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LUIGIA MELILLO
UNESCO Chair in Bioethics, Italian Unit, Napoli

LUIGI MASCILLI MIGLIORINI
University of Napoli "L'Orientale"

MIGRATIONS AND
FUNDAMENTAL RIGHTS:
THE WAY FORWARD

Edited by
GIUSEPPE CATALDI – MICHELE CORLETO – MARIANNA PACE

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MIGRATION IN THE MEDITERRANEAN SEA
AND PROTECTION OF RIGHTS:
SOME RECENT CASES OF ITALIAN PRACTICE
*Giuseppe Cataldi**

SUMMARY: 1. Events involving the ships *Aquarius*, *Lifeline*, *Maersk*, *Diciotti*, *Open Arms*. – 2. The legal framework of the incidents. – 3. The concepts of “safe place” and “reasonable delay” and the requirements of protection of fundamental human rights. – 4. The question of “disembarkation”. – 5. Conclusions.

1. *Events involving the ships Aquarius, Lifeline, Maersk, Diciotti, Open Arms*

The new political winds that are blowing through Europe and Italy have recently caused the rejection from some Italian ports of ships (owned by non-governmental organizations - NGOs, as well as merchant ships and even Italian military ships) with on board migrants rescued at sea. They have been denied entry into internal waters and ports.

Too often we hear that the current migration crisis is unprecedented, but some names of ships should remain in our collective memory: from the Bulgarian boat *Struma* with 767 Jewish refugees on board, which was blocked at the entrance of the Bosphorus during the winter of 1941 and then sunk by mistake by a Soviet torpedo, to the Norwegian ship *Tampa*, which in 2001 had collected at sea 438 Afghan asylum seekers but was banned by the Australian authorities from access to national ports for more than a week, generating a diplomatic crisis with Norway, until the situation was resolved thanks to the “outsourcing” of the management of the issue to the State of Nauru, which accepted asylum seekers in exchange for money. Incidentally, the latter is the so-called “Pacific Solution” (i.e., typical of the Pacific Ocean) that inspired the current Italian Minister of the Interior, by his own admission, to consider it as a “good practice” to be imitated.

The situations that will be discussed involve a series of delicate legal

* Full Professor of International Law University of Naples “L’Orientale”; Chair Jean Monnet Network “MAPS – Migration and Asylum Policy Systems. Weaknesses, Shortcomings and Reform Proposals”.

issues, new and old at the same time: 1) the issue of flags of convenience; 2) the role of NGOs at sea; 3) the possibility for a coastal State to order a foreign ship to stop while on the high seas; 4) the hypotheses in which a coastal State may refuse the landing of people rescued at sea in its ports. I shall focus my remarks in particular on the latter point. We must start from a clear narrative of the facts.

(a) The *Aquarius* case

On Sunday, June 10, 2018, the ship *Aquarius*, flying the Panamanian flag, belonging to the NGO “Doctors Without Borders”’s fleet, with 629 migrants on board, including 123 unaccompanied minors, 11 children and 7 pregnant women, was refused entry into an Italian port. These people were rescued during six operations, under the coordination of the Italian Maritime Rescue Centre (IMRCC), in the light of the Hamburg Convention of 1979 (with which we will deal later). After transferring the rescued persons to the ship *Aquarius*, Italy denied access to the rescued persons and asked Malta (the nearest port to the operations) to accept the rescued persons. The Valletta Government immediately objected that the matter was not within its competence and that such a solution would not be possible. The activity of the ship *Aquarius*, as stated by a spokesman for the Maltese government, quoted by *Malta Today*, “took place in the Libyan search and rescue area (SAR) and was coordinated by the coordinating authority, the centre of Rome, and Malta therefore has no jurisdiction over this case”.

The *Aquarius*, refused first by Italy, then by Malta, remained many hours halfway between the two countries (35 miles from Italy and 27 from Malta), in an area where the SAR of the two countries overlap. In the end, the Spanish government offered to welcome the ship and the immigrants in the port of Valencia, where the *Aquarius* arrived after six days of travel.

b) The *Lifeline* case

Immediately after the case of the ship *Aquarius*, the Italian Government was the protagonist of a new confrontation with a ship belonging to an NGO, *Lifeline*, which deals with the rescue of migrants in the Mediterranean.

On Thursday, June 21, 2018, the Dutch-flagged ship *Lifeline*, owned by a German NGO, rescued 224 migrants in imminent danger of shipwreck after leaving the Libyan coast in rubber dinghies. The Italian

Government announced that it would not make its ports available, explaining that Italy could not be the only country to host these ships. The seizure of the ship, which, it is recalled, was a foreign ship operating outside Italian jurisdiction, was also threatened, challenging the right of the German ship to a Dutch flag. The latter point is inconclusive, since it is for the flag State alone to challenge that right if necessary. As regards the possibility of disembarking rescued persons in Italy, it should be pointed out that NGOs assisting migrants are required to comply with the 1979 Hamburg Convention and other rules on rescue at sea, which stipulate that landings of persons rescued at sea must take place in the first ‘safe haven’ (*Safety Place*), which qualifies as such both for the health and personal safety guarantees offered, as well as for the protection of human rights. The Safety Place must be reached within a reasonable period of time, implying that the geographical proximity to the place where people in danger of shipwreck have been rescued is fundamental.

In considering the above requirements, it should be borne in mind, with regard to the area where the rescue activities take place, that Tunisia is a relatively safe country, but is not equipped to meet the needs of migrants and, in the opinion of NGO operators, does not have comprehensive legislation on international protection; Malta is a very small state and already looks after the migrants it manages; Greece, France and Spain are too far from the Libyan coast, not to mention the Netherlands, the flag state of the ship *Lifeline*. That is why the NGOs are transporting to Italy and only to Italy all the people who are being rescued close to Libya (in this case *Lifeline* reiterated that the rescue operation took place off the Libyan coast but in international waters, due to the uncertainty regarding the existence of a Libyan SAR area): the Italian ports are simply the closest and safest. Obviously, this is one of the major problems to be solved: the burden of managing landings cannot be borne only by Italy, the European Union has a duty to take charge of an issue that falls within its competence and that necessarily affects all Member States. In the present case, in the end, the “political wrangling” between Italy and Malta (and between Italy and the European Union) ended with the acceptance by the Valletta Government of the landing of migrants in its territory, once it had obtained the guarantee that some other Member States (nine to be precise) would definitively receive the majority of these people.

(c) The *Maersk* case

During the same period, the Danish container ship *Maersk* was given the go-ahead for the landing of migrants by the Ministry of the Interior after lengthy negotiations. It was the Italian coastguard who ordered the ship to rescue 113 people in danger on a rubber dinghy. Then, however, the ship remained in the harbour for three days, not far from the Sicilian coast and beaches, waiting for instructions before finally landing in Pozzallo. On this occasion, it became clear that the policy of obstructing the activities of NGOs, long undertaken by the Italian authorities, will weigh more and more heavily on merchant ships, forced to carry out search and rescue operations. In a statement of June 11, 2018, the International Chamber of Shipping of London (the World Shipowners' Association) pointed out not incidentally that "if the ships of NGOs are unable to disembark in Italian ports the people rescued in Italy, this will also have significant consequences for merchant ships (...), which will again have to participate in a significant number of rescue missions". It is no coincidence, therefore, that precisely on the occasion of the *Maersk* affair, the Minister of the Interior expressed his hope that the Italian Coast Guard will no longer respond to the SOS launched by those in difficulty in the Libyan region.

d) The *Diciotti* case

The *Diciotti* is an Italian Coast Guard ship, engaged, in mid-August 2018, in a rescue activity for 190 migrants in difficulty in the Maltese SAR region. After Malta's refusal to take over the migrants, the Italian ship disembarked 13 people in need of emergency care in the port of Lampedusa, and then continued its journey towards Catania. But once they arrived, they were denied permission to take the migrants ashore (with a clear difference of opinion within the Italian Government between the Minister of Infrastructure and the Minister of the Interior), except for a few who were in urgent need of medical care. It was only five days after reaching the port of Catania that 137 migrants were allowed to disembark, where they were first identified and then transferred to the "hotspot" of Messina waiting for final settlement to locations willing to receive them. In this regard, we must note the singular circumstance of prohibiting an Italian military ship from docking in an Italian port, and the subsequent distribution of the migrants on this specific occasion: apart from Ireland, they were in fact housed by the CEI (Italian Bishops' Conference), which is not a State, and therefore the persons rescued

continued to have Italy as their only point of reference for the possible granting of refugee status, and in Albania, i.e. a country outside the European Union, with the result that the transfer was carried out outside the Dublin system, and therefore could not take place without the consent of the migrant. It should be noted that on January 23, 2019, the Court of Catania (Ministerial Offences Section) submitted to the Senate a request for authorization to proceed in court, pursuant to Article 96 of the Constitution, against the Minister of the Interior for the crime referred to in Article 605 of the Criminal Code (aggravated abduction). This is because the Minister, abusing his powers and in violation of international conventions, blocked the procedures to disembark migrants, forcing them to remain in critical physical and mental conditions for five days on board the ship *Diciotti*, moored in the port of Catania.

e) The *Open Arms* case

In March 2018, a few months before the events briefly described above, the IMRCC in Rome reported that the Libyan coastguard was about to carry out an operation to rescue migrants in danger. However, while the Libyan units were on their way, the NGO *ProActiva's Open Arms* ship, which was closest to the area in question, intervened and boarded the migrants after consultations between the ship's manager and the NGO's coordinator in Spain, the flag state. Once there, however, the Libyan coastguard demanded that all migrants on board the *Open Arms* be transferred to its ship, threatening to use force in the event of refusal. After moments of high tension, the Libyans, thanks also to the IMRCC radio intervention, allowed the *Open Arms* to resume navigation with its load of migrants on board. At this point, the Italian authorities informed *Open Arms* that it was not Italy but the Libyan State, which had coordinated the operations in question, or the flag State, therefore Spain, that was responsible for managing the landing in a "safe haven" for the migrants, suggesting that permission to disembark be requested from the Maltese authorities since the Mediterranean insular State was closest. This suggestion was not accepted by the NGO (apart from the rapid evacuation of two people in a serious state of health) as they believed it to be a useless attempt, given their previous experience with Maltese authorities refusing to receive migrants. However, in the end, authorization was granted for entry in the port of Pozzallo, where all the landing and identification operations took place.

A request for confirmation of preventive seizure of the vessel, with

simultaneous indictment of those responsible on board the *Open Arms* for the crime of aiding and abetting illegal immigration, was filed by the Public Prosecutor of Ragusa on April 7, 2018, motivated by the conduct of the ship that, ignoring the injunctions of the Libyan coast guard and therefore entering Italian waters illegally, had made it necessary, for security reasons, to berth in the port of Pozzallo. However, the Tribunal of Ragusa, Office of the Judge for Preliminary Investigations, by decree of 16 April 2018 rejected this request. In its very detailed decision, the Tribunal reconstructed the entire case, stating that, although the rescue at sea had not been carried out in a state of necessity, since it had taken place in the Libyan intervention zone, where Libyan authorities had assumed responsibility for the rescue, nevertheless, in order to assess the legitimacy of the actions of the *Open Arms*, “one cannot consider simply the problem of recovery of migrants at sea”. In fact, the judge observes that rescue operations are not limited to the recovery at sea of persons in danger, but must be completed and concluded with the landing in a safe place, and the place is safe only if it also ensures that the fundamental rights of the persons rescued are respected. From this perspective, on the basis of the available information, it emerges that Libya does not offer such guarantees to migrants (to all migrants, it is important to note that the judge, very rightly, does not distinguish between asylum seekers and so-called “economic” migrants in this case). Therefore, despite the conduct of the ship in blatant disobedience to the directives issued by the authorities in charge of coordinating relief in the Libyan and Maltese SAR areas, the conduct of those responsible for the *Open Arms* is justified in application of the exemption of the state of necessity.

2. *The legal framework of the incidents*

What lessons can we learn from these events? And, above all, how can we view these events within a legal framework? First of all, we must start from the consideration that when people in difficulty are rescued at sea, their qualification as “migrants” necessarily takes second place. That is why the rules laid down for such incidents apply first and foremost. First of all, art. 98 of the United Nations Convention on the Law of the Sea (UNCLOS, enforced in Italy by law no. 689 of 2 December 1994), which codifies an ancient principle of customary law, providing that: “1. Every State shall require the master of a ship flying

its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose". It must be noted that no geographical indication or limitation is contained in this provision.

More detailed are the provisions of the 1974 International Convention for the Safety of Life at Sea (SOLAS), and the 1979 Hamburg Convention, already mentioned several times, on search and rescue at sea, which establishes the SAR (Search and Rescue) areas mentioned above. These two conventions were amended in 2004, after the *Tampa* affair, in particular by resolution (MSC No 167 of 20 May 2004) of the Maritime Safety Committee (IMO - International Maritime Organisation), entitled "Guidelines on the Treatment of Persons rescued at Sea", to clarify that the government responsible for the SAR region in which the survivors are recovered is required to identify the safe place of landing and to provide it directly or to ensure that such a place is provided by another State. A safe place cannot be considered the rescuing vessel, except for a limited time.

The first question which is evident in the cases examined is that Italy has a problem with Malta, since this State, despite having a SAR area of considerable size, does not recognise the validity of the guidelines just mentioned (which, by the way, are not compulsory though generally accepted) and, on the basis of the limits of its territory and the means at its disposal, disputes its competence to direct rescue operations in its SAR (unless Maltese flag vessels are engaged, which is very rare), which, moreover, overlaps in several places with the Italian one. The result is considerable uncertainty and ongoing accountability on the part of the Italian authorities.

The issue of the Libyan SAR, the existence of which has not yet been fully established, is different but no less problematic. It was only on July

2018, that the IMO was notified of the existence of a coordinating authority for the Maritime Rescue Centre, without which it is obvious that the SAR cannot be considered effective. The fact that Libya still lacks an effective government to control the entire territory weighs on the issue.

The primary subjects who must pay the consequences for the uncertainties mentioned above are the migrants whose fate is linked to the existence, on a case-by-case basis, of a State that is willing to monitor operations. Usually this state is Italy, but it has already been said that this is a burden that must necessarily be shared, at least within Europe. The obligation to provide assistance and relief, one of the oldest in the Law of the sea, requires that people in distress at sea be helped out of a spirit of solidarity and humanity, without discrimination based on the reason why the people rescued had undertaken their journey. The distinction that European States are trying to make between migrants and other persons in distress is a serious limit to the protection of human life at sea. It should not be forgotten that transit by sea presents far greater risks than transit by land. According to the “Missing Migrants Project” of the International Organization for Migration (IOM), of the 3,514 people who died worldwide in 2017 in an attempt to migrate, whose identity has been verified, as many as 2,510 lost their lives in the Mediterranean. It is a percentage that needs no comment.

3. The concepts of “safe place” and “reasonable delay” and the requirements of protection of fundamental human rights

Another key aspect is the issue of the closure of ports. This measure is not in itself excluded from the Law of the sea, since ports fall under the exclusive sovereignty of the State. There is no right of entry into a foreign port under international Law, since the port is located in internal waters, and unless an international agreement has been reached, the coastal State may choose whether or not to admit a foreign ship (unlike in the territorial sea, where all States enjoy the “right of innocent passage”). Article 25 of UNCLOS then provides that the State may refuse entry if the ship violates national immigration regulations. However, any ship has the right to enter a port if it is itself in a situation of difficulty, or if the persons on board are in difficulty. In this case, the rule of “force majeure” or the “state of necessity”, already provided for and

codified, moreover, by the 1923 Convention on the Regime of Sea Ports, applies. The refusal to accept a ship into a port constitutes in these cases a violation of the duty to safeguard human life at sea, unless a simple intervention (e.g. medical or mechanical repair) carried out on board can be sufficient to put an end to the state of necessity, without proceeding to the entry into the port. In the specific case of possible asylum seekers on board, when the ship is in internal waters and therefore under the jurisdiction of the coastal State, it must be the latter to verify, person by person, whether or not the requirements have been met, otherwise there will also be a violation of obligations under human rights standards, in particular the obligation of “non-refoulement” under the Geneva Convention of 1951 on refugees and the European Convention on Human Rights (ECHR) as interpreted by the Court of Strasbourg. This is the situation, for example, that applies with regard to the persons embarked on the vessel *Diciotti*.

4. *The question of “disembarkation”*

We now reach the point, following the rescue, of disembarkation. Here we must return to the concepts of “safety place” and “reasonable delay”. The State responsible for the SAR zone has an obligation to identify this location (an obligation which is not recognized as such only by Malta, as has been said), but the Law of the sea does not provide that such a place be necessarily on the territory of that State. It is clear that the rules of the two Conventions SOLAS and SAR, and the recommendations of the IMO, rely on cooperation between the State of the SAR area, the flag State of the ship providing the assistance, and possibly the State whose ports are closest to the area in which the intervention took place (“*the coordination by a State of the relief action does not release the other States*”, as expressed by the IMO in its recommendations). Unfortunately, this cooperation is almost always lacking, as has been seen in the cases examined, and this is all the more serious because in most cases the States in question are united by the bond of common membership in the European Union! In the case of *Aquarius*, for example, Italy had the main responsibility, since the IMRCC in Rome had coordinated rescue activities at sea, and therefore, given the precariousness of the conditions of the people on board the week that elapsed from rescue to landing in the port of Valencia cannot be considered as a “reasonable

delay”, and therefore certainly Italy has violated the Hamburg Convention. However, neither the United Kingdom, the flag State, nor France, the national State of the majority of the crew members, nor the other States in the area, in particular those to which the obligation of ‘sincere cooperation’ laid down by European Union law applies, can be regarded as being relieved of all responsibility.

In the case of *Open Arms*, the question of ‘safe place’ arose, however, with particular reference to the guarantees of protection of fundamental human rights. In our opinion, the decision of the Tribunal of Ragusa on this issue is absolutely correct. It is worth remembering that in 2012 Italy was condemned by the European Court of Human Rights in the *Hirsi* case because, after being rescued by an Italian military ship, a group of migrants drifting on several boats in difficulty had been taken back to Libya, the country they had left. This was in execution of an agreement between Italy and Libya. The Court stated that Italy had first violated Article 3 of the ECHR, on the prohibition of torture and degrading treatment, both because there was a risk of indirect refoulement (the Libyan authorities would most likely have proceeded to hand over these people to the countries of origin, where their safety was seriously threatened), and because there was evidence of torture and ill-treatment activities carried out directly by the Libyans. The rule on the prohibition of mass expulsions (art. 4 Prot. n. 4 of the ECHR) and art. 13, on the right to an effective remedy, were also violated, since no case by case assessment of the possible existence of the requirements for refugee status had been carried out and no possibility of challenging any negative decisions in this regard had been granted (European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and others v. Italy*, 23 February 2012). The political situation in Libya, with detailed reports on the mistreatment of migrants in Libyan detention centres provided by various sources, allow us to state with reasonable certainty that there are currently no “safe” ports in this country from the point of view of guarantees for the protection of human rights, and that there do not appear to be any significant improvements with respect to the situation considered by the European Court of Human Rights at the time of the *Hirsi* case.

It should be noted that the ship *Open Arms* was also accused of violating the “Code of conduct” adopted by the Italian Ministry of the Interior in July 2017 and signed by several NGOs, including precisely *Pro-Activa* (on 8 August 2017). In particular, in the present case, the first of the commitments mentioned in the code of conduct is relevant, provid-

ing for NGOs, “in accordance with relevant international law, a commitment not to enter Libyan territorial waters, except in situations of serious and imminent danger requiring immediate assistance, and not to hinder the activity of Search and Rescue (SAR) by the Libyan Coast Guard, in order not to hinder the possibility of intervention by the competent national authorities in their territorial waters, in accordance with international obligations”. A direct consequence of this is also the contestation of the “commitment to cooperate with the IMRCC, executing its instructions and informing it in advance of any initiatives taken independently because they are considered necessary and urgent”.

But what is the legal value of this Code of conduct? First of all it is clear that it does not have the force of law, since it was not issued by Parliament or in any other constitutionally provided equivalent form. Of course, this is not a private law contract either, given the nature of the contractors. It is likely that it could be given the value of an administrative act drawn up by the ministry and proposed for acceptance by subscription to NGOs. It follows, therefore, that its provisions must in any case yield to the need to apply superordinate rules such as those mentioned so far, from the Hamburg Convention to the ECHR, from UNCLOS to SOLAS, all international conventions enforced in Italy by ordinary law. This is not to mention other possible principles that are also superior to ordinary law, which have constitutional value by virtue of the mechanism of adaptation provided for in art. 10, first paragraph, of the Constitution.

5. Conclusions

The events that have been summarily described also strongly confirm that the European Regulation (“Dublin III”) identifying the Member State responsible for examining an application for international protection (EU Regulation no. 604/2013) should be revised. This system, conceived without taking into account the size of migration flows in recent years, places too heavy a burden on Italy to examine the enormous number of applications for protection submitted. This is due to its geographical position and conformation, which necessarily leads it to be the natural point of entry for migrants from the African continent. It is therefore right that our country should push for a revision of the Dublin system, and insist on asking the European partners for a fairer distribu-

tion of the efforts (logistical and economic) necessary to deal with the humanitarian emergencies intrinsic to migrations by sea. We have seen that, since there is almost always a lack of agreement, within a reasonable period of time, among the parties involved in rescue operations, and taking into account the needs of people in distress at sea, Italy must assume full responsibility. It should also be remembered that even in the framework of operations conducted under the aegis of the European Border and Coast Guard Agency (formerly and more commonly known as Frontex) responsible for controlling the external borders of the Union (operations Triton and Themis, in particular, see EU Regulation No 656/2014), in the majority of cases the port of reference is an Italian port.

The revision of the “Dublin system”, in application of the principle of loyal cooperation between Member States established by the European Union, could finally lead both to overcoming this shameful human “ping-pong” being enacted at the expense and suffering of people in distress, and, consequently, to reducing the problem of the interpretation of the concept of “safe place” of landing, providing a necessary legal certainty even to NGOs, which provide an essential service otherwise necessarily borne by merchant ships, vessels of national navies, or the European coastguard and border control. The enactment of certain rules would also be a warning and a message to States such as Libya, which, while desiring to deal on an equal footing with the Union and its members, are having difficulties establishing rules and institutions as a country that respects democracy and human rights, and to other entities such as criminal organizations involved in the smuggling of migrants and that thrive precisely because of the legal uncertainty that prevails today.

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