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**OPINION ON THE COMPATIBILITY WITH EUROPEAN STANDARDS OF
ITALIAN DECREE LAW NO. 1 OF 2 JANUARY 2023
ON THE MANAGEMENT OF MIGRATORY FLOWS**

**Prepared by the Expert Council on NGO Law of the
Conference of INGOs of the Council of Europe***

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I. Introduction

1. This opinion examines the compatibility with European standards and best practices of Decree Law No. 1, of 2 January 2023, on urgent provisions for the management of migratory flows (Decree Law No. 1/2023), which relates to search and rescue operations.
2. In particular, it assesses the compliance of the Decree Law with the requirements of Article 11 of the European Convention on Human Rights (the ECHR), Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member States on the legal status of non-governmental organisations in Europe (Recommendation CM/Rec(2007)14) and the Guidelines on Protecting NGO Work in Support of Refugees and other Migrants, adopted by the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe in May 2020 (Guidelines on NGO Work).
3. The adoption of Decree Law No. 1/2023 has been justified on the basis of the extraordinary need and urgency to adopt management measures for rescue operations at sea. However, there is also a need to consider its impact on the implementation of the above-mentioned standards pertaining to civil society space, and to take account of the critical nature of NGO work in this area, given the absence of Italian state or EU-level search and rescue at sea operations following the end of Italy's "*Mare Nostrum*" mission, the dismantling of the Triton joint operation, and the decision by EU Member States to cease the maritime patrols of EUNAVFOR MED Operation Sophia.¹
4. This opinion first provides an overview of Decree Law No. 1/2023. It then considers the compatibility of its provisions with European standards.
5. The opinion was prepared by Expert Council on NGO Law member Carla Ferstman.

II. Summary of Decree Law No. 1/2023

6. Decree Law No. 1/2023 modifies Decree Law No. 130/2020 on migration and security which was subsequently converted into Law 173/2020. Law 173/2020 introduced a new special protection permit (replacing the humanitarian protection permit that had been abolished under a prior decree), added the possibility for asylum seekers to register with city registries and introduced further reforms to the asylum reception system.
7. Under Law 173/2020, it was possible to restrict or deny the entry into or transit through territorial waters to vessels undertaking search and rescue operations, unless those vessels communicated this operation to the competent national authorities or their flag state. Noncompliance could result in a fine from 10,000 to 50,000 euros (which was lower than the fines that had previously been in place).

¹ Anja Radjenovic, "Search and rescue in the Mediterranean", EU Parliament Briefing PE 659.442 (January 2021).

8. Decree Law No. 1/2023 increases significantly the requirements on vessels carrying out rescue missions to enter or transit through Italian territory. For instance, it must be shown that initiatives were promptly taken to inform the persons taken on board of the possibility of requesting international protection, and the vessel personnel are required to collect relevant data to be made available to the authorities.² Furthermore, the vessel is required to immediately after the event (the rescue) request the assignment of a port of disembarkation, and must proceed to that port without delay.³ In addition, the Decree Law specifies, using vague and unclear language that risks being interpreted in an arbitrary fashion, that the methods of search and rescue at sea by the ship should not have contributed to creating dangerous situations on board or prevented the timely arrival at the port of disembarkation designated by the authorities.⁴
9. The penalties for violating the decree remain at 10,000 – 50,000 euros, applied to the ship captain, with joint liability extended to the shipowner, accompanied by the administrative detention of the vessel for a period of two months.⁵ Decree Law No. 1/2023 also provides for the confiscation of the vessel in the event of repeat violations of the provisions with the same vessel.⁶
10. In addition, Decree Law No. 1/2023 specifies that for other types of violations linked to the failure to provide information, there is a fine of 2,000 – 10,000 euros, and 20 days administrative detention of the vessel, with further penalties for repeat violations.⁷
11. Decree Law No. 1/2023 is in force for 60 days from its adoption. If its provisions are to continue to be applicable beyond this period, the Government is required to convert the text (with any modifications as appropriate) to a law ratified by the Parliament.

III. Compatibility of the Legislation with European Standards and Best Practices pertaining to Civil Society Space

i) In general

12. As the Guidelines on NGO Work make clear:

NGO activities in support of refugees, victims of human trafficking and other migrants are a manifestation of the right to freedom of association guaranteed by Article 11 of the European Convention on Human Rights and elaborated in Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, and the Joint

² Decree Law 1/2023, Art. 2*bis* (b).

³ *Ibid*, Art. 2*bis* (c), (d).

⁴ *Ibid*, Art. 2*bis* (f).

⁵ *Ibid*, Art. 2*quater*.

⁶ *Ibid*, Art. 2*quinquies*.

⁷ *Ibid*, Art. 2*sexies*.

Guidelines on Freedom of Association of the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights.⁸

13. Furthermore, the regulation of NGO activities must comply with Council of Europe member States' obligations under human rights law, and in particular, the obligations to respect, protect and fulfil freedom of association.⁹ Any interference with freedom of association must be narrowly construed; it must not impair the essence of the right,¹⁰ and must be consistent with other fundamental human rights principles, including the prohibition of discrimination. The interference must have a formal basis in law and be necessary in a democratic society in the interest of one of the permitted legitimate aims: national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.¹¹
14. Whether a particular measure is legitimate depends on whether it can be said that the legislation pursues a legitimate aim, as set out in the exhaustive list of grounds of limitation set out above: the maintenance of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.¹² In addition, the legitimate aims must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from applying for asylum.¹³
15. The measure must also be necessary and proportionate to the legitimate aim pursued. This requires that the reasons adduced by the national authorities to justify the legislation must be relevant and sufficient. States seeking to restrict the right to freedom of association must demonstrate a pressing social need for so doing.¹⁴ When such a pressing social need arises, 'States have then to ensure that any restrictive measures fall within the limit of what is acceptable in a "democratic society"'. In that regard, longstanding jurisprudence of the European Court of Human Rights asserts that democratic societies exist only where "pluralism, tolerance and broadmindedness" are in place.'¹⁵

ii) Ability of civil society to carry out its activities

⁸ Expert Council on NGO Law, 'Guidelines on Protecting NGO Work in Support of Refugees and Other Migrants', CONF/EXP(2020)3, May 2020, para. 2.

⁹ See, e.g., Art. 20, UDHR; Art. 22, ICCPR; Art. 11, ECHR; Art. 12, EU Charter.

¹⁰ UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai', UN Doc. A/HRC/20/27, 21 May 2012, para. 16.

¹¹ Art. 11(2) ECHR. See also, Art. 22(2) ICCPR.

¹² Art. 11(2) ECHR. See also, Art. 22(2) ICCPR.

¹³ CoE Venice Commission and OSCE ODIHR, 'Joint Opinion on the Provisions of the So-Called "Stop Soros" Draft Legislative Package which Directly Affect NGOs', [Hungary] CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 80.

¹⁴ UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai', UN Doc. A/HRC/20/27, 21 May 2012, para. 17.

¹⁵ *Ibid.*

16. The positive obligation to fulfil freedom of association requires states to take steps to facilitate the enjoyment of freedom of association. Discharging such duties will require Council of Europe member States to create an enabling environment for NGOs to carry out their work without undue interference by the state or third parties, and to remove any unnecessary, unlawful or arbitrary restrictions or impediments to civil society space.¹⁶
17. The assessment of Decree Law No. 1/2023 must also take account of wider challenges affecting the functioning of NGOs working to support refugees and other migrants in Italy. These include the criminalisation of certain aspects of their humanitarian work;¹⁷ the imposition of a code of conduct on NGOs engaged in sea rescue activities, some aspects of which may hinder life-saving activities /or breach the right to freedom of association;¹⁸ as well as the increase in hostility directed at humanitarian workers and NGOs working to support migrants and refugees.¹⁹ As was recognised by the UN Special Rapporteur on the Human Rights of Migrants, crackdowns on civil society organizations which are often combined with States scaling back their services, ‘has had a profound effect on the safety and rights of migrants, endangering their rights to life, to seek asylum, information and humanitarian assistance, to other basic services such as legal assistance, housing and education, and to enjoy protection from human traffickers and smugglers.’²⁰ These broader challenges contribute to an overall chilling effect which severely impedes the crucial work of NGOs to contribute to ‘the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies.’²¹
18. These reforms should also be considered in the light of other human rights violations suffered by migrants, including reported push-backs of asylum seekers and migrants to Libya resulting in violations of the right to life and prohibition of torture, stemming from the implementation of the Memorandum of Understanding concluded in February 2017 between Italy and the Libyan

¹⁶ Recommendation CM/Rec(2007)14 on the legal status of nongovernmental organisations in Europe, and Recommendation CM/Rec(2018)11 on the need to strengthen the protection and promotion of civil society space in Europe.

¹⁷ See, the Expert Council on NGO Law’s thematic study: ‘Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States’. CONF/EXP(2019)1, December 2019. See also, Amnesty International, “Punishing Compassion: Solidarity on Trial in Fortress Europe”, AI Index: EUR 01/1828/2020 (2020); Marta Minetti, “International Legal Principles, Penal Populism and Criminalisation of ‘Unwanted Migration’: An Italian Cautionary Tale”, (2022) 24 *International Community Law Review* 358–376; Eugenio Cusumano and Flora Bell, “Guilt by association? The criminalisation of sea rescue NGOs in Italian media”, (2021) 47(19) *Journal of Ethnic and Migration Studies* 4285-4307.

¹⁸ *Codice di condotta per le ong impegnate nelle operazioni di salvataggio dei migranti in mare*, available at: http://www.interno.gov.it/sites/default/files/allegati/codice_condotta_ong.pdf. See also, Amnesty International, *ibid*, 57-58.

¹⁹ Cusimano and Bell, (n 17).

²⁰ UN Human Rights Council, ‘Right to freedom of association of migrants and their defenders’, Report of the Special Rapporteur on the human rights of migrants, UN Doc. A/HRC/44/42, 13 May 2020, para. 83.

²¹ COE Committee of Ministers, ‘Recommendation CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe’, 10 October 2007, para. 2 of the Preamble.

Government of National Accord;²² the failing to assist persons in distress;²³ and the denial of the right to disembark, or the impositions of delays, sometimes significant, to disembark vessels containing refugees and other migrants,²⁴ in contravention of law of the sea requirements.

19. Decree Law No. 1/2023 has the effect of prohibiting vessels from carrying out more than one rescue mission prior to returning to port. This, coupled with the recent practice of the Italian government of assigning ports far away from the vessels' locations,²⁵ which is itself an UNCLOS violation,²⁶ means the vessels time at sea carrying out vital search and rescue work is minimised.
20. Should authorities instruct search and rescue NGOs to proceed immediately to a port, irrespective of whether there are other people in distress at sea in the immediate vicinity, this would contradict the captain's obligation to render immediate assistance to people in distress, as enshrined in the UN Convention on the Law of the Sea²⁷ and the Palermo Protocol Against the Smuggling of Migrants.²⁸
21. Decree Law 1/2023 requires the vessel to collect data from the rescued refugees and other migrants which articulates their intent to apply for international protection and to share such information with the authorities.²⁹ This gives to vessel officials what is an obligation of state officials (to accord individuals the right to seek asylum).³⁰ UNHCR has underscored that asylum requests should be dealt with on dry land only, after disembarkation to a place of safety, and only once immediate needs are covered.³¹ Requiring vessel officials to collect such information puts them in a difficult position and violates the privacy of the persons concerned. In order not to partake in such activities, some search and rescue NGOs may be dissuaded from carrying out their NGO activities, further reducing civil society space.
22. Not only do these new requirements impede the work of search and rescue NGOs, they also increase the risks associated with carrying out that work both in respect of fines, detention and confiscation of vessels, which may exacerbate an already challenging civil society space for NGOs working with refugees and other migrants. The measures conflict with the Expert Council's Guidelines on NGO Work, in particular, their specification that laws, policies, and practices should

²² The text of the Memorandum of Understanding is available here: <http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>. See generally, Radjenovic (n 1).

²³ *S.A. v Italy*, UN Doc. CCPR/C/130/D/3042/2017 (28 April 2021).

²⁴ Radjenovic (n 1).

²⁵ See, e.g., ECRE, "Mediterranean: New Deadly Tragedies as NGO SAR Operators Fight to Save Lives in the Face of Crackdown by Italy, Malta Reiterates Debunked Pull Factor Myth and Floats Ideas of Increased Cooperation with Libya" (13 January 2023).

²⁶ Art 98(1)(c) UNCLOS (Adopted 27 April 1979, entered into force 22 June 1985).

²⁷ Art. 98. UNCLOS, *ibid*.

²⁸ *Protocol against the Smuggling of Migrants by Land, Sea And Air, supplementing the United Nations Convention Against Transnational Organized Crime* (Adopted 12 December 2000, entered into force 28 January 2004).

²⁹ Decree Law 1/2023, Art. 2*bis* (b).

³⁰ Article 14, Universal Declaration of Human Rights; Article 18 of the EU Charter of Fundamental Rights.

³¹ UNHCR, "Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum", (1 December 2022), paras. 4.1 and 4.4.

not prohibit or prevent NGOs from helping refugees and other migrants in distress whether at sea or on land.³²

iii) The need for adequate public consultations on law reforms

23. Law reform will always benefit significantly from a participatory, inclusive process. This ensures that the decisions taken by government benefit from the inputs from stakeholders, particularly those with expertise and experience on the issues under consideration, and those whose interests or rights are affected.
24. While there is evidence that certain NGOs and others have made public statements and communicated with the government about Decree Law 1/2023 after it was issued,³³ there is no evidence to suggest that the government sought input from civil society prior to introducing it, nor is there evidence to suggest that the Government has introduced a formal process to receive written comments on it after its introduction, or to meet with the groups most affected. Furthermore, there is no indication that the Government has taken on board NGOs' concerns.
25. As an executive decision, the adoption of Decree Law 1/2023 did not follow the process for parliamentary scrutiny. However, given its substantive nature and its direct impact on freedom of association, it should arguably have been introduced as a piece of legislation and, in this sense, it would have been clearly important for it to have undergone the usual parliamentary scrutiny. NGOs should receive adequate and timely notice about consultation processes, which should be meaningful and inclusive.³⁴

IV. Conclusions and Recommendations

Shortcomings with current provisions

26. Decree Law No. 1/2023 raises both procedural and substantive difficulties with respect to freedom of association and the protection of civil society space.
27. The absence of adequate and timely public consultation and discussion with NGOs on reforms that affect their interests is contrary to best practice regarding inclusive and participatory decision-making and limits the democratic legitimacy of the government's reform agenda.

³² Expert Council on NGO Law, 'Guidelines on Protecting NGO Work in Support of Refugees and Other Migrants', CONF/EXP(2020)3, May 2020, para. 5(a).

³³ See., e.g., Joint Statement "New Decree Obstructs Lifesaving Rescue Efforts at Sea and will Cause More Deaths" (5 January 2023) available at: <https://sos-humanity.org/en/press/joint-statement-by-search-and-rescue-organisations/>.

³⁴ Recommendation CM/Rec(2007)14 Para. 77. The Explanatory Memorandum to the *Recommendation 2007(14)* further clarifies that: 'it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed' (para. 139).

28. The onerous, arbitrary and at times unlawful (in the sense that they may breach law of the sea requirements, place vulnerable people at heightened risk and result in violations of individuals' privacy) requirements for NGOs carrying out search and rescue work give rise to problems of compliance with the rights in Articles 8 and 11 of the ECHR because of a lack of legality, legitimacy and proportionality.
29. The provisions will have a significant chilling effect on the work of civil society on account of the unlawfulness of some of the provisions, and the concomitant increased risks that NGOs face as a result of continuing with search and rescue work. The reduction in civil society space in the areas of support to refugees and other migrants may produce a worrying humanitarian situation, given the significant needs of this very vulnerable population and already existing gaps in service provision by government and others, and the continued violence and judicial harassment such NGOs face, including criminalisation of aspects of their work.

Recommendations

30. The Italian Government should proceed with effective consultations with civil society groups most affected (particularly search and rescue NGOs) prior to taking any steps to translate Decree Law No. 1/2023 into a formal piece of legislation. Furthermore, the Government should revoke it until such time that such consultations can take place, and until adequate and effective steps are taken to ensure that migrants' lives are not being put at risk by the inability of search and rescue NGOs to work effectively.
31. Any future law to be enacted should be in line with European standards.