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# **Closed Ports, Dubious Partners: The European Policy of Outsourcing Responsibility**

Study Update

BY PROF. DR. ANUSCHEH FARAHAT & PROF. DR. NORA MARKARD

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## Introduction

In March and April 2020, Malta and Italy declared their ports closed to boats rescued from distress at sea, citing the strain imposed by Covid-19 as the reason. The *Alan Kurdi* and the *Aita Mari*, both of which had performed rescues in the Mediterranean, were therefore kept in limbo at sea for close to two weeks, before the survivors were finally transferred to a passenger ship, where they were quarantined until it was clear that they did not carry Covid-19 infections. In a third incident, a boat in distress was first left adrift and then intercepted by a private vessel, at the behest of the Maltese authorities, which disembarked the survivors in Libya, where they were put in detention – seven perished trying to reach a merchant vessel, five more died before reaching Libya.

Malta has not ratified the 2004 amendments to the law of the sea treaties governing Search and Rescue (the SAR and SOLAS Conventions), which specify that persons rescued from distress at sea must be delivered to a Place of Safety,<sup>1</sup> and has not accepted the corresponding IMO Guidelines. Malta's concern was that the state in charge of the respective Search and Rescue (SAR) would end up having to provide such a Place of Safety; given the large size of the Maltese SAR zone (250,000 km<sup>2</sup>, comprising among others the Italian island Lampedusa) in comparison to the size of the island itself and its proximity to the northern African coast, Malta feared disproportionate obligations. However, the fact that it has not ratified these amendments does not mean that Malta has no law of the sea obligations towards persons in distress at sea.

Firstly, this study shows that port closures are governed not only by the law of the sea and human rights law, but also by WHO law. While restrictive measures in ports are permissible in cases of communicable diseases such as Covid-19, states must choose those measures that least interfere with international mobility. Since, in the case of Covid-19, a 14-day quarantine is sufficient to make sure passengers are not infected, a blanket port closure is not justified.

Secondly, *non-refoulement* obligations continue to apply even in emergency situations; a derogation is not permissible under international law. The situation in Libya has, if anything, deteriorated. Libya can therefore still not be considered a place of safety, and pushbacks to Libya violate *non-refoulement*. A state cannot escape its international obligations by instructing private actors to commit the violation; in such cases, their actions are attributable to the state itself under international law. This means that Malta is responsible for the pushback to Libya.

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<sup>1</sup> See Anuscheh Farahat & Nora Markard, "[Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility](#)", February 2020, of which this study is an update.

## 1. Summary of Recent Events

### 1.1 Port Closures

According to a letter from the German Ministry of Interior,<sup>2</sup> on 30 and 31 March 2020, the Italian Minister of the Interior, Luciana Lamorgese, informed the German government that the NGO Sea-Eye's ship *Alan Kurdi*, sailing under German flag, had resumed Search and Rescue (SAR) operations in the Mediterranean. It pointed out that due to the health emergency caused by the current Covid-19 pandemic, Italy would not be able to manage the disembarkation, reception and provisioning of refugees and migrants rescued at sea by private vessels. The *Alan Kurdi* would therefore not be allowed to enter Italian territorial waters and Italian ports. On 3 April 2020, the Maltese government also informed the German government that it would not allow the *Alan Kurdi* to disembark survivors in Malta.

On 6 April 2020, the Head of Department for Migration in the German Ministry of Interior informed all German rescue organisations of the verbal notes received and called on them to abstain from further rescue operations:

You therefore have to assume that no port of disembarkation will be found for you in the Mediterranean and that you risk being referred to a disembarkation of those rescued from distress at sea in the flag state. In view of the current difficult situation, we therefore appeal to you not to initiate journeys for the time being and to call back ships already at sea.<sup>3</sup>

On 7 April 2020, **four Italian ministries passed a decree declaring that, for the duration of the national Covid-19 health emergency, the Italian ports do not fulfil the criteria of a Place of Safety** for the purposes of SAR conducted by vessels flying foreign flags outside the Italian SAR zone;<sup>4</sup> the decree cites the following reasoning:

In consideration of the emergency situation connected to the spread of the coronavirus, of the current critical situation of the regional health services, and of the extraordinary strain incurred by doctors and all the health personnel in assisting Covid-19 patients, it is not possible to ensure the availability of such places of safety on the Italian territory without compromising the functionality of the national logistic and safety health structures dedicated to containing the spread of the infection and to the assistance and care for Covid-19 patients;

Considering that any rescued persons, among whom the presence of an infection cannot be excluded, must be assured of the absence of threats to their lives, the satisfaction of primary needs and access to fundamental services from a health, logistical point of view and transport; [...]

Bearing in mind that the assistance and rescue activities to be carried out in the "safe harbour" can be ensured by the country whose flag the naval units are flying, where they have carried out operations outside the Italian SAR area in the absence of the coordination of the IMRCC Rome [...].<sup>5</sup>

Just 24 hours later, on 8 April 2020, the Maltese government passed a declaration sent to the European Commission, stating that the **"Maltese authorities are not in a position to guarantee the rescue of prohibited immigrants on board of any boats, ships or other vessels, nor to ensure the availability of a 'safe place' on the Maltese territory to any persons rescued at sea"**.<sup>6</sup>

Considering the situation of a public health emergency resultant from the spread of the coronavirus and the current extraordinary burden being faced by the national health services, as well as due to the extraordinary commitments being made by the public sector, for the care and assistance to Covid-19 patients, it is presently not possible to ensure the availability of a "safe place" on the Maltese territory, without compromising the efficiency/functionality of the national health, logistic and safety structures,

<sup>2</sup> Letter of the German Ministry of the Interior to the NGOs Médecins sans frontières, SOS Méditerranée, Sea-Watch, Sea-Eye and Mission Lifeline, 6 April 2020, available at: [https://sea-eye.org/wp-content/uploads/2020/04/Brief-des-Innenministeriums\\_06.04.2020-1.pdf](https://sea-eye.org/wp-content/uploads/2020/04/Brief-des-Innenministeriums_06.04.2020-1.pdf) (all links last accessed 12 May 2020).

<sup>3</sup> Ibid., at 2 (translation by the authors).

<sup>4</sup> Art. 1, Decreto no. 150 del Ministro delle infrastrutture e dei trasporti, del Ministro degli affari esteri e della cooperazione internazionale, del Ministro dell'interno e del Ministro della salute del 7 Aprile 2020, available at:

[https://www.avenire.it/c/attualita/Documents/M\\_INFR.GABINETTO.REG\\_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf](https://www.avenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf)

See also Antonio Massari, "Coronavirus, decreto firmato da 4 ministri:

'Italia non è più un porto sicuro'. Migranti da portare nei paesi delle navi che li soccorrono", *il Fatto Quotidiano*, 8 April 2020,

<https://www.ilfattoquotidiano.it/2020/04/08/coronavirus-decreto-firmato-da-4-ministri-italia-non-e-piu-un-porto-sicuro-migranti-da-portare-nei-paesi-delle-navi-che-li-soccorrono/5763499/>

<sup>5</sup> Ibid., at 2 (translation by the authors).

<sup>6</sup> "Malta shuts its ports to asylum seekers, citing COVID-19 pandemic", *Times of Malta*, 9 April 2020, <https://timesofmalta.com/articles/view/malta-says-it-cannot-guarantee-migrant-rescues.784571>

which are dedicated to limiting the spread of the contagious disease, as well as to provide assistance and care to Covid-19 patients.

Considering that any persons rescued at sea, who may also be suffering from the Covid-19 contagious disease, must be protected from any threats to their life, and also must have their primary needs fulfilled including access to fundamental services in terms of health, logistics and transport.

Considering also that the Maltese authorities have already ordered the closure of the airport and ports for passenger traffic.

Considering the necessity to provide the proper balance between the control over the Maltese territory and the compliance with Malta's international obligations whilst addressing this public health emergency including the enforcement of effective measures already put in place for the containment of the spread of contagious disease adopted so far, whilst taking into account the involvement of the law enforcement officers primarily the Armed Forces of Malta, the Police Force and the Civil Protection Department whose resources are all focused on combating the spread of this contagious disease.

Considering that, following the declaration of a public health emergency issued by the Superintendent of Public Health in terms of the Public Health Act and in order to counter the spread of the contagious disease, it is necessary to ensure the taking of the appropriate and proportionate measures to prevent additional risks of contagion.

Therefore, in the light of the magnitude of these pressures, it is considered that the Maltese authorities are not in a position to guarantee the rescue of prohibited immigrants on board of any boats, ships or other vessels, nor to ensure the availability of a "safe place" on the Maltese territory to any persons rescued at sea.<sup>7</sup>

**This means that NGO vessels involved in Search and Rescue (SAR) missions in the Mediterranean are unable to disembark the survivors in Italy and Malta.** The European Commission refrained from commenting, stating that it had no competence to determine whether a port is safe.<sup>8</sup> Meanwhile, both Malta and Italy have also declared that they will not be able to participate in the EU's operation EUNAVFORMED Irini due to "the emergency caused by the Covid-19 virus outbreak."<sup>9</sup> That operation is primarily aimed at implementing the UN arms embargo on Libya, but also includes voluntary arrangements for the disembarkation, reception and swift relocation of persons rescued at sea by ships participating in such operations.<sup>10</sup>

On 9 April 2020, the UN-recognised government in Tripoli, **Libya also closed its ports.** On 11 April, it declared that, "forced to face the attacks of General Haftar's army, the current resources do not allow to also control the departure of the boats of migrants."<sup>11</sup> In recent months, the situation in Libya has continued to deteriorate. At the end of January, UNHCR already had to suspend its operational work at the Gathering and Departure Facility (GDF) due to safety concerns.<sup>12</sup>

## 1.2 The Case of the *Alan Kurdi* and the *Aita Mari*

On 6 April 2020, when the German Ministry of the Interior contacted the German SAR NGOs, the *Alan Kurdi* rescued 150 survivors in international waters off the Libya coast from two wooden boats, following a distress call logged by Alarm Phone Med.<sup>13</sup> Sea-Eye reports that the first operation was **endangered by Libyan forces using a speedboat and firing shots into the air**, causing half of the survivors to jump into the water without life jackets, while an Italian supply ship had refrained from rescuing the second boat.<sup>14</sup> **Following its decree of 7 April 2020, Italy did not admit the *Alan Kurdi* for disembarkation.** On Good Friday, 10 April 2020, Italy evacuated one survivor and tried to involve Malta, whose RCC immediately responded: "Do not try to push this onto Malta,"

7 Ibid.

8 "EU unable to comment on Italy and Malta port closures", *EU Observer*, 15 April 2020, <https://euobserver.com/migration/148058>

9 For Italy: Council of the EU, Monthly Summary of Council Acts – March, 6 April 2020, ST 6869 2020 INIT, at 14; for Malta:

Matthew Vella, "Malta rattles EU with Irini withdrawal, Macron and Merkel schedule calls", *Malta Today*, 10 May 2020,

[https://www.maltatoday.com.mt/news/national/102228/malta\\_rattles\\_eu\\_with\\_irini\\_withdrawal\\_macron\\_and\\_merkel\\_schedule\\_calls](https://www.maltatoday.com.mt/news/national/102228/malta_rattles_eu_with_irini_withdrawal_macron_and_merkel_schedule_calls);

Ivan Martin, "Malta to veto EU funding for naval mission monitoring Libya arms traffic", *Malta Times*, 8 May 2020,

<https://www.independent.co.uk/voices/coronavirus-migrants-crossing-mediterranean-eu-libya-malta-italy-a9477586.html>

10 Council of the EU, Press release: "EU launches Operation IRINI to enforce Libya arms embargo", 31 March 2020,

<https://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/>

11 Valeria Alice Colombo, "Coronavirus is being used as an excuse to leave desperate migrants stranded at sea", *Independent*, 22 April 2020,

<https://www.independent.co.uk/voices/coronavirus-migrants-crossing-mediterranean-eu-libya-malta-italy-a9477586.html>

12 UNHCR, Press release: "UNHCR to suspend operations at GDF in Tripoli amid safety concerns: UNHCR has started moving dozens of highly vulnerable refugees, who have already been identified for resettlement or evacuation to third countries, from the facility to safer locations", 30 January 2020, <https://www.unhcr.org/mt/13375-unhcr-to-suspend-operations-at-gdf-in-tripoli-amid-safety-concerns.html>

13 Sea-Eye, "Alan Kurdi rescues 150 people from two wooden boats in one day", 6 April 2020,

<https://sea-eye.org/en/alan-kurdi-rescues-150-people-from-two-wooden-boats-in-one-day/>

14 Ibid.

while the German MRCC in Bremen stated that it was unable to respond, and the ship set course towards Sicily.<sup>15</sup> Italy later sent food and evacuated another three survivors on 16 April 2020, following a suicide attempt.<sup>16</sup> On 17 April 2020, the remaining survivors were finally **transferred onto an Italian passenger ship**, the tourist ferry *Raffaele Rubattino*, coordinated by the Italian Red Cross and assisted by the Italian coast guard.<sup>17</sup> Both the *Alan Kurdi* and the *Raffaele Rubattino* were put into a **14-day quarantine** off Palermo (all survivors tested negative for Covid-19).<sup>18</sup> On 6 May 2020, the *Alan Kurdi* was allowed to enter Palermo; **the *Alan Kurdi* remains detained** because of alleged defects affecting safety on board.<sup>19</sup>

On Easter Monday, 13 April 2020, the Spanish vessel *Aita Mari* (deployed by the Spanish NGO Salvamento Marítimo Humanitario), responded to a Mayday call of a rubber boat, rescuing 43 survivors, one of them pregnant. **The *Aita Mari* was also denied access to Italian ports.** A family of three as well as four men had to be evacuated to Lampedusa for health reasons.<sup>20</sup> On 19 April 2020, the remaining 34 survivors, too, were **transferred** to the *Raffaele Rubattino*, where they were also **quarantined**.<sup>21</sup>

On 8 May 2020, UNHCR expressed concern “that humanitarian search and rescue vessels, which usually patrol the central Mediterranean area, are being prevented from supporting migrants in distress, at a time when the numbers attempting to make the perilous journey from Libya to Europe has increased sharply. **Following the immobilization of the humanitarian rescue ships *Alan Kurdi* and *Aita Mari*, there are currently no active humanitarian search and rescue vessels in the central Mediterranean.** It has also been alleged that administrative regulations and measures are being used to impede the work of humanitarian NGOs.”<sup>22</sup>

### 1.3 Private Pushbacks to Libya

On the night of 9 April 2020, a further 63 people left Libya on a rubber boat. The boat was **spotted by a Frontex aircraft** on Good Friday, 10 April 2020, which informed Malta, Italy, Libya and Tunisia of the distress situation.<sup>23</sup> The same night, the survivors contacted the NGO Alarm Phone, which located their GPS position in international waters and also informed the relevant authorities in Malta, Italy and Libya.<sup>24</sup> On 11 April, the Libyan authorities responded: “The Libyan Coastguard now only does coordination work because of COVID-19, we can’t do any rescue action, but we are in contact with Italy and Malta.”<sup>25</sup> On Sunday, 12 April, according to its GPS data, the boat had **drifted into the Maltese SAR zone**; it then lost contact with Alarm Phone. On 13 April, three days after they had been informed of the boat’s distress situation by Frontex, **Malta and Italy launched an air surveillance mission** and located the boat. Shortly after midnight on Tuesday, 14 April, Maltese authorities **launched a distress alert** via NAVTEX, requiring ships transiting the area to assist and specifying that Malta would not be able to provide a Place of Safety. The merchant ship *Ivan* was ordered to monitor the situation, while **Maltese air assets remained on the scene** and bad weather (as well as the steepness of the sides of the *Ivan*) prevented a rescue; according to survivors, seven rescues died, three of them while trying to reach the *Ivan*.<sup>26</sup>

At 5am on 14 April, **a fishing boat – which had disabled its tracker – took the remaining survivors on board**, while the *Ivan* was released from its duties. On 15 April, Alarm Phone was informed that **56 people had been returned to Tripoli by a fishing boat**, five of them dead from hunger and dehydration, the rest taken into detention.<sup>27</sup> The boat was accompanied by

15 Sea-Eye, “Alan Kurdi receives neither food nor medicine”, 10 April 2020, <https://sea-eye.org/en/alan-kurdi-receives-neither-food-nor-medicine/>; “Easter Sunday: Still no protection for 149 people after 7 days”, 12 April 2020, <https://sea-eye.org/en/easter-sunday-still-no-protection-for-149-people-after-7-days/>

16 Sea-Eye, “Attempted suicide aboard the Alan Kurdi after ten days of blockade”, 16 April 2020, <https://sea-eye.org/en/attempted-suicide-aboard-the-alan-kurdi-after-ten-days-of-blockade/>

17 Sea-Eye, “Odyssey of the Alan Kurdi rescue ship ends”, 26 April 2020, <https://sea-eye.org/en/odyssey-of-the-alan-kurdi-rescue-ship-ends/>

18 Sea-Eye (Martin Geiger), “After the quarantine is before the quarantine: Interview with Caterina, board doctor on the Alan Kurdi”, 28 April 2020, <https://sea-eye.org/en/after-the-quarantine-is-before-the-quarantine>

19 Sea-Eye, “Harassment of rescue ship Alan Kurdi prevents next mission”, 6 May 2020, <https://sea-eye.org/en/harassment-of-rescue-ship-alan-kurdi-prevents-next-mission/>

20 Matthias Rüb, “Wer lässt die Migranten auf der ‘Alan Kurdi’ an Land?”, FAZ, 16 April 2020, <https://www.faz.net/aktuell/politik/ausland/die-lage-auf-der-alan-kurdi-spitzt-sich-weiter-zu-16728483.htm>

21 “Flüchtlinge auf Quarantäne-Schiff verlegt”, *Migazin*, 19 April 2020, <https://www.migazin.de/2020/04/20/mittelmeer-fluechtlinge-auf-quarantaene-schiffen-verlegt/>

22 UNHCR, Press briefing note: “Migrant rescues in the Mediterranean”, 8 May 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E> (emphasis added).

23 Frontex, Press statement released to ANSA Rome, 13 April 2020, cited in: <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya>

24 Alarm Phone (in collaboration with Sea-Watch and Mediterranea), Press release: “Twelve Deaths and a Secret Push-Back to Libya”, 16 April 2020, <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/>

25 Ibid.

26 Timeline: Matthew Vella, “Secret pushback? Timeline of the AFM’s rescue coordination of the returned migrant boat”, *Malta Today*, 21 April 2020, [https://www.maltatoday.com.mt/news/national/101847/secret\\_pushback\\_timeline\\_of\\_the\\_afms\\_rescue\\_coordination\\_of\\_the\\_returned\\_migrant\\_boat](https://www.maltatoday.com.mt/news/national/101847/secret_pushback_timeline_of_the_afms_rescue_coordination_of_the_returned_migrant_boat)

27 Ibid. Confirmed by UNHCR Libya, *Twitter*, 15 April 2020, 4:39pm, <https://twitter.com/UNHCRLibya/status/1250433528979795973>

another ship carrying several tons of food and water.<sup>28</sup> The 51 survivors, including eight women and three children, were taken to the Takiq al-Sikka detention facility by the Libyan authorities.<sup>29</sup> All in all, twelve people perished.

The identity of the fishing boat was first unclear, but it was soon identified as the *Mae Yemanja*, also known as *Dar al Salam 1*, owned by a businessman with apparent shady ties to Libya and flying a Libyan flag.<sup>30</sup> According to survivors, the crew admitted working at sea for Malta.<sup>31</sup> **Malta confirms having coordinated the rescue and disembarkation in Libya.**<sup>32</sup> Government official Neville Gafà was questioned about the incident in a trial case during which he explained not only his involvement in this operation, but also Malta's policy over the last months: "I wish to confirm that during the years when I was coordinating such missions, no pushbacks have ever been done. I was only preventing migrants from entering Maltese SAR (search and rescue area). [...] If we knew of any boats headed to Malta's SAR, we would draw the attention of the Libyan coastguards, who would re-divert any boats in Libyan waters, back to Libya."<sup>33</sup>

Meanwhile, Malta has started keeping rescued migrants on chartered boats outside its territorial waters.<sup>34</sup> Recent witness testimonies and video evidence also suggest that Maltese military boats prevented migrants from arriving in Malta by driving dangerous manoeuvres at sea, thereby endangering the lives of 101 migrants in distress on a rubber boat in the Mediterranean on 11 April 2020.<sup>35</sup> Later, Mal-

tese authorities facilitated the arrival of the rubber boat in Italy on 12 April 2020.<sup>36</sup>

On 8 May, UNHCR expressed deep concern about "recent reports of failure to assist and coordinated pushbacks of migrant boats in the central Mediterranean [...]. Reports that Maltese authorities requested commercial ships to push boats with migrants in distress back to the high seas are of particular concern."<sup>37</sup>

## 2. Port Closures

Can Malta close its ports to persons rescued from distress at sea, invoking the Covid-19 pandemic? Can Malta close its territorial waters to SAR vessels, without other EU Member States agreeing to accept survivors?

### 2.1 The SAR Regime: Accessing a Place of Safety

**It remains a problem of the SAR regime** that while it contains a duty to rescue and a duty to deliver the survivors to a "place of safety", it does not specify which place this must be – and **it does not oblige any specific state to allow disembarkation.**

As the 2008 UNHCR Guidelines on SAR clarify, "[t]he responsibility for finding solutions to enable timely disembarkation in a humane manner *rests exclusively with States* and not with private actors."<sup>38</sup> Specifically, pursuant to the **2004 amendments** to the SAR Convention and the SOLAS Convention and the 2004 MSC Guidelines,<sup>39</sup> there is a **duty of governments to**

- 28 Patrick Kingsley & Haley Willis, "Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet", *NYT*, 30 April 2020, <https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>
- 29 UNHCR, Press briefing note on Migrant rescues in the Mediterranean, 8 May 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>
- 30 See Manuel Delia, "A boat with no name", *Truth be told*, 23 April 2020, <https://manueldelia.com/2020/04/a-boat-with-no-name/>, citing a detailed report by *TV Malta* of 22 April 2020, available at <https://www.tvrm.com.mt/mt/news/is-salvatagg-tal-immigranti-il-gvern-malti-qab-bad-dghajjes-privati-jghinu-u-baghat-ikel-u-xorb-il-libja/> (in Maltese). Confirming details on the boat: Ivan Martin, "How a Maltese fishing boat pushed migrants back to Libya", *Times of Malta*, 24 April 2020, <https://timesofmalta.com/articles/view/how-a-maltese-fishing-boat-pushed-migrants-back-to-libya.787664> See also: Kingsley & Willis, "Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet", *NYT*, 30 April 2020, <https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>; Sea-Eye (Martin Geiger), "Starved, parched and drowned in a European Search and Rescue zone", 26 April 2020, <https://sea-eye.org/starved-parched-and-drowned-in-an-european-search-and-rescue-zone/>
- 31 Lorenzo Tondo, "Exclusive: 12 die as Malta uses private ships to push back migrants to Libya", *The Guardian*, 19 May 2020, <https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya>
- 32 Press release, 15 April 2020, <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx>
- 33 Sarah Carabott, "Anger as Neville Gafà says he coordinated Libya pushback on OPM orders", *Times of Malta*, 30 April 2020, <https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951>. In a separate case, the Maltese Navy boat *P52* is reported by Alarm Phone to have cut the electricity on a boat in distress to prevent it from accessing the Maltese SAR zone; the survivors were later rescued by Malta and quarantined there: *NYT*, 9 April 2020, <https://www.nytimes.com/2020/04/09/world/europe/malta-migrant-boat.html>
- 34 "All migrants 'safely aboard' Captain Morgan boat, as Malta digs in", *Times of Malta*, 1 May 2020, <https://timesofmalta.com/articles/view/all-migrants-safely-aboard-captain-morgan-boat-as-malta-digs-in.789470>
- 35 Alarm Phone, "Malta's dangerous manoeuvres at sea", 20 May 2020, <https://alarmphone.org/en/2020/05/20/maltas-dangerous-manoeuvres-at-sea>
- 36 Ibid.
- 37 UNHCR, Press briefing note: "Migrant rescues in the Mediterranean", 8 May 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>
- 38 The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees. Report of the Office of the United Nations High Commissioner for Refugees to the UN General Assembly, UN Doc. A/AC.259/17, 11 April 2008 ("2008 UNHCR Guidelines"), para. 32 (emphasis added).
- 39 1974 International Convention for the Safety of Life at Sea (SOLAS), 1184 UNTS 278.

**cooperate** in providing suitable places of safety for the individuals rescued.<sup>40</sup> According to these amendments, the initiative for determining a place of safety lies with the state responsible for the SAR region in which the rescue operation took place. This state is responsible for providing a place of safety, or to ensure that a place of safety is provided<sup>41</sup>:

Contracting Governments shall *co-ordinate and co-operate* 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 the obligations under the current regulation does not further endanger the safety of life at sea. The *Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility* for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [International Maritime] Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.<sup>42</sup>

Accordingly, the Rescue Co-ordination Centre (RCC) or Sub-Centre of the state responsible for the SAR region “shall initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea. It shall inform the ship or ships and other relevant parties concerned thereof.”<sup>43</sup> However, the amendments do not specifically oblige the SAR region state to provide such a place itself.

When the 2004 amendments were drafted, Malta proposed a deletion of the assurance that a place of safety will be provided by the Contracting Governments, fearing that the government responsible for the SAR region would end up having to accept the persons rescued at sea; this proposed deletion was rejected by

46:22 votes and 12 abstentions. Consequently, **Malta has not ratified the 2004 amendments** and does not accept the 2004 MSC Guidelines.<sup>44</sup> This means it does not consider itself bound by the duty to take the initiative on identifying a Place of Safety, even when the rescue took place in its SAR zone.<sup>45</sup>

However, when the Maltese Rescue Coordination Centre (RCC) is involved, it remains bound by **the obligations contained in the original SAR and SOLAS Conventions**. A coastal state's RCC contacted with a distress call must secure an effective and timely rescue that fulfils the obligations of the law of the sea.<sup>46</sup> In the case of the boat that drifted into the Maltese SAR zone, after Malta had already been informed of the distress situation, Malta was under an obligation to secure a rescue operation that leads to a place of safety,<sup>47</sup> even if that place is not Malta. Shipmasters also remain under the obligation to disembark in a place of safety; if they are not flying the Maltese flag, their flag state is bound by the criteria developed in 2004, which they must consequently adhere to.<sup>48</sup>

The Council of Europe's Commissioner for Human Rights recently reminded Malta of its general obligations under the law of the sea: “I would like to recall Malta's obligation under international maritime and human rights law to ensure that its authorities respond effectively and urgently to any situation of distress at sea of which they become aware. Obligations to coordinate search and rescue operations may also accrue when the distress situation occurs outside the Maltese Search and Rescue Region (SRR), at the very least until such moment when coordination can be handed over to other states' authorities that are willing and able to assume responsibility in a manner compliant with maritime and human rights law, and have effectively done so.”<sup>49</sup> Indeed, **as long as no other state is willing or able to assume responsibility, Malta remains responsible** for the effective rescue of persons in distress under the SAR Convention. This responsibility continues **until the survivors can be disembarked in a “place of safety”, even if Malta may not be legally obliged to provide such a place**

<sup>40</sup> Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78), adopted on 20 May 2004, MSC 78/26/Add.2, Annex 34 (“2004 MSC Guidelines”), para. 6.16.

<sup>41</sup> 2004 MSC Guidelines (supra note 34), para. 2.5.

<sup>42</sup> SOLAS (2004) regulation V/33 para. 1.1 (emphasis added); SAR (2004) Annex 3.1.9 is phrased in identical terms, replacing “contracting governments” with “parties”.

<sup>43</sup> SAR (2004) Annex 4.8.5.

<sup>44</sup> Report of the Maritime Safety Committee on its Seventy-Eighth Session, MSC 78/26, 28 May 2004, para. 3.67, 16.46–16.54, available at <http://merchantmarine.financelaw.fju.edu.tw/data/IMO/MS/78/MS/2078-26.pdf>; Malta's proposal: MSC 78/WP.5/Rev.1, 18 May 2004, available at <http://merchantmarine.financelaw.fju.edu.tw/data/IMO/MS/78/MS/2078-WP.5-Rev.1.pdf>

<sup>45</sup> For the implications of this position, see Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 2014, at 30–40.

<sup>46</sup> See in particular SAR Annex 2.2. and 2.3.

<sup>47</sup> On the criteria for places of safety, see section 3.2 below.

<sup>48</sup> See Farahat & Markard (supra note 2), at 37–38.

<sup>49</sup> Council of Europe Commissioner for Human Rights, Dunja Mijatović, *Letter to Mr. Robert Abela, Prime Minister of Malta*, 5 May 2020, <https://rm.coe.int/letter-to-robert-abela-prime-minister-of-malta-on-the-human-rights-of-16809e4c9c>

on its own territory. Moreover, Malta's obligations under international law do not depend on other EU Member States being willing to share the responsibility for accepting the survivors.

In addition, coastal states' sovereignty over their territorial waters is also limited by **other rules of international law**, in addition to the law of the sea. Coastal states remain bound by the 1951 Geneva Convention on the Status of Refugees (Refugee Convention) and by international human rights law; in particular, where they exercise jurisdiction, they must respect the European Convention on Human Rights (ECHR).<sup>50</sup> There are good reasons to assume that a SAR state exercises "effective control" over persons in distress during a rescue operation and therefore has jurisdiction in the sense of Article 1 ECHR.<sup>51</sup> This means that an RCC coordinating a SAR operation must also comply with applicable international human rights law. This may result in obligations to protect when a ship cannot find a place of safety to disembark the survivors (see sections 2.2.3–4 below).

## 2.2 The Covid-19 Pandemic as a Justification

### 2.2.1 The Navigation Regime: Public Health as a Limit to Innocent Passage

Generally, the UN Convention on the Law of the Sea (UNCLOS) does recognise public health concerns. In particular, a coastal state may rely on such concerns to **limit the exercise of the right to innocent passage**.

The right to innocent passage is held by any ship flying a foreign flag and constitutes a limit to the coastal state's sovereign rights over its territorial sea. Any ship may use this right to pass through the territorial waters of a coastal state;<sup>52</sup> this includes stopping and anchoring there as part of ordinary navigation or if rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.<sup>53</sup> Passage is "innocent" if it is not

prejudicial to the peace, good order or security of the coastal State;<sup>54</sup> practices considered prejudicial include "the loading or unloading of any commodity, currency or person **contrary to the customs, fiscal, immigration or sanitary laws and regulations** of the coastal State" (Article 19(2)(g) UNCLOS). Coastal states may regulate those aspects of innocent passage in their domestic laws and foreign ships have to comply with them;<sup>55</sup> coastal states may also take steps to prevent non-innocent passage.<sup>56</sup> However, they **may not discriminate** in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.<sup>57</sup>

This means that, insofar as the right to innocent passage is concerned, a coastal state does not have to permit disembarkation contrary to its sanitary laws. The condition would be that it has passed sanitary laws relating to possible infections with Covid-19. In addition, it must exercise its sovereign rights without discrimination; it may not limit innocent passage of ships from some states but not from others.

**However, these sovereign powers are further limited by the international health regime and by the human rights and refugee law regime.**

### 2.2.2 The International Health Law Regime: Preserving Health and Mobility

The World Health Organization (WHO) regime provides specialised instruments for dealing with public health threats. On the basis of Article 21 of the WHO Constitution,<sup>58</sup> the WHO's 194 member states passed the most recent **International Health Regulations (IHR) in 2005**.<sup>59</sup> Developed in light of the SARS pandemic in 2002–3, the IHR entered into force on 15 June 2005 and is currently legally binding on 196 State Parties.<sup>60</sup> Their aim is "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with interna-

<sup>50</sup> Article 1 ECHR. The question of whether a Convention state exercises jurisdiction over a ship through its MRCC is currently pending before the Court; for an in-depth analysis, see Violeta Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model'", 21 *German Law Journal* 3 (2020), 385, <https://doi.org/10.1017/glj.2020.25>. An argument can also be made from the law of the sea: Efthymios Papastavridis, "The European Convention of Human Rights and Migration at Sea: Reading the 'Jurisdictional Threshold' of the Convention Under the Law of the Sea Paradigm", 21 *German Law Journal* 3 (2020), 417, <https://doi.org/10.1017/glj.2020.23>. In addition, the exercise of the right to rescue may provide an avenue: Itamar Mann, "The Right to Perform Rescue at Sea: Jurisprudence and Drowning", 21 *German Law Journal* 3 (2020), 598, <https://doi.org/10.1017/glj.2020.30>

<sup>51</sup> Farahat & Markard (*supra* note 2), at 44–46.

<sup>52</sup> Article 17 UNCLOS.

<sup>53</sup> Article 18(2) UNCLOS.

<sup>54</sup> Article 19(1) UNCLOS.

<sup>55</sup> Article 21(1) and (4) UNCLOS.

<sup>56</sup> Article 25 UNCLOS.

<sup>57</sup> Article 24(1)(b) UNCLOS.

<sup>58</sup> Constitution of the World Health Organisation ("WHO Constitution"), adopted 22 July 1946, entered into force 7 April 1948, as last amended in 2005.

<sup>59</sup> 58th World Health Assembly, resolution WHA58.3 (23 May 2005).

<sup>60</sup> In accordance with Article 22 WHO Constitution.

tional traffic and trade.<sup>61</sup> Following the declaration of a pandemic, the WHO Director-General may issue temporary recommendations. These recommendations, such as the Strategic Preparedness and Response Plan for Covid-19,<sup>62</sup> do not formally bind State Parties, but non-compliance or applying more restrictive measures in order to achieve higher protection standards trigger an obligation to justify and explain.<sup>63</sup> The provisions of the IHR itself create legally binding obligations; states can take more restrictive measures aiming at higher protection standards only if they fulfil the justification requirement set out in Article 43 IHR.

Part V Chapter II of the IHR contains special provisions for conveyances (including ships) and conveyance operators.<sup>64</sup> In particular, Article 28 IHR provides that “subject to Article 43 or as provided in applicable international agreements, **a ship [...] shall not be prevented for public health reasons from calling at any point of entry.** However, if the point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it, unless the ship or aircraft has an operational problem which would make this diversion unsafe.”<sup>65</sup> Subject to the same proviso, **ships “shall not be refused *free pratique* by States Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking,** discharging or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties may subject the granting of *free pratique* to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, disinsection or deratting, or other measures necessary to prevent the spread of the infection or contamination.”<sup>66</sup> *Free pratique*, as indicated in the provision, comprises the embarkation and disembarkation of passengers and the loading or

unloading of cargo;<sup>67</sup> it shall, if practicable, be authorised prior to arrival.<sup>68</sup>

Article 43 IHR provides that the IHR “shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which are otherwise prohibited under Article 28(1) and (2), “provided such measures are otherwise consistent with these Regulations. **Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.**”<sup>69</sup> In determining whether to implement such health measures, State Parties shall base their determinations on scientific principles, available scientific evidence and any available specific guidance or advice from WHO.<sup>70</sup> This means that, where there is scientific evidence that quarantine is enough, further restrictions on international traffic – such as port closures – are not permissible.<sup>71</sup>

In particular, **in the case of Covid-19, complete port closures for SAR missions are not necessary to protect public health** in a coastal state. As shown in the case of the *Alan Kurdi* and the *Aita Mari* – and in the case of cruise ships with infections on board – **passengers can be kept in quarantine** either on the rescue ship or on another vessel. A quarantine period of fourteen days is enough to show that they are not infected with Covid-19,<sup>72</sup> after which time the passengers can be safely admitted to the country. For this reason, UNHCR Malta has confirmed that: “Legitimate public health concerns can be addressed through quarantine, health checks, and other measures. However, delayed rescue or failure to disembark boats in distress put the lives in danger.”<sup>73</sup>

61 Article 2 IHR.

62 Available, with a strategy update from 14 April 2020, at:

<https://www.who.int/publications-detail/strategic-preparedness-and-response-plan-for-the-new-coronavirus>

63 Armin von Bogdandy & Pedro A. Villareal, “International Law on Pandemic Responses: A First Stocktaking in Light of the Coronavirus Crisis”, *MPIL Research Paper Series* 2020-7, at 10, 14 et seq.

64 According to Article 1(1) IHR, “‘conveyance’ means an aircraft, ship, train, road vehicle or other means of transport on an international voyage; ‘conveyance operator’ means a natural or legal person in charge of a conveyance or their agent”.

65 Article 28(1) IHR.

66 Article 28(2) IHR.

67 Article 1(1) IHR.

68 Article 28(3) IHR.

69 Article 43(1) IHR.

70 Article 43(2) IHR.

71 In line with this, WHO has reminded governments that travel restrictions should be based on scientific evidence and proportionate, and strongly encourages governments to facilitate ships’ movements; see WHO, IMO & ILO, *A Joint Statement on medical certificates of seafarers, ship sanitation certificates and medical care of seafarers in the context of the COVID-19 pandemic*, 22 April 2020,

[https://www.who.int/docs/default-source/coronaviruse/2020-04-22-ilo-who-imo-joint-statement-on-medical-certificates-of-seafarers-ship-sanitation-certificates-22-april-sg-\(003\).pdf?sfvrsn=6afdd464\\_2](https://www.who.int/docs/default-source/coronaviruse/2020-04-22-ilo-who-imo-joint-statement-on-medical-certificates-of-seafarers-ship-sanitation-certificates-22-april-sg-(003).pdf?sfvrsn=6afdd464_2). WHO also provides guidance on health measures at points of entry:

<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/points-of-entry-and-mass-gatherings>

72 Stephen A. Lauer et al., “The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application”, *Annals of Internal Medicine*, 5 May 2020, <https://doi.org/10.7326/M20-0504>

73 UNHCR, “News comment on search and rescue in the Central Mediterranean by the Assistant High Commissioner for Protection at UNHCR, the UN Refugee Agency, Gillian Triggs”, 1 May 2020, <https://www.unhcr.org/mt/13871-news-comment-on-search-and-rescue-in-the-central-mediterranean-by-the-assistant-high-commissioner-for-protection-at-unhcr-the-un-refugee-agency-gillian-triggs.html>

Article 28(5) IHR makes special provisions **if a ship lands elsewhere than planned**. In such cases, local authorities may apply the health measures recommended by WHO or provided in the IHR (including testing, quarantine and other measures) and may require travellers to remain on the ship except for emergency purposes or as required for communication with the competent authority, after which time the ship may proceed to the scheduled port or a conveniently situated port.<sup>74</sup> While the IHR thus appear to envisage the ship departing without disembarking its passengers, **in the case of passengers rescued from distress at sea and possibly entitled to international protection, special obligations apply** under international human rights law, international refugee law and EU asylum law. Those obligations require the ability to apply for asylum, have the claim examined and have access to remedies with suspensive effect.

The requirement to observe *non-refoulement* has also been affirmed by leading WHO officials in a comment published in the medical journal *The Lancet*.<sup>75</sup> In its guidance on “Covid-19 and the Human Rights of Migrants”, the UN Office of the High Commissioner for Human Rights (OHCHR) also emphasises:

Tightened border controls and measures implemented at international borders, including screening and quarantine at points of entry, must ensure non-discrimination, confidentiality and dignity and should not imply mandatory or indefinite detention. **Search and rescue operations should be maintained ensuring compatibility with public health priorities.**

Measures should be in place to ensure continued access to individual assessment, best interests assessment and determination, and international protection under international human rights and refugee law. Migration and asylum procedures should comply with due process guarantees and avoid placing migrants in vulnerable situations, such as rendering them without migration status. [...]<sup>76</sup>

### 2.2.3 The Human Rights Regime: Public Health Exceptions and Search and Rescue

While an important element of Covid-19 containment are restrictions on “non-essential” travel, forced migration from places such as Libya, where migrants are faced with inhuman conditions, torture, arbitrary killings and *refoulement*, is quite the opposite of travel for leisure or business networking. And while states can generally rely on their sovereignty for immigration bans, these sovereign rights are limited by their humanitarian obligations in relation to forced migrants.

In the same way, while the cited provisions on innocent passage relate to regular navigation, **Search and Rescue constitutes a special case**. This is already suggested in the Search and Rescue Convention (SAR Convention), which stipulates that coastal states should authorise immediate entry into their territorial sea of rescue units of other states if their sole purpose is Search and Rescue.<sup>77</sup> While that provision only mentions state vessels, private vessels are also obliged to render assistance to persons in distress at sea (Article 98 UNCLOS). An interpretation of UNCLOS in good faith<sup>78</sup> and in light of the humanitarian objectives addressed in Article 98 “require[s] the primacy of saving lives over enforcing domestic laws of the coastal state”<sup>79</sup> Moreover, when interpreting UNCLOS, any other relevant rule of international law must be taken into account.<sup>80</sup> This means that the provisions on innocent passage **must be interpreted in line with international human rights law**.<sup>81</sup> Accordingly, when relying on immigration law and health law requirements to restrict the right of innocent passage, State Parties must ensure that effective rescue of persons in distress remains possible and that other obligations under international human rights law are respected. In particular, states must ensure that *non-refoulement* is fully respected and not circumvented by making access to protection impossible.

As soon as a state exercises jurisdiction over persons in distress at sea or on board a rescue vessel, it has

<sup>74</sup> Article 28(5) IHR.

<sup>75</sup> Hans Henri P. Kluge, Zsuzsanna Jakab, Jozef Bartovic, Veronika D’Anna & Santino Severoni, “Refugee and migrant health in the COVID-19 response”, *The Lancet*, 31 March 2020, [https://doi.org/10.1016/S0140-6736\(20\)30791-1](https://doi.org/10.1016/S0140-6736(20)30791-1)

<sup>76</sup> OHCHR, *Covid-19 and the Human Rights of Migrants: Guidance*, 7 April 2020, [https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance\\_COVID19\\_Migrants.pdf](https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf) (emphasis added).

<sup>77</sup> SAR Annex 3.1.2.

<sup>78</sup> This is required by virtue of the Vienna Convention on the Law of Treaties (VCLT), Article 31(1).

<sup>79</sup> Kristof Gombeer & Melanie Fink, “Non-Governmental Organisations and Search and Rescue at Sea”, *Maritime Safety and Security Law Journal* 4/2018, 1, at 12. See also Tullio Treves, “Human Rights and the Law of the Sea”, 28(1) *Berkeley Journal of International Law* (2010) 1, at 6.

<sup>80</sup> Article 31(3)(c) VCLT, Article 293 UNCLOS.

<sup>81</sup> Gombeer & Fink (*supra* note 74), at 12; Selina Trevisanut, “Is there a right to be rescued? A constructive view”, 4 *Questions of International Law* 3 (2004), at 9–11, [http://www.qil-qdi.org/wp-content/uploads/2014/06/02\\_LOS\\_Trevisanut\\_FINAL.pdf](http://www.qil-qdi.org/wp-content/uploads/2014/06/02_LOS_Trevisanut_FINAL.pdf); Efthymios D. Papastavridis, “Is there a right to be rescued? A skeptical view”, 4 *Questions of International Law* 17 (2004), at 23–24, [http://www.qil-qdi.org/wp-content/uploads/2014/06/03\\_LOS\\_Papastavridis\\_FINAL.pdf](http://www.qil-qdi.org/wp-content/uploads/2014/06/03_LOS_Papastavridis_FINAL.pdf)

obligations to respect their human rights and **obligations to protect their life and basic well-being** (Article 2 and 3 ECHR). Crucially, non-admission may result in *refoulement* incompatible with Article 3 ECHR and Article 33 of the Refugee Convention. As argued in detail elsewhere, the exercise of SAR coordination duties may be considered an exercise of jurisdiction.<sup>82</sup> If no other options are available, this may require allowing disembarkation, subject to the necessary precautionary health measures. Further obligations result from EU law, specifically from EU asylum law.<sup>83</sup> According to the EU Asylum Procedures Directive,<sup>84</sup> Member States are obliged to proactively provide information on the availability of asylum procedures, once there are “indications that [a person present at the external borders] may wish to make an application for international protection”. This certainly applies in a Member State’s territorial waters.<sup>85</sup> This means that if no other EU member states are willing to accept the rescued survivors, Malta may be under an obligation to allow disembarkation in order to conduct such an asylum procedure.

The ECHR does permit derogations from its obligations in case of a “public emergency threatening the life of the nation” (Article 15 ECHR). Such derogations must be notified to the Secretary General of the Council of Europe.<sup>86</sup> As of 14 May 2020, ten of the 47 Council of Europe members have declared a state of emergency. **Neither Malta nor Italy are among the states that have notified a derogation from the ECHR.**<sup>87</sup> In any case, such derogations are limited to what is “strictly required by the exigencies of the situation” (meaning that the least intrusive measures must be adopted) and may not be inconsistent with a state’s other obligations under international law (including, for example, SAR obligations and WHO obligations).<sup>88</sup> Moreover, outside of war, no derogations may be made from Article 2 (right to life), Article 3 (freedom from torture and inhuman or degrading treatment, as well as *non-refoulement*), Article 4(1) (freedom from slavery) and Article 7 (no punishment without law); these rights are referred to as “**non-derogable rights**”.<sup>89</sup>

#### 2.2.4 Specifically: *Non-refoulement Obligations*

Specifically, states must respect the right to seek asylum (Article 14 UDHR) and the obligation of *non-refoulement* (Article 3 ECHR, Article 33 Refugee Convention, Article 7 ICCPR, Article 3 CAT) when handling SAR scenarios. As mentioned, *non-refoulement* is a non-derogable right; **the obligation to respect non-refoulement also applies in situations of public emergency.**

The EU Commission has released a Guidance on “how to ensure continuity of procedures as much as possible while fully ensuring the protection of people’s health and fundamental rights in line with the EU Charter of Fundamental Rights”, recalling that measures to prevent and contain the spread of Covid-19 must be “reasonable, proportionate and non-discriminatory”. In addition, “[a]ny restrictions in the field of asylum, return and resettlement must be proportional, implemented in a non-discriminatory way and take into account the principle of non-refoulement and obligations under international law”. In particular, individuals seeking international protection must be able to lodge their applications.<sup>90</sup>

As UNHCR points out, **blanket entry bans – such as port closures – are incompatible with non-refoulement obligations.** It recalls that “States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of refoulement,”<sup>91</sup> before explaining:

States are entitled to take measures to ascertain and manage risks to public health, including risks that could arise in connection with non-nationals arriving at their border. Such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health. In response to the Covid-19 pandemic States have, or are considering putting in place public health measures such as the screen-

<sup>82</sup> Farahat & Markard (*supra* note 2), at 44–46; Moreno-Lax (*supra* note 45), at 401–13 (relating to the S.S. case); see also Papastavridis (*supra* note 45).

<sup>83</sup> Farahat & Markard (*supra* note 2), at 34

<sup>84</sup> Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection, OJ L 180/60, 29 June 2013, Article 8 in conjunction with Article 3.

<sup>85</sup> Article 3(1) Directive 2013/32/EU.

<sup>86</sup> Article 15(3) ECHR.

<sup>87</sup> Council of Europe Treaty Office, Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms, status as of 14 May 2020, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=0C00wpD0](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=0C00wpD0). On this practice, see Kanstantin Dzehtsiarou, “COVID-19 and the European Convention on Human Rights”, *Strasbourg Observers*, 27 March 2020, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>

<sup>88</sup> Article 15(1) ECHR.

<sup>89</sup> Article 15(2) ECHR.

<sup>90</sup> EU Commission, *COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*, 16 April 2020, C(2020) 2516 final, at 1–4.

<sup>91</sup> UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, para. 3, available at: <https://www.refworld.org/docid/5e7132834.html>

ing of travellers on arrival and the use of quarantine for persons who have been identified as suffering from the disease or who may have been exposed to the virus. Such efforts, multilateral or national, are directed at containing this infectious disease and preventing its spread.

**However, imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement.** In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of non-refoulement. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.

Reasonable measures to ascertain and manage risks to public health that could arise in connection with people arriving from other countries could include temporary limitations on movement for a limited period. **Such restrictions must however be in accordance with the law, necessary for the legitimate purpose of managing the identified health risk, proportionate, and subject to regular review.** Where such restrictions amount to detention, that detention must not be arbitrary or discriminatory, must be in accordance with and authorized by law in accordance with applicable procedural safeguards, for a limited time period and otherwise in line with international standards. Health concerns do not justify the systematic use of immigration detention against individuals or groups of asylum-seekers or refugees.

While such public health measures may not specifically target persons seeking international protection, they may have far-reaching consequences for such persons. States' measures to protect public health may affect persons seeking international protection. While such measures may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, **such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement.** Not only would this be at variance with international law, it could send the persons into "orbit" in search of a State willing to receive them and as such may contribute to the further spread of the disease.<sup>92</sup>

The 2020 Principles on "Human Mobility and Human Rights in the Covid-19 Pandemic", signed by nearly 800 international experts around the world, confirm that:

**A State's pursuit of legitimate health goals must respect the fundamental principle of non-refoulement,** including non-return to a real risk of persecution, arbitrary deprivation of life, torture, or other cruel, inhuman, or degrading treatment. The norm of non-refoulement, a fundamental principle of international law, is implicated in two important respects by State measures to respond to Covid-19. First, it may, under certain circumstances, prohibit removal of a migrant, refugee, or displaced person to a country where the absence or inadequacy of health care creates threats to life or a risk of serious, rapid, and irreversible decline in health.

Second, State measures may infringe upon the right to seek and enjoy asylum. **Blanket measures to exclude refugees or asylum seekers from access to territory without ensuring protection from refoulement are inconsistent with international law.** Exceptions for refugees and asylum seekers to border closures and limitations on entry, combined with health measures such as screening, testing and quarantine, can enable States to manage arrivals safely while respecting the principle of non-refoulement.<sup>93</sup>

<sup>92</sup> Ibid., para. 5–8 (emphasis added).

<sup>93</sup> *Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons*, at 7, available at <https://zoberginstitute.org/covid-19/#Human%20Rights%20Document> (emphasis added). (Full disclosure: Nora Markard, co-author of this study, is among the 797 signatories of these Principles.) See also Gillian Triggs, "We can secure both public health and the rights of refugees to protection", *Kaldor Centre for International Refugee Law*, 8 April 2020, <https://www.kaldorcentre.unsw.edu.au/publication/we-can-secure-both-public-health-and-rights-refugees-protection>

### 3. Private Pushbacks to Libya

Can the Maltese RCC order Libyan fishermen and/or the Libyan Coast Guard to rescue persons from distress at sea and bring them to Libya?

#### 3.1 The Situation in Libya

Compared to our assessment published in February 2020,<sup>94</sup> the situation in Libya has, if anything, deteriorated.

As mentioned, **UNHCR had to suspend its operational work** at the Gathering and Departure Facility (GDF) due to safety concerns at the end of January 2020.<sup>95</sup> The International Criminal Court's prosecutor, Fatou Bensouda, continues to monitor the targeting of civilians that may constitute **international crimes** and is working on additional arrest warrants.<sup>96</sup> In May 2020, seven UN agencies called for a ceasefire, reporting that "hostilities continue unabated, hindering access and the delivery of critical humanitarian supplies", with Covid-19 posing "yet another strain on the already overstretched health system" and a food crisis looming on the horizon.<sup>97</sup>

The **situation for migrants and refugees is characterised as "especially alarming"**. Many of those intercepted at sea "end up in one of the eleven official detention centers. Others are taken to facilities or unofficial detention centers to which the humanitarian community does not have access. The United Nations has repeatedly reiterated that Libya is not a safe port and that persons rescued at sea should not be returned to arbitrary detention."<sup>98</sup> In addition, according to recent reports, **Libya is continuing to deport migrants across the border** without providing access to protection procedures; thus, between 11 and 15 April 2020, nearly 900 migrants detained in Kufra were summarily deported to Chad and Sudan.<sup>99</sup>

#### 3.2 Pushbacks to Libya Continue to Violate the Law of the Sea

Our previous study found that the situation in Libya was such that it can under no circumstances be considered a place of safety. This assessment remains unchanged; **Libya cannot be considered a place of safety**.

While Malta has not ratified the 2004 SAR and SOLAS amendments (containing the notion of "places of safety") and has continuously opposed them, **Malta's opposition does not concern the concept of "places of safety" as such** and the obligation to disembark rescued survivors in such a place. Its opposition primarily relates to the obligation of the SAR state to provide such a place in case none can be found elsewhere; this is clear from its efforts to delete such language from the 2004 amendments and the 2004 MSC Guidelines.<sup>100</sup> In declaring that Malta cannot be considered a place of safety due to the current challenges posed by the coronavirus pandemic,<sup>101</sup> Malta has confirmed that it accepts the general concept of "place of safety".

However, Malta has been advancing a **narrow reading of "places of safety"**, rejecting the link between SAR obligations and obligations under international refugee law and international human rights law. In Malta's view, for the purposes of SAR, it is enough that basic needs can be satisfied.<sup>102</sup> However, given the current situation there, it is clear that **even these basic conditions are not fulfilled for rescued migrants in Libya**. If, in the view of the Maltese government, even Malta cannot currently be considered a place of safety in this narrow reading, how could Libya possibly be considered a place of safety?

Thus, in her letter of 5 May 2020 to the government of Malta, the Council of Europe's Commissioner for Human Rights recalled Malta's SAR obligations in relation to places of safety, reiterating that Libya is no such place:

<sup>94</sup> Farahat & Markard (*supra* note 2), at 22–27.

<sup>95</sup> UNHCR, Press release: "UNHCR to suspend operations at GDF in Tripoli amid safety concerns: UNHCR has started moving dozens of highly vulnerable refugees, who have already been identified for resettlement or evacuation to third countries, from the facility to safer locations", 30 January 2020, <https://www.unhcr.org/mt/13375-unhcr-to-suspend-operations-at-gdf-in-tripoli-amid-safety-concerns.html>

<sup>96</sup> Edith M. Lederer, "Prosecutor says ICC is working on new Libya arrest warrants", *AP News*, 6 May 2020.

<sup>97</sup> OCHA, UNHCR, UNICEF, UNFPA, WFP, WHO, IOM, *Joint statement: UN agencies warn conflict and the COVID-19 pandemic present a significant threat to life in Libya*, 13 May 2020, <https://www.unhcr.org/news/latest/2020/5/5ebc1b954/un-agencies-warn-conflict-covid-19-pandemic-present-significant-threat.html>

<sup>98</sup> *Ibid.*

<sup>99</sup> Lori Hinnant & Isabel Debre, "Desert or sea: Virus traps migrants in mid-route danger zone", *AP News*, 3 May 2020.

<sup>100</sup> Report of the Maritime Safety Committee on its Seventy-Eighth Session, MSC 78/26, 28 May 2004, para. 3.64, para. 16.46–16.54, available at <http://merchantmarine.financelaw.fju.edu.tw/data/IMO/MSC/78/MSC%2078-26.pdf>; see also Malta's proposal: MSC 78/WP.5/Rev.1, 18 May 2004, available at <http://merchantmarine.financelaw.fju.edu.tw/data/IMO/MSC/78/MSC%2078-WP5-Rev.1.pdf>

<sup>101</sup> *Supra* note 5.

<sup>102</sup> See Silja Klepp, "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538 (2011), at 549–50.

I would also like to emphasise that prompt disembarkation in a place of safety is an integral part of states' search and rescue obligations. It has been well documented that Libya, both on account of the ongoing conflict and the serious human rights violations that persons disembarked there face, cannot be considered a place of safety. I call on your government to ensure that no action is taken by Malta that would result in the return to and disembarkation in Libya of persons rescued or intercepted at sea. This includes ensuring no one is returned to Libya by Maltese authorities, refraining from issuing instructions to private vessels to disembark rescued persons in Libya, and not handing over responsibility to the Libyan Coast Guard or related entities when the foreseeable consequence of this would be disembarkation in Libya. I also urge your government to ensure full accountability for situations in which action by Maltese authorities has led, directly or indirectly, to returns of persons at sea to Libya.<sup>103</sup>

The Maltese Prime Minister, in his response, **did not dispute the obligation to not disembark survivors in Libya**. He merely reiterated Malta's position that the SAR state had only coordinating duties:

I also wish to point out that the 2004 amendments made to the IMO Safety of Life at Sea Convention (SOLAS) and the IMO Search and Rescue Convention provide that persons rescued in the SAR area who are not taken on by any State are to be taken on by the Search and Rescue area State. These amendments challenge the traditional view that the duty of the Search and Rescue State in the Search and Rescue area is only to coordinate rescue operations. The amendments are, however, not binding on Malta, which is not in a position to adopt them and has constantly and persistently opposed them.

In the case of Malta, the obligations that are binding in terms of the Search and Rescue Convention are those of coordinating rescue operations of ships in distress within Malta's Search and Rescue Area. This position is also in line with the principle that humanitarian aid should be provided as soon as possible.

**Disembarkation in Libya is therefore a violation of the international law of Search and Rescue, also for Malta.**

### 3.3 Pushbacks to Libya Continue to Violate Non-refoulement

Even against the background of Malta's narrow reading of the concept of "places of safety", **Malta remains bound by the ECHR and by the Refugee Convention and, therefore, by the obligation of non-refoulement** contained therein.

Article 3 ECHR prohibits returns to countries where there is a real risk of torture or inhuman or degrading treatment; such risks clearly continue to be present in Libya for migrants.<sup>104</sup> Article 33 of the Refugee Convention prohibits returning refugees to their home country where they have a well-founded fear of persecution for reasons of their race, religion, nationality, political opinion, or membership of a particular social group (for example, because of their homosexuality). Both provisions also prohibit "chain refoulement", that is, deportation to a country that will then deport the person to a state (in the case of the Refugee Convention, her home state) where such risks exist. As explained above, these obligations are non-derogable; **non-refoulement continues to apply even during a health emergency**.

Given the treatment of migrants in Libya, the fact that Libya has no asylum system and is not a signatory of the Refugee Convention, and that it routinely deports migrants without procedure, **pushbacks to Libya constitute a clear violation of these non-refoulement obligations**.

### 3.4 Pushbacks by Private Actors are Attributable to Malta

Where private individuals – rather than state officials – are concerned, a state is only responsible for their actions in specific situations. These situations are laid down in the Articles on State Responsibility (ASR).<sup>105</sup> As explained in our previous study, states can be held accountable for private actions if the private person acted on the **instructions of the state**.<sup>106</sup>

<sup>103</sup> CoE Commissioner for Human Rights, Dunja Mijatovi, *Letter to Mr. Robert Abela, Prime Minister of Malta*, 5 May 2020, <https://rm.coe.int/letter-to-robert-abela-prime-minister-of-malta-on-the-human-rights-of-16809e4c9c>

<sup>104</sup> See Farahat & Markard (*supra* note 2), at 22–27.

<sup>105</sup> Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility" or "ASR"), Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10 ("ILC Report"), p. 26–30.

<sup>106</sup> Farahat & Markard (*supra* note 2), at 38–40.

Article 8 ASR stipulates that “the conduct of a person [...] shall be considered an act of a State under international law if the person [...] is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.” Significantly, Article 8 ASR does not require a private person to be integrated in the official structure of the state, nor does it matter “whether their conduct involves ‘governmental activity.’”<sup>107</sup> Article 8 ASR seeks to cover constellations where states use private persons as their auxiliary, while not requiring them to be “specifically commissioned by the State.”

Consequently, if a state authority instructs the shipmaster of a private vessel to bring rescues to an unsafe place, where there is a real risk of torture or inhuman or degrading treatment and of chain *refoulement*, this disembarkation can be considered an act of that state under Article 8 ASR<sup>108</sup> – an act that, if executed by officials of the state, would clearly constitute a breach of the principle of *non-refoulement* under the Refugee Convention and/or the ECHR as well as a breach of the obligation to rescue under Article 98 UNCLOS, which only ends when the survivors can be disembarked in a “place of safety”.

In the situation described above (section 1.3), it is clear that Maltese officials instructed the owner of the *Mae Yemanja* (also known as the *Dar al Salam 1*) to send the ship to the distress site in the Maltese SAR zone, to take on board the migrants in distress and deliver them to Libya. **The pushback must therefore be considered to have happened on the instructions of Malta, leading to its international responsibility.**<sup>109</sup>

#### 4. Conclusion

Both Italy and Malta have closed their ports to Search and Rescue vessels, pointing to the strain imposed by the Covid-19 pandemic to claim that they cannot provide a “place of safety” to rescued survivors. Malta has not accepted the 2004 amendments of the two most important international treaties on Search and Rescue (the SAR and SOLAS Convention) and the accompanying IMO Guidelines, which indicate that the SAR state coordinating a rescue mission has to provide a place of safety if none can be found elsewhere. However, this does not mean Malta is without obligations towards rescued survivors. When it is seized with a SAR case, a state must ensure an effective rescue mission that concludes with disembarkation in a place of safety,

wherever this place is found. This does not change in times of a pandemic. In addition, obligations to protect the human rights of the survivors and obligations under EU asylum law may require disembarkation.

Port closures also have to comply with international law. WHO law on public health emergencies requires that states limit interferences with mobility as little as possible and base their measures on scientific evidence. As the cases of the *Alan Kurdi* and the *Aita Mari* demonstrate, quarantining survivors for the two weeks currently considered necessary to eliminate an infection is quite sufficient to protect a coastal state’s public health. While the law of the sea permits public health restrictions on innocent passage through a state’s territorial waters and into its ports, the provisions make clear that rescue from distress at sea is a special case. Moreover, a state coordinating a Search and Rescue mission is bound by human rights and international refugee law; blanket entry bans are incompatible with these obligations.

The situation in Libya has, if anything, deteriorated since the beginning of the year and since the outbreak of the Covid-19 pandemic. Libya is still not a place of safety and pushbacks to Libya continue to violate *non-refoulement* obligations under international human rights law and international refugee law. Although Malta has not accepted the 2004 amendments, it does accept that a rescue must end with disembarkation in a place of safety. And while it advocates a narrower reading of this concept, one that disregards risks of persecution, torture or inhuman or degrading treatment and that focuses solely on basic needs, the conditions in Libya are such that even this minimalist concept of a place of safety is not fulfilled. It is hard to see how Malta could dispute this if it considers that even Malta itself can no longer be considered a place of safety because of the impact of Covid-19.

It is now undisputed that Malta sent a privately owned fishing trawler to rescue migrants in distress in the Maltese SAR zone and ordered it to bring them to Libya, where they were placed in detention. This clearly constitutes the type of instruction of private actors that leads to the attribution of such actors’ behaviour to a state under the international law of state responsibility. This means that Malta is responsible for this pushback and has thereby violated the international law of the sea and international human rights law.

<sup>107</sup> ILC report (*supra* note 99), at p. 47, Art. 8 para. 2 (Commentary).

<sup>108</sup> Efthymios Papastavridis, “Rescuing migrants at sea and the law of international responsibility”, in: Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalization. Transnational Law Enforcement and Migration Control*, 2017, p. 161, at 173.

<sup>109</sup> This also appears to be the position of the CoE Commissioner for Human Rights in the letter cited above (*supra* note 49).

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