ITALIAN LAW 15/2023 AND
DISTANT PORT PRACTICE

EUROPEAN COMMISSION COMPLAINT

EXECUTIVE SUMMARY

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MEDECINS SANS FRONTIERES

SEARCH AND RESCUE (SAR) REGIONS

Italian
Maltese
Libyan

BACKGROUND

1. MSF has submitted a complaint to the European Commission (EC), asking the Commission to put under scrutiny the content of the Italian Decree-Law no. 1/2023 converted into Law no. 15/2023 ("Law 15/2023"[1]) and the Italian authorities' practice of assigning distant ports to disembark survivors from NGO Search and Rescue (SAR) vessels. The NGO's SOS Humanity, Emergency, Oxfam Italy and ASGI have each filed similar complaints as well.

2. The provisions in Law 15/2023, coupled with the practice of assigning distant ports, impose unjustified conditions and restrictions that ultimately hinder SAR operations by NGOs vessels in the Central Mediterranean.

3. The measures have been implemented in the context of inadequate proactive state-led SAR activity in the Central Mediterranean, that left NGOs to fill a gap to avoid preventable life loss at sea. In the first 6 months of 2023, 1,750 people have died or are missing, making the Central Mediterranean the deadliest migratory route in the world.

4. The complaint argues that Law 15/2023 and the practice of assigning distant ports for disembarkation of survivors rescued at sea breach provisions of various EU legal instruments and relevant international law, as explained below.

a. Norms protecting human and fundamental rights of persons rescued at sea as enshrined in the Treaty of the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) as well as the Charter of Fundamental Rights of the European Union (CFR) and the European Convention on Human Rights (ECHR);

b. The freedom of association of SAR NGOs (ECHR);

c. International, conventional and customary maritime law, including the International Convention for the Safety of Life at Sea (SOLAS); the International Convention on Maritime Search and Rescue (SAR); and the International Maritime Organization (IMO) Resolutions MSC.153(178), MSC.155(178) and MSC.167 (78) 20/5/2004, both as acquired from the European legal system itself, as well as through the direct applicability to member states of international conventions on sea rescue.

THE COMPLAINT

GENERAL ARGUMENTS

1. SAR at sea is the responsibility of States under international maritime law. However, as mentioned, SAR activities carried out by NGOs very often make up for the shortcomings and inadequacies of rescue operations managed by public administrations. At the EU level, the European Commission has recognized the significant contribution in this area by NGOs and considered routine SAR activities conducted by private vessels as lawful [2]

2. By providing humanitarian assistance at sea, SAR NGOs exercise their legitimate right of freedom of association. The freedom of association has been recognized[3] to be protected against unjustified interference by a state; such interference relates, among others, to the performance of an NGO's legitimate activities foreseen in its statute. If a State adopts measures that interfere with the exercise of freedom of association, it has to be assessed whether these measures are proportional to what the State is aiming at with the adoption of the measures. However, even if legitimate, any measure applied by a State must not and cannot be used as a pretext to control and/or limit an NGO's ability to perform their duties.

3. The activities of SAR NGOs contribute to the respect and safeguarding of human and fundamental rights of those rescued, as those rights are recognized and always applicable under the Treaty on European Union[4] , the Treaty on the Functioning of the European Union[5], the Charter of Fundamental Rights of the European Union[6], and the European Charter of Human Rights[7]. These rights include the right to life and the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the right to asylum, and the right to not be sent back to a country where the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (prohibition of non-refoulment).

ARGUMENTS ON SPECIFIC POINTS

1. Law 15/2023 obliges the crew of the rescue vessel to inform survivors of the possibility to apply for international protection and to collect relevant data to be made available to the Italian Authorities. The collection of this type of data is contrary to the provisions of EU Directive 2013/32 on "common procedures for granting and withdrawing international protection status", which sets out that only the responsible authorities of a Member State can acquire this information. Moreover, this obligation constitutes a significant and unjustified burden on the rescuing ship, contrary to the provisions outlined in the IMO Resolution 20/5/2004 MSC.167 (78), which provides that, if the status of the survivors needs to be determined, the competent authorities can address this question once the survivors have been delivered to a place of safety and any such assessment should not unduly delay the disembarkation.

2. Law 15/2023 requires the rescuing vessels to reach the assigned port of disembarkation "without delay, immediately after carrying out the rescue operation". In practice, this hinders effective SAR activities by NGO ships, including the possibility to continue active search ("patrolling") after a first rescue and to respond to further distress calls after a port has been assigned by the Italian authorities. This requirement violates international law, which provides for the obligation to render assistance to any person in distress at sea regardless of the nationality or status of the person or the circumstances in which he/she was found .

3. Law 15/2023 obliges the rescue vessels to provide information to the competent authorities for the detailed reconstruction of the rescue operation, however without specifying which type of information. Law 15/2023 foresees penalties, such as detention of the ship and a fine, in case the vessel does not comply. This provision essentially allows the national authorities to ask for any information., In practice this results in excessive, unrelated, and unpredictable information requests and makes the work of SAR NGOs more burdensome (such as the current practice by Italian authorities to the MSF rescue vessel to download, save and provide data from the Voyage Data Recorder of the ship, for which there is no justification

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THE COMPLAINT

4. The practice of the Italian authorities of assigning excessively distant ports from the rescue region, despite the existence of numerous closer ports, is contrary to relevant international law and EU Regulation no. 656/2014 that outline the so-called "place of safety". According to these legal instruments, rescue operations are considered concluded when survivors have been delivered to a place of safety. States must coordinate and cooperate in rescue operations, so that survivors can be delivered to a 'place of safety' as soon as reasonably possible. States have to look out for, among others, the circumstances on board, not to cause undue delays, financial burdens or other difficulties for the rescue vessel, and to minimize the time spent by the survivors on the rescue vessel.

a. In practice this means survivors must be disembarked at a safe port in the shortest possible time. Italy's practice is in violation of this, considering that it

- o unreasonably prolongs the stay of the survivors on board the rescue vessel, thus jeopardizing the health and wellbeing of extremely vulnerable individuals;
- o whilst imposing undue delay and financial burden on rescue vessels.

b. This practice also goes against the protection of human and fundamental rights of persons rescued at sea.

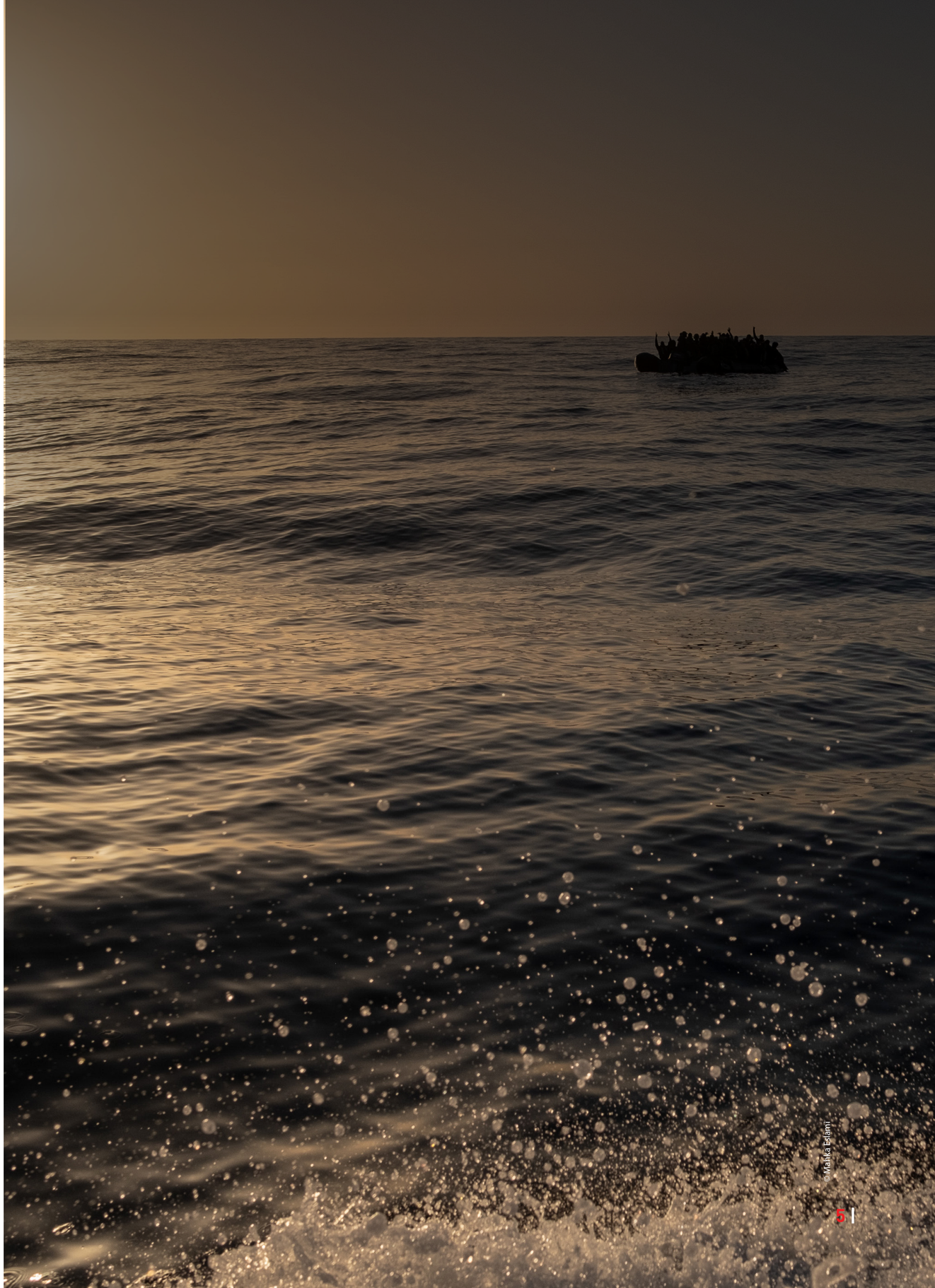
c. The decisions by the Italian authorities to assign distant ports are not justified. The Italian administration has so far not allowed the relevant NGOs to acquire any documentation related to how these decisions were reached. This additionally results in violation of Article 41 of the European Charter of Fundamental Rights of the European Union, which requires administrations to provide reasons for their decisions and to allow access to administrative documentation.

d. That Italy has stated that it needs to operate a more equal distribution of migrants between the regions, as well as of the organization and logistical burdens related to the management of landings,

only to NGO SAR ships (and not to the Italian Coast Guard, Guardia di Finanza, or merchant vessels doing rescues), while numerous closer ports are available, effectively is untenable. The practice of assigning distant ports only to NGO SAR ships (and not to the Italian Coast Guard, Guardia di Finanza, or merchant vessels doing rescues), while numerous closer ports are available, effectively keeps SAR NGOs out of the area of operations for extended periods of time, as reaching the distant ports can take up to 4 days; the same amount of time to sail back south to reach the area of operations.in neither national, EU, nor international regulations).

5. NGO vessels engaged in SAR activities have been subjected to repeated inspections by Port State Control officers and prolonged administrative detentions, even in the absence of clear and proven dangers to persons, property or the environment. This practice stands in contrast to (i) what is established in international and European law on port state control of ships; and (ii) the specific conditions set by the Court of Justice in its judgment of 1/8/2022 (rendered in Cases C-14/21 and C-15/21) regarding the cases in which a State can proceed with an inspection and an administrative detention.

MSF asks the European Commission to put the Italian Law and practices under scrutiny and to intervene in these unjustified restrictions of NGO SAR work, for the preservation of human life as per European obligations and responsibilities.



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/ FOOTNOTES

[1] Law 15/2023 outlines several criteria that have to be cumulatively fulfilled for a vessel that has conducted a rescue to enter Italian territorial waters. Some of these criteria are: obligation to inform survivors of the possibility to apply for asylum and to collect relevant data to be made available to the Italian Authorities; to reach the assigned port of disembarkation without delay, immediately after carrying out the rescue operation; and to provide information to the competent authorities for the detailed reconstruction of the rescue operation

[2] Recommendation (EU) 2020/1365 and the memorandum produced in the case before the Court of Justice in Cases C-14/21 and C-15/21).

[3] See, for example, the judgment of the European Court of Human Rights on Yoldanovi v. Bulgaria and CJEU judgment of 24/11/2016, Hungary v. Commission, C-78/18, regarding Article 11 of the European Convention on Human Rights ("ECHR"). It is noted that the ECHR is the cornerstone of another organisation, namely the Council of Europe. Such Convention has taken on constitutional significance by virtue of Article 6 of the Treaty on EU, and therefore becomes relevant to this complaint.

[4] Articles 2, 3 and 6.

[5] Articles 8, 9, 10, 15, 18, 67, 69, 77, 78, 79, 80, 214.

[6] Articles 1, 2, 3, 4, 5, 6, 12, 18, 19, 20, 21, 41, 45 and 52.

[7] Articles 1, 2, 3, 4, 5, 11, 14, 16, 17 and 18.

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