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CIR Report Regarding Recent Search and Rescue Operations in the Mediterranean

INTRODUCTION

The Italian Refugee Council is deeply concerned about the way Search and Rescue operations have been recently carried out in the Mediterranean.

This report deals with the situation faced by four boats carrying persons in need of urgent help, and the very different rescue-at-sea responses to that need.

The Italian Council for Refugees is providing legal support to the 27 persons forced to cling to the "Budafel" tuna pen and who, after disembarkation in Italy thanks to the Italian Navy, have been admitted to the asylum procedure.

The cases described below show once again that immigrants coming by sea face both the difficulties involved in crossing the Mediterranean and dangers deriving from the highly differing search and rescue responses in operation in these waters. This is mostly due to the different value accorded by States to the saving of lives, on the basis of their own immigration priorities.

These accounts further indicate another hard fact evident in some parts of the Mediterranean: the reluctance of fishermen to rescue people in distress at sea, frequently because of a fear of losing working days on the sea or huge amounts of money, and sometimes also due to an awareness of their own states' policies.

Moreover, it should be pointed out that the great majority of these people are asylum-seekers in need of international protection. The Italian Council for Refugees condemns the attitude of some States violating directly or indirectly the principle of *non refoulement*.

On the other hand, the Italian Council for Refugees praises the attitude of both Italian and Spanish authorities, as well as the Spanish private fishing boat "Monfalco" which acted according to the International Maritime Law and the respect of Human Rights legislation.

CASE 1: Boat with 53/57 people in distress at sea missing south of Malta.

A boat carrying 53-57 people has been confirmed missing since Wednesday 23 May (the Maltese had "lost contact" since late Monday 21 May). The group includes women, children and, in all likelihood, individuals fleeing persecution and armed conflict. Some, if not all, persons in this group are reportedly Eritrean. Relatives of those on board who live in Malta and Italy, and who had received phone calls from the boat, had raised the alarm early on Monday 21 May by contacting the Italian and Maltese maritime authorities. At 9 am, a Maltese Armed Forces aircraft located the boat

about 80 nautical miles south of Malta and took a number of photos. The images appear to show the boat to be adrift while the 53 persons, some of whom are wearing life jackets, seem to be bailing out water with a jerry can; one of the men on board is waving a piece of red cloth.

A Maltese navy patrol – one of a number of fast vessels donated by the Italian government – reached the spot where the boat had last been located at 6 pm on Monday, but failed to find it. A search operation carried out by Maltese aircraft in the afternoon was also unsuccessful. Search and rescue activities were called off by the Maltese authorities on Wednesday morning, 48 hours after the boat was spotted.

On Thursday 24 May, the Italian Navy, having been alerted, announced that it was committing an Atlantic aircraft to the search, while seven patrol boats belonging to the Italian Coast Guard left Lampedusa and the southern shores of Sicily on the same day. The Italian authorities' search and rescue operation was initially limited to the Italian SAR waters, but then extended to the Libyan SAR zone. The boat carrying the 57 people was not found, but the Italian Navy spotted and rescued another 27 people clinging to a Maltese tug's tuna pen on Saturday 26 May.

On Saturday 26 May, an Eritrean opposition website¹ claimed that the 53-57 people on board the boat were alive and in a detention center in Libya. One of the Eritreans on the boat reportedly called his sister in Europe to tell her that the persons had been rescued by the Libyan authorities, that they were at the moment detained in a 'secret prison' in Libya, and that they would be repatriated shortly, before UNHCR or Human Rights organizations had been informed of their whereabouts. UNHCR received five names of people who were allegedly on the missing boat from relatives in Italy, France and the United States.

Though it is not yet certain that the 57 people have been intercepted and rescued at sea and/or they have in fact reached Libya, there are ongoing efforts to locate the persons in one of the many detention centers in Libya.

CASE (2) 27 persons cling to a fish pen belonging to Maltese trawler in Libyan SAR waters for 3 days.

On Saturday 26 May, the Italian news agency ANSA was informed by a reliable source in Malta that a number of persons were clinging to a Maltese trawler's tuna fish pen north of Libya. The source claimed that the Maltese tug, the "Budafel", had communicated with the Maltese maritime authorities about the fact late on Thursday 24 May. ANSA called the Italian Coastguard and Navy to verify the story, prompting the Italian Coastguard, who were unaware of the incident, to send an informal query to the Maltese authorities. Malta denied the claims made by ANSA's source.

Even the Italian Coastguard's phone call to Malta was met with another negative reply. Then the Italian maritime authorities sent Malta a formal request for information in writing. On Saturday 26 May, the Maltese authorities replied, confirming the reports and specifying the exact location of the Maltese trawler.

By 1:18 pm the story had been published by ANSA. The ship-owner, Charles Azzopardi, who later spoke to ANSA, claimed that his crew could not take the migrants on board. The migrants' boat had reportedly gone down 60 miles off the coast of Libya, in Libyan Search And Rescue waters, and the Maltese and Libyan authorities were apparently engaged in a diplomatic standoff as to who should take responsibility for the migrants.

¹ www.asmarino.com

An Italian patrol vessel, the "Orione", and an Atlantic aircraft belonging to the Italian navy were in Libyan SAR waters and Libyan airspace, respectively, as part of the search for the above-mentioned boat carrying 53/57 persons, which had been reported missing south of Malta. Prior to 26 May, when ANSA ran the story and published photographs (taken by the Italian aircraft) of the migrants clinging to the pen, Malta had not circulated information about the incident for at least 40 hours and, on Saturday morning, had denied reports about it.

The Italian navy vessel reached the "Budafel" at about 9 pm on 26 May and by 10:50 pm all 27 persons were on board the "Orione", which then headed to Lampedusa. The "Orione" docked in Lampedusa at about 8 am on Sunday 27 May and those on board were able to join the 77 persons then in the island's screening center.

Interviews of the people conducted in Lampedusa and by the Italian Council for Refugees in Crotone, showed that the 27 persons, all men, are from Ghana, Nigeria, Cameroon, Sudan, Ivory Coast, Niger, Senegal and Togo. Previous news items had reported that the persons had clung to the narrow walkway surrounding the Maltese tug's tuna pen for 24 hours. The persons, however, claimed that they had left the Libyan port of Al Zwarah 9 days before they were rescued, on 17 May. During the crossing they had reportedly attempted to seek help from two fishing boats, one of which attempted to rescue them whilst the second one, whose crew spoke English and Arabic, apparently rebuffed the people's attempts to climb on board.

On their sixth day at sea, Wednesday 23 May, the persons came across the "Budafel" and its floating tuna pen, surrounded by buoys propping up the 50 cm-wide walkway, which the fishermen use to feed the fish. The people reportedly tried to grasp the ropes linking the Maltese tug to the pen in an attempt to tie their water-logged boat to them, but the boat capsized. The 27 men then swam to the walkway and spent the next three days clinging to the buoys for dear life. The "Budafel"'s 4-man crew reportedly only gave the persons water and some fruit during the first day, when a Maltese reconnaissance plane apparently flew over the area. The captain refused to allow the persons on board the "Budafel", stating that "As a Maltese, I'm prepared to assist people, but there's a limit to everything. What if these 24 [sic] strong men rebelled and tried to assume control of the boat?²". The captain also argued that he could not take the persons to Malta as he could not risk losing the € 1 million-worth catch of tuna being hauled by the ship, which was heading to Spain.

As the persons clung to the walkway and endured harsh weather conditions (fierce sunshine during the day and cold nights), Libya and Malta wrangled over who should take responsibility for the 27 men. The Libyan authorities reportedly sent Malta a fax saying they would pick up the persons, but then failed to do so. On Saturday 26 May the Maltese authorities finally confirmed that the persons were stranded on the buoys and gave the Italian navy the exact location of the tug.

Maltese Justice and Home Affairs Minister Tonio Borg, however, told reporters on Monday 28 May that the government had made it very clear to the captain of the Budafel that he was obliged to take the persons on board if they were in any danger. At the time of the incident, according to Mr. Borg and Brigadier Carmel Vassallo of the Armed Forces of Malta, the Budafel was 23 nautical miles outside Malta's SAR zone.

² 'Illegal immigrants floating in limbo', *The Times of Malta*, 28/05/07:
<http://www.timesofmalta.com/core/article.php?id=263078>

CASE (3) 26 people saved by Spanish fishing boat "Monfalco" in Libyan SAR waters but refused disembarkation in Malta

The Italian news agency ANSA reported on Saturday 26 May that 26 people had been rescued by the Spanish tug "Monfalco". The ship was apparently operating in Libyan SAR waters about 60 nautical miles from the Libyan coast. Spanish daily 'El País', however, claims that the trawler came across the persons on Friday night and that they were found about 100 nautical miles from both Libya and Malta. The "Monfalco"'s six-man crew reportedly gave the persons water, food and fuel and urged them to continue their journey. The captain, Ruben Vasquez, told 'El País' that "there was no room for all those people on board"³ the "Monfalco".

On Saturday morning the fishermen of "Monfalco" realized that the boat was sinking and hauled the 26 men on board.

According to news reports, the Maltese authorities refused to allow the people to disembark and have told the ship's captain that Libya is responsible for the stretch of water where they were rescued.

On Monday 28 May, the "Monfalco" was reported to be floating 83 nautical miles south of Malta. The Maltese media claim that the 26 persons were supposed to have been picked up by the Italian navy patrol which rescued the 27 sub-Saharan who had been clinging to a Maltese tug's tuna pen for 3 days, but that this did not occur.

The Spanish ambassador in La Valletta has reportedly met officials from the Maltese Foreign Affairs Ministry in an attempt to find a solution to the crisis. On Monday 28 May, Maltese Interior Minister, Tonio Borg, told the Italian press that "the issue concerns Spain and Libya, given that the rescue took place in Libyan waters and that the clandestine immigrants are on a Spanish fishing vessel"⁴. "Malta", Borg added, "cannot welcome all the clandestine immigrants who say that they do not want to go back to Libya. We do not have competence over this case and cannot take on the responsibility of others".

During a press conference on Monday, the Maltese government insisted that the incident took place 27 miles inside Libya's search and rescue area and 17 miles outside Malta's SAR zone, and that Libya was therefore responsible for the people's safety. "The AFM [Armed Forces of Malta] has risked many lives in rough seas and strong winds this year in order to save many lives", Mr. Borg told reporters, "lives that would have been lost were it not for the AFM's efforts".

Spanish Foreign Affairs Ministry spokesman Alfonso Barnuevo told 'El País' that no negotiations with Malta and Libya had taken place. Spain, Barnuevo claimed, would take in the persons as they are "potential asylum seekers who appear to come from Ivory Coast, a country at war"⁵. On Monday afternoon Barnuevo stated that the "Monfalco" was heading towards Spain, but the boat's captain flatly denied the government spokesman's claims. "The boat is still here", he told 'El País', "we cannot abandon the fish pens". The head of the Navy company for Tugs and Services (Nareser) also said that the weather was rough and that water and food supplies on board were running low.

³ 'Un barco español lleva tres días al sur de Malta con 26 naufragos que nadie quiere', *El País*, 29/05/07: http://www.elpais.com/articulo/internacional/barco/espanol/lleva/dias/sur/Malta/26/naufragos/nadie/quiere/elpepuint/20070529elpepiint_12/Tes

⁴ 'Immigrazione: braccio di ferro diplomatico per 26 clandestini', *ANSA*, 28/05/07

⁵ 'Un barco español lleva tres días al sur de Malta con 26 naufragos que nadie quiere', *El País*, 29/05/07: http://www.elpais.com/articulo/internacional/barco/espanol/lleva/dias/sur/Malta/26/naufragos/nadie/quiere/elpepuint/20070529elpepiint_12/Tes

Pedro Peredo, the captain of the Montroig, another boat in the area, told Europa Press that “the situation on board [the Monfalco] is desperate. The crew feel abandoned⁶”.

On Tuesday 29 May, the Spanish media widely echoed the decision of the Spanish Government to bring these persons to Spain. The media also mentioned that, given the alleged nationalities of these persons, they would probably seek asylum in Spain.

The head of Nareser said he had faith in the negotiations underway between Malta, Spain and Libya, but affirmed that if no solution was forthcoming he would have to head back to the Spanish port of Tarragona, 755 nautical miles away, a distance which, according to ‘El País’, the "Monfalco" would take at least three days to cover.

The "Monfalco" reportedly began its journey towards Spain at 3 pm on Tuesday 29 May. The boat's speed, according to ‘El País’, was initially 14.8 km/h, but rough weather forced the crew to slow down to a speed of 4 knots. ‘El País’ reported on Wednesday 30 May that the "Monfalco" was due to meet a Spanish Coastguard vessel, the Clara Campoamor, which had left the Spanish island of Palma de Mallorca on Tuesday night, south of Sardinia during the night. The 27 men will then reportedly be taken to Spain, though ‘El País’ was not able to specify which port they will dock at.

The "Clara Campoamor" met the "Monfalco" on May 31 in order to effect the transfer. On June 2 the rescued persons were admitted to Spanish territory.

CASE (4) Maltese aircraft spots boat full of persons, but fails to initiate rescue operation

According to information received in Lampedusa a boat carrying 52 people from Algeria, Eritrea, Ethiopia, Morocco and Sudan, including a child and seven women, was sighted by a Maltese aircraft two days after the group left Libya. However, no rescue operation was launched and the Italian authorities were only alerted as to the boat's presence when a Tunisian fishing boat contacted them. The persons arrived in Lampedusa on 25 May.

Possible violations of the European Convention on Human Rights and the International Maritime law

CIR is very concerned about the current attitude of some States, in particular Libya and Malta, putting lives at risk and causing unnecessary suffering to people in distress at sea, most of whom are asylum seekers.

CIR stresses the need for preserving the integrity of the longstanding maritime tradition as well as the obligation enshrined in International Law of maritime search and rescue services.

Considering the recent events described above, CIR is worried about the violations perpetrated by Maltese Authorities of both the International Maritime Legislation and the protection obligations by virtue of the *non refoulement* principle, deriving from Article 33 of the 1951 Geneva Convention relating to the Status of Refugees, Article 3 of the European Convention on Human Rights (ECHR),

⁶ ‘Un barco español lleva tres días al sur de Malta con 26 naufragos que nadie quiere’, *El País*, 29/05/07: http://www.elpais.com/articulo/internacional/barco/espanol/lleva/dias/sur/Malta/26/naufragos/nadie/quiere/elpepuint/20070529elpepiint_12/Tes

Article 3 of the UN Convention against Torture and other cruel, inhuman or degrading Treatment or Punishment as well as Article 7 of the International Covenant on Civil and Political Rights.

There is an urgent need to define more precisely the conditions under which a Member State is obligated to assume responsibility for examining asylum claims of people rescued at sea, in particular when it takes part in operations carried out in the territorial or contiguous waters of another State or in the high seas. However, States are not exempted from complying with their obligations under Community and International Law.

First, according to the information obtained by ANSA, UNHCR, and rescued persons interviewed by CIR on how facts have evolved in Case 2 (Budafel tug) and Case 4, the behavior of the competent Maltese Authorities in launching and conducting the Search and Rescue operations was unclear. This leads one to believe that not all efforts have been made in order to intervene urgently on behalf of people in distress at sea, taking into consideration- *inter alia*- that nowadays, distress signals can be rapidly transmitted by satellite and terrestrial communication techniques both to search and rescue authorities ashore, and to ships in the immediate vicinity.

Several maritime Conventions define the obligations of State Parties to ensure arrangements for distress communication and coordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts.

1982 United Nations Convention on the Law of the Sea (UNCLOS Convention) imposes an obligation on every coastal State Party to

“...promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose” Art. 98 (2).

1974 International Convention for the Safety of Life at Sea (SOLAS Convention) requires State Parties

“... to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary ...” (Chapter V, Regulation 7)

Secondly, Maltese Authorities should have obliged the shipmaster of the Maltese tug, the Budafel, to get the 27 rescued persons on board instead of leaving them clinging to the buoys for three days in very harsh weather conditions. The Budafel put these people's lives at risk and submitted them to inhuman and degrading treatment in violation of article 2 and 3 of the European Convention on Human Rights.

The Authorities should have required the master of "Budafel", who embarked the 27 persons in distress at sea, to treat them with humanity, within the capabilities of the ship. The Master of the Budafel refused to let them on board of the tug in order to avoid the risk of losing E 1 million-worth catch of tuna being hauled by the ship which was heading to Spain.

The Maltese Authorities should verify specific responsibilities of the Master of Budafel and, if found guilty, prosecuted him according to Maltese legislation, for not having given adequate assistance to people in danger.

1982 United Nations Convention on the Law of the Sea (UNCLOS Convention) provides that:

“ Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.” (Art. 98 (1)).

1974 International Convention for the Safety of Life at Sea (SOLAS Convention) obliges the *“master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so....”*

(Chapter V, Regulation 33(1)).

Furthermore, Maltese Authorities should have intervened to release the "Budafel" and the Spanish vessel from their obligations with minimum further deviation from the ship's intended voyage.

The amendments to the SOLAS and SAR Conventions, entered into force on 1 July 2006, aim at maintaining the integrity of the SAR services, by ensuring that people in distress at sea are assisted while minimizing the inconvenience for the assisting ship. They require the Contracting States/Parties to

- 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 ship's intended voyage; and

- arrange disembarkation as soon as reasonably practicable.

They also oblige masters who have embarked persons in distress at sea, to treat them with humanity, within the capabilities of the ship.

Guidelines on the Treatment of Persons Rescued at Sea adopted by the Maritime Safety Committee Resolution 167 (78) in May 2004 which provide guidance to governments and to shipmasters in implementing these amendments.

Malta should ratify these amendments in order to comply with the maritime obligations and to ensure that the obligation of the ship Master to render assistance is complemented by a corresponding obligation of States to co-operate in rescue situations, thereby relieving the Master of the responsibility to care for survivors, and allowing individuals who are rescued at sea in such circumstance to be delivered promptly to a place of safety.

Thirdly, Malta should have intervened in order to deliver the rescued persons to a **place of safety** as established by International Maritime Law. In particular, according to **1979 International Convention on Maritime Search and Rescue (SAR Convention)** State Parties are obliged to

“...ensure that assistance be provided to any person in distress at sea...regardless of the nationality or status of such a person or the circumstances in which that person is found” (Chapter 2.1.10) “ [...] provide for their initial medical or other needs, and deliver them to a place of safety.” (Chapter 1.3.2)

According to the **Guidelines on the Treatment of Persons Rescued at Sea**

- The government responsible for the SAR region in which survivors were recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided. (para. 2.5).
- 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.
 (par. 6.12)
- While an assisting ship may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made. (para. 6.13).

Furthermore, as regards asylum seekers, the **Guidelines on the Treatment of Persons Rescued at Sea** foresee that

- Disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided. (para. 6.17)
- Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation. (para. 6.20)

Maltese authorities in case 1 ("Budafel" tug) and in particular in case 3 ("Monfalco" boat) did not intervene to relieve ships of their responsibilities and didn't even attempt to make arrangements to find a place of safety. Thanks to the Italian Authorities in case 1 and the Spanish Authorities in case 3, after refusal of Malta to relieve both "Budafel" and "Monfalco" boats of their responsibilities, rescued persons were admitted to the Italian and Spanish territory.

Moreover, Maltese Authorities should have taken into consideration that Libya has not ratified the 1951 Geneva Convention and cannot be considered a safe third country for asylum seekers. Maltese Authorities tried to make arrangements with Libyan Authorities to bring back to Libya rescued persons in case 1 ("Budafel" tug) and case 3 ("Monfalco"). In these cases sending these persons - mostly asylum seekers - to Libya, considered responsible for the SAR zone where they were rescued, would imply that Malta indirectly was not complying with the *non-refoulement* principle foreseen by article 33 of the **1951 Convention relating to the Status of Refugees**. This provision prohibits that refugees or asylum-seekers be expelled or returned in any way " to the frontiers of territories where his (or her) life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion" (Article 33). This refers principally to the country from which the individual has fled but also includes any other territory where he/she faces such a threat.

Maltese Authorities were aware of Libyan practices towards migrants and asylum seekers and of the fact that they were indirectly violating article 2 and article 3 of the European Convention on Human Rights (ECHR).

As most likely occurred in Case 1 (boat with 53/57 people in distress at sea), once people are intercepted and/or rescued they are generally detained in prisons or centers where no lawyers and Human Rights Organizations have access to them.

It should also be emphasized that the local UNHCR office has huge difficulties in getting information on asylum seekers detained in Libya in order to intervene and avoid forced repatriation.

The fact that a State has intercepted and rescued people in distress at sea under its jurisdiction does not mean that it is automatically responsible for examining their asylum claims. This State, in fact, is required to verify in practice whether the people concerned are at risk of being submitted to

torture or degrading and inhumane treatment when sent -directly or indirectly- to countries that are considered unsafe.

The same obligation must be met by any State whose vessels fly the flag and have intercepted and /or rescued people in distress at sea. This obligation has been respected by the Italian Navy and Spanish authorities respectively in Case 2 ("Budafel" tug) and in Case 3 ("Monfalco"), avoiding "*Refoulement en cascade*".

Besides the principle according to which the State responsible for the SAR zone should provide such a safe place or to make sure that a place is found, there is no rule designating by default a State responsible for receiving the rescued passengers such as, for example, the State of nationality or of residence of the persons, the flag State, or the State from which the ship departs.

In spite of the recent revision of the SAR regime undertaken by the International Maritime Organization, one of the problems that needs to be solved would be the determination of the most appropriate place of disembarkation following rescue at sea and/or interception, as well as the connected question of the sharing, between the State participating in the interception and search and rescue operations, of responsibilities regarding the persons intercepted or rescued seeking international protection.

Specific action to be taken by the European Union and specifically by the European Parliament: organisational and policy actions

The **European Parliament** may wish:

- to urge EU Member States to comply with the International Law on Human Rights, as well as Asylum and Refugee Law, in particular the *non refoulement* principle;
- to call upon Member States to observe and honour International Maritime Law;
- to invite States that have not done so yet, to ratify the amendments to SAR and SOLAS Conventions and to establish a regional agreement on Search and Rescue situations;
- to demand the European Commission to urgently continue actions to adopt specific legislation in order to fill the gaps in the existing law about the disembarkation and the admission to the asylum procedure or, on the other hand, repatriation. These actions have to be adopted within the existing policy framework which aims towards reinforcement of the southern maritime external borders management in order to improve the capacity of the Community and its Member States to deal with critical situations, such as the massive influx of illegal immigrants by sea;
- to invite the European Commission to strengthen its dialogue and co-operation policy with the non-EU Mediterranean States concerned with the search and rescue operations at different levels, as well as with countries of origin and transit in order to prevent illegal immigration and trafficking of persons.
- to promote the establishment of a specific fund to cover the costs to shippers, such as delays, diversions and other inconveniences which can arise as a result the launching of rescue operations.

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