<https://www.reuters.com/article/us-europe-migrants-italy-ngo/aid-groups-split-over-italys-new-rules-for-migrant-rescues-idUSKBN1AG2FT>> accessed 6 December 2019.

55 Lizzie Dearden, 'Italy Threatens to Close Ports to Humanitarian Refugee Rescue Ships as it Reaches "Saturation Point"' (*The Independent*, 29 June 2017).

56 The Maritime Executive, 'Libya Excludes NGO Vessels from 'Rescue Zone'' (11 August 2017) <www.maritime-executive.com/article/libya-excludes-ngo-vessels-from-rescue-zone> accessed 6 December 2019.



creasing its utilization of the Libyan coast guard infrastructure to intercept migrant vessels, even when NGO rescuers were in close proximity to distressed vessels.⁵⁷ The MRCC also began granting Libyan assets 'on scene command' in which Libyan vessels were delegated the authority to give instructions to other rescuing vessels.⁵⁸ After intercepting migrant vessels, the Libyan coast guard would controversially return the migrants to Libya, rather than coordinate disembarkation to Italian territory.⁵⁹ This approach caused outrage from observers in humanitarian circles who argued that Europe was outsourcing border security to the Libyans in a way that contributed to human rights abuses by proxy.⁶⁰ Others countered that it saved lives by reducing the number of migrants attempting dangerous sea crossings.⁶¹

The discourse intensified after the Libyan coast guard reportedly interfered with NGO operations, including firing shots at NGO vessels, interrupting rescues, and threatening NGO personnel.⁶² These dangerous interactions triggered new legal action against Italy in the ECtHR.⁶³ It also caused most NGO rescuers to cease operations in the Central Mediterranean.⁶⁴ By the end of 2017, only a few NGO vessels were still operating in the Central Mediterranean. Among them was the *M/V Aquarius*, which continued to be deployed under a joint arrangement between MSF and SOS Méditerranée.

57 Steve Scherer and Aidan Lewis, 'Italy Plans Big Handover of Sea Rescues to Libya Coastguard' (*Reuters*, 15 December 2017) <www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG> accessed 6 December 2019.

58 Paolo Cuttitta, 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End for the Humanitarian Turn (Part II)' (*University of Oxford Law*, 19 April 2018) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0> accessed 6 December 2019.

59 See e.g. Ahmed Elumami, 'Libyan Coastguard Turns Back Nearly 500 Migrants After Altercation with NGO Ship' (*Reuters*, 10 May 2017) <www.reuters.com/article/us-europe-migrants-libya/libyan-coastguard-turns-back-nearly-500-migrants-after-altercation-with-ngo-ship-idUSKBN1862Q2> accessed 6 December 2019; Aidan Lewis, 'Bolstered Libyan Coast Guard Intercepts Packed Migrant Boat' (*Reuters*, 4 November 2017) <www.reuters.com/article/uk-europe-migrants-libya/bolstered-libyan-coast-guard-intercepts-packed-migrant-boat-idUKKBN1D40WN> accessed 6 December 2019.

60 Stephanie Kirchgaessner and Lorenzo Tondo, 'Italy Deal with Libya to 'Pull Back' Migrants Faces Legal Challenge' (*The Guardian*, 8 May 2018).

61 Giulia Paravicini, 'Italy's Libyan Vision' Pays Off as Migrant Flows Drop' (*Politico*, 10 August 2017) <www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/> accessed 6 December 2019.

62 Lizzie Dearden, 'Libyan Coastguard "Opens Fire" During Refugee Rescue as Deaths in Mediterranean Sea Pass Record 1,500' (*The Independent*, 24 May 2017) <www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libya-coastguard-opens-fire-drowned-gunshots-ngos-rescue-boat-a7754176.html> accessed 6 December 2019; The Maritime Executive, 'Libyan Coast Guard Threatens to Kill Migrant Rescue Team' (16 March 2018) <www.maritime-executive.com/article/libyan-coast-guard-threatens-to-kill-migrant-rescue-team> accessed 6 December 2019.

63 See e.g. *Rackete and Others v Italy*, App no 32969/19 (ECtHR, 29 January 2019) Interim Measure; Global Legal Action Network, '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 6 December 2019.

64 Jon Henley and Angela Guiffrida, 'Three NGOs Halt Mediterranean Migrant Rescues After Libyan Hostility' (*The Guardian*, 14 August 2017) <www.theguardian.com/world/2017/aug/14/three-ngos-halt-mediterranean-migrant-rescues-after-libyan-hostility> accessed 6 December 2019; Charles Heller and others, 'It's An Act of Murder: How Europe Outsources Suffering as Migrants Drown' (*The New York Times*, 26 December 2018) <www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html> accessed 6 December 2019.



In March 2018, the controversial League party won critical elections in Italy on a largely anti-immigrant platform.⁶⁵ By June 2018, party leader Matteo Salvini was sworn in as Deputy Prime Minister and Minister of the Interior. Salvini committed to reduce illegal immigration to Italy and threatened to prevent NGO vessels carrying rescued migrants from accessing Italian ports. He accused the NGOs of acting as a ‘taxi service’ to Europe and popularized the Twitter hashtag #chiudiamoiporti or ‘Let’s close the ports!’⁶⁶

In June 2018, Italy, for the first time, denied the *Aquarius* port access when it arrived off Sicily carrying more than 600 rescued migrants.⁶⁷ The Italian MRCC had coordinated with the operators of the *Aquarius* to facilitate the rescue of the migrants from several rubber boats in the Central Mediterranean. But on 10 June 2018, as the *Aquarius* approached the Sicilian coast, the Italian government announced it would refuse to allow the vessel to enter port and disembark the migrants. The Italians instead argued that Malta should be required to take the migrants since the *Aquarius* was marginally closer to Malta at the time of the rescue. Malta countered that it was the Italian MRCC who had ordered the rescue in the first place, and Italy should therefore allow disembarkation into its own territory. After several days of standoff, Spain ultimately agreed to accept the migrants for disembarkation.⁶⁸ This required the *Aquarius* to undertake a multiple day journey of more than 700 nautical miles from the coast of Sicily to the Spanish port of Valencia. The *Aquarius* did not have enough supplies to safely perform this voyage, so two Italian coast guard vessels had to carry some of the migrants and escort the *Aquarius* across the Mediterranean in rough weather.⁶⁹

Following the *Aquarius* incident, Salvini explained to the media: ‘[f]oreign NGOs, with foreign crews, flying a foreign flag and financed by foreign institutions will no longer step foot in Italy.’⁷⁰ On Facebook, he wrote: ‘[r]escuing lives is a duty, transforming Italy into an enormous refugee camp is

65 Nick Squires, ‘Italian Politician Pledges to Kick Out Half a Million Illegal Migrants if Elected Prime Minister’ (*The Daily Telegraph*, 23 January 2018) <www.telegraph.co.uk/news/2018/01/23/italian-politician-pledges-kick-half-million-illegal-migrants/> accessed 6 December 2019.

66 Special thanks to Paolo Zampella for providing this version of the translation; See also: Mary Fitzgerald, ‘“Close the Doors” – Salvini Tweet Signals Rise of Hard Right in EU’ (*The Independent*, 16 June 2018) <www.independent.ie/world-news/europe/close-the-doors-salvini-tweet-signals-rise-of-hard-right-in-eu-37016478.html> accessed 6 December 2019.

67 Gaia Pianigiani and others, ‘Italy’s New Populist Government Turns Away Ship with 600 Migrants’ (*The New York Times*, 11 June 2018) <www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html> accessed 6 December 2019.

68 Nick Squires, ‘Italy’s Hardline Government Threatens to Pull Back from Migrant Rescue Missions’ (*The Daily Telegraph*, 18 June 2018) <www.telegraph.co.uk/news/2018/06/18/italys-hardline-government-threatens-pull-back-migrant-rescue/> accessed 6 December 2019.

69 Megan Specia, ‘Aboard the Rescue Ship Where Migrants Have been Stuck for a Week’ (*The New York Times*, 15 June 2018) <www.nytimes.com/2018/06/15/world/europe/migrants-ship-mediterranean-europe.html> accessed 6 December 2019.

70 AFP/The Local, ‘Italy Will Close Ports to NGO Migrant Ships “All Summer” Despite Drownings’ (*The Local*, 29 June 2018) <www.thelocal.it/20180629/italy-will-close-ports-to-ngo-migrant-ships-all-summer-despite-drownings> accessed 6 December 2019.



not.⁷¹ In the aftermath, other NGO vessels were denied or delayed disembarkation into Italian and Maltese ports.⁷²

Italy then took further steps targeting the *Aquarius*. This included using flag state policy to delegitimize the vessel's operations, including allegedly pressuring Panama to revoke the ship's flag.⁷³ While Salvini denied involvement in the Panama Maritime Authority's decision, he remarked: '[t]hey can change their name and flag another thousand times but Italy's ports will remain shut to these gentlemen.'⁷⁴ Human rights groups criticized Panama for submitting to political pressure and revoking the flag in the first place.⁷⁵ Meanwhile, Italy threatened to seize the vessel if it entered Italian ports, alleging that the operators had illegally disposed of toxic waste in Italian territory.⁷⁶ This pressure led to the decision of the *Aquarius* operator to suspend its Mediterranean SAR initiatives.⁷⁷

In the summer of 2018, an Italian-flagged vessel also returned rescued migrants to Libya for the first time since the ECtHR ruled it to be a violation of international law in 2012.⁷⁸ While the vessel, the *Asso Ventotto*, is an oil platform supply vessel supporting offshore activities for Italian energy com-

71 Gaia Pianigiani and others, 'Italy's New Populist Government Turns Away Ship with 600 Migrants' (*The New York Times*, 11 June 2018) <www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html> accessed 6 December 2019; Nick Squires, 'Italy's Hardline Government Threatens to Pull Back from Migrant Rescue Missions' (*The Daily Telegraph*, 18 June 2018) <www.telegraph.co.uk/news/2018/06/18/italys-hardline-government-threatens-pull-back-migrant-rescue/> accessed 6 December 2019.

72 Megan Specia, 'Italy and Malta Block Another Rescue Ship Carrying Migrants' (*The New York Times*, 28 June 2018) <www.nytimes.com/2018/06/24/world/europe/migrant-ship-mediterranean.html> accessed 6 December 2019.

73 Lorenzo Tonda and Karen McVeigh, 'No NGO Rescue Boats Currently in the Central Mediterranean, Agencies Warn' (*The Guardian*, 12 September 2018) <www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean> accessed 6 December 2019; Reuters, 'Panama Revokes Registration of Last Migrant Rescue Ship in Central Mediterranean' (23 September 2018) <www.reuters.com/article/us-italy-migration-aquarius-panama/panama-revokes-registration-of-last-migrant-rescue-ship-in-central-mediterranean-idUSKCN1M30S9> accessed 6 December 2019.

74 *ibid.*

75 Anastassios Adamopoulos, 'Registries Criticised for Aquarius De-flagging' (*Lloyd's List*, 12 February 2019) <<https://lloydslist.maritimeintelligence.informa.com/LL1126215/Registries-criticised-for-Aquarius-deflagging>> accessed 6 December 2019.

76 Jason Horowitz, 'Italy Orders Seizure of Migrant Rescue Ship' (*The New York Times*, 20 November 2018) <www.nytimes.com/2018/11/20/world/europe/italy-aquarius-seizure-order.html> accessed 6 December 2019; Lorenzo Tonda, 'Italy Orders Seizure of Migrant Rescue Ship Over "HIV-Contaminated Clothes"' (*The Guardian*, 20 November 2018) <www.theguardian.com/world/2018/nov/20/italy-orders-seizure-aquarius-migrant-rescue-ship-hiv-clothes> accessed 6 December 2019.

77 Mark Fuechec, 'Flag Revoked for Europe's only Civilian Rescue Vessel' (*Lloyd's List*, 2 November 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1124931/Flag-revoked-for-Europes-only-civilian-rescue-vessel>> accessed 6 December 2019; Giovanni Legorano, 'Cowed Aid agencies Cease Migrant Rescues in the Mediterranean' (*The Wall Street Journal*, 7 December 2018) <www.wsj.com/articles/cowed-by-italys-crackdown-aid-agencies-cease-migrant-rescues-in-the-mediterranean-1544194964> accessed 6 December 2019; The Maritime Executive, 'Last Migrant Rescue Vessel in Central Med Ceases Operations' (7 December 2018) <www.maritime-executive.com/article/last-migrant-rescue-vessel-in-central-med-ceases-operations> accessed 6 December 2019; Karen McVeigh, 'Deflagging of Refugee Rescue Ship a "Dark Day" for Europe' (*The Guardian*, 12 February 2019)

78 Reuters News Agency, 'Italian Ship accused of taking migrants back to Libya for First Time' (*The Daily Telegraph*, 31 July 2018) <www.telegraph.co.uk/news/2018/07/31/italian-ship-accused-taking-migrants-back-libya-first-time/> accessed 6 December 2019.



pany ENI, rather than an Italian coast guard or naval vessel, the action drew intense criticism from observers.⁷⁹ The UNHCR initiated an investigation to determine whether the action contravened Italy's humanitarian obligations under the principle of *non-refoulement*.⁸⁰ At the same time, Salvini called for the EU to label Libya a 'safe port' in order to remove the *non-refoulement* barrier, but the EU rejected this request on the grounds that this is a legal issue that cannot be changed by a political statement.

In a culminating event during the summer of 2019, after the NGO vessel Sea Watch 3 was denied disembarkation of dozens of survivors at Lampedusa, vessel operator Carola Rackete defied orders and proceeded to port, allegedly ramming border-control vessels in the process. She was arrested by Italian authorities and charged for violating provisions of the Italian Code of Navigation which prohibit "resisting a warship."⁸¹ Although the charges were ultimately dismissed,⁸² shortly thereafter Salvini signed a security decree codifying the ban on NGO rescue vessels and subjecting operators to fines of up to 1 million Euros for entering Italy's territorial waters.⁸³ An administrative court in Rome suspended the decree on grounds that it violated international law, but Salvini responded once again with a revised NGO ban.⁸⁴

Shortly thereafter, in a surprise move to solidify power, Salvini announced plans to dissolve his own coalition government to make way for new elections.⁸⁵ Remarkably, Salvini's League party suffered a defeat and was replaced with a more moderate coalition government.⁸⁶ In the aftermath, Italy's hard

79 Caitlin Bodfish, 'Italian Merchant Vessel Returns 108 Migrants to Libya' (*The Italian Insider*, 31 July 2018) <<http://www.italianinsider.it/?q=node/7047>> accessed 6 December 2019.

80 Hannah Roberts, 'UN Investigates Migrants' Return to Libya by Italian Boat' (*Financial Times*, 1 August 2018) <www.ft.com/content/75086482-957b-11e8-b747-fb1e803ee64e> accessed 6 December 2019.

81 Elisabetta Povoledo, 'Italy Arrests Captain of Ship That Rescued Dozens of Migrants at Sea' (*The New York Times*, 29 June 2019) <<https://www.nytimes.com/2019/06/29/world/europe/italy-migrants-captain-arrest.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>> accessed 6 December 2019.

Elisabetta Povoledo, 'Ship Captain Who Landed Migrants in Italy Sails Into Political Storm' (*The New York Times*, 5 July 2019) <<https://www.nytimes.com/2019/07/05/world/europe/carola-rackete-italy-migrants.html>> accessed 6 December 2019.

82 Lorenzo Tondo and Josie Le Blond, 'Italian Judge Orders Release of Ship Captain Who Rescued Refugees' (*The Guardian*, 2 July 2019) <<https://www.theguardian.com/world/2019/jul/02/more-than-1m-raised-for-rescue-ship-captain-carola-rackete-italy>> accessed 6 December 2019.

83 Jason Horowitz, 'Salvini's Standoff at Sea Highlights Italy's War on Rescue Ships' (*The New York Times*, 16 August 2019) <<https://www.nytimes.com/2019/08/16/world/europe/salvini-italy-migrants-open-arms.html>> accessed 6 December 2019.

84 'Migrant Ship Heads for Italy's Waters After Judge Overrules Salvini' (*The Guardian*, 14 August 2019) <<https://www.theguardian.com/world/2019/aug/14/migrant-ship-heads-for-italys-waters-after-judge-overrules-salvini>> accessed 6 December 2019.

85 Jason Horowitz, 'Italy's Government Faces a Confidence Vote Where Nothing is Certain' (*The New York Times*, 19 August 2019) <<https://www.nytimes.com/2019/08/19/world/europe/salvini-italy-confidence-vote-elections.html>> accessed 6 December 2019.

86 Colleen Barry and Giada Zampano, 'Italy's Bitter Political Foes Unite in Bid to Foil Salvini' (*Associated Press*, 29 August 2019) <<https://apnews.com/376d97bb5f4d4a31bc4a64a2fa4af2a3>> accessed 6 December 2019.



line policy targeting rescuing vessels appears to have softened.⁸⁷ Yet observers have cautioned that populists leadership could soon return to Italy.⁸⁸

This recent political resistance to migrant disembarkation from NGO vessels has not been confined to Italy. During 2019, Malta has also maintained a policy that has kept migrant rescuing vessels waiting outside of port sometimes for weeks until burden-sharing agreements have been made with third party states to accept migrants into their territory.⁸⁹ Malta has also become embroiled in its own political crisis unrelated to migration issues.⁹⁰ Joseph Muscat has announced plans to resign as Prime Minister as the government appears to be on the verge of an unexpected transition.⁹¹ It remains to be seen what new Maltese leadership might bring to the SAR policy debate.

In the final months of 2019, even amidst these political changes, Italy and Malta, along with France, Germany, and Finland, agreed to a temporary arrangement to systematize disembarkation and relocation of rescued migrants.⁹² The proposal was presented to other EU stakeholders at a meeting of interior ministers, but consensus was not achieved. This political impasse leaves the place of safe disembarkation determination continually subject to ad hoc negotiations.⁹³

87 Giovanni Legorano, 'Europe Migration Agreement Aims to Bolster Italy's Pro-EU Government' (*The Wall Street Journal*, 23 September 2019) <<https://www.wsj.com/articles/europe-migration-agreement-aims-to-bolster-italys-pro-eu-government-11569263050>> accessed 6 December 2019.

88 Giovanna De Maio, 'Matteo Salvini is Out but Not Down' (*Brookings*, 4 September 2019) <<https://www.brookings.edu/blog/order-from-chaos/2019/09/04/matteo-salvini-is-out-but-not-down/>> accessed 6 December 2019; Billy Perrigo, 'The Far Right Lost Power in Italy Two Months Ago. So Why are Migrant Rescue Boats Still Being Refused Entry?' (*Time*, 29 October 2019) <<https://time.com/5713279/italy-migrant-rescue-boats/>> 6 December 2019.

89 See e.g. Darrin Zammir Lupi, '“We are not Fish”: Migrants Stranded at Sea Grow Frustrated' (*Reuters*, 4 January 2019) <www.reuters.com/article/us-europe-migrants-ngo/we-are-not-fish-migrants-stranded-at-sea-grow-frustrated-idUSKC-N1OY1AR> accessed 6 December 2019; Patrick Kingsley, 'Stranded Migrants Are Finally Brought to Shore After 19 Days' (*The New York Times*, 9 January 2019) <www.nytimes.com/2019/01/09/world/europe/migrant-refugees-boat-malta.html> accessed 6 December 2019; See e.g. Associated Press, 'E.U. Countries Agree to Take Migrants After Rescue Ship Standoff' (*The New York Times*, 13 April 2019) <www.nytimes.com/2019/04/13/world/europe/malta-migrants-ship.html> accessed 6 December 2019; Esther King, 'Malta to Allow German NGO Ship to Dock, Ending Standoff' (*Politico*, 7 July 2019) <<https://www.politico.eu/article/malta-to-allow-german-ngo-ship-to-dock-ending-standoff-alan-kurdi-malta-joseph-muscat/>> accessed 6 December 2019.

90 Margherita Stancati, 'Malta's Prime Minister Hit by Growing Political Crisis Over Journalist's Assassination' (*The Wall Street Journal*, 29 November 2019) <<https://www.wsj.com/articles/maltas-prime-minister-hit-by-growing-political-crisis-over-journalists-assassination-11575071155>> accessed 6 December 2019.

91 Juliette Garside, 'Malta's PM Quits In Crisis Over Daphne Caruana Galizia Murder' (*The Guardian*, 1 December 2019) <<https://www.theguardian.com/politics/2019/dec/01/malta-pm-joseph-muscat-quits-daphne-caruana-galizia>> accessed 6 December 2019.

92 Stephen Calleja and Fances D'emilio, '5 EU Nations Reach Temporary Deal on Rescued Migrants' (*Associated Press*, 23 September 2019) <<https://apnews.com/cde0585652614604a5342b30c6219306>> accessed 6 December, 2019.

93 Bernd Riegert 'EU Fails to Cement Agreement on Migrants Rescued at Sea' (*Deutsche Welle*, 8 August 2019) <<https://www.dw.com/en/eu-fails-to-cement-agreement-on-migrants-rescued-at-sea/a-50743383>> accessed 6 December 2019.



4. Reactions in the Shipping Industry

As European SAR policy has evolved over time, the shipping industry has increasingly sought inclusion in the discourse. As early as 2015, industry representatives participated in the Shared Awareness and De-confliction in the Mediterranean (SHADE MED) forum.⁹⁴ This multi-stakeholder forum provided industry participants the opportunity to discuss best practices and other rescue coordination issues with state and regional actors in the SAR community.

In June 2017, the International Chamber of Shipping also made proposals to the IMO's Maritime Safety Committee urging further action at the UN level to respond to unsafe maritime migration.⁹⁵ In response, the IMO organized a meeting between leaders of relevant international organizations and shipping industry stakeholders.⁹⁶ This inter-agency meeting was held at the IMO in October 2017 and provided a high-level forum for maritime industry organizations to discuss relevant SAR issues with representatives of the IOM, UNHCR, United Nations Office on Drugs and Crime (UNODC), and others.⁹⁷ Participants representing the shipping industry included the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the International Transport Workers' Federation, and the International Federation of Shipmasters Association.⁹⁸

After the meeting, in a letter written by the Secretary General of the IMO, a record of the views of the industry participants was circulated among stakeholders. The participants agreed to include a single statement to form part of the official record. The statement emphasized that commercial ships 'are not configured to take on board large numbers of migrants', and that the number of rescued persons on board might 'significantly exceed the total ship's complement as well as the ship's capacity to provide a safe and secure environment during transit to a place of safety'.⁹⁹ It further argued that although international law does require ships to assist and rescue people, there is a 'corresponding requirement on States to provide adequate SAR resources and also to promptly identify and facilitate disembarkation in a place of safety'.¹⁰⁰ The statement also raised the concern that '[c]urrent political changes in Europe may make the provision of a disembarkation port more difficult' and that policies requiring merchant vessels to disembark rescued persons in Libya 'may create civil unrest amongst those rescued and lead to the charge that the ship's master contravened the principle of *non-refoulement*'.¹⁰¹ Among other proposals, the statement recommended that the international community respect the 'legitimate right of NGOs to conduct rescues to relieve the burden on the merchant fleet'.¹⁰²

94 EUNAVFOR Med: Operation Sophia 'SHADE MED' <www.operationsophia.eu/shade-med/> accessed 25 January 2019.

95 Letter of IMO Secretary General, 'Outcome of the Inter-Agency meeting with the Maritime Industry on Mixed Migration' (IMO, 31 October 2017).

96 *ibid.*

97 *ibid.*

98 *ibid.*

99 *ibid.*

100 *ibid.*

101 *ibid.*

102 *ibid.*



Industry stakeholders have voiced similar concerns in other published documents. In a statement released on its website, ICS raised the issue that changing disembarkation protocol to include possibly returning rescued persons to Libya could cause serious problems for commercial vessel operators because they would be violating international law 'as well as risking conflict with any rescued people who might object to being returned to Libya'.¹⁰³ While the ICS statement commended Italy and Greece for having 'consistently permitted prompt and predictable disembarkation of rescued people from merchant ships' it also raised the concern that '[a]s attitudes in Europe towards illegal immigration harden, the real fear is that shipping might face the prospect of prompt disembarkation of rescued persons being refused [...]'.¹⁰⁴

These fears among industry participants intensified after the *Aquarius* incident. In June 2018, while the fate of the *Aquarius* was still being negotiated as it waited off the Sicilian port, ICS Secretary General at that time, Peter Hinchliffe, participated in an interview with shipping publication Lloyd's List.¹⁰⁵ Hinchliffe noted that having experienced the fallout of the *Tampa* incident in 2001, the shipping industry had been 'extremely concerned' that a commercial vessel would perform a large-scale rescue 'and then find that they were unable to disembark [survivors] to a European country'.¹⁰⁶ He acknowledged that up until that point, the Italian government had never refused a merchant ship access for disembarkation.¹⁰⁷ But he argued that the treatment of the *Aquarius* caused doubt in the shipping industry because 'the Italian government has not made it clear whether or not the same ban, which they appear to be applying to non-Italian flagged NGO ships, would apply to a merchant ship in the same circumstances'.¹⁰⁸ Hinchliffe confirmed the ICS view that shipping industry participants are 'absolutely committed' to the obligation for merchant vessels to recover anyone in a distress situation at sea.¹⁰⁹ However, he also clarified that 'the assurance that a ship having picked up several hundred people can land them somewhere is an absolute prerequisite'.¹¹⁰ If merchant ships are unable to disembark rescued persons, he explained, this would have a 'serious impact on world trade and on ships passing through the Mediterranean'.¹¹¹

103 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.

104 *ibid.*

105 Lloyd's List, 'The Lloyds List Podcast: Migrant Crisis' (15 June 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1123042/The-Lloyds-List-Podcast-Migrant-Crisis>> accessed 6 December 2019.

106 *ibid.*

107 *ibid.*

108 *ibid.*

109 *ibid.*

110 *ibid.*

111 *ibid.*



Other industry representatives offered similar statements. The International Transport Worker's Federation (ITF) and the European Transport Workers Federation (ETF) issued a joint statement expressing that they were 'deeply concerned' by the refusal of Italy and Malta to allow disembarkation of the rescued persons on the *Aquarius* and over 'possible future implications for merchant ships that have met their UNCLOS and SOLAS obligations and rescue persons in distress'.¹¹² ITF General Secretary Stephen Cotton remarked, '[i]t is high time the European Union and its member states got their act together and agreed on a long-term sustainable solution to this long-standing problem at its borders and addressed the issue in a humanitarian manner'.¹¹³ Likewise, ETF General Secretary Eduardo Chagas said that while merchant ships have rescued tens of thousands of people in accordance with their moral and legal obligations, '[...] this is not a lasting solution to a structural problem governments need to solve'.¹¹⁴ He continued: '[u]sing merchant ships as rescue boats also poses safety risks for seafarers and migrants alike, especially if they are not allowed to enter the nearest ports and have to travel long additional distances'.¹¹⁵

As if on cue, only days after the *Aquarius* was denied access to ports in Italy and Malta, a similar incident occurred - this time involving a large container vessel operated by Danish shipping company Maersk Line. On 21 June 2018, the container vessel *Alexander Maersk* received a distress signal while on a voyage carrying cargo from Libya to Malta. It responded to the call and facilitated the rescue of 113 migrants. The *Alexander Maersk* then proceeded towards Sicily where it awaited instructions from the Italian MRCC. On arrival, it waited several miles off the coast of Pozzallo for several days while Italian officials decided whether or not to allow disembarkation.

This delay again mobilized the shipping industry to speak out. Martin Dorsman, Secretary General of the European Community Shipowners' Association (ESCA) issued a scathing statement: 'It is not acceptable that a merchant vessel, saving migrants on its own or called upon to assist in search and rescue activities, is confronted with this kind of problem. Problems that potentially affect the safety and well-being of the migrants and the crew'.¹¹⁶ ICS's Peter Hinchliffe told Lloyd's List, '[t]his is the scenario that ICS has feared since the sudden growth in migrant rescues a number of years ago [...]'.¹¹⁷

112 International Transport Workers' Federation, Press Release, 'Aquarius Ship: ITF and ETF Condemn Actions of Italy and Malta' (14 June 2018) <www.itfglobal.org/en/news/aquarius-ship-itf-and-etf-condemn-actions-italy-and-malta> accessed 6 December 2019.

113 *ibid.*

114 *ibid.*

115 *ibid.*

116 European Community Shipowners' Association, 'European Shipowners Call upon Authorities to Disembark the Migrants on Board the Alexander Maersk As Soon As Possible' (25 June 2018) <www.ecsa.eu/press-releases/european-shipowners-call-upon-authorities-disembark-migrants-board-alexander-maersk> accessed 6 December 2019; World Maritime News, 'Merchant Ships Hostage of Italian Immigration Policy' (26 June 2018) <<https://worldmaritimeweb.com/archives/255676/merchant-ships-hostage-of-italian-immigration-policy/>> accessed 6 December 2019.



The sudden change in the position of the Italian government is extremely concerning.¹¹⁷ He urged EU leaders to ‘get to grips’ with the problem of EU Member States ‘refusing to disembark rescued persons that have been correctly rescued by merchant ships as required by international law’.¹¹⁸ US-based World Shipping Council Chief Executive John Butler told Lloyd’s List that while operators of commercial vessels willingly respond to requests for assistance, ‘commercial cargo vessels are not designed to carry large numbers of people, and that is why SOLAS also obligates governments to promptly provide a place of safety for the rescued persons’.¹¹⁹ Denmark’s Immigration Minister Inger Støjberg chimed in, noting ‘[i]t is unreasonable towards Maersk to put them in a situation in which they have a ship full of migrants, not least migrants whom they have been asked to help by the authorities, and this is therefore a question in which the Italians certainly should allow them to be brought to an Italian harbour’.¹²⁰ She also pointed out, ‘[t]his is costing Maersk a lot of money with every hour their ship is off the coast without being able to unload the migrants [...]’. On 26 June 2018, Italy relented under the pressure and allowed the migrants to disembark at the port of Pozzallo, Sicily.

Following this event, there were several other provocative incidents involving commercial vessel rescues and disembarkation problems.¹²¹ In July 2018, an Italian-flagged platform supply vessel, the *Vos Thalassa*, was temporarily delayed after performing a migrant rescue.¹²² It was reported that the migrants had actually threatened to kill the crew out of fear that they were going to be returned to Libya.¹²³ The Italian coast guard had to intervene and disembark the migrants onto a coast guard vessel at sea.¹²⁴ Another violent event occurred in November 2018 when the Panamanian-flagged cargo

117 Helen Kelly, ‘ICS Calls for EU States to Avoid Deaths at Sea Following Italy’s Latest Migrant Snub’ (*Lloyd’s List*, 25 June 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1123166/ICS-calls-for-EU-states-to-avoid-deaths-at-sea-following-Italys-latest-migrant-snub>> accessed 6 December 2019.

118 *ibid.*

119 James Baker, ‘Italy Accepts Rescued Migrants from Maersk Boxship’ (*Lloyd’s List*, 26 June 2018) <<https://lloydslist.maritimeintelligence.informa.com/LL1123175/Italy-accepts-rescued-migrants-from-Maersk-boxship>> accessed 6 December 2019.

120 Ritzau/The Local, ‘Italy’s Refusal of Maersk Migrants “Unreasonable”: Denmark’s Immigration Minister’ (*The Local*, 25 June 2018) <www.thelocal.it/20180625/italys-refusal-of-maersk-migrants-unreasonable-denmarks-immigration-minister> accessed 6 December 2019.

121 For a discussion of delayed disembarkation involving the Tunisian-flagged *Sarost 5*, which lasted three weeks, see: Kiri Santer, ‘The Case of the *Sarost 5*: Black Holes for Responsibility in the Central Mediterranean’ (*Open Democracy*, 15 August 2018) <www.opendemocracy.net/can-europe-make-it/kiri-santer/case-of-sarost-5-black-holes-of-responsibility-in-central-mediterranean> accessed 6 December 2019.

122 The Maritime Executive, ‘Italy Bars Italian OSV from Port After Migrant Rescue’ (9 July 2018) <<https://www.maritime-executive.com/article/italy-bars-italian-osv-from-port-after-migrant-rescue>> accessed 6 December 2019.

123 Alice Cuddy, ‘Italian Coast Guard Intervenes in Migrant Rescue ‘to Save Crew’ (*Euronews*, 10 July 2018) <www.euronews.com/2018/07/10/italian-coast-guard-says-it-intervened-in-migrant-rescue-to-save-crew> accessed 6 December 2019; Nick Squires, ‘Italy Questions Migrants who Allegedly Made Death Threats Against Crew of Rescue Ship’ (*The Daily Telegraph*, 12 July 2018) <www.telegraph.co.uk/news/2018/07/12/italy-questions-migrants-allegedly-made-death-threats-against/> accessed 6 December 2019.

124 BBC News, ‘Italy Accuses Migrants of Hijacking Rescue Ship Off Libya’ (12 July 2018) <www.bbc.com/news/world-europe-44806079> accessed 6 December 2019.



vessel *Nivin* stopped to rescue 93 migrants off Tripoli.¹²⁵ The *Nivin* then proceeded to its next port of call in Libya, but on arrival most of the migrants refused to disembark the vessel. This caused the captain and the crew to take refuge on the upper decks of the vessel.¹²⁶ After ten days, Libyan authorities used tear gas and rubber bullets to forcibly remove the migrants from the *Nivin*.¹²⁷

One of the most remarkable of these incidents occurred in March 2019 when several rescued migrants commandeered a commercial vessel after its operators had rescued them. The Palau-flagged Turkish-owned oil tanker *El Hiblu 1* was on a voyage from Istanbul to Libya when it received a distress call. The shipmaster responded and rescued over 100 migrants in the territorial waters of Libya off the coast of Tripoli. The shipmaster of the *El Hiblu 1* then set course towards Libya to disembark the rescued migrants. According to the shipmaster, once the rescued migrants realized they were heading back to Libya, several of them demanded that the ship divert the course to Europe and threatened the crew with force. The shipmaster claimed that several men attacked the cockpit with heavy metal tools and threatened to smash the ship and leave it in pieces. Fearing for his life and the safety of the crew, the shipmaster relented and notified the RCC in Malta that he was being forced to proceed to Malta. In response, Maltese special operations team intercepted the *El Hiblu 1* using three vessels and a helicopter, returned control to the shipmaster, and escorted the vessel to Boiler Wharf, Malta. On arrival, several teenage migrants were arrested for hijacking the vessel and three of them were ultimately charged with crimes punishable by up to 30 years in prison.¹²⁸ The shipmaster later accused Maltese officials of treating him disrespectfully as if he had illegally facilitated migrant smuggling. In the aftermath, he declared to the media: 'I swear in the name of God, if I find a million people dying in front of me in the sea, I will never rescue them after what I saw here in Malta.'¹²⁹

Shipping industry organizations again reacted with unified outrage. Guy Platten of ICS remarked: 'If a ship is directed to disembark rescued people in Libya, it creates a potential for conflict between the crew and desperate frustrated people that might object to being returned. Given the numbers picked up in such large-scale rescue operations, the crew of the rescuing ship can easily be outnumbered and overwhelmed.'¹³⁰ He also emphasized that the seafarers are civilians severely affected by

125 Lori Hinnant, 'Dozens of Migrants Refuse to Leave Container Ship in Libya' (*Associated Press*, 14 November 2018) <<https://apnews.com/2056be67824b4c55846918ea89afe6c1>> accessed 6 December 2019.

126 Sam Magdy, 'Migrants Forced Off Ship After Refusing to Return to Libya' (*Associated Press*, 21 November 2018 <<https://apnews.com/0866c2612f5647a5a356a7887068a1b5>> accessed 6 December 2019.

127 Anastassios Adampoulos, 'Migrants Forced Off Cargo Ship in Libya' (*Lloyd's List*, 21 November 2018) <<https://lloydlist.maritimeintelligence.informa.com/LL1125208/Migrants-forced-off-cargo-ship-in-Libya>> accessed 6 December 2019.

128 The Associated Press, '3 Teenage Migrants are Charged in Malta with Hijacking Ship at Sea' (*The New York Times*, 31 March 2019) <www.nytimes.com/2019/03/31/world/europe/migrants-hijacking-ship-malta.html> accessed 6 December 2019.

129 Elene Becatoris and Maggie Michael, 'Ship Takeover by Migrants Raises Concerns for Rescues at Sea' (*Associated Press*, 31 March 2019) <www.apnews.com/fa5d40293aa84c558d8140404130c567> accessed 6 December 2019.

130 International Chamber of Shipping, 'ICS Deeply Concerned by Mediterranean Migrant Rescue Incident' (28 March, 2019) <www.ics-shipping.org/news/press-releases/view-article/2019/03/28/ics-deeply-concerned-by-mediterranean-migrant-rescue-incident> accessed 6 December 2019.



these traumatic situations and urged coastal states to facilitate a safe place of disembarkation 'both for those rescued and for the seafarers involved in the rescue'.¹³¹ John Stawpert of ICS also remarked: '[w]hat we need is action at a high level – at state level and also international level – to ensure that ships that find themselves in this sort of situation, through no fault of their own, get immediate assistance'.¹³² Martin Dorsman of the European Community Shipowners' Association agreed, writing on Twitter that European shipowners were 'highly worried' about the situation and noted that the failure to properly source international SAR operations in the Central Mediterranean may cause 'serious consequences for merchant vessels and its crews'.¹³³

Meanwhile, Italy's Matteo Salvini took the opportunity to promote his political narrative, remarking, 'these are not migrants in distress, they are pirates'.¹³⁴ While shipping industry participants have generally refrained from invoking such antagonistic rhetoric, rights groups have alleged that merchant vessels are increasingly avoiding getting involved in rescues altogether.¹³⁵ Data from the Italian Coast Guard does suggest that after the *Aquarius* and *Alexander Maersk* incidents, commercial vessel participation dropped sharply. In June 2018, commercial vessels performed 736 rescues, but after these events and throughout the remaining six months of 2018 commercial vessels rescued a total of only 109.¹³⁶ This might be partially explained by a lower number of total attempted sea crossings during that period, but the Italian Coast Guard has not even published the numbers of migrants rescued by merchant vessels in 2019, which perhaps supports a more cynical view.¹³⁷

131 *ibid.*

132 Elene Becatoris and Maggie Michael, 'Ship Takeover by Migrants Raises Concerns for Rescues at Sea' (*Associated Press*, 31 March 2019) <www.apnews.com/fa5d40293aa84c558d8140404130c567> accessed 6 December 2019.

133 Anastassios Adamopoulos, 'Shipowners Worried for Crew After Vessel Hijacked by Migrants' (*Lloyd's List*, 28 March 2019) <<https://lloydslist.maritimeintelligence.informa.com/LL1126827/Shipowners-worried-for-crew-after-vessel-hijacking-by-migrants>> accessed 6 December 2019.

134 Lorenzo Tondo and Jennifer Rankin, 'Rescued Migrants Hijack Merchant Ship Off Libya' (*The Guardian*, 27 March 2019) <www.theguardian.com/world/2019/mar/27/rescued-migrants-hijack-merchant-ship-off-libya> accessed 6 December 2019.

135 Frances D'Emilio, 'Aid Groups: Ships Not Willing to Save Mediterranean Migrants' (*Associated Press*, 12 August 2018) <<https://apnews.com/6aa38aae754815bf8286830ba9e8f9>> accessed 6 December 2019; Tom Kington, 'Captains 'Hide Ship Locations in Med to Avoid Migrant Rescues' (*The Times*, 1 August 2018) <www.thetimes.co.uk/article/captains-hide-ship-locations-in-med-to-avoid-migrant-rescues-pq6bxjklh> accessed 6 December 2019; Humanitarian organizations have alleged that Merchant ships are not responding to their obligations to rescue and have even allegedly filed civil lawsuits raising such claims, see: Juan Medina, 'Migrant Charity Files Complaint Against Cargo Ship, Libya' (*Reuters*, 21 July 2018) <www.reuters.com/article/us-europe-migrants/migrant-charity-files-manslaughter-complaint-against-cargo-ship-libya-idUSKBN1KB-0MV> accessed 6 December 2019.

136 Guardia Costiera, 'SAR Activity in the Central Mediterranean Sea from January 1 to December 31, 2018' <<https://www.guardiacostiera.gov.it/en/Pages/search-and-rescue.aspx#>> accessed 6 December 2019.

137 Nevertheless, the international media continues to highlight anecdotal involvement of merchant shipping in migrant rescues, see: Lorraine Kihl, 'La Marine Marchande, Victime Collatérale de la Politique Migratoire en Méditerranée' (*Le Soir*, 18 June 2019) <<https://www.lesoir.be/231251/article/2019-06-17/la-marine-marchande-victime-collaterale-de-la-politique-migratoire-en>> accessed 6 December 2019.



5. Conclusion

The Mediterranean rescue crisis has generated varying political attitudes at different stages. The humanitarian concerns that drove enhanced state-orchestrated SAR initiatives in the early days of the crisis mellowed as coastal states struggled to manage the overwhelming demand for assistance and immense scale of arrivals. As volunteer NGO rescuers entered the scene, their contributions were initially welcomed, but scepticism increased over time as they repeatedly arrived at European ports carrying survivors by the hundreds. Politicians in Mediterranean states along the frontlines capitalized on this hardening of popular sentiments, using them to justify restrictive disembarkation policies requiring third party states to accept migrants for resettlement before allowing rescuing vessels to access their ports. But without a systematic arrangement on burden-sharing between states, these negotiations have remained unpredictable and politically-charged affairs, which has contributed to dangerous delays reminiscent of the *Tampa* incident that drove the modernization of SAR obligations nearly two decades ago.

This dilemma has placed operators of commercial vessels in a Catch-22 situation. On the one hand, they are morally and legally obliged to respond to requests for assistance at sea and to coordinate with state RCCs to deliver survivors to a place of safety. If they fail to comply with these obligations, people in need of assistance could die, and the shipmaster could also face criminal prosecution. But on the other hand, if merchant ship operators do honour their legal obligations, they depend on states to quickly determine a safe place for disembarkation. If states abrogate these responsibilities, private shipmasters cannot fulfil their own duties without putting lives at risk and suffering substantial economic harm.¹³⁸

Even throughout this period of frequent large-scale rescues, shipping industry participants have regularly recommitted to their SAR responsibilities. But as state actors politicize these obligations, making it difficult to disembark survivors, attitudes within the shipping industry may evolve as well. Moving forward, as EU policymakers attempt to develop a workable burden-sharing consensus on rescue and disembarkation protocol, it must be recognized that the fate of commercial vessel participation in rescues is linked to the continued contributions of other rescuers, including volunteer NGOs. With the operational viability of NGO rescuers currently in doubt, a void has emerged that could cause increased reliance on commercial resources. While members of the merchant fleet have attempted to avoid politicization of the issue, evolving EU policies have increasingly mobilized industry voices. ICS and other industry representatives continue to relay the position that the primary concern is humanitarian.¹³⁹ At the same time, when merchant seafarers have placed their lives on the line to save others, they expect and deserve immediate SAR support from state actors under the complimentary obligation to provide it.

138 Human Rights Watch, 'EU/Italy/Libya: Disputes Over Rescues Puts Lives at Risk' (25 July 2018) <www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk> accessed 6 December 2019.

139 International Chamber of Shipping, 'Key Issues: The Migrant Rescue Crisis' <www.ics-shipping.org/docs/default-source/key-issues-2018/the-migrant-rescue-crisis.pdf?sfvrsn=0> accessed 6 December 2019.