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EURO-MEDITERRANEAN EXPERIENCES ON MANAGEMENT OF MIGRATION GOVERNANCE

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I. INTRODUCTION – II. RIGHT OF INNOCENT PASSAGE IN THE TERRITORIAL
SEA – III. RESCUE OBLIGATIONS – IV. CONCLUSION

ABSTRACT: Central Mediterranean migrations have led to a series of initiatives by successive Italian governments, initiatives aimed at countering the arrival in the ports of the Peninsula of boats with people rescued at sea. Two are the guidelines followed: the “outsourcing” of the migratory phenomenon’s management, which began in particular through the “Memorandum of Understanding on migrants” stipulated with the government of Tripoli on 2 February 2017; and the “disengagement” with respect to Search and Rescue activities at sea, gradually limiting the direct involvement and above all discouraging these operations by NGOs, “guilty” of attracting rescued persons to the Italian jurisdiction.

In 2018 and 2019, the two so called “security decrees” arrived. These decrees provide, among other things, measures to combat the phenomenon of irregular migration by sea at all costs, including through a progressive detachment from the international commitments undertaken.

In this Note I would like to dwell in particular on a single aspect of the “security decree bis” (n. 53/19 converted by law n. 77 of 8 August 2019) which concerns the interpretation of the right of innocent passage in the territorial sea, an institution codified by the United Nations Convention on the Law of the Sea signed in Montego Bay in 1982 and ratified by Italy in 1994.

KEYWORDS: Migrations, Italy, NGOs, right of innocent passage, disembarkation, asylum, territorial sea, port, internal waters, Law of the Sea, United Nations Convention on the Law of the Seas (UNCLOS).

EXPERIENCIAS EUROMEDITERRÁNEAS DE GESTIÓN DE LA GOBERNANZA MIGRATORIA

RESUMEN: La inmigración en el Mediterráneo Central ha dado lugar a una serie de iniciativas por parte de los sucesivos gobiernos italianos destinadas a contrarrestar la llegada a los puertos de

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la Península de embarcaciones con personas rescatadas en el mar. Dos son las directrices seguidas: la «externalización» de la gestión del fenómeno migratorio, que comenzó en particular a través del «Memorando de Entendimiento sobre los migrantes» estipulado con el gobierno de Trípoli el 2 de febrero de 2017; y la «desvinculación» con respecto a las actividades de Búsqueda y Rescate en el mar, limitando gradualmente la participación directa y sobre todo desalentando estas operaciones por parte de las ONG, «culpables» de atraer a las personas rescatadas a la jurisdicción italiana.

En 2018 y 2019, llegaron los dos llamados «decretos de seguridad». Estos decretos prevén, entre otras cosas, medidas para combatir a toda costa el fenómeno de la migración irregular por mar, incluso a través de un desprendimiento progresivo de los compromisos internacionales asumidos.

En esta nota me gustaría detenerme en particular en un único aspecto del «decreto de seguridad bis» (n. 53/19 convertido por la ley n. 77 del 8 de agosto de 2019) que se refiere a la interpretación del derecho de paso inocente en el mar territorial, institución codificada por la Convención de las Naciones Unidas sobre el Derecho del Mar firmada en Montego Bay en 1982 y ratificada por Italia en 1994.

PALABRAS CLAVE: Migraciones, Italia, ONG, derecho de paso inocente, desembarco, asilo, mar territorial, puerto, aguas interiores, Derecho del Mar, Convención de Naciones Unidas sobre Derecho del Mar (CNUDM).

I. INTRODUCTION

It is well known that, with the downsizing of the “Balkan route” following the 2016 “Statement” between EU Member States and Turkey² as well as the policy of closure implemented by the so-called “Visegrad group”’s countries³, the progressive and consequent pressure in the central Mediterranean, and especially on Italy, has led to a series of initiatives by successive Italian governments, initiatives aimed at countering the arrival in the ports of the Peninsula of boats with people rescued at sea. Two are the guidelines followed, obviously connected to each other: the “outsourcing” of the migratory phenomenon’s management, which began in particular through the “Memorandum of Understanding on migrants” stipulated with

² On which see CARRERA, S., DEN HERTOG, L., STEFAN, M., “The EU-Turkey deal. Reversing ‘Lisbonisation’ in EU migration and asylum policies”, in Carrera, S., Santos Vara, J., Strik, T., (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, 2019, Cheltenham, 2019, p. 155 ff.; GATTI, M., OTT, A., “The EU-Turkey Statement: legal nature and compatibility with EU institutional law”, in in Carrera, S., Santos Vara, J., Strik, T., (eds.), *Constitutionalising... cit.*, p. 175 ff.

³ The Visegrád Group, (Visegrád Four, or V4), is a cultural and political alliance of four countries of Central Europe (Czech Republic, Hungary, Poland and Slovakia), all of which are members of the EU and of NATO, to advance co-operation in military, cultural, economic and energy matters with one another and to further their integration to the EU.

the government of Tripoli on 2 February 2017⁴, and the “disengagement” with respect to Search and Rescue activities at sea, gradually limiting the direct involvement and above all discouraging these operations by NGOs, “guilty” of attracting rescued persons to the Italian jurisdiction. The first act of this phase can be considered the enactment of the so called “Minniti Code” (from the name of former Italian Minister of Interior) of July 2017, which set a series of rules to be followed by NGOs, through very questionable provisions⁵. Among the latter we would like to point out here, since it constitutes a precedent with respect to interpretation of the right of innocent passage by the regulations subsequently adopted in Italy, and on which we shall dwell, the commitment “not to enter Libyan territorial waters, except in situations of serious and imminent danger that require immediate assistance, and not to hinder the activity of Search and Rescue (SAR) by the Libyan Coast Guard, in order not to hamper the possibility of intervention by the competent national Authorities in their territorial waters, in compliance with international obligations”. This is, of course, an untenable demand for a ship flying a foreign flag, since it would be required not to exercise its right of innocent passage through the territorial waters of a third State! Subsequently, in perfect harmony with the political winds blowing through Europe and facilitated by the lack of solidarity shown by the European Union’s partners in the management of landings, the new Italian government undertook, starting in June 2018, a series of measures aimed at closing ports to all vessels (in the case of the ship Diciotti also to an Italian military ship!) with migrants on board, rescued at sea. And so, in 2018 and 2019, the two so called “security decrees” arrived. These decrees provide, among other things, measures to combat the phenomenon of irregular

⁴ In comment to which reference should be made to LIGUORI, A., “The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights”, *Rivista di Diritto Internazionale*, 2018, p. 1228 ff.; ID., *Migration Law and The Externalisation of Border Controls*, Routledge, London and New York, 2019; SPAGNOLO, A., “The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice”, *Italian Yearbook of International Law*, 2018 p. 211 ff.

⁵ On the “Minniti Code” see RAMACCIOTTI, M., “Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di Search and Rescue (SAR)”, *Rivista di diritto internazionale*, 2018, p. 213 ff.; FERRI, F., “Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee”, *Diritti umani e diritto internazionale*, 2018, p. 189 ff.

migration by sea at all costs, including through a progressive detachment from the international commitments undertaken, as we will try to demonstrate.

In the few pages that follow I would like to dwell in particular on a single aspect of the “security decree bis” (n. 53/19 converted by law n. 77 of 8 August 2019) which concerns the interpretation of the right of innocent passage in the territorial sea, an institution codified by the United Nations Convention on the Law of the Sea signed in Montego Bay in 1982 (hereinafter UNCLOS) and ratified by Italy with law n. 689 of 22 December 1994.

II. RIGHT OF INNOCENT PASSAGE IN THE TERRITORIAL SEA

Article 1 of the “security bis” decree inserts in Article 11 of Legislative Decree No 286 of 25 July 1998, the new paragraph 1-ter by which it attributes to the Minister of the Interior, in his capacity as national authority of public security, in the exercise of the coordination functions attributed to him by law, the power to restrict or prohibit the entry, transit or stopping of ships in the territorial sea, with the exception of military vessels and ships on non-commercial government service, for reasons of public order and security, or when he deems it necessary to prevent the “prejudicial” or “non-innocent” passage of a specific ship in relation to which the conditions set out in Article 19, paragraph 2, letter g) of UNCLOS can be fulfilled - limited to violations of immigration laws.

The right of innocent passage, referred to in Articles 17 et seq. UNCLOS, consists of the right of each State to transit with its ships (private and public) through foreign territorial seas provided that such transit is harmless, i.e. does not disturb the “peace, good order and security” of the coastal State⁶. This is provided for in Article 19, first paragraph, UNCLOS, which reproduces the same rule contained in Article 14 of the 1958 Geneva Convention on the Territorial Sea. In the second paragraph, however, Article 19 UNCLOS, unlike the 1958 version, lists a series of activities whose commission by the foreign ship automatically renders its passage not innocent. One of the activities is the one mentioned in Article 1 of the decree in question, namely “the loading or unloading of materials, currency or persons in violation of customs, tax, health or immigration laws and regulations in force in the coastal state”.

⁶ On the Right of innocent passage see CATALDI, G., “Il passaggio delle navi straniere nel mare territoriale”, Giuffrè, Milano, 1990.

The right of passage belongs to any vessel which enters the territorial waters of a foreign State only for the purpose of crossing them, whether it subsequently enters the internal waters of that State (incoming passage), comes from those waters with the intent of reaching other destinations (outgoing passage) or, finally, only transits parallel to the coast, without entering the internal waters (lateral passage). The passage must be rapid and continuous, save for the exceptions provided for in the last part of art. 18, par. 2, UNCLOS: activities necessary for ordinary navigation and, what is more relevant in our case, situations of force majeure, danger and need to provide assistance to ships and aircraft in danger.

I believe this necessarily synthetic description of the institute is sufficient to reveal the perplexities raised by the formulation of Art. 1. Such article, in fact, provides for two distinct hypotheses with regard to the power to limit or prohibit the entry, transit or stopping of ships in the territorial sea: either for reasons of order and public safety, or when the passage is prejudicial or not innocent under Art. 19, para 2, letter g) UNCLOS. However, it is not clear how the two hypotheses can be distinguished. In other words, Art. 19 UNCLOS allows “for reasons of public order and safety” to restrict or prohibit the passage of a foreign ship. The assumption is that such passage is not innocent. Consequently, the passage of ships exercising the right of innocent passage cannot, as a general rule, be prevented, while measures can be taken to prevent non-innocent passage (Art. 25 UNCLOS). The special provision included in Article 11 of Legislative Decree no. 286 of 25 July 1998 certainly cannot give new and additional powers to limit the right of innocent passage beyond those already provided for under Articles 19 and 25 UNCLOS and which constitute the perimeter within which the coastal State can take action against the foreign ship. It is worth remembering that the existence of a primary legal framework obviously does not change the system of supranational sources (ratified by Italy) within which such measures are inserted and with which they are required to comply pursuant to Art. 10, 11 and 117 of the Italian Constitution. This is also expressly provided for by the decree in question, which contains a specific reference to the necessary “compliance with international obligations”.

What, therefore, is the rationale upon which the rule in Article 1 is based, given that it is not possible to introduce new limits to the right of innocent

passage, nor is it conceivable that the purpose is a mere restatement of those principles?

The answer must necessarily take account of practice in implementing this provision. As it appears from the cases that have occurred so far, the will of the legislator appears to be the following: except for cases in which the Italian coastal authorities have expressly authorized the entry into the territorial sea of a ship with migrants rescued on board, such entry is to be considered contrary to “public order and public safety”, since the absence of authorization means, in the light of the rules on search and rescue at sea that we shall soon examine, refusal to assign the POS (Place of Safety), a refusal based, in this case, on the responsibility of another State. This will to qualify the passage *ex ante* as innocent or not is therefore functional to the policy of “closure of national ports”.

The measure of port closure is not in itself excluded by the law of the sea, since ports fall within the exclusive sovereignty of the State. There is no right of entry into a foreign port under international law, since the port is located in internal waters, and unless an international agreement has been reached, the coastal State may choose whether or not to admit a foreign ship (unlike the territorial sea, where all States enjoy the right of innocent passage). Article 25 of UNCLOS also provides that the State may refuse entry if the ship violates national immigration regulations. However, any ship has the right to enter a port if it is itself in a situation of distress, or if the persons on board are in difficulty. In this case, the rule of “force majeure” or the “state of necessity”, already provided for and codified by the 1923 Convention on the Regime of Sea Ports, applies. In these cases, the refusal to accept a ship into a port constitutes a violation of the duty to safeguard human life at sea, unless a simple intervention (e.g. medical or mechanical repair) carried out on board can be sufficient to put an end to the state of necessity, without proceeding to the entry into the port. In the specific case of possible asylum seekers on board, when the ship is in internal waters and therefore under the jurisdiction of the coastal State, said coastal State must verify, person by person, whether or not the requirements have been met, otherwise it would be in violation of its obligations according to human rights standards, in particular the obligation of “non-refoulement” under the 1951 Geneva Convention on refugees and

the European Convention on Human Rights (ECHR) as interpreted by the Court of Strasbourg.

Therefore, the entry into the territorial sea of a ship carrying people already rescued in fulfilment of the international obligation to save human life at sea is legitimate, and must be considered as an innocent passage, because landing in a Place of Safety is functional to the completion of rescue operations; in the same way, obviously, the entry into the territorial sea in order to rescue people in danger at that moment must be considered as an innocent passage. Neither of the two activities can be considered to have been carried out in violation of national immigration laws, provided that the purpose of the ship is related to the rescue obligations. On this point, Italian case law is abundant and almost unanimous⁷.

III. RESCUE OBLIGATIONS

A few words on rescue obligations. They are first of all embodied in Article 98 UNCLOS, which codifies a very ancient principle of customary law, namely the obligation to rescue persons in distress at sea, without any geographical indication or limitation, and also specifying the need for the State

⁷ Among the many decisions: Court of Agrigento 7 October 2009, no. 954 in the Cap Anamur case; request for dismissal of the Palermo Public Prosecutor's Office, 15 June 2018, in the case involving the ship Golfo Azzurro of the NGO Iuventa; Court of Ragusa, office for preliminary investigation decree of rejection of the request for preventive seizure, 16 April 2018, confirmed by the Ragusa Court of Review (Tribunale del riesame), 11 May 2018 in the Open Arms case; Corte di Cassazione, Criminal section I, judgment 27 March 2014, no. 14510 and Corte di Cassazione, Criminal section IV, judgment 30 March 2018, no. 14709, which on the subject of the subsistence of Italian jurisdiction in relation to conduct, alternatively qualified as humanitarian aid operations or aiding and abetting illegal immigration, which took place on the high seas, noted that "the rescue intervention is a duty under the International Conventions on the Law of the Sea"; Court of Catania, 7 December 2018, which with reference to the Diciotti case underlines that "the obligation to save life at sea is a precise duty of States and prevails over all bilateral rules and agreements aimed at combating irregular immigration"; GIP (Judge for the preliminary investigation) of Trapani, decision 3 June 2019, in the Vos-Thalassa case, which recognizes the exemption of legitimate defense in the case of migrants rescued and protested with force the compulsory accompaniment to Libya; Corte di Cassazione, Criminal section I, 23 January 2015, n. 3345, on the subject of "mediated author", i.e. rescue operations provoked by the same smugglers who determine the responsibility of the latter but certainly not of those who provide rescue at sea.

to promote “the establishment, operation and maintenance of an adequate and effective search and rescue service”⁸.

More detailed are the provisions of the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 Hamburg Convention on Search and Rescue at Sea (SAR). These two conventions were amended in 2004, following the case of the Norwegian ship *Tampa*, which in 2001 picked up 438 Afghan asylum seekers at sea but was banned by the Australian authorities from entering their ports for more than a week, generating a diplomatic crisis with Norway, until the situation was resolved by “outsourcing” the management of the matter to the State of Nauru, which accepted the asylum seekers in exchange for money⁹. In particular, the 20 May 2004 IMO (International Maritime Organisation) Maritime Safety Committee Resolution made it clear that the Search and Rescue operation only ends with the disembarkation (in the shortest possible time and with the minimum possible diversion of the voyage undertaken by the rescuer ship) of the rescued persons in a safe place; that the government responsible for the SAR region where the survivors were recovered is required to identify the safe place of disembarkation and to either provide it directly or ensure that it is provided by another state; that a safe place cannot be considered as the ship performing the rescue, except for a limited time, and that neighboring coastal states, as well as the flag state and any state involved (e.g. because it is the nation state of the majority of the crew or passengers) cannot be considered to be exempted from liability, especially

⁸ “1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”.

⁹ Incidentally, this is the so-called “Pacific Solution”, i.e. specific to the Pacific Ocean, which inspired many European governments that, by their own admission, consider it as a good practice to imitate. On this case see BAILLIET C., “The ‘Tampa’ Case and Its Impact on Burden Sharing at Sea”, *Human Rights Quarterly*, 2003, p. 741 ff.

if the government responsible for the SAR region is unwilling or unable to intervene.

With regard to the latter, it should be stressed that the concern has been, especially since 2004, to broaden as far as possible the “titles” of competence and thus the scope of the States potentially responsible. The rules of the two SOLAS and SAR Conventions, as well as IMO recommendations, are based on cooperation (“the coordination by one state of rescue action does not free other states”, as the IMO states in its recommendations). In fact, the first maritime rescue centre that becomes aware of a case of danger, even if the event affects the SAR area of another country, must take the necessary urgent action and then continue to coordinate the rescue until the authority responsible for the area takes over the coordination. The State to which the Coordination Centre which first received the news, or which has in any case taken over the coordination of the rescue operations, has the obligation to identify a safe place on its territory where the rescue operations can be completed by the disembarkation of the shipwrecked persons, provided that it is not possible to reach agreements with a State that may be closer to the area of the event, regardless of any consideration regarding the status of the shipwrecked persons.

It is equally clear, however, that there are two problems with the application of these rules in the central Mediterranean. The first is that Malta, which has a very large SAR area, has not, however, ratified the 2004 amendments and, in view of the limits of its territory and the means at its disposal, it disputes its competence to direct rescue operations in its SAR (unless Maltese flag vessels are involved, which is a very rare hypothesis), which, moreover, overlaps with the Italian one in several places.

Different but no less problematic is the issue of the Libyan SAR. This country, which still lacks an effective government that controls the entire territory, although it has declared that it has assumed responsibility for search and rescue in the (large) sea area north of its coasts, does not even have an efficient coordination centre for rescue operations. Moreover, and most significantly, Libya cannot at this time be considered, by almost unanimous recognition, as a safe place of landing from the point of view of protection of fundamental human rights. Indeed, it is clear that the place of disembarkation is understood as “safe” when both physical security and the enjoyment of

human rights are no longer in danger. Corollary to this principle is the right, as well as the obligation, to provide the Place of Safety, a right to which the rescued persons are entitled¹⁰.

The obligation to save human life at sea, therefore, is obligatory for both States (according to art. 98, par. 1 UNCLOS) and masters of ships (according to Chapter V, reg. 33 SOLAS, as well as national rules on the matter, such as for example art. 489 of Italian navigation code). This obligation requires the master to assist persons in distress and take them to a safe place “in the shortest possible time”¹¹. In other words, the event of rescue at sea continues until the master has disembarked the persons in a safe place, and its entry into the territorial sea and ports of a State cannot be seen in a different light. The passage of a ship which has rescued persons in distress, even outside the territorial sea, cannot therefore be precluded if the ship intends to enter in order to finalize its obligation to save human life at sea. This is required by the conventional rules on the rescue and salvage of persons at sea already mentioned, which provide for coordination between the States involved. Thus the inaction or failure by other States to fulfil their obligations is wholly without merit.

Consequently, there can be no automatic refusal of the right of passage by virtue of its preventive qualification as not harmless if the vessel hosts persons rescued at sea. Correctly, the Court of Palermo, section for ministerial crimes, by decision of January 30, 2020 acknowledged (on p. 37), that art. 11 paragraph 1 ter inserted in Legislative Decree 286/98 can only be interpreted, in the light of UNCLOS rules cited, as meaning that the prohibition of entry must refer “only to cases of illegal immigration not related to a rescue operation at sea”. As a result, the Court asked the Senate for authorization to

¹⁰ In this regard, see the clear statements of the GIP of Trapani, cit. For the doctrine please refer to SCOVAZZI, T., “Human Rights and Immigration at Sea”, in Rubio-Marín, R., (ed.), *Human Rights and Immigration*, OUP, Oxford, 2014, p. 225 ff.

¹¹ On the obligations and the right/duty of the master of the ship to obey international law, and on the relationship with the competence of the State, please refer to DE VITTOR, F., STARITA, M., “Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters”, *Italian Yearbook of Int. Law*, 2018, p. 82 ff.; STARITA, M., “Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave privata”, *Diritti umani e diritto internazionale*, 2019, p. 5 ff.

proceed against former Interior Minister Salvini in the case of the Spanish-flagged Open Arms vessel chartered by the NGO “Pro-Activa Open Arms”.

Paradoxically, with its initiatives, the Italian government conformed with the idea, which was at the basis of the European “rejection” of the 2013 Italian Mare Nostrum operation, but is completely contradicted by practice, according to which an effective Search and Rescue activity provides an incentive (“taxi effect” as defined at the time of Mare Nostrum) to departures¹². In this regard, it is necessary to recall what has already been said, namely that the international obligations mentioned, in particular Article 98 UNCLOS, commit States to carry out search and rescue activities directly, to this end promoting “the establishment and permanent operation of an adequate and effective search and rescue service to protect maritime and air safety”. In the motion for a resolution submitted to the European Parliament on 21 October 2019 by the Committee on Civil Liberties, Justice and Home Affairs, “on Search and Rescue in the Mediterranean”¹³, and rejected by 290 votes against, 288 in favour and 36 abstentions, the following is emphasized: NGOs rescuing migrants were nominated in 2018 for the *Sakharov Prize*; after the Italian operation Mare Nostrum (ceased on 31 October 2014) there were no State SAR actions in the Central Mediterranean; and finally on 26 September 2019 the EU Operation Sophia was extended until 31 March 2020 but only for air operations. Therefore, NGOs have limited themselves to occupying a space left (maliciously) free by States reluctant to fulfil their obligations and thus creating problems for commercial navigation. In a statement of 11 June 2018, the International Chamber of Shipping in London (the World Shipowners’ Association) not incidentally pointed out that “if NGO ships are unable to land people rescued in Italy in Italian ports, this will also have significant consequences for merchant ships (...), which will again have to participate in

¹² See in this regard the paper by CUSUMANO, E., and VILLA, M., “Sea Rescue NGOs: a Pull Factor of Irregular Migration?”, in *Policy Brief. Migration Policy Centre. Robert Schuman Centre for Advanced Studies. European University Institute*, Issue 2019/22, November 2019. The authors, basing their research on data and facts, effectively demonstrate how wrong this assumption is. More in general, on the relationship between NGOs and Italian authorities on the subject, refer to BEVILACQUA, G., “Italy versus NGOs: The controversial Interpretation and Implementation of Search and Rescue Obligations in the context of Migration at Sea”, *Italian Yearbook of International Law*, 2018, p. 11 ff.

¹³ 2019/2755(RSPF)B9-0154/2019, Recovered from: http://www.europarl.europa.eu/doceo/document/B-9-20190154_EN.html.

a significant number of rescues”. The Italian “security decree bis” therefore violates the spirit and the letter of the international rules mentioned so far from two different points of view. First because there is a clear prejudice with respect to the rescue activities of NGOs, and secondly because the ultimate goal is, once again, the idea that the landing should take place “anywhere except in Italy”. In fact, in this regard, it should be remembered that, on various occasions, different arguments have indicated that a State other than Italy is competent: in the case of the ship *Mare Jonio*, flying the Italian flag, the initial responsibility for landing, according to the Italian authorities, did not lie with the flag State but with the State of the nearest port. Furthermore, it was claimed that since the vessel was not in the Italian SAR, it was not possible for the POS to be identified in an Italian port! On the contrary, the priority of a rescue vessel landing in its own flag State was already invoked by the Italian Government in events involving the vessels *Aquarius* (UK flag), *Sea Watch 3* (Netherlands), *Open Arms* (Spain). In the latter case, reference was also made to the nearest port (Malta), and the country of the SAR region (Libya), while in the case of the refusal of Italian ports to the vessel *Aquarius*, reference was made, as an alternative to the flag (UK), to the ownership of the vessel or the nationality of the NGO (France), or to the waters where the vessel was located at the time of the ministerial declarations (Malta).

The infringement to the letter of the international rules on the subject emerges, as we have attempted to demonstrate, from the claim to qualify a priori as offensive the passage into the territorial sea of ships engaged in “unauthorized” rescue operations. In this regard, it should be recalled, first of all, that, despite the different interpretations that States have reserved to the relevant provisions of UNCLOS (Articles 17 - 26), the right of innocent passage without the need for prior authorization is, in fact, recognized to all foreign ships, including warships, even by States which, during the Third Conference on the Law of the Sea as well as in their domestic laws, had affirmed the need for authorization by the coastal State or prior notification of passage. This conclusion is further supported, in the most recent practice, by the attitude of States such as Finland or Sweden, which have abandoned their original position in favour of the legitimacy of the imposition by the coastal State of the obligation of prior notification of passage; at the time of ratification of UNCLOS, in fact, they have not deposited any interpretative

declaration in this respect. A development in customary law in the sense of the legitimacy of at least the condition of prior notification of the passage of nuclear-powered ships and ships carrying radioactive or other intrinsically hazardous or noxious substances has, in our view, occurred in recent years, mainly as a result of the practice of European States, but this is in the light of an increased sensitivity to values of common interest, and we stress values of common interest, such as health and the environment¹⁴. However, the requirement for authorisation to transit remains a practice considered incompatible with freedom of navigation.

At the time of writing, various appeals are pending before the Constitutional Court in order to have this new legislation declared unconstitutional. In the political arena, amendments are being discussed, in particular with a Project of Law (Decree-Law no. 130 of 21.10.2020 on security and immigration) which deletes article 1 of the so called “security decree bis”. According to the Project, the Minister of the Interior may still restrict or prohibit the entry into or the transit through territorial waters of non-military or non-commercial government vessels. However, the Decree provides for an exception to this prohibition or limit of navigation in the case of ships which have carried out rescue operations in accordance with international conventions, and which have communicated their operations to the competent national authorities or their flag state. In other cases, on the other hand, of “non-compliance with the prohibition or limit of navigation”, fines ranging from 10,000 to 50,000 euros are imposed. It is reminded that, at present, in case of violation of the above mentioned prohibition, an administrative fine is foreseen, with a limit higher than the fine contemplated in the Project (up to one million for those who rescue migrants at sea). Finally, in the Project, the seizure of the vessel which enters territorial waters in an irregular way is no longer foreseen.

Anyway, as the conditions legitimising the closure of ports and territorial waters remain essentially the same in the Project, i.e. the “reasons of public order and safety” (with reference to Article 83 of Italian Navigation Code), or the occurrence of the “conditions referred to in Article 19, paragraph 2, letter g), UNCLOS, limited to violations of immigration laws”, our critics on the improper interpretation of the right of innocent passage remain unchanged.

¹⁴ On this point please refer to CATALDI, G., « Problèmes généraux de la navigation en Europe », in Casado Raigon, R., (ed.), *Europe et la mer, II Colloque de l'Association internationale du droit de la mer*, Bruylant, Bruxelles, 2005, p. 127 ff.

IV. CONCLUSION

In conclusion, it should be reaffirmed that the means used to cross the Mediterranean, and the factual circumstances, lead, *ab initio*, to a state of necessity and therefore the application of the customary rule on the duty to render assistance codified in Article 98 UNCLOS. Especially in the light of the absence of direct state intervention, the legality of the actions carried out by NGOs is beyond doubt. It is worth remembering that according to the Missing Migrants Project of the International Organization for Migration (IOM), of the 3,514 people who died in 2017 in an attempt to emigrate, whose identity has been verified, as many as 2,510 have lost their lives in the Mediterranean. Moreover, despite a significant drop in arrivals, the route from Libya to Europe remains, according to UNHCR, the deadliest migration route in the world. In 2018 it was five times more fatal than in 2015, mainly due to the reduction in search and rescue activities off the Libyan coast. These figures need no comment. Consequently, the automatic denial of the right of passage under the administrative measures issued in application of the “security *bis* decree” is illegitimate because it is incompatible with the international rules on the matter (art. 17 ff. UNCLOS). This refusal, while recalling Italy’s SAR obligations, is motivated by an alleged intention to land irregular migrants, on the basis of actions carried out “in full autonomy”. The entry into the territorial sea, on the other hand, when linked to the Search and Rescue activity and to the right/duty that a POS be assigned, is, as such, perfectly legitimate. With regard to that part of the “security *bis* decree” which deals with search and rescue at sea, in our humble opinion there is a need for a profound change, in light of the evident contradiction with the functioning of the international rules on the subject, as is also apparent from the absolutely prevailing Italian jurisprudence, which continues to affirm the primacy of legality, both domestic and international, without surrendering to pressures of alleged exceptional necessity and urgency¹⁵.

¹⁵ In addition to the case law cited above, see recently Court of Cassation, 3rd Criminal Chamber, judgment No 112 of 20 February 2020, in the case of Carola Rackete, commander of the vessel Sea Watch 3. For the Supreme Court, the latter, from the beginning to the end of the rescue operations, acted in full compliance with the obligations imposed by international law, including therefore the decision not to comply with the prohibition to enter the territorial sea and an Italian port (prohibition issued in execution of the “security *bis* decree”), forcing

This being said, we must not forget that these unacceptable initiatives put in place by Italian government, and at present under a process of revision, are also the consequences of the attitude of EU Institutions and other EU State Members toward the unprecedented migratory pressure started with the year 2015 in Europe. This pressure, in fact, put into question the very structure of the Common European Asylum System (CEAS). As it is well known, in fact, according to the so-called Dublin regime, the country of first entrance is responsible for carrying out the asylum procedure leaving it open how the burden that the granting of asylum involves should eventually be shared between the EU Member States. Both the 1951 United Nations Geneva Convention relating to the Status of Refugees (GCR 1951) and the CEAS are built upon the implicit assumption that refugee protection should be of a temporary nature, but in reality, protection has most often become permanent. Migration through the Mediterranean has to be considered nowadays no more as an “emergency”. In order to avoid excessive burdens for front-line states in Europe, Italy in particular, and for Europe as a whole, the call for the introduction of burden-sharing mechanisms is becoming ever louder. In this context, quota systems have been presented as ideal problem solution instruments. As Mediterranean Coastal States had demanded solidarity, the European Union has tried to establish such mechanisms, both in carrying out SAR operations and in relocating rescued people, but so far all these attempts proved to be insufficient and they met with considerable resistance by some EU Member States. With its Judgment of 2 April 2020, the European Court of Justice (Third Chamber) assessed that even the temporary measures adopted in 2015 with two Council decisions relocating some asylum seekers from Greece and Italy¹⁶, following the so-called refugee crisis, have been breached by several Member States. Poland, Czech Republic and Hungary, in particular, had violated Member States’ obligation to indicate at regular intervals, and at least every three months, the number of applicants for international protection who can be relocated swiftly to their territory.

the “blockade” opposed by the military authorities and leading the migrants rescued on 12 June 2019 to a safe place for disembarkation.

¹⁶ Council decision (EU) 2015/1523 of 14 September 2015 and Council decision (EU) 2015/1601 of 22 September 2015, both establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

The first urgency is always to save lives at sea, but at present border surveillance and the fight against trafficking and smuggling of migrants seem to be the priorities in EU policy and action. The new models, in particular the Statement agreed with Turkey, do not convince from a legal point of view, mainly because refugees deserve a special attention, based on the “non-réfoulement” principle. The time has come to exit the logic of emergency and formulate a lasting policy to manage migrations, implementing Lisbon Treaty and Fundamental Rights Charter’s principles based on solidarity and respect of human rights, as well as on true cooperation among States.

The European Commission acknowledges finally that solidarity has been lacking. The Commission has stated, *inter alia*, in the “Proposal for an Asylum and Migration management Regulation”¹⁷, that «in 2019, half of all irregular arrival by sea were disembarked following search and rescue operations putting a particular strain on certain Member States solely due to their geographical position». This new “Pact on asylum and migration” (as it has been defined by the Commission, hereafter Pact) adopted by the European Commission on 23 September 2020 addresses once again the problem of the burden posed by continuing disembarkations on EU Mediterranean States, on their asylum systems, by introducing «a new solidarity mechanism for situations of search and rescue, pressure and crises». It promises more resources for SAR activities and asks for a coordinated approach towards NGOs carrying out SAR operations¹⁸.

But how does the Pact address the imbalances created by the continuing disembarkations on the distribution of the responsibility for examining the applications for international protection? Notwithstanding its highly controversial character, the centrality of the entry criterion (which has worked so far as a kind of “default” criterion, putting on Mediterranean border States the responsibility for examining the most part of applications presented by

¹⁷ Brussels, 23.9.2020 COM (2020) 610 final 2020/0279 (COD). Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration management and amending Council Directive (EC) 2003/109.

¹⁸ For a more in-depth analysis of the Pact, see M. STARITA, “Search and Rescue Operations under the New Pact on Asylum and Migration”, available at <http://www.sidiblog.org>, 8 November 2020; MAIANI, F, A “ ‘Fresh Start’ or One More Clunker? Dublin and Solidarity in the New Pact”, *Immigration and Asylum Law and Policy*, 20 October 2020, recovered from: <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>.

persons disembarked following SAR operations as well as, more generally, by persons spontaneously arriving at the borders of these States by sea) remains in the proposal for an asylum and migration management, whose Article 21, paragraph 1, reproduces Article 13, paragraph 1, of the Dublin III Regulation. Furthermore, to avoid misunderstandings, paragraph 2 of Article 21 expressly states that «the rule set out in paragraph 1 shall also apply where the applicant was disembarked on the territory following a search and rescue operation». There are however some changes in the responsibility criteria: The Commission introduces a new criterion, expanding the possibilities to allocate applicants based on their “meaningful links” with Member States: for example, prior education in a Member State (article 20), and family reunification according with article 2 (g) which includes siblings in the definition of family. Although interesting and welcome, these changes do not seem able to prevent future imbalances in the distribution of the responsibility of examining applications for international protection, in particular applications by persons rescued at sea.

The Commission’s remedy to imbalances is essentially left to the so called “solidarity mechanisms”. These mechanisms work through a complex procedure (Articles 47-49), which is essentially framed in three stages. First, each year the Commission shall adopt a Migration Management Report «setting out the anticipated evolution of the migration situation and the preparedness of the Union and the Member States». Secondly, Member States are invited to notify the contributions they intend to make, given a “distribution key” previously established by the Commission on the basis of the size of population and the total GDP (Article 54). However, States are not obliged to offer their contributions in terms of relocations, but are free to combine, respecting their distribution key, relocations and other contributions (capacity-building, operations support, cooperation with third States). Thirdly, the Commission assembles a “solidarity pool”, considering the contributions offered by the Member States.

Even if these changes seem deserving a positive evaluation, it must be underlined that these solidarity mechanisms shall apply only after disembarkations have taken place. This clearly reduces the capacity of solidarity mechanisms to alleviate the pressure over border States’ national asylum systems. Also, the solidarity procedures leave wide room for manoeuvre to

negotiations between Member States. Finally, the Commission's decision on whether a Member State is under "a migratory pressure", or a "crisis" in the migration flow, is highly discretionary.

It is evident that the Pact is, as usual, the output of an effort to combine EU Mediterranean States' positions with those of their European partners, in an effort of *realpolitik*.¹⁹ This is understandable, but, once again, the uniformity of legal obligations among Member States is not guaranteed and the actual sacrifice imposed on the Mediterranean States (who are requested to accept again the "entry" criterion as the default one in determining the State responsible for examining asylum applications) is balanced only by a promise of solidarity whose fulfilment depends on two basic circumstances: on the one side, the way in which the Commission will use its highly discretionary powers in the implementing procedures; on the one other side, the degree of open-handedness that the other Member, States will show in the solidarity forum. Precedents are not encouraging.

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¹⁹ On this point see THYM, D., "European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum", *Immigration and Asylum Law and Policy*, 28 September 2020, recovered from: <https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>.

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