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## Struggles for Freedom within and against the Legal Order at the Borders of Europe

On March 18, 2019, the Italian-flagged boat *Mare Jonio*, operated by the platform of activists *Mediterranea*, rescued forty-nine migrants forty-two miles off the Libyan coast and sailed toward Lampedusa, Italy. The very evening, the Minister of Home Affairs, Matteo Salvini, issued a directive with the aim to restrict the entrance of rescue boats in Italian territorial waters.<sup>1</sup> The directive does not introduce any specific prohibition but, rather, provides an interpretation of international conventions and national legislation according to which the passage of a rescue boat in territorial waters is deemed to be in conflict with national security as it aims to bring illegal migrants into national territory. Additionally, it recommends that The Italian Coast Guard strictly follow the directive's interpretation in order to prevent the illegal entry of migrants into domestic territory. The next day, while approaching the Italian coast, the *Mare Jonio's* captain disobeyed the order issued over the radio by the Coast Guard to stop the engine at the limit of the territorial waters of Lampedusa because he considered that doing so could endanger the passengers. As a consequence, after an inspection by the Italian police, on March 19, the boat was seized and the forty-nine migrants were disembarked, while the captain and the head of mission were put under investigation for the charge of migrant smuggling.<sup>2</sup> This episode came after a series of disembarkation crises which have taken place in the Mediterranean from the summer of 2018 and which have involved boats belonging to humanitarian organizations, such as Doctors Without Borders, Sea Watch and Sea Eye, as well as the *Diciotti* ship belonging to the Italian Navy.

During these crises, many observers spoke of a conflict between the law of the sea, which imposes an obligation to save those in distress at sea and to bring the rescued to a safe port for disembarkation,<sup>3</sup> and regimes of mobility control, which grant the state control over its borders. This conflict can be recognized, for instance, in the January 2019 interim measure the European Court of Human Rights (ECHR) issued on behalf of a Sea Watch ship. This measure did not grant the applicants' requests to be disembarked but merely invited the Italian Government "to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary."<sup>4</sup> From the perspective of the boat passengers, however, what was at stake was not merely the right to disembark *per se* nor the right not to suffer inhuman conditions while forced to remain moored off the coast. Indeed, for the migrants who risk their lives attempting to cross the Mediterranean, the place (and time) of disembarkation is not at all irrelevant. Their destination is Europe, where member state's territories have not become less significant despite the move toward increasing globalization of legal orders in which the European polity is implicated (Rigo 2011).

Seen from this perspective, the episodes sketched above pose more than one question regarding the alleged universality of human rights regimes when confronted with the materiality of borders and the violence faced by migrants who attempt to cross them. Should the behavior of the vessel's migrant passengers and crew be regarded as legal/lawful or illegal/unlawful? Is the refusal or the delay in granting a safe port for disembarkation a legitimate or arbitrary act? These and other questions have been raised by *Mediterranea* and have specifically been discussed by the legal team (LT) that supports the project.

Existing statutes provide articulated answers to the two questions outlined above. With regard to the lawfulness of migrants' behavior, the returning of migrants interdicted in the open seas to the country of departure is not acceptable on the basis of the "non-refoulement" principle of international law, and European and national legislation grants access to asylum procedures once third-country nationals are on European territory. As a consequence, irregular entry to the territory cannot be considered an unlawful act in itself. In addition, the facilitation of illegal entry has criminal relevance only if it violates immigration law. With regard to the arbitrariness of the restriction of entry in territorial waters, it should be noted that, in legal theory, arbitrariness is an ambiguous concept. In the domain of administrative law, arbitrariness, intended as abuse of power or deviation from the scopes of

law—“*detournement de pouvoir*” according to the French expression—has been constructed with the aim to limit the jurisdictional control over the discretionary power of authorities. In other words, the legal construction of arbitrariness reaffirms, rather than limits, the discretionary nature of power in a series of circumstances, and the act of posing borders has always been considered a discretionary prerogative of sovereign states.

Among discussions on arbitrariness, the position of the Italian influential jurist Santi Romano (1917: 12) is emblematic of the ambivalent meaning of the concept in classical legal theory:

[T]he concept of law must encompass the idea of social order. This is necessary to eliminate all of the elements that can be reduced to mere arbitrariness [*arbitrio*] or material (*viz.* non ordered) force. Any manifestation of the law, by dint of being social, is ordered as far as its population is concerned.

In Romano’s view, in order to eliminate arbitrariness, intended as a material, *non-ordered* force, the concept of law must encompass the social order. Certainly, by following this view, in spite of any deviation of power, an arbitrary act can then be considered as the manifestation of a specific social order. An order that mirrors processes that affect the European polity in its wide and deep dimension and—as I will argue in the next sections—is currently imposing itself at the borders of Europe.

### The Arbitrary Borders of Europe

The Mediterranean has, in recent times, been the scene of border developments that have taken place unusually quickly (Heller, Pezzani, and Stierl 2018; Rigo 2018), and have not necessarily followed changes in legislation. In 2016, one hundred eighty thousand sea arrivals reached Europe via the central Mediterranean route and, in the same year, the number of deaths touched the peak of five thousand (Rigo 2018). Migrants’ attempts to cross the Mediterranean dramatically decreased the following year, after the Italian government signed a memorandum of understanding with the Libyan Government of National Accord, which provide for Italy to deploy ships in Libyan territorial waters and support Libyan authorities in curbing migrant flows.<sup>5</sup> Although deaths on the Central Mediterranean route have decreased in absolute numbers, the number of shipwrecks has proportionally increased.<sup>6</sup> Meanwhile, even though media and NGOs have repeatedly reported the abuses that migrants suffer in official and unofficial Libyan detention camps,<sup>7</sup> in December 2017, the Libyan Port and Maritime Transport Authority unilaterally noti-

fied the International Maritime Organization that a Libyan Search and Rescue had been constituted thanks to the financial support of the European Emergency Trust Fund for Africa.<sup>8</sup>

The first attempt to limit NGO rescue operations dates back to the summer of 2017, when the Italian government issued a code of conduct and invited the humanitarian organizations that operated in the Mediterranean to sign up to it voluntarily.<sup>9</sup> Subsequently, under the direction of the interior minister, Matteo Salvini, leader of the nationalistic and populist League party, attitudes toward rescue operations hardened. The cases of the *Aquarius* and *Diciotti*<sup>10</sup> ships during the summer of 2018 were two significant breaking points, which formed the background against which the Mediterranean project was launched as a form of resistance. In June 2018, the Panamanian flagged *Aquarius* operated by the NGO Doctors Without Borders was not granted a place of safety for disembarkation, by either Malta or Italy, and had to sail on to Spain. It is worth noting that over one hundred of the 629 migrants on board had been transferred to the *Aquarius* by the Italian coast guard as a result of cooperation in rescue operations. Salvini publicly declared that Italian harbors were closed to boats transporting migrants, although this was never ratified in law. In August 2018, 177 migrants who had been rescued at sea during patrolling operations were not allowed to disembark from the *Diciotti*, an Italian navy ship. A solution to the crisis was only reached after Ireland and Albania agreed to accept some of the migrants, thus initiating a tussle over sea borders that is still ongoing.<sup>11</sup>

None of the developments outlined so far are the result of changes in legislation or decisions that followed accountable and transparent procedures. Agreements between EU member states on the distribution of migrants—sometimes involving third countries—have been informally negotiated. Needless to say, the closure of harbors and territorial waters—which also applied to Italian-flagged and navy ships—should not be considered either accountable or transparent, up to the point that on two occasions the prosecutors of Catania and Rome filed investigations on the grounds of the illegitimate limitation of the freedom of the people on board.<sup>12</sup>

Notions of arbitrariness, however, that define this as going against reason and the rule of law, fail to capture what is at stake in the conflict over European borders. As recently observed by Robert Barski, arbitrary acts are generally defined as departures from the rule of law and this is intended to exclude uncertainty and caprice at all levels of the administrative and decision-making processes. Arbitrariness, in this sense, can work only as a dysfunction of a system considered fair as a whole. Conversely, when the law is

applied and enforced in sectors such as immigration it is the general quality of regularity or consistency that is missing (Barski 2016: 17). To put it simply, by defining arbitrariness as a departure from the rule of law, when it comes to migration, it is the very criterion against which it acquires its meaning that gets lost. In contrast to reason, arbitrariness is predominantly understood as “caprice” or “sweet will and whims” and therefore described as “freakish,” “random,” or “chosen in a lottery.” In other words, it is formulated “as unsystematic in nature, dissociated from specific extralegal sources, such as race or class, that might exercise a systematic effect” (Bowers 1983: 1067). Nevertheless, with respect to the management of European borders and the experience of migrants of the application or the enforcement of law, arbitrariness is neither random nor accidental, to the extent that it does not affect everyone who is subjected to the law in the same way. Arbitrary power is most readily used against certain categories of subjects who cannot rely on the self-restraint that the social order imposes on officials and on society at large. Beyond the fiction of borders that protect the “insider” community against an “outsider” threats, the material conditions of the subjects who cross borders, as well as the purposes and interests of the competing actors appear thus as a central component of border regulations. As shown by Mezzadra and Neilson (2013), borders not only exclude but also include through processes of differential inclusion that, in turn, multiply the regimes of exploitation and domination that are essential to contemporary capitalism. This lens accounts not only for differential regimes inside national territories, but also for their continuity at the external borders as well as for the attempts to expand these same regimes across the seas.

When arbitrariness is considered as a departure from of the rule of law, the objectives pursued by the law can be easily accomplished by following procedural rules. From this perspective, migrants’ and refugees’ determination to choose their destination is regarded merely as a capricious choice and restricted to very limited discretion. To go back to the earlier examples, by establishing official procedures for the distribution of migrants among member states, the transparency of disembarkation agreements would be assured, and supporters of transparency and accountability would probably be satisfied. Even the curtailment of personal liberty caused by restricting access to territorial waters could be brought under the rule of law, for example, by introducing a regulation for identification and detention of migrants and asylum seeker on board ship.<sup>13</sup> These adjustments would probably satisfy rule of law advocates, but at the price of excluding from the relevant purposes of the law part of the reason underlying the conflict over the order of borders. Here again, the concept of arbitrariness comes to the foreground in

its ambivalent meaning: the law considers the migrants' choice of the *where*, *when* and *how* of their journey to be merely capricious *non*-ordered force and toward whom arbitrary responses can be justified as means to restore the violated order.

### Toward a Politics of Freedom of Movement

By addressing the issue of legal globalization, Hans Lindahl (2018) has recently underlined how the emergence of global legal orders goes hand in hand with the globalization of inclusion and exclusion. Legal globalization, in fact, does not proceed as the expansion of a homogeneous legal space within which rights and capacities are equally exercised by every subject. It is rather a process of unification and pluralization, which produces an “interrelated distribution of places, times, subjects and act-content” (Lindahl 2018: 60) that does not correspond to or materially support one or more legal systems.

Lindahl's (2018: 71) view of a *pragmatic order* complicates the account of legal pluralism beyond the dichotomy between legality and illegality as

[t]he capacities it marginalizes are not simply the domain of illegal behaviour (which a legal order renders possible and even accommodates to a certain extent) but rather of practical possibilities that are excluded as inconsequential in light of the point of a given legal collective.

Rather than a conflict between different sets of norms, the problem of the *unordered* is thus read by Lindahl as a conflict produced by acts of resistance that contest the concrete articulation of normative and physical dimensions that characterizes the legal space of globalization. To use the author's own words, the conflict makes visible not just a divergence between sets of norms, but rather a *xenotopia*, that is, “a place that resists accommodation in the interconnected distribution of places that a collective calls its ‘own’ space” (Lindahl 2018: 38).

By looking through this lens at the ongoing conflict in the Mediterranean (Mezzadra and Stierl 2019), divergences among different sets of norms—including the law of the sea, regimes of mobility control, and the international law of human rights—cannot be resolved by merely repositioning their boundaries. To put it simply, the conflict would not be resolved if the international law of human rights prevailed over border regulation, since what is at stake is not the validity of one or the other but rather the very articulation of normative and physical dimensions within which the human capacity of mobility is exercised or marginalized: a concrete articulation and distribution of places to which both sets of norms contribute. As shown by

the ECHR decision in the *Sea Watch* case, even human rights must come to terms with spatial limits, to the extent that the *where*, *when* and *how* of the exercising of rights is not at all irrelevant for their bearer or claimer. In other words, the fact that in the *Sea Watch* case the ECHR decision could be executed without the disembarkation of the migrants contributes to the construction of a *xenotopia*, rather than to the integration of the boat passengers into the larger legal community. At the same time, this is not merely the outcome of conflicting norms, but also the result of how normative and physical limits are experienced, perceived, and even played against each other by those whose behavior ought to be regulated. Undoubtedly, applicants' complaints against human rights violations were not lodged for the purpose of proving the violation *per se*, but rather to contest the concrete articulation of normative and physical limits imposed on migrants' mobility. This was the same articulation and distribution of place that was contested by the *Mare Jonio* when it entered Italian territorial waters and disobeyed the order to stop the engine. Undoubtedly, legal systems repeatedly adopt strategies to reframe acts of contestation in a legal manner, either by authorizing or prosecuting them. Nonetheless, sometimes these acts succeed and open a space for the recognition of the unorderable within society as well as within the law. The migrants who disembarked from both the *Sea Watch* and the *Mare Jonio*<sup>14</sup> in early 2019 succeeded in reaching Europe by contesting its borders, although they will probably experience other normative and physical limits as they continue on their journeys, thus confirming the persistence of unordered struggles for the freedom of movement also within Europe.

When the quest for open borders (for a recent discussion, see Aksan and Bailes 2019) is reframed as the quest for freedom of those who challenge the pragmatic order of borders, it does not appear as a merely utopian aspiration but rather as a course that should normatively guide concrete politics that gives greater recognition to human mobility as a capacity which entails a degree of discretion. Indeed, the dysfunctionality that European policies have demonstrated in facing flows of migrants and asylum seekers over recent years has been mainly addressed by calling for solidarity between states in sharing the burden of refugees; conversely, solidarity among and toward migrants has been largely criminalized. A shift toward the politics of freedom of movement would instead take seriously the proposal of granting free circulation of asylum seekers within the EU, thus reducing the arbitrariness of redistribution agreements as well as of practices of off-shoring borders. The *Mediterranea* project contributes to a politics of the freedom of movement by showing, through effective acts, possibilities that are usually

excluded from debates of decision makers and thus demonstrating, as well, that visionary aspirations are not only possible but also necessary to change the course of current migration policies.

The act of posing and reconfiguring borders tackles the inner problem of authority that, in Lindahl's (2018: 162) words, is defined by "what is to count as our own in response to the challenge of the strange that stands inside and outside the legal order." Seen from this standpoint, the increasing criminalization of solidarity towards and among migrants has produced the paradoxical effect to politicizing the humanitarian support for migrants. Indeed, besides contesting the European order of borders, the *Mediterranea* platform contests the authoritative monopoly of defining what is to count as "our own" or the "strange," namely, the collective "we" that counts as the political subject of the polity. At the same time, within this politicization process, freedom of movement emerges not just as the fight for inclusion of marginalized strangers but as a common terrain of struggle<sup>15</sup> for defining a different order of the society as a whole.



### Postscript

While this article was under review the Italian Government issued a decree that provides a legal basis for the Ministry of Transport and the Ministry of Interior to block humanitarian ships from entering Italian territorial waters. The law, which was subsequently approved by Parliament, also introduces administrative measures and a maximum fine of one million euros for each participant on a rescue boat that disobeys the ministerial order. The measure became law as the ship *Sea Watch 3* was in the process of approaching Italy after a rescue operation. During the night between June 28 and 29, 2019, the captain of the *Sea Watch 3*, Carola Rackete, forced the naval blockade of the Italian authorities and entered the port of Lampedusa. She was arrested for smuggling and disobeying an order issued by military forces. The judge who heard the case during the preliminary hearing stated that the rescue was carried out under exonerating circumstances to safeguard the lives of migrants and that the captain was fulfilling the obligation of sailing the boat to a safe port for disembarkation. Although the arrest was not validated, Rackete will still probably face trial. With the new law now in force, at the beginning of July 2019, the *Alex*, a sail boat operated by *Mediterranea* that had conducted a rescue operation was impounded, thus confirming that the law is being deployed as a deterrent against acts of solidarity.



## Notes

The author of this article is part of the legal team (LT) of *Mediterranea*. The LT is an informal group that includes lawyers, scholars, law students, and other activists that volunteer giving legal advice and support on legal research for the *Mediterranea* project. The LT is also a forum of critical analysis and discussion. The accuracy of information given in this article and the opinions expressed are the exclusive responsibility of the author. I wish to particularly thank Lucia Gennari who, as member of the LT, commented on this article and shared views and information for the development of the arguments.

- 1 Ministry of Home Affairs, Directive n. 14100/141(8) of March 18, 2019, accessible at [http://www.interno.gov.it/sites/default/files/direttiva\\_ministro\\_su\\_controllo\\_frontiere\\_marittime\\_18.03.2019.pdf](http://www.interno.gov.it/sites/default/files/direttiva_ministro_su_controllo_frontiere_marittime_18.03.2019.pdf). During the following weeks other directives of the sort were issued by the Ministry of Home Affairs, one of which specifically addressed to the Mare Jonio. See, Ministry of Home Affairs, Directive n. 14100/141(8), of 4 April 2019, accessible at [http://www.interno.gov.it/sites/default/files/direttiva\\_4\\_aprile\\_2019.pdf](http://www.interno.gov.it/sites/default/files/direttiva_4_aprile_2019.pdf); and Directive n. 14100/141(8) of April 15, 2019, accessible at [http://www.interno.gov.it/sites/default/files/direttiva\\_del\\_ministro\\_n.\\_141001418\\_15\\_aprile\\_2019.pdf](http://www.interno.gov.it/sites/default/files/direttiva_del_ministro_n._141001418_15_aprile_2019.pdf). An appeal against this acts was lodged by the LT with the support of the Associazione Studi Guiridici sull'Immigrazione (ASGI) and is currently pending in front of the administrative Tribunal of Lazio.
- 2 For updated news, see <https://mediterranearescue.org/en/>.
- 3 See the provisions contained in the International Convention for the Safety of Life at Sea (SOLAS), of November 1, 1974, at [http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-\(solas\)-1974.aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas)-1974.aspx); and in the International Convention on Maritime Search and Rescue (SAR), of 27 April 1979, [http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx). On the legal framework of search and rescue operation, see Trevisanut 2010.
- 4 Decision on application n. 5604/19 B.G and Others versus Italy, of January 29, 2019. See the ECHR's press release at, <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-6315038-8248463%22%5D%7D>. The complaint to the ECHR was presented by the LT with the support of ASGI.
- 5 The memorandum has raised the concern also of the Council of Europe's Commissioner for Human Rights; see Niels Muiznieks, Letter to the Italian Minister of Interior Marco Minniti, September 28, 2017, <https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea>, accessed on May 12, 2019. The memorandum is part of a broader strategy that involves African countries and includes military cooperation with Niger; see <http://www.analisidifesa.it/2017/09/firmato-laccordo-di-cooperazione-militare-tra-italia-e-niger/>, accessed on May 12, 2019.
- 6 Detailed information are contained in a submission brought in June 2019 by international lawyers to the International Criminal Court against the EU migration policies in the central Mediterranean and Libya; available at [we.tl/t-EZxAILiU5k](http://we.tl/t-EZxAILiU5k), accessed on June 12, 2019
- 7 Great impact had, in September 2017, the report of the BBC journalist Oria Guerin; see <https://www.bbc.com/news/world-africa-41189247>, accessed on 12 May 2019. for a synthesis of NGOs reports, see <http://protezioneinternazionale.giur.uniroma3.it>

- /wp-content/uploads/2018/07/Rapporto-COI-Libia-detenzione-migranti-11-maggio-2018.pdf, accessed on May 12, 2019.
- 8 The European Commissioner Dimitris Avramopoulos has affirmed that this unilateral declaration is legitimate and unilaterally constitutive of “primary responsibility for ensuring the coordination of a rescue situation, including initiating the process for identifying the most appropriate place of safety for disembarkation following a search and rescue situation, in cooperation with the coastal States.” See answer given to Parliamentary questions on 4 September 2018, at [http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html?redirect). The LT of the Mediterraneana platform contests this interpretation of international conventions and is currently considering legal ways to challenge it.
  - 9 For a critical account, see the position paper of the ASGI on the Proposed “Code of Conduct for NGOs Involved in Migrants’ Rescue at Sea,” July 24, 2017, at [https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper\\_Final\\_EN.pdf](https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf), accessed on May, 12, 2019.
  - 10 Both cases have attracted the attention of national and international media: see for example <https://www.theguardian.com/world/2018/jun/17/migrant-rescue-ship-aquarius-to-dock-in-spain-after-rough-week-at-sea>, <https://www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti>.
  - 11 It is not clear how many migrants have been transferred in other EU member states or third countries. Part of the work of the LT has been focus on monitoring the relocation of the persons disembarked from rescue operation and assuring legal assistance to them.
  - 12 For media coverage, see <https://www.theguardian.com/world/2018/aug/25/matteo-salvini-formally-investigated-over-migrant-ship-standoff>. At the time of writing the Italian senate has not authorized further investigation of the Ministry of Home Affairs in relation to the Diciotti case.
  - 13 Procedures for the identification of migrants and asylum seekers and their channeling into different reception and legal rights systems have been introduced in the so-called “hotspot approach” by the European Commission in order to confront exceptional migratory flows. For a critical account, see Gennari, Ferri, and Caprioglio 2018, and Garelli and Tazzioli 2016.
  - 14 On May 9, 2019, the Mare Jonio rescued another thirty migrants who disembarked at Lampedusa the day after. At the time of writing, the boat is impounded and the captain has been charged with smuggling. For further updates, see <https://mediterranea.org/>.
  - 15 For a discussion of this point from a feminist perspective, see Rigo and De Masi 2019.

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