

Preliminary Assessment of Legal Issues Arising from the MT Salamis Case

Malta's obligations under international law

Malta has the right to control its borders, to exclude aliens from its territory and to prescribe laws governing the entry of aliens into its territory, stemming from its state sovereignty.

Malta is not the state carrying primary responsibility for the refugees under to the international convention on maritime search and rescue („**treaty**“, „**convention**“). Furthermore, the fact that the survivors are migrants or asylum seekers are considerations that may be regarded by Malta when fulfilling its duties under this treaty.

By causing a delay for the migrants to reach a place of safety, however, Malta seems to have breached its duties under the international convention on maritime search and rescue. According to this convention Malta is under the obligation to cooperate with Italy and to ensure that „disembarkation [... of the survivors] be effected as soon as reasonably practicable.“ (*para 3.1.9 of the convention*)

The (binding) guidelines on the treatment of persons rescued at sea („**guidelines**“) that were adopted according to the treaty further specify that

- a „ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea“ (*para 6.3. of the guidelines*),
- „governments [...] should make every effort to minimize the time survivors remain aboard the assisting ship (*para 6.8. of the guidelines*)
- „a place of safety is provided within a reasonable time“ (*para 2.5 of the guidelines*)
- the masters of ships “providing assistance are relieved of their responsibility within a reasonable time and with as little impact on the ship as possible“ (*para 2.6 of the guidelines*)

Italy's obligations under international law

Although the primary responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered, Italy in being the first rescue co-ordination centre (**RCC**) that handled the case, carries responsibility for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility (*para 6.7. of the guidelines*).

It is hence the primarily responsible state to guarantee that a place of safety is provided within a reasonable under the convention.

By directing the ship back to the Libyan shore, Italy seems not only to have breached its obligation to prevent a delay in finding a place of safety for the survivors (see above), it further seems to have breached its obligations under international law in a twofold way.

First, it acted contrary to its responsibility for ensuring that survivors are disembarked from the assisting ship and delivered to a place of safety under para 3.1.9 of the convention.

The guidelines on the treatment of persons rescued at sea specify that a place of safety „is a location where rescue operations are considered to terminate. [...] It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met“ (*para 6.12 of the guidelines*). „When finding a place of safety, the particular circumstances of the case need to be taken into consideration“ (*para 6.15 of the guidelines*).

Next to circumstances such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units, what needs especially taken into account in the case of asylum-seekers and refugees recovered at sea, is the „need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case“ (*para 6.17 of the guidelines*).

By directing the ship back to a Libyan port, Italy probably also breached the Refugee Convention's prohibition of expulsion or return ‚refoulement‘ contained in Article 33.1,

which prohibits contracting states from expelling or returning a refugee to the frontiers of territories where his or her life or freedom would be threatened.

The Shipmaster's obligations under international law

The shipmaster complied with his duty under international (customary and conventional) law to assist persons in distress at sea (*see also para 5.1. guidelines*). The question of whether the master was under the obligation to comply with orders from the Italian authorities to steer the ship back to a Libyan port, is a difficult one to answer, since the shipmasters' obligations according to the guidelines seem in a way contradictory in this sense.

On the one hand, he has to „seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized“ (*para 5.1.6 of the guidelines*). On the other hand, he is requested to comply with any relevant requirements of the responsible Government (*para 5.1.7 of the guidelines*).

I believe, that for several reasons, the shipmaster acted according to his legal obligations in this case, however. First, the duty for the shipmaster to ensure that survivors are not disembarked to a place where their safety would be jeopardized is listed in the guidelines before the duty to comply with orders from the responsible government. This systematic argument is further supported by the fact that the treaty and the guidelines mention the need for survivors to be disembarked at a place of safety in several provisions. The duty to comply with orders from government authorities, however, is only mentioned in this one paragraph. Furthermore, guideline para 5.1.7. sees the shipmaster under an obligation to „seek additional guidance from authorities where difficulties arise in complying with requirements from authorities“. This can only mean that the guidance from authorities do not provide imperatives for the shipmaster, but that he has discretion in how he wants to comply with his duty under international law and can hence decide not to follow orders from government authorities that he believes are not in line with international maritime law.

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