



Brussels, 29/03/2018

Dear Mr. Mordue,

Following our recent meeting with you, we write to you to share the MSF statement in annex about the seizure of the Proactiva ship 'Open Arms' and to express our concerns regarding the public declarations made by the spokesperson of the European Commission, Natasha Bertaud, in regards to this event at a press briefing on the 19th of March.

Ms. Bertaud said *"There is an Italian code of conduct that aims to avoid these situations. We call on all parties to respect it in future. We have been closely following the case since Friday and we are in contact with the Italian authorities"*¹. We believe this statement from the European Commission is highly problematic as it implies that the alleged non-respect of the code of conduct can justify criminal proceedings against NGOs regardless of the humanitarian imperative behind their actions and their compliance with international law.

As you know, Médecins sans Frontières has refused to sign the code of conduct because we feared that it will lead to a decreased capacity at sea and confusions in the allocation of state responsibilities to coordinate search and rescue operations². The statement made by Ms. Bertaud further highlights these legitimate fears. The Italian authorities have directly referred to the violation of the code of conduct to seize the Open Arms vessel. Today, the Aquarius – operated by SOS Méditerranée and MSF – is the only appropriate boat left at sea to proactively search and rescue migrants and refugees in distress.

Moreover, it is our opinion that rather than offering clarity in the allocation of responsibilities at sea and avoiding "these situations", the code of conduct and the current collaboration between the Italian Maritime Coordination Center, the Italian Navy and the Libyan Coast Guards has led to dangerous practices and the creation of dangerous "grey areas" in the conduct of SAR operations. In particular, the handing over of the responsibility to rescue to the Libyan Coast Guards by the Italian authorities - in particular the IMRCC - in international waters when another asset fit for the rescue and able to disembark in a port of safety is ready to intervene is a source of great concern.

¹ http://www.ansa.it/english/news/politics/2018/03/19/respect-migrant-rescue-conduct-code-eu-2_b8bc07a1-e5e2-4b71-99a4-e21a6e3733ec.html source: ANSA; and

<https://ec.europa.eu/avservices/audio/audioDetails.cfm?ref=1152861&sitelang=en>

² <http://www.msf.org/en/article/msf-committed-saving-lives-mediterranean-will-not-sign-italian-code-conduct>

Several facts and rules are important to keep in mind in this matter. Based on the information available in the press and in the order of impoundment issued by the Catania Prosecutor, it is our understanding that Proactiva was acting in international waters and was directed to the boat in distress by the Italian MRCC. It is our opinion that in this case, like in many occasions before, the Italian MRCC was in charge of coordinating the SAR operation. It has then instructed Proactiva not to proceed in order for the Libyan coast guards to intercept the boat. The people were still rescued by Proactiva and brought safely on board of the Open Arms. According to the crew and video footage, they were then ordered to hand over the people rescued and threatened at gun points by the Libyan Coast Guards who had arrived on scene.

We believe the management of this SAR event by the IMRCC is in contradiction with UNHCR's guidance (based on the SAR Convention, IMO guidelines and relevant provisions of international human rights and refugee law) which states "*an MRCC that coordinates SAR operations outside its own Search and Rescue Region (SRR) should refrain from giving directions or advice which it knows or ought reasonably to know would have negative human-rights implications for those requiring assistance, unless doing so is unavoidable in order to respond to serious and imminent risks to human life at sea in a situation of distress or force majeure*"³. The UN Special Rapporteur on Torture in his latest report to the UN Human Rights Council has warned against such attempts to organize pull-backs in breach with the prohibition of torture and of non *refoulement*⁴. MSF, who has been instructed in the past not to intervene in spite of being in the vicinity of a boat in distress and has first-hand experience of the fate of those pulled back to Libya, is extremely concerned about the increasing attempts by the Italian MRCC to keep other rescue ships at bay and lay the groundwork in international waters for the Libyan coastguards. Lives are currently being endangered by this practice.

Today, there is no Libyan MRCC that can coordinate search and rescue operations. Italy has and continues to assume the coordination of SAR operations each time it has information about a boat in distress. According to international maritime law, Search and rescue operations end when the people rescued are brought to a port of safety. Libya cannot be considered a place of safety according to international standards⁵. Handing-over migrants and refugees who have been rescued at sea to the Libyan coast guard constitutes *refoulement*. It is the responsibility of coastal states to co-ordinate and co-operate in relieving the ship master of the responsibility to provide follow up care of survivors and to deliver the persons rescued at sea promptly to a place of safety. In the case of the Open Arms, this cooperation has led to the very opposite and have failed both those in distress at sea and the crews of rescue vessels.

No code of conduct can change states' international obligations or take precedence over human lives and integrity. If applying the code of conduct leads to *refoulement* to Libya and subsequent ill-treatment of the people rescued, NGOs cannot be blamed for not complying with it as your spokesperson implies.

³ UNHCR General legal considerations: search-and-rescue operations involving refugees and migrants at sea.

⁴ A/HRC/37/50

⁵ http://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Libya_position_on_returns_12_November_2014.pdf

With this information in mind, it appears crucial that the European Commission takes the measure of the severity of the situation in the Mediterranean Sea and analyses more in-depth the current practice of the Italian MRCC and the compliance of both this practice and the Code of Conduct with international and European laws.

In light of the stated concern of the European Commission to see these situations being avoided in the future, we look forward to receiving your answer and legal analysis on this issue.

Sincerely Yours,



Médecins sans Frontières – International Office

Annexes:

- MSF statement “Central Mediterranean: European governments are obstructing lifesaving rescues and returning people to unsafe Libya” <http://www.msf.org/en/article/central-mediterranean-european-governments-are-obstructing-lifesaving-rescues-and-returning>
- MSF Note on Libya and SAR 20/03/2018