

Exploratory Workshop

The Human Costs of Border Control in the Context of EU Maritime Migration Systems

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DRAFT

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A double bind: Malta and the rescue of unwanted migrants at sea

In the following paper I will present results of a research I carried out in Malta in September and October 2007. On the island, which is situated in the central Mediterranean Sea between Tunisia, Libya and Italy, one of my aims was to find out more about the situation at sea concerning *Search and Rescue* operations (SAR) of migrants crossing the Mediterranean by boat. The number of missing and drowned migrants registered in the central Mediterranean between Libya, Malta and Italy reached 551 in 2007 and increased to 1,274 in 2008 (Fortress Europe 2008). The goal of my research on Malta was therefore to understand why an increasing number of migrants are dying at sea and what role the European security forces play in this critical situation.

The Mediterranean Sea is divided into SAR-areas which are then assigned to the different coastal states. In these SAR-areas each coastal state is responsible for taking out SAR-actions. The humanitarian law of the sea states clearly that any person in distress at sea must be assisted regardless of the nationality or the status of the person (SAR Convention 1979). Nonetheless political discussions over the responsibilities of the coastal states to save irregular migrants in distress and to disembark them in a *place of safety* can hinder immediate SAR actions. Legal loopholes and dodges are used to get around *Search and Rescue* obligations. On the local Maltese level the Commanders of the *Armed Forces of Malta* (AFM), who are responsible for SAR actions at sea, seem to be bound by a strong commitment to save migrants in distress. Nonetheless, political discussions around SAR responsibilities and the heated atmosphere on the island regarding irregular migration shape the behaviour of the AFM. As a consequence, practices of the AFM can be observed which impede or slow down SAR actions, with serious consequences for migrants.

“We could be taken over” – a small island under pressure

Although Malta is a small island, its role within the migration system of the Mediterranean Sea should not be underestimated, especially in SAR matters. The very densely populated

country (approx. 410,000 inhabitants on 316 km²) has an enormous SAR area. The relatively small *Maritime Squadron* of the *Armed Forces of Malta* (AFM), consisting of 300 men and women, has to cover 250,000 km², reaching from the Tunisian coastal waters nearly to the Greek island of Crete.¹ All migrants who are crossing the Mediterranean from the African coast to reach Italy have to pass through the Maltese SAR area.

From 2002 to 2008 approx. 10,700 migrants have landed on Malta or have been rescued by AFM in the Maltese SAR area. Nearly all migrants who have landed on Malta had plans to reach Italy, but bad weather conditions or other unforeseen circumstances had prevented them from reaching their destination. Over the last few years a heated political atmosphere against migrants coming by boat has developed on the island. Most migrants come from crisis areas such as Somalia, Sudan and Eritrea and ask for asylum on Malta (Médicins Sans Frontières 2009). As the spokesperson of the Maltese Ministry of the Interior explained to me in an interview, “people fear that we could be taken over. Because of our size, people are seeing more of these immigrants.”² One could talk of a “climate of psychosis” (Texeira 2006, p.10) that has developed on the island regarding the phenomenon of irregular migration. Xenophobic attacks like burning the cars of the Jesuit Refugee Service (JRS) or burning the house of a refugee advocate have become reality.³ In the interviews I had conducted with representatives of the Maltese government it became clear that the landing of more migrants on Malta should be avoided by all means.

On the European level Malta, as other countries at the external community borders, feels disadvantaged by the Dublin II Regulation and emphasises on every occasion that there should be more burden sharing agreements concerning asylum issues amongst the EU-member states.

Who is responsible for migrants in distress?

One of the most problematic issues regarding the diplomatic relationship between Malta and other countries in the last years has been the controversially discussed responsibility for the disembarkation of rescued irregular migrants in the central Mediterranean Sea.

¹ All names of informants have been changed. Interview with Michael Azzopardi, Director of the Civil Aviation Department Malta, 19/09/2007 in his office at the airport.

² Interview with Martin Sulana, spokesperson of the Ministry of Justice and Internal Affairs, 18/09/2007 in La Valletta.

³ Interview with the Director of JRS Malta, Pater Joseph Anima, 23/09/2007, in his office.

In July 2006, the Spanish trailer *Francisco Catalina* had rescued 51 migrants from a disabled boat. The trailer had then headed for Malta to disembark the passengers on the island. The Maltese army stopped the vessel 60 miles off the coast claiming that the migrants could not be disembarked on Malta. The Maltese government argued that the migrants had been rescued within the Libyan SAR area and that they should be taken to Spain.⁴ After a short time the situation on board became unbearable as a hygienic and medical emergency occurred. After one week of diplomatic quarrels the trailer headed for Spain where most of the migrants applied for asylum. Similar incidents were taking place in the following years. On 16th April 2009 the Turkish owned and Panamian flagged cargo ship *Pinar E* with 154 migrants on board was refused entry to Malta, arguing that the migrants were picked up 41 nautical miles off Lampedusa. The Italian authorities rejected entry into Italian waters insisting that the migrants should be taken to Malta being responsible for this SAR region (Times of Malta 17/04/2009). Finally the Turkish cargo ship was allowed to enter Italy's territorial waters as Italian ministers gave in after a four-day standoff.

In the past years different cases similar to these have occurred in the central Mediterranean Sea. Fishermen and other seamen took shipwrecked migrants on board and then had difficulties to disembark them. As these circumstances could mean a loss of time and money for the shipping industry and consequently could lead to a weakening of the international SAR-system which is built on the principle that all people at sea have to assist people in distress, the *International Maritime Organisation* (IMO) decided to amend the SAR and SOLAS-Conventions which are crucial for the international SAR-system. The amendments were adopted by the *Maritime Safety Committee* (MSC) of IMO on May 20th 2004 (Resolution MSC.153 (78) 2004). The new rules determine that the state responsible for a certain SAR-area is also responsible of finding a *place of safety* to disembark shipwrecked people. This means that each particular SAR-state needs to provide a harbour on its own territory where people can be safely disembarked or has to negotiate with other states to find such a harbour.

Although the Amendments to the International Convention for the Safety of Life at Sea (Resolution MSC.153 (78) 2004) aim at facilitating and supporting the position of seamen who assist people in distress and smoothes the progress of disembarkation, Malta is not willing to sign the amendments. The main argument is the vast SAR-area of Malta. The

⁴ Interview with Commander Borg (AFM), 21/09/07, headquarters of AFM, Luqa Barracks, Malta.

government of the island has always insisted that rescued migrants should be taken to the nearest safe port from the location where they were rescued at, as AFM-Lieutenant Roger Gonzi states in our interview.⁵

The questions where a person can be disembarked as well as the definition of a *place of safety* are pointing at another important factor. This also shows how closely the humanitarian law of the sea and refugee law are interconnected with each other when it comes to irregular migration at sea. In the *Guidelines on the Treatment of Persons Rescued at Sea*,⁶ which were adopted together with the SAR- and SOLAS- amendments, it is explicitly stated that: “A place of safety is a location where rescue operations are considered to terminate, and where: the survivors’ safety or life is no longer threatened; basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the survivors’ next or final destination.”

Furthermore regarding the needs of asylum seekers rescued at sea the guidelines get even more concrete: “Disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided.”⁷

This passage includes actually the principle of *Non-Refoulement* of the Geneva Refugee Convention of 1951.⁸ In the quarrels around the *place of safety* and rescued migrants in the Mediterranean Sea it becomes especially relevant regarding the Libyan state. Libya has no asylum system and violates basic human and refugee rights (Klepp 2008). Therefore it cannot be regarded as a *place of safety* for migrants crossing the Mediterranean. Also in this regard the Maltese Government has a different opinion, as Commander Gonzi explains to me. In our interview he accuses UNHCR and that the agency would mix up matters of SAR and matters of refugee policy. Migrants rescued in Libyan SAR waters or in Libyan coastal waters must be brought to Libya, he affirms.

Insecurities regarding the disembarkation of rescued migrants in the central Mediterranean Sea are one aspect which could impede rescue actions, especially by vessels of the civil shipping industry. Another point which is linked even more directly to possible fatalities at

⁵ Interview with Lieutenant Roger Gonzi, 05/10/07 at the AFM headquarter, Luqa Barracks.

⁶ Resolution MSC 167 (78) (2004): Guidelines on the Treatment of Persons Rescued at Sea

⁷ Resolution MSC 167 (78) (2004): Guidelines on the Treatment of Persons Rescued at Sea, Paragraph 6.12, 6.17 & 6.20

⁸ The principle of *Non-Refoulement* is a central cornerstone of the international refugee protection system. It constitutes the prohibition of returning refugees to places where they might be subjected to persecution and the prohibition of sending them back without considering their proposal for asylum.

sea are negotiations between Malta and Italy about the responsibility of rescuing migrants. To help the small island out, Italy is regularly conducting SAR actions in the Maltese SAR area. In 2006 the Italian coastal guard *Guardia Costiera* carried out 289 operations that were connected to *Search and Rescue* of migrants in distress in the Mediterranean Sea. It is remarkable that 135 of these operations were realized in the Maltese SAR area. (Comando Generale del Corpo delle Capitanerie di Porto 2007). Nonetheless, negotiations about which country should take action can delay SAR measures in a situation where every minute counts, especially because there are no fixed mechanisms that are automatically delegating responsibilities. All actions taken by Italy in the Maltese SAR area are based on ad-hoc agreements of the SAR forces of the two countries.⁹ In May 2007 an Italian vessel saved 27 migrants who were clinging to tuna-pens of a Maltese trailer which did not want to take the migrants on board. The migrants who were then situated between Libyan and Maltese SAR waters were only rescued after three days following a diplomatic controversy between Libya, Malta and Italy. One man died of dehydration.

“What does SOS mean to them?”

Malta, as a country with a strong shipping tradition, has a small but highly professional Maritime Squadron. As Commander Borg states during an interview, contrary to other European states, the military in Malta is also involved in police roles. Due to the small size of the country the *Armed Forces of Malta* (AFM) is the sole agency that has the resources to carry out complex rescue operations at sea. They have the necessary boats, the helicopters and the aircraft.¹⁰ The Commander explains that the Maltese navy consists of nine ships and of 300 men and women. It is no surprise that the over 8000 migrants who had been rescued by AFM between 2002 and 2007¹¹ represent a great challenge. However, Commander Borg made it very clear: As people of the sea, his troops feel committed to save every person in distress, also in case of irregular migrants. When I asked him about possible explanations for the rising number of fatalities at sea during the last years, the Commander said, suddenly with a disturbed tone: “Who has told you that there are so many people dying at sea? So far we have rescued 58 boats! That’s 1551 people. If these numbers carry on like that... We had the worst August on record.”¹²

⁹ Interview with Commander Calvinare, Comando Generale del Corpo delle Capitanerie di Porto, 26/06/07 in his office in Rome.

¹⁰ Interview with Commander Borg (AFM), 21/09/07, headquarters of AFM, Luqa Barracks, Malta.

¹¹ *Ib.*

¹² *Ib.*

After the interview with Commander Borg, I was trying to find out more about the situation at sea and the work of the AFM. I met Brian Vassallo, representative of UNHCR in Malta. He described how UNHCR of Malta has actually become a “maritime rescue organisation”¹³ and which moments he feared most during his daily work: “Many times we receive calls in the office... Often directly from boats approaching. I mean, I pick up the phone and they say UNHCR, UNHCR we are sinking. Can you imagine my reaction? I hear people shouting in the background and I panic. Or we receive calls from friends or relatives in Malta saying that they are arriving. So what do we do? We have a basic procedure: First we try to get all the information, number of people on board. Gender, age, nationalities and we pass all the information to the AFM. What we have seen this year particularly is that the AFM is very reluctant to saying automatically ok, yes, we go and rescue them. They ask: what kind of problem they have? I say the engine stopped, and they say ok, we will look after it. And then I call an hour later, because I call on an hourly basis. We call the AFM every hour. And they usually tell us, yes they have made contact with the boat, they didn’t want to be rescued, we will not rescue them, they are moving steadily north. And then they will leave them.”¹⁴

The journalist Scott Calleja calls this practice of the AFM illustrated by Brian Vassallo “passing the buck” to the Italian navy. The journalist, who has investigated several reports on SAR failures of the AFM, describes the calculations of the Maltese navy as follows: “When Malta is alerted that a boat is coming in its SAR region it has to calculate whether it will end up here, whether it has enough fuel to keep going on, whether it is in danger of sinking and whether they may have to face a tragedy and find answers for it; this is a thing they would rather avoid as well, because it would give them a bad name. Obviously passing the problem on to the Italians is the most attractive option.”¹⁵

Actually one of the Maltese navy Commanders I talked to, Lieutenant Roger Gonzi, explained to me personally how the AFM often proceeds when it is informed about a boat entering its SAR area: the AFM goes out with an offshore vessel. They approach the boat with a smaller boat and try to communicate with the people on board. Very often the migrants want to continue their journey north in order to reach Italy, as Lieutenant Gonzi elucidates. In these cases they provide food, water and sometimes fuel for the boat and let them continue their

¹³ Interview with Brian Vassallo, UNHCR-representative Malta, 26/09/07 in his office in La Valletta.

¹⁴ *Ib.*

¹⁵ Interview with the journalist Scott Calleja 20/09/07 in his office of the newspaper Maltatoday.

journey to Italy. They inform the Italian SAR authorities and accompany the boat up to Italian SAR waters.¹⁶

These practices can have fatal consequences for the travelling migrants. UNHCR representative Brian Vassallo identifies the weak points of this method. He states that he knows about several incidents where migrants' boats were already identified or approached by the AFM, but were never seen again.¹⁷ One of these boats was called the "phantom ship" (*barca fantasma*) by the Italian media. The incident of the "phantom ship" occurred when I was visiting Lampedusa in May 2007 and employees of UNHCR in Lampedusa told me that their colleagues in Rome had tried to convince the AFM and the Italian *Guardia Costiera* for several days not to give up the search for this boat. A photo that was taken by the AFM and got into the hands of the press showed 57 men who clearly were in distress on their small boat in Maltese SAR waters (La Repubblica 24/05/07). Vassallo remembers: "The boat vanished. It was the famous boat; there was a photo in the newspapers... (...) They were bailing out water, they were in evident danger. The Maltese insisted that there was no SOS. Come on! They have a very restricted interpretation of what SOS means.

S.K.: So what does SOS mean to them?

B.V: I think that they literally want people to say: Yes please save us! Any other sign that the boat might not make it is a sign for them that they can help them but not rescue them. I mean the photo was taken by the AFM themselves. There was a man with a red T-shirt, there were buckets with which they were bailing out water. This boat vanished! We have no idea where this boat went. Our colleagues in Libya went to every single detention centre, everywhere asking for that boat and they didn't find them. And like that boat we are sure there are many, many more."¹⁸

I asked Commander Roger Gonzi about the incident of the "phantom boat". He confirms that the AFM had made a photo of the boat from an AFM aircraft. But he refuses to believe that this boat was in distress, explaining AFM's definition of distress at sea. "Distress is the imminent danger of loss of lives, so if they are sinking it's distress. If the boat is not sinking it's not in distress. Even if it's six meters long and has 30 people on board."¹⁹ The Commander of the AFM assures me that this would also be the definition of the IMO. He

¹⁶ Interview with Lieutenant Roger Gonzi, 05/10/07 at the AFM headquarter, Luqa Barracks.

¹⁷ Interview with Brian Vassallo, UNHCR-representative Malta, 26/09/07 in his office in La Valletta.

¹⁸ *Ib.*

¹⁹ Interview with Lieutenant Roger Gonzi, 05/10/07 at the AFM headquarter, Luqa Barracks.

confirms that the Italian navy has a different perception; they would rescue every heavily overloaded boat. But how should the AFM react if the migrants on board don't want to be rescued by the Maltese navy, he asks me.

Regarding the communication with migrants at sea by the AFM, the Maltese journalist Scott Calleja documented a case in November 2005, which created a stir also in the Italian media. In our interview he cannot reveal to me how he managed to photograph the official AFM logbook registering the orders given from the headquarters by radio to rescuers who were sent to track the boat on that day. He wants to protect his source. However, the entries in the logbook showed that the order coming from Commander Carmel Borg who was coordinating the SAR action from the AFM operations room at Luqa Headquarters, was to "keep at distance" from the boat carrying 200 migrants in force six winds on the 17th of November 2005 (Malta Today 16/04/06). The Italian SAR forces were informed late about a boat coming closer to their SAR region. The next day, Malta's and Italy's press were full of critical reports about the shipwreck of the migrants, with nine of them found dead along the coast of Pozzallo, Sicily, between 20 and 30 of them missing and 177 found on land, including five children and three women. In the controversies afterwards the Maltese parliamentary secretary stated that the migrants did not want to be rescued by Malta, Scott Calleja recounts: "The day after in parliament Tony Abela, the parliamentary secretary who is responsible for the army, said that the immigrants had refused assistance. That was an outright lie. The migrants couldn't refuse assistance because they were never asked."²⁰

When is a boat in distress and when do passengers have to be saved? In the controversies around these questions of rescuing and not-rescuing people it gets particularly evident how violent the negotiation process around irregular migration, border protection and humanitarian law of the sea is evolving in the Mediterranean Sea. Looking back at my conversation with Commander Carmel Borg who did not want to talk about fatalities at sea, it seemed to me as if he was caught between his moral obligation as a seaman to help people in distress and his wish to save their lives and the Maltese government as his employer which is keen on avoiding more landings and political and legal conflicts regarding the situation at sea. This double bind between being a seaman and a representative of the Maltese government made him deny the fact that many migrants at sea are drowning.

²⁰ Interview with Scott Calleja, 20/09/07 in the office of the journal Malta Today.

The complex links and disagreements of the different actors concerning SAR actions of irregular migrants at sea are getting apparent in the various notions of what it means to be in distress and the conflicts regarding the amendments of the SAR-and SOLAS-conventions and the disembarkation of rescued migrants. The negotiable and political character of the drafting and implementation of law is becoming evident. Internationally valid law is not merely enforced on the national and local level. The process is much more complex: on the ground, legal norms are modified and adapted by local actors, pursuing their own agenda sometimes through informal or even illegal practices (Merry 2005, p.224). The humanitarian law of the sea is ignored or modified according to political considerations and the manoeuvres of the governments of the coastal states are dominating the situation at sea. The perspective of the Maltese government that sees itself as a “front-line-state”²¹ within the fight of the European Union against irregular migration, is influencing the practices of the AFM regarding SAR actions in the Mediterranean Sea. Even in the case of people in imminent danger and distress at sea political aspects can delay or even impede SAR obligations.

Malta cannot be blamed alone for the grievances at sea. It is the other EU-member-states that don't seem to be willing to show more solidarity with Malta and to find appropriate burden-sharing regulations to improve the Maltese situation. A core issue is the Dublin-II-regulation in this regard, which is subject to criticism also by other Mediterranean countries and which should be revised. Right now, there can't be any political winner of the situation. Apart from many people dying at sea, the over-challenged security forces themselves are the victims. They cannot fully perform their tasks of saving the lives of migrants in distress, for they are caught in a double bind.

Epilogue

The Italian security forces rescued five Eritrean nationals, three men and two women, close to Lampedusa on the 20th of August 2009. They were at sea since three weeks. 75 of their comrades had died of dehydration and starvation. At least ten ships were passing by without rescuing them, as the migrants told the Italian security forces.

The Italian Ministry of Interior is accusing the Maltese navy that AFM saw the boat two days before the Italians discovered them, gave water and groceries to the migrants, but did not rescue them. The spokesperson of the *Armed Forces of Malta*, Ivan Consiglio, stated that the

²¹ Interview with Jason St. John, official advisor to the Maltese government on irregular immigration, 02/10/2007, in La Valletta.

AFM had found the boat and the migrants “in very good shape” and that the migrants had refused assistance by the AFM (La Repubblica 22/08/09).

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