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## THE CONTROL OF MIGRATION FLOWS IN THE CENTRAL MEDITERRANEAN SEA: INSIGHTS FROM RECENT ITALIAN PRACTICE

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I. FOREWORD – II. THE CLOSED-PORTS POLICY. – III. THE PERILOUS COOPERATION WITH THIRD COUNTRIES. – IV. THE RESPONSIBILITY FOR FAILED RESCUE OPERATIONS. – V. HAS THERE BEEN A REAL SHIFT IN ITALIAN MIGRATION POLICY?. – VI. CONCLUDING REMARKS: THE NEED TO ENHANCE COOPERATION AT THE EU LEVEL AND THE INADEQUACY OF THE SOLUTIONS PROPOSED IN THE NEW PACT ON MIGRATION AND ASYLUM

**ABSTRACT:** With this contribution, we underline some of the different problems that the recent Italian practice related to the control of migration flows by sea may raise. We examine the closed-ports strategy and the problems connected to the choice to cooperate with third countries in order to stop migration flows arriving by sea. A specific insight will be dedicated to the responsibility for failed rescue operations at high sea in the light of the recent practice. Furthermore, the examination of some recent developments will make it possible to verify if a real shift in Italian migration policy has been enacted. Finally, the paper will end with a brief consideration of the cooperation framework that needs to be developed at the EU level in order to improve the management of migration flows arriving by sea to Italy and other European countries.

**KEYWORDS:** Migration by sea, Italian Practice, Territorial waters, Ports, NGOs, Cooperation with third Countries.

### EL CONTROL DE LOS FLUJOS MIGRATORIOS EN EL MEDITERRÁNEO CENTRAL: PERSPECTIVAS DESDE LA PRÁCTICA ITALIANA RECIENTE

**RESUMEN:** Con esta contribución, destacamos algunos de los diferentes problemas que puede plantear la reciente práctica italiana relacionada con el control de los flujos migratorios por mar. Examinamos la estrategia de los puertos cerrados y los problemas relacionados con la opción de cooperar con terceros países para detener los flujos migratorios que llegan por mar. Se dedicará una

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visión específica a la responsabilidad de las operaciones de rescate fallidas en alta mar a la luz de la práctica reciente. Además, el examen de algunos desarrollos recientes permitirá verificar si se ha producido un cambio real en la política migratoria italiana. Finalmente, el trabajo terminará con una breve consideración del marco de cooperación que debe desarrollarse a nivel de la UE para mejorar la gestión de los flujos migratorios que llegan por mar a Italia y a otros países europeos.

**PALABRAS CLAVE:** Inmigración por mar, Práctica italiana, Aguas territoriales, Puertos, ONG, Cooperación con terceros países.

## I. FOREWORD

Because of its geographical position, Italy is, by nature, the front door for migrants arriving in Europe through the Central Mediterranean Sea. In general, the intention of migrants is not to remain in Italy but to move towards Northern EU countries where they expect to find a better social welfare system and a better chance for integration. However, the mechanism provided by the Dublin Regulation<sup>2</sup> entails that Italy – when it is the first EU Member State entered by a migrant – will be the country responsible in most cases for examining the application for international protection usually presented by those who arrive by sea. Consequently, the social burden deriving from migration is particularly significant for Italy.

Especially in recent years, this situation has had repercussions at the political level. One of the main arguments of the Italian populist parties who won the general election in 2018 has been the need to stop migration flows arriving by means of the Central Mediterranean route, leading to the well-known closed-ports policy aimed at preventing the arrival on Italian shores of vessels carrying migrants saved from shipwrecks.

In this paper, we will shortly examine the closed-ports strategy and the problems connected to the choice to cooperate with third countries in order to stop migration flows arriving by sea. A specific insight will be dedicated to the responsibility for failed rescue operations at high sea in the light of the

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<sup>2</sup> Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJEU L 180, 29.6.2013, p. 31. The critical aspects of the Dublin system have been stressed, *inter alios*, by DI FILIPPO, M. “The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns”, *Revista de derecho comunitario europeo*, 2018, pp. 41-95.

recent practice. Furthermore, the examination of some recent developments will make it possible to verify if a real shift in Italian migration policy has been enacted. Finally, the paper will end with a brief consideration of the cooperation framework that needs to be developed at the EU level in order to improve the management of migration flows arriving by sea to Italy and other European countries.

## II. THE CLOSED-PORTS POLICY

In order to reduce sea arrivals, the Italian Government in office from 1 June 2018 to the beginning of September 2019 enacted a restrictive approach towards migration by sea and inaugurated a “closed-ports” strategy based on the criminalisation of humanitarian rescues by NGO vessels operating in the Mediterranean Sea to prevent the disembarkation of the migrants on Italian shores.

The previous government (the one that was in charge until June 2018) also tried to reduce the NGO’s involvement in search and rescue (SAR) operations through the elaboration of a Code of Conduct in 2017 which provided that Italy would closed its ports to vessels belonging to NGOs that refused to sign the same Code of Conduct<sup>3</sup>. In this period, NGOs began to be accused of representing a pull factor for irregular migration and even of being connected to smugglers and human traffickers.

However, there is no doubt that this approach has been taken to extremes since June 2018, the period from which the Italian Government adopted a number of legal acts and informal practices<sup>4</sup> intended to deny the disembarkation of migrants rescued at sea not only to NGO vessels<sup>5</sup> but

<sup>3</sup> With regard to the Code of Conduct for NGOs Undertaking Activities in Migrants’ Rescue Operations at Sea drafted in July 2017, see MANCINI, M. “Italy’s New Migration Control Policy: Stemming The Flow of Migrants From Libya Without Regard For Their Human Rights”, *Italian yearbook of international law*, vol. XXVII, 2017, p. 259, at p. 268 ff.; FERRI, F. “«Codice di condotta delle ONG» e diritti dei migranti: tra diritto internazionale applicabile e carenze dell’attuale approccio UE in tema di migrazioni”, *Diritti umani e diritto internazionale*, 2018, pp. 189-198.

<sup>4</sup> For an overview on this practice, see CATALDI, G., “Migration in the Mediterranean Sea and protection of rights: some recent cases of Italian practice”, in Cataldi, G., Corleto, M., Pace, M. (eds.), *Migrations and Fundamental Rights: The Way Forward*, Napoli, 2019, p. 9.

<sup>5</sup> See, e.g., the case of the *Aquarius*, a humanitarian vessel of the NGO SOS-Méditerranée and Médecins sans Frontières, which carried more than 700 migrants in June 2018 after rescuing

also to commercial and military ships that have carried out search and rescue activities in international waters<sup>6</sup>. The Circular addressed by the Minister of Interior on 18 March 2019<sup>7</sup> or the so-called Security Decrees of September 2018 and June 2019 could be mentioned in this regard. With this new legal framework, the Minister of Interior gained the power to deny private rescue vessels access to territorial waters. The sanctions for infringement of such a prohibition are sanctioned with the imposition of fines on the captain and the ship owner ranging from 150 000 to 1 000 000 euros and the seizure and impounding of the vessel.

In assessing the closed-port strategy, it should be observed that notwithstanding the right of the coastal state to decide whether or not to allow foreign ships to enter into its territorial sea and internal waters, the aim of saving the lives of migrants which are in distress on board allows the captain of the ship to enter the area under the sovereignty of the coastal state without authorisation<sup>8</sup>. In fact, according to the SAR Convention, as amended in 2004, carrying out rescue operations does not exhaust the duty to render assistance, which extends to the disembarkation of the rescued persons in a place of safety as soon as reasonably practicable<sup>9</sup>. This principle has also been confirmed by the Italian Supreme Court which recognised that the captain of

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them at high sea and that was not allowed to dock at an Italian port. Or the case of the *Sea Watch-3*, a humanitarian vessel of the German NGO Sea Watch, which rescued 53 migrants off the Libyan coast on 19 June 2019 and decided to dock in the Italian port of Lampedusa notwithstanding the express prohibition received from the Italian authorities.

<sup>6</sup> See, e.g., the case of the *Diciotti*, an Italian military ship that in August 2018 accepted to take on board more than one hundred migrants rescued at high sea by other patrol boats of the Italian coast guard and that, after docking in Catania harbour, did not obtain authorisation to disembark them for several days. Or the case of the *Gregoretti*, another military ship of the Italian coast guard, which saved 131 migrants at high sea in July 2019. After the then Interior Minister prohibited the disembarkation of the migrants, the case was solved when the Italian Government six days later obtained a willingness to receive the same migrants from five other EU Member States and from the Italian Episcopal Conference.

<sup>7</sup> See Circular no. 14100/141 (8) of 15 April 2019.

<sup>8</sup> With regard to the possibility to invoke the distress situation in the case that occurred with *Aquarius* in June 2018, see, e.g., PASTAVRIDIS, E. “The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?”, *EJIL:Talk*, 27.6.2018.

<sup>9</sup> See, *inter alios*, TREVISANUT, S. “Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?”, *The international journal of marine and coastal law*, 2010, p. 523, at p. 529.

the *Sea Watch-3* was fulfilling her duty to save the lives of migrants when she decided to disembark them at the Italian port of Lampedusa notwithstanding the prohibition of the Italian authorities<sup>10</sup>.

### III. THE PERILOUS COOPERATION WITH THIRD COUNTRIES

With the aim to put an end to the departures from the southern shores of the Mediterranean, Italy has considered it essential to develop cooperation with the countries of origin (or of departure) of the migration flows.

This kind of approach to migration flows is part of a broader strategy – shared with the EU institutions – of externalisation and of extra-territorialisation of border controls<sup>11</sup>. With this goal, Italy has concluded agreements with several African countries. The most controversial of these deserve mention: the two Protocols of 2007<sup>12</sup> and the Memorandum of 2017<sup>13</sup> with Libya; the Agreement with Tunisia of 2011<sup>14</sup>; the Memorandum with Sudan of 2016<sup>15</sup>; and the Agreement with Niger of 2017<sup>16</sup>. Even

<sup>10</sup> See Italian Supreme Court, Judgment no. 6626 of 16 January 2020. For a comment to the Judgment, see PITEA, C., ZIRULIA, S. “L’obbligo di sbarcare i naufraghi in un luogo sicuro: prove di dialogo tra diritto penale e diritto internazionale a margine del caso *Sea Watch*”, *Diritti umani e diritto internazionale*, 2020, pp. 659-687.

<sup>11</sup> The distinction between the externalisation and extra-territorialisation has been well explained by DEL VALLE GÁLVEZ, A. “Inmigración, derechos humanos y *modelo europeo* de fronteras. Propuestas conceptuales sobre ‘extraterritorialidad’, ‘desterritorialidad’ y ‘externalización’ de controles y flujos migratorios”, *Revista de estudios jurídicos y criminológicos*, 2020, n. 2, p. 145, at p. 162 ff.

<sup>12</sup> The two Protocols (a Protocol of Cooperation and an Additional Operational Protocol) were signed in Tripoli on 29 December 2007.

<sup>13</sup> *Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana*, signed in Rome on 2 February 2017.

<sup>14</sup> Italy and Tunisia signed on 5 April 2011 an Agreement on measures to control the flow of irregular migration. The text of the agreement had not been made public, as underlined by ECtHR, Grand Chamber, Judgment of 15 December 2016, *Khlaifia and o. v. Italy*, application no. 16483/12, para. 36.

<sup>15</sup> *Memorandum d’intesa tra il Dipartimento della pubblica sicurezza del Ministero dell’interno italiano e la Polizia nazionale del Ministero dell’interno sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio*, signed in Rome on 3 August 2016.

<sup>16</sup> Italy signed an Agreement of Cooperation with Niger in September 2017. This Agreement was concluded in a secret form, with the consequence that its content was not known. The

though it is not possible to examine in detail the different contents of those agreements, it can be observed that their main goal is to improve the tools and the infrastructures of third countries, enabling them to manage migration flows within their territorial and maritime borders. The criticalities of these kinds of agreements are various. A first problem is connected to the fact that Italy has often concluded such agreements in an informal way, claiming that they are technical agreements and thus don't need to be published in the Official Journal. Indeed, this kind of argument is intended to avoid the parliamentary control that is required under the Italian Constitution when the international agreement deals with political issues, which can be said to apply without any doubt to agreements related to the management of migration flows<sup>17</sup>. Another cause of concern with these kinds of agreements is related to the reliability of the partner chosen by Italy for cooperation in the field of migration policies. In this respect, the cooperation carried out with Libya is particularly worrisome. Suffice is to think about the Memorandum of Understanding on illegal immigration and enforcement of border security that Italy signed on 2 February 2017 with Fayeze al-Serraj, the then Head of the UN-backed Libyan Government of National Accord. The Memorandum was concluded to cut off the Mediterranean route for migrants coming from Libya in order to prevent them from reaching the shores of Italy and subsequently enter the European Union. Under this agreement, Italy provides training and resources (vessels and other equipment) to the Libyan coast guard. The clear aim is to enable Libyan authorities to conduct operations at sea and disembark people in Libya. The problem is that NGOs and international organizations have reported repeated violations of the human rights of migrants during rescue operations carried out by the Libyan coast guard<sup>18</sup>. Furthermore, the migrants which are rescued by the Libyan coast guard are brought back to Libya where they are held in detention centres in which severe human rights

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Administrative Regional Tribunal of Roma (Lazio), with its Judgment of 16 November 2018 no. 11125, imposed an obligation to the Italian Government to publish the Agreement.

<sup>17</sup> On this topic, see CALAMIA, A.M. “Accordi in forma semplificata e accordi segreti: questioni scelte di diritto internazionale e di diritto interno”, *Ordine internazionale e diritti umani*, 2021, p. 1, at p. 13 ff.

<sup>18</sup> With regard to the different issues related to the training of Libyan coast guard, see ACOSTA SÁNCHEZ, M.A., “La formación de guardacostas libios: hacia un modelo de sinergia de políticas en la gestión integrada de fronteras marítimas europeas”, *Revista de derecho comunitario europeo*, 2019, pp. 859-895.



violations have been widely reported<sup>19</sup>. We must consider that some of the detention centres (and even the Libyan coast guard) are alleged of having links to human traffickers. In other words, there is a common belief that Libya cannot currently be considered a safe country.

For these reasons, the cooperation carried out by Libya raises serious concerns. This cooperation also exposes Italy to international responsibility as is shown by the case currently pending in front of the European Court of Human Rights (ECtHR) based on the claim of 17 Nigerian survivors of a shipwreck which happened in November 2017<sup>20</sup>. According to the applicants, the Libyan coast guard interfered with the rescue operation that was being carried out by the *Sea Watch-3*. Italy should be held responsible because the intervention of the Libyan coast guard happened under the aegis of the Italian Navy and because Italy should know of the inhuman conditions in the detention centres where the survivors have been brought. However, it will not be easy for the applicants to demonstrate that events happened under the jurisdiction of Italy and, consequently, that the ECtHR will consider the application admissible<sup>21</sup>. In fact, a state's jurisdiction outside its own border can be established only in cases in which the same state exercises its effective control over the applicant or over the foreign territory where the facts occurred<sup>22</sup>. Nevertheless, a broader approach with regard to the concept of jurisdiction has been recently been followed by the Human Rights Committee

<sup>19</sup> See Report of the United Nations High Commissioner for Human Rights, Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, para. 36 ff., UN Doc. A/HRC/43/75, 23.1.2020. See also CALVO MARISCAL, L., "Cooperación entre la UE y Libia en materia de inmigración y asilo: la posible creación de plataformas de desembarco", *Revista general de derecho europeo*, 2020, p. 162, at p. 183 ff.

<sup>20</sup> ECtHR, *J.S. and others v. Italy*, application no. 21660/18 (pending).

<sup>21</sup> With regard to the problematic issue related to the possibility to determine whether the applicants were under the jurisdiction of the respondent state in cases concerning migration at sea, see, e.g., MORENO-LAX, V. "The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *J.S. and Others v. Italy*, and the «Operational Model»", *German Law Journal*, 2020, p. 385; PAPASTAVRIDIS, E. "The European Convention of Human Rights and Migration at Sea: Reading the «Jurisdictional Threshold» of the Convention Under the Law of the Sea Paradigm", *German law journal*, 2020, p. 417.

<sup>22</sup> See, e.g., ECtHR, Judgment of 7 July 2011, *Al-Skeini and o. v. The United Kingdom*, application no. 55721/07.



(HRC) in its case law that is worth a brief examination as it deals with the Italian search and rescue operations in the Central Mediterranean Sea.

#### **IV. THE RESPONSIBILITY FOR FAILED RESCUE OPERATIONS**

On 4 November 2020, the HRC determined that Italy had violated the right to life granted by art. 6, para. 1, of the International Covenant on Civil and Political Rights of 1966 (ICCPR) after failing to promptly respond to a distress call received on 10 October 2013 from a vessel which had departed from Libya carrying about 400 migrants (mostly Syrian refugees)<sup>23</sup>. Italy has also been held responsible for breach of the same art. 6, para. 1, in conjunction with art. 2 para. 3 ICCPR, for depriving the victims access to an effective remedy due to the unjustified delays in carrying out a criminal investigation over the incident.

The vessel was in the Maltese search and rescue zone when several distress calls reached both Italian and Maltese authorities. By the time a Maltese patrol boat reached the migrant vessel, it had already capsized. Shortly thereafter, the Italian authorities ordered the Italian naval ship *Libra* to provide assistance: the ship was located only about an hour away from the event but its intervention in the first moment had been blocked by the same Italian authorities. The rescuers arrived too late to prevent the death of about 200 migrants.

The complaint to the HRC was lodged against Malta and Italy by three Syrians and a Palestine national who survived the accident but lost their families. The HRC held the complaint against Malta inadmissible due to the non-exhaustion of domestic remedies<sup>24</sup>. On the contrary, the HRC decided on its merit the complaint presented against Italy. The decision is particularly significant with regard to the criterion that the HRC applied in order to

<sup>23</sup> See HRC, decision of 4 November 2020, *A.S., D.I., O.I. and G.D. v. Italy*, UN Doc. CCPR/C/130/D/3043/2017. For a first comment to the decision, see VELLA DE FREMEAUX, P., ATTARD, F.G. “Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee?”, *OpinioJuris.org*, 3 March 2021; CITRONI, G. “Operations at Sea: the Human Rights Committee’s Views on the Case A.S., D.I. and G.D. v. Italy and Malta”, *OpinioJuris.org*, 9 March 2021; MILANOVIC, M. “Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations”, *EJIL:Talk!*, 16 March 2021.

<sup>24</sup> See HRC, decision of 13 March 2020, *A.S., D.I., O.I. and G.D. v. Malta*, UN Doc. CCPR/C/128/D/3043/2017.

determine whether the jurisdiction of Italy could be established in the case, with the consequent extraterritorial application of the ICCPR. The HRC recalled its General Comment no. 36<sup>25</sup> according to which every state party has an obligation to respect and ensure the right to life of all persons over whom it exercises power or effective control, including persons located outside any territory effectively controlled by the same state in cases in which the right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner<sup>26</sup>. Furthermore, according to the same General Comment, state parties are also required to respect and protect the lives of all individuals who find themselves in a situation of distress at sea in accordance with their international obligations on rescue at sea.

Considering the particular circumstances of the case, the HRC affirmed that “a special relationship of dependency” had been established between the individuals on the vessel in distress and Italy. This special relationship was deemed to be based on the initial contact made by the vessel in distress with the Maritime Rescue Co-ordination Centre (MRCC) of Rome, the close proximity of the Italian ship *Libra*, the ongoing involvement of the MRCC in the rescue operation, the legal obligations incurred by Italy under international law of the sea and, in particular, under the SOLAS Regulations and the SAR Convention. On these grounds, the HRC considered that “the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and they were thus subject to Italy’s jurisdiction for the purpose of the Covenant”<sup>27</sup>. This solution was not supported by all the members of the HRC. In their dissenting opinion, some members of the HRC affirmed that Italy did not coordinate the search and rescue operation and did not establish an effective control over the individuals of the vessel in distress<sup>28</sup>. In another dissenting opinion, it was observed that the decision taken by the HRC might have the effect of convincing states parties to the Covenant to avoid coming close to boats in distress so as to refrain from establishing the

<sup>25</sup> See HRC, *General Comment no. 36, Article 6 (Right to Life)*, para. 63, 3.9.2019, UN Doc. CCPR/C/GC/35.

<sup>26</sup> See HRC, *A.S., D.I., O.I. and G.D. v. Italy*, para. 7.5.

<sup>27</sup> See HRC, *A.S., D.I., O.I. and G.D. v. Italy*, para. 7.8.

<sup>28</sup> See Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting), UN Doc. CCPR/C/130/D/3043/2017, Annex 1.

“special relationship of dependency” which triggers the jurisdiction of the state<sup>29</sup>.

The decision of the HRC offers interesting insights on the exercise of the jurisdiction of a state in case of rescue operations on high seas and could also affect the attitude of Italian authorities towards such activities. The hope is that Italy will, in the future, take its responsibility for rescue operations more and more seriously and will not escape from them by relying on the intervention of other countries.

## **V. HAS THERE BEEN A REAL SHIFT IN ITALIAN MIGRATION POLICY?**

The closed-ports strategy and the criminalisation of the activities of migrant rights defenders involved in search and rescue activities has been strongly criticised at the international level<sup>30</sup>. This has created a great expectation for a policy shift. In particular, a prompt erasure of the two Security Decrees already mentioned was desired and a different attitude towards migration by sea was expected.

Notwithstanding the declaration of its willingness to overcome the previous attitude towards migration by sea and despite knowing the humanitarian concerns related to the conduct of the Libyan coast guard, the Italian Government that has been in charge since September 2019 (the second chaired by Giuseppe Conte), has consented to the automatic renewal of the 2017 Memorandum with Libya<sup>31</sup>. This is in spite of calls from human rights groups and institutions to revoke the agreement<sup>32</sup>. However, after the renewal,

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<sup>29</sup> See Individual Opinion of Andreas Zimmermann (dissenting), UN Doc. CCPR/C/130/D/3043/2017, Annex 2.

<sup>30</sup> See, e.g., Mandates of the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children, 15 May 2019, AL ITA 4/2019.

<sup>31</sup> On 2 February 2020, the Memorandum has been automatically renewed, for another three years.

<sup>32</sup> See, e.g., the letter of the Commissioner for Human Rights of the Council of Europe addressed to the Italian Minister of Foreign Affairs on 13 February 2020 after which the Memorandum was automatically renewed, <https://rm.coe.int/letter-to-mr-luigi-di-maio-minister-of-foreign-affairs-and-internation/16809c8262>.

the dialogue for the amendments has resumed, but so far concrete results have not been achieved.

On the other hand, in October 2019, the possibility to amend the Code of Conduct for NGOs was discussed. The new Italian Minister of Interior convened a meeting with the main NGOs with this goal. The reopening of the dialogue with NGOs was good news, but it has not been followed by concrete acts. After being confirmed under the government chaired by Mario Draghi, this same Minister in March 2021 again declared her willingness to reconvene as soon as possible a table with NGOs<sup>33</sup>, but it is not yet known when this meeting will be held and, above all, what kind of new regulation the Italian Government will propose.

Some of the provisions contained in the Security Decrees were amended with the adoption of Decree Law no. 130 of 2020<sup>34</sup>. However, the power of naval interdiction of the Minister of the Interior has in substance been maintained<sup>35</sup>. A violation of a Ministerial order of interdiction can be sanctioned with the reclusion for up to two years and with a fine from 10.000 to 50.000 euros. The new provision does not apply in cases in which the rescue operation has been immediately communicated to the competent MRCC and to the flag state and is conducted in accordance with the instructions of the competent authorities for search and rescue at sea. Although this provision expressly states the need to respect, *inter alia*, the status of refugees, concerns may derive with regard to the applicability of the power of interdiction in cases in which the competent search and rescue authority whose instructions have not been respected by the humanitarian vessel belongs to an unsafe country<sup>36</sup>. Take, for example, the case of a humanitarian rescue vessel that doesn't comply with the order received by the Libyan search and rescue authorities to disembark the rescued migrants on Libyan shores because Libya is not a safe country. In this case, could the Italian

<sup>33</sup> See Press release, 24.3.2021, <https://www.interno.gov.it/it/stampa-e-comunicazione/interventi-e-interviste/lamorgese-ue-fermi-sbarchi-dalla-libia-nuovo-patto-sui-migranti>.

<sup>34</sup> The Decree Law no. 130 of 21 October 2020 was later converted into Law no. 173 of 18 December 2020.

<sup>35</sup> According to art. 1 par. 2 of the Decree no. 130/2020, the Minister of Interior in conjunction with the Minister of Defence and with the Minister of Transports, after having informed the Prime Minister, can limit or prohibit the transit or the stay in the territorial waters to vessels for reasons of public order and public security.

<sup>36</sup> See PITEA, C., S. ZIRULIA, S., *loc. cit.*, p. 686.

authorities refuse entry of the NGO vessel to an Italian port? The Decree no. 130 doesn't erase such a risk.

There is no doubt that the attitude towards NGO search and rescue operations has become, at least in part, more favourable. But this doesn't mean that the port-closed strategy can be considered completely overcome. It is significant that the Italian Government with Inter-ministerial Decree no. 150 of 7 April 2020, which was adopted during the COVID-19 pandemic, established that for the period of the health emergency, the Italian ports cannot be considered a "place of safety" according to the SAR Convention with regard to rescue operations conducted outside the Italian SAR zone by foreign vessels. The aim of this Decree is to prevent NGO foreign flag vessels from disembarking migrants rescued at sea in Italian ports during the pandemic. The Decree raised many concerns that we cannot examine in this context<sup>37</sup>: we only observe that with such an administrative act, Italy pretends to unilaterally derogate from international customary rule which imposes the duty to rescue and assist people in distress at sea and from other international obligations related to the law of the sea and human rights which are binding on Italy.

## **VI. CONCLUDING REMARKS: THE NEED TO ENHANCE COOPERATION AT THE EU LEVEL AND THE INADEQUACY OF THE SOLUTIONS PROPOSED WITH THE NEW PACT ON MIGRATION AND ASYLUM**

With this brief contribution, we have underlined some of the different problems that the recent Italian practice related to the control of migration flows by sea may raise.

The policy of closure of ports based on the criminalisation of the NGO search and rescue operations has been mitigated by the Italian Government since September 2019 but cannot be considered completely overcome. In fact, the tools which allow the Minister of the Interior to deny to NGO vessels the disembarking of migrants rescued at sea on Italian shores have not been dismantled. However, there is no doubt that the less tense climate that the Italian Government has established in the management of migration by sea has favoured the cooperation with other EU Member States. In particular, a

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<sup>37</sup> The different concerns raised by the Decree have been stressed by MUNARI, F., "L'emergenza COVID-19 nell'ambito degli obblighi dell'Italia ai sensi della Convenzione SAR: l'insostenibile «intermittenza» del luogo sicuro per i migranti diretti verso l'Italia", *SIDIBlog*, 16.4.2020.

signal in this direction was represented by the Malta Declaration, according to which a voluntary and temporary mechanism to identify an alternative place of disembarkation was provided for situations in which Italy or Malta would be facing a disproportionate migratory pressure. On the basis of pre-declared pledges prior to the disembarkation and under the coordination of the European Commission, the mechanism would contribute to the swift relocation of asylum seekers rescued at sea. The Declaration confirmed the commitment to enhancing the cooperation with Southern Mediterranean third countries to fight illegal migration and expressly affirmed that vessels engaged in rescue operations (thus also NGO vessels) should refrain from obstructing the activity of the Libyan coast guard. The cooperation developed through the Malta Declaration had positive aspects, but it was limited to the countries that accepted participation in it<sup>38</sup>, had a nonbinding nature and required an *ad hoc* consensus. The Declaration expired at the end of March 2020 because of nonrenewal. However, the Declaration served as a source of inspiration for the New Pact on Migration and Asylum presented by the European Commission in September 2020. In particular, in the proposal of a Migration Management Regulation, a specific process was introduced to address the disembarkation in accordance with following SAR operations under the coordination of the Commission, as was a relocation mechanism with the aim to institutionalise the temporary solidarity mechanism set up in the Malta Declaration<sup>39</sup>. The impression is that, whether or not these new rules are adopted, the current ineffective system of solidarity *vis-a-vis* the coastal states will be replicated<sup>40</sup>. With the New Pact, a Recommendation was also drafted

<sup>38</sup> On 23 September 2019, France, Germany, Italy and Malta participated in La Valletta at the summit that was concluded with the adoption of the Malta Declaration. Only three other states (Ireland, Luxembourg and Portugal) had informally affirmed support of the Malta Declaration during the Justice and Home Affairs Council of 7 and 8 October 2019.

<sup>39</sup> On the mechanism of solidarity provided by the Proposal of a Regulation of the European Parliament and of the Council on asylum and migration management, COM (2020) 610 def. of 23.9.2020, see MALANI, F., “«A fresh Start» or One More Clunker? Dublin and Solidarity in the New Pact”, *EU Immigration and Asylum Law and Policy*, <https://eumigrationlawblog.eu>, 20.10.2020; MORGESE G., “La solidarietà tra Stati membri dell’Unione europea nel nuovo Patto sulla migrazione e l’asilo”, *I Post di AISDUE*, II, 2020, Focus “La proposta di Patto su immigrazione e asilo”, n. 2, 23.10.2020, p. 16, at 22 ff.

<sup>40</sup> On this view, see POLI, S., “«Flexible» cooperation between the European Union and third countries to contain migration flows and the uncertainties of «compensation measures»: the case

on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities<sup>41</sup>. Although the Recommendation adds “nothing to the current EU (underwhelming) rescue response”<sup>42</sup>, it aims to strengthen cooperation between Member States, in particular between flag and coastal Member States and with the Commission through the newly instituted Contact Group<sup>43</sup> in relation to search and rescue operations carried out by private vessels.

The inadequacy of the New Pact of Migration and Asylum in taking into account the request for a fairer distribution of responsibility and more solidarity coming from the Southern European Mediterranean countries has been recently denounced by Cyprus, Greece, Italy, Malta and Spain, which gathered during the first Ministerial Meeting of the “Med-5 Group” held in Athens on 19 and 20 March 2021<sup>44</sup>.

The solution proposed in the New Pact will need to be improved and amended with a view towards producing a real shift in the management of migration flows arriving by sea. However, there is no doubt that efficient solutions can only be found through the strengthening of cooperation at the European level, considering that the EU – in contrast to Member States individually – could have the force to stand as a global actor able to deal with the causes that induce migrants to leave and, at the same time, to act in accordance with the imperatives of solidarity and respect for human rights<sup>45</sup>.

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of the resettlement of refugees in EU Member States”, *DPCE online*, 2020, p. 5272, at p. 5297.

<sup>41</sup> Doc. C(2020) 6468 of 23.9.2020.

<sup>42</sup> In these terms, MORENO-LAX, V. “The EU (Non-)rescue Paradigm”, *EU Immigration and Asylum Law and Policy*, <https://eumigrationlawblog.eu>, 3.2.2021.

<sup>43</sup> The European Contact Group on Search and Rescue is composed by relevant stakeholders, including Frontex, NGOs, academics and international organisations, and has as its goal to develop best practices, exchange information and reinforce cooperation between flag and coastal Member States. The first meeting of the Contact Group was held on 22 March 2021.

<sup>44</sup> The Declaration adopted in Athens by the “Med-5 Group” is available at <https://www.pio.gov.cy/en/press-releases-article.html?id=19113#flat>.

<sup>45</sup> See CATALDI, G., “Migrations in the Mediterranean between protection of Human Rights and border control”, *Revue québécoise de droit international*, vol. 2-1, 2018, p. 41 at p. 53.



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