UNIVERSITÀ DEGLI STUDI DI NAPOLI "L'Orientale"

EVALUATION SCIENTIFIC COMMITTEE

PROF. RAFAEL CASADO RAIGÒN
University of Cordoba

PROF. NATHALIE ROS
University François Rabelais of Tours

PROF. MASSIMO STARITA
University of Palermo

MAPS NATIONAL AND SUPRANATIONAL REGIMES: THE GENERAL FRAMEWORK AND THE WAY FORWARD

Edited by
GIUSEPPE CATALDI AND PETER HILPOLD

Editoriale Scientifica

Via San Biagio dei Librai, 39 – 80138 Napoli
ISBN 979-12-5976-529-1

M.A.P.S NETWORK

Jean Monnet Activities are designed to promote excellence in teaching and research in the field of European Union studies worldwide. The activities also foster the dialogue between the academic world and policymakers. In particular Jean Monnet Networks aim to create and develop consortia of international players (Higher Education Institutions, Centers of Excellence, departments, teams, individual experts, etc.) in the area of European Union studies in order to gather information, exchange practices, build knowledge and promote the European integration process across the world. Activities include:

- gathering and promoting information and results on methodologies applied to high-level research and teaching on EU studies
- enhancing cooperation between different players and other relevant bodies throughout Europe and around the world
- exchanging knowledge and expertise to improve good practices
- fostering cooperation and exchanges with public actors and the European Commission services on highly relevant EU subjects

INDEX

SOME OBSERVATIONS ON ITALIAN ASYLUM AND IMMIGRATION POLICIES

ANNA LIGUORI*

1. Introduction

The present paper, which does not claim to be exhaustive, focuses on some of the main innovations in Italian legislation/practice/jurisprudence since September 2019, date of the inaugural Conference of the Maps Network,[1] and at the same time offers some suggestions for the way forward.

I will therefore focus first of all on the major changes in Italian legislation, introduced with Decree n. 130/2020, called "Decreto Lamorgese" after the Minister for the Interior responsible for it. This decree eliminated (or at least reduced) some of the main shortcomings of the previous legislation introduced in 2018 and 2019 by the two questionable "Security Decrees" (or "Decreti Salvini", after the Minister of the Interior at that time).[2]

The second part of this paper will deal rather with what did not change at all, i.e., the Memorandum of Understanding (MoU) Italy-Libya of 2 February 2017 - although right from the start it was clear that the implementation of such an agreement would violate migrants' and asylum seekers' rights as attested by many reports from international organizations.[3] However, the Memorandum was renewed in 2020 without any changes.

* University of Naples "L'Orientale".

[1] The present paper reproduces, with slight changes, the talk given on 19 May 2022, during the Round Table "MAPS National and Supranational Regimes: Weaknesses, Shortcomings and Reform Proposals" of the Final Conference of the Jean Monnet Network on Migration and Asylum Policies Systems (MAPS), <https://www.mapsnetwork.eu/wp-content/uploads/2022/04/MAPS-Final-Conference_29-04.pdf> (10/22).

[2] On the "Salvini Decrees" (Decrees Nos. 113/2018 53/2019) see G. Cataldi, "Search and Rescue of Migrants at Sea in Recent Italian Law and Practice" and A. Del Guercio, "The Right to Asylum in Italy", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration and Asylum Policies Systems Challenges and Perspectives,* Editoriale Scientifica, Napoli, 2020, respectively p. 11 ff. and p. 27 ff.

[3] See *ultra*, para. 3.

This paper will finally highlight some recent domestic case-law which states, in very clear terms, that Libya is not a safe place for migrants or asylum seekers, and also suggest a way forward.

2. The Lamorgese Decree

As anticipated, one of the main changes to Italian legislation in the period under examination, is the Decree adopted in October 2020 in order to reduce some of the main shortcomings of the two abovementioned "Salvini decrees", which had been convincingly described as "one of the worst examples of the failure to comply with national and international human rights obligations".[4] The new decree, called "Decreto Lamorgese", after the Minister for the Interior who replaced Salvini, was then converted with amendments into Law no. 173 of 18 December 2020.[5]

Although the changes introduced by the new decree with respect to search and rescue activities are not fully convincing (indeed, as several scholars have pointed out, the impression is that the decree still reflects the political will to protect frontiers through the obstruction of search and rescue activities conducted by civil society, and more specifically by NGOs),[6] much more significant progress has been made with respect to other problematic aspects of previous legislation.

[4] A. Del Guercio, "Migration and fundamental rights. The case of Italy", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds.), *Migration and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 81 ff.

[5] On the Lamorgese decree see C. Corsi, "Il decreto legge 130/2020 tra continuità e cambiamento. Cenni introduttivi sui profili dell'immigrazione e dell'asilo", *Forum di Quaderni Costituzionali*, 2021, <https://www.forumcostituzionale.it/wordpress/?p=15680> (10/22); A. De Petris, "Il Decreto Immigrazione e Sicurezza: luci e ombre per il nuovo sistema di accoglienza e integrazione", *ADiM Blog*, *Editoriale*, October 2020, <http://www.adimblog.com/2020/10/31/il-decreto-immigrazione-e-sicurezza-luci-e-ombre-per-il-nuovo-sistema-di-accoglienza-e-integrazione/> (10/22).

[6] See S. Zirulia, "Dai porti chiusi ai porti socchiusi: nuove sanzioni per le navi soccorritrici nel Decreto Lamorgese", *ADiM Blog, Analisi & Opinioni*, March 2021, <https://www.adimblog.com/wp-content/uploads/2021/03/SodaPDF-converted-ADiM-Blog-Marzo-2021-Analisi-1-1.pdf> (10/22); G. Cataldi, "Le sauvetage des migrants en Méditerranée", in S. Breitenmoser, P. Uebersax, P. Hilpold (eds.), *Schengen et Dublin en pratique dans l'UE, en Suisse et dans quelques Etats européens,* forthcoming; F. Venturi, "La gattopardesca riforma della disciplina delle operazioni di soccorso in mare ad opera dell'art. 1, comma 2, del d.l. n. 130/2020", *Forum di Quaderni Costituzionali*,

First of all, while the previous government had in practice abolished "humanitarian protection" (a very important form of protection, granted to foreigners who prove the existence of serious reasons of a humanitarian nature or resulting from constitutional or international obligations of the Italian State), the Decree restores something very similar called "special protection" and provides for a wide range of permits to be converted into residence permits for work reasons.[7] In addition, the competence to examine these requests comes back to *Commissioni Territoriali,* which are composed of fonctionnaires specialized in asylum matters (while Security Decree n. No. 113/2018 had assigned this responsibility to the *Questore or Prefetto*, who belong to the police system). Indeed, the need to intervene on humanitarian protection was due, according to the Explanatory Report of decree law No. 113/2018, to an alleged instrumental use of international protection by Territorial Commissions and by the judges: the reports states that resorting to a "residence permit for humanitarian reasons" had indeed become the most widespread form of protection in the national system, on account of a legal definition with uncertain contours and an "excessively extensive" interpretation. However, as pointed out, the Executive seemed to identify the cause of these great numbers in what was actually the consequence of multiple factors: "an extremely restrictive visa policy; the absence of legal entry channels; the malfunctioning, prior to the reform, of the old Territorial Commissions, which had been composed of unskilled personnel disinclined to recognize international protection even where the requisites established by law existed; and the rigidity of the conditions attached to refugee status and subsidiary protection".[8]

Secondly, while in the previous version the Italian Law explicitly

2020, pp. 87-110, <https://www.forumcostituzionale.it/wordpress/?p=15710> (10/22); F. V. Paleologo, "I tribunali demoliscono l'asse del rifiuto Lamorgese-Lega, ma i respingimenti in mare continuano", *Melting Pot*, 25 October 2021, <https://www.meltingpot.org/2021/10/i-tribunali-demoliscono-lasse-del-rifiuto-lamorgese-lega-ma-i-respingimenti-in-mare-continuano/> (10/22).

[7] Among them also the so-called "permit for disasters". On this permit see C. Scissa, "La protezione per calamità: una breve ricostruzione dal 1996 ad oggi", *Forum di Quaderni Costituzionali*, 2021, <https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2021/01/09-Scissa-FQC-1-21.pdf> (10/22), and in this volume A. Fazzini, "Recent developments in the protection of environmental migrants: the case of Italy".

[8] A. Del Guercio, *The Right to Asylum in Italy*, cit., p. 36.

prohibited expulsion or refoulement only if this entailed the risk of torture for migrants/asylum seekers, the article in question has been amended, now providing for a much broader range of cases in which refoulement, expulsion or extradition are prohibited, in conformity with international law. In particular, the amendment establishes that such measures cannot be adopted when there is a risk of inhuman or degrading treatment (not only of torture), or of the violation of the right to respect for one's private and family life (in the latter case except in circumstances where the measure is necessary for reasons of national security, or of public order and security).

Finally, the new decree modifies reception, introducing a system called the Reception and Integration System (SAI) open both to asylum seekers and beneficiaries of international protection, similar to the SPRAR approach, which had been conversely significantly reduced by the Salvini decrees - although recognized at European level as a best practice to be imitated: indeed the return to a model of reception characterized by the provision of an "integrated reception", with a special focus on the process of self-autonomy and social inclusion of the person (as SPRAR was) is very welcome since it is much closer to the real needs of asylum seekers/refugees than the government centers (CAS), which, on the contrary, have often been criticized as dysfunctional (because of the poor quality of the services and of the facilities, in most cases overcrowded, in remote areas and distant from transportation).

3. The Memorandum of Understanding between Italy and Libya of 2 February 2017

So far, we can say that – thanks to the Lamorgese decree - some of the most problematic aspects of Italian legislation have been overcome.[9]

[9] See in this direction also the elimination of the ban on registration in the municipal registry for asylum seekers ("iscrizione all'anagrafe"): indeed, this ban (introduced by the 2018 Salvini decree) had already been declared incostitutional by the Italian Constitutional Court (judgment n. 186/20209) for violation of Article 3 which provides for the equality of citizens before the law "without distinction of sex, race, language, religion, political opinions, personal and social conditions", considering the ban on registration illegitimate because it creates an "unreasonable difference in treatment" in preventing asylum seekers from being able to access services such as driving licenses, declaration of commencement of activity etc. However, as pointed out *supra* (see litera-

However, what remains exactly the same is the very problematic agreement with Libya, concluded in February 2017 and renewed in 2020 without any changes.

Indeed, the core of the deal is represented by articles 1 and 2, which state in very clear terms that the Parties agree to start cooperation initiatives with the explicit aim of *stemming the illegal migrants' fluxes*[10] and that to this end Italy will provide, *inter alia*, "technical and technological support to the Libyan institutions in charge of the fight against illegal immigration …", finance "reception centres already active" and train Libyan personnel.

The most critical aspect of the MoU is - notwithstanding a rhetorical reference provided for in article 5 - the complete lack of concern for migrants' and asylum seekers' human rights. Indeed, Libya is not a signatory of the 1951 Refugee Convention; furthermore, a domestic regime for people in need of international protection is completely lacking and, above all, widespread violations and abuses vis-à-vis migrants in Libya had already been attested to by the European Court of Human Rights in the well-known *Hirsi* judgement.[11] In fact, with this decision the Strasbourg Court had found Italy responsible for violation of article 3 ECHR for having pushed migrants back to Libya in 2009 specifically

ture at note 6 with respect to the changes concerning search and rescue activities), the decree is not free from grey areas: see more in general Corsi, *Il decreto legge n.130/2020 tra continuità e cambiamento*, cit.

[10] Article 1. Italics added.

[11] On ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09. In this judgment, a cornerstone for the respect of migrants' and asylum seekers' human rights, the Grand Chamber of the European Court of Human Rights stigmatized externalization practices such as interceptions on the high seas when conducted under the effective control of Contracting States. On this case see: F. Messineo, "Yet Another Mala Figura: Italy Breached Non-Refoulement Obligations by Intercepting Migrants' Boats at Sea, Says ECtHR", *European Journal of Int. Law Talk!,* 24 February 2012, <https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/> (10/22); A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi", *Rivista di Diritto internazionale*, 2012, p. 415 ff.; V. Moreno-Lax, "Hirsi v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review*, 2012, p. 574 ff.; N. Napoletano, "La condanna dei 'respingimenti' operati dall'Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra", *Diritti umani e diritto internazionale*, 2012, p. 436 ff.; M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *International Journal of Refugee Law*, 2013, p. 265 ff.

because of the inhuman treatment to which those people were subjected in Libya, with regard both to the conditions in the Libyan detention centres and to the risk of being sent back to the countries from which they were fleeing (indirect *refoulement*). Since 2009, the risk of abuse of migrants in Libya has become increasingly worse; notwithstanding, not only is any positive conditionality completely missing in the 2017 MoU (i.e. there is no clause making the aid subject to the improvement of human rights conditions or to the ratification of the Geneva Convention), but the MoU aims explicitly to send migrants back to Libya. The only difference with the *Hirsi* case is that Italy will not be doing it by itself, aware that this might be contrary to the ECHR, but will be providing technical, technological and financial aid to Libya, in effect achieving the same results. As pointed out, Italy is doing "refoulement by proxy",[12] to circumvent the prohibition unequivocally affirmed by the European Court of Human Rights in the abovementioned *Hirsi* judgment.

Following the Hirsi case, adopted in 2012, the risk of abuse of migrants in Libya increased steadily, due, *inter alia,* to the deterioration of the political situation after the fall of Gaddafi in 2011. With regard to the period immediately before the signing of the MoU, we can refer to the report of 1 December 2016[13] of the Secretary-General on the United Nations Support Mission in Libya,[14] which attests that:

Migrants detained in centres operated by the [Libyan] Department did not go through any legal process, and there was no oversight by judicial authorities. Conditions in the centres were inhuman, with people held in warehouses in appalling sanitary conditions, with poor ventilation and extremely limited access to light and water. In some detention centres, migrants suffered from severe malnutrition, and UNSMIL received numerous and consistent reports of torture, including beatings and sexual violence, as well as forced labour by armed groups with access to the centres.

[12] See the report *Mare Clausum*, by Forensic Oceanography (Charles Heller, Lorenzo Pezzani), affiliated to the Forensic Architecture agency, Goldsmiths, University of London, May 2018.

[13] United Nations Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya*, 1 December 2016, Doc. S/2016/1011, para. 41 <http://undocs.org/S/2016/1011> (10/22).

[14] Pursuant to Security Council resolution 2291 (2016), which decided to extend the mandate of UNSMIL (including inter alia human rights monitoring and reporting).

Many other reports adopted in the same period go in the same direction: the report of the United Nations Support Mission in Libya and the Office of the United Nations High Commissioner for Human Rights, released on 13 December 2016, significantly titled "Detained and dehumanised. Report on human rights abuses against migrants in Libya", stating that "OHCHR considers migrants to be at high risk of suffering serious human rights violations, including arbitrary detention, in Libya and thus urges States not to return, or facilitate the return of, persons to Libya";[15] the EUBAM Libya Initial Mapping Report of January 2017,[16] mentioning gross human rights violations and extreme abuse (including sexual abuse, slavery, torture) vis-à-vis migrants detained in Libyan camps; the Human Rights Watch World Report 2017, published on 12 January 2017, revealing that in Libya "Officials and militias held migrants and refugees in prolonged detention without judicial review and subjected them to poor conditions, including overcrowding and insufficient food. Guards and militia members subjected migrants and refugees to beatings, forced labour, and sexual violence".[17] Also noteworthy is the UNHCR-IOM joint statement[18] addressing migration and refugee movements along the Central Mediterranean route, delivered on 2 February 2017, in which both organizations declared "We believe that, given the current context, it is not appropriate to consider Libya a safe third country nor to establish extraterritorial processing of asylum-seekers in North Africa".

With respect to the period following the signature of the MoU, the situation in Libya became steadily worse, on account of the instability in the region and the involvement of the Libyan coastguard, which was tasked with search and rescue activities previously implemented by Italian naval units. This resulted in shipwrecks, violence and abuses during search and rescue operations, and the return of thousands of migrants to Libya, thus in serious human rights violations, in particular torture and

15 <http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> (10/22), p. 12. Italics added.

16 <http://www.statewatch.org/news/2017/jun/eu-eeas-strategic-review-libya-9202-17.pdf> (10/22).

17 <https://www.hrw.org/world-report/2017/country-chapters/libya> (10/22).

18 <http://www.unhcr.org/news/press/2017/2/58931ffb4/joint-unhcr-iomstatement-addressing-migration-refugee-movements-along.html> (10/22).

inhuman treatments, widely attested by many reports of international organizations[19] and NGOs.[20]

One of the questions much debated by scholars so far has been the international responsibility of Italy for migrants' human rights violations as a consequence of the MoU of 2 February 2017; indeed, at the time of writing there are a number of proceedings pending before international bodies against Italy – as the case of *S.S. et al. v Italy*[21] before the European Court of Human Rights and the case *S.D.G. v. Italy*[22] before the UN Human Rights Committee. In addition, in 2019 a communication[23] was addressed to the Office of the Prosecutor of the International Criminal Court, concerning EU and Member States' officials and agents for crimes against humanity[24] with

[19] See, ex multis, OHCHR reports in cooperation with UNSMIL, *Abuse Behind the Bars: Arbitrary and unlawful detention in Libya*, April 2018, <https://reliefweb.int/report/libya/abuse-behind-bars- arbitrary-and-unlawful-detention-libya-april-2018-enar> (10/22); *Desperate and Dangerous; Report on the human rights situation of migrants and refugees in Libya*, December 2018, <https://reliefweb.int/report/libya/desperate-and- dangerous-report-human-rights-situation-migrants-and-refugees-libya> (10/22); *IOM and UNHCR condemn the return of migrants and refugees to Libya*, 16 June 2021, <https://www.unhcr.org/news/press/2021/6/60ca1d414/iom-unhcr-condemn-return-migrants-refugees-libya.html> (10/22).

[20] See ex multis AMNESTY INTERNATIONAL, *Libya's dark web of collusion*, *Abuses against Europe-bound refugees and migrants*, 11 December 2017, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/> (10/22), and the many updates from Amnesty, Human Rights Watch etc.

[21] *S.S. and Others v. Italy* case, applic. No 21660/18: on this case see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the «Operational Model»", in *Migration and Asylum Policies Systems Challenges and Perspectives,* cit, p. 183 ff.

and A. Fazzini, "Il caso S.S. and Others v. Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della Corte di Strasburgo", *Diritto, Immigrazione e Cittadinanza*, n. 2/2020, p. 87 ff.

[22] Human Rights Committee, Communication of 18 December 2019, *SDG v. Italy*.

[23] <https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> (10/22).

[24] See on this point punto I. Mann, V. Moreno-Lax, O. Shatz, "Time to Investigate European Agents for Crimes against Migrants in Libya", *European Journal of International Law: Talk!*, 29 March 2018, <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/> (10/22); A. Pasquero, "La Comunicazione alla Corte Penale Internazionale sulle Responsabilità dei Leader europei per Crimini contro l'umanità commessi nel Mediterraneo e Libia. Una lettura critica", *Diritto, Immigrazione e Cittadinanza*, 2020, p. 50.

regard to migration policies in the Mediterranean Basin between 2014 and 2019.[25]

While waiting for the decisions of international organs, and despite the indifference of the government and Parliament – which did not hesitate either to renew the agreement or to refinance it – we wish to mention some interesting domestic case-laws, which unequivocally state that Libya cannot be considered a safe place.[26]

To this end, it is worth mentioning first of all the Assize Court of Milan[27] which, after acknowledging the inhuman and degrading conditions of the Libyan migration detention centres, sentenced a Somali citizen to life imprisonment as a member of the criminal network which managed the Libyan detention centres of Bani Walid and Sabratha.[28]

In addition, in 2019 the Tribunal(e) of Rome ordered the immediate issue of a humanitarian visa to enter Italy to a Nigerian minor – in need of a surgical intervention but trapped in Libya while

[25] The ICC had already opened investigations for the same crimes against Libya: in March 2011, the ICC Office of the Prosecutor of the international criminal court opened its investigation into the situation in Libya, following a referral by the UN Security Council, in order to investigate crimes against humanity in Libya starting 15 February 2011. As the ICC Prosecutor Fatou Bensouda clarified to the UN Security Council in her statement of 8 May 2017, the investigation also concerns "serious and widespread crimes against migrants attempting to transit through Libya".

[26] In an opposite direction the judgment of the Consiglio di Stato n. 4569/2020: see on this case A. Marchesi, "Finanziare i rimpatri forzati in Libia è legittimo? Sulla sentenza del Consiglio di Stato n. 4569 del 15 luglio 2020", *Diritti Umani e Diritto Internazionale*, 2020, p. 796 ff.; E. Nalin, "Esternalizzazione delle frontiere nel nuovo Patto sulla migrazione e l'asilo e accordi di "cooperazione" con i Paesi africani stipulati dall'Italia", in I. Caracciolo, G. Cellamare, A. Di Stasi, P. Gargiulo (eds), *Migrazioni internazionali. Questioni giuridiche aperte*, Editoriale scientifica, Napoli, 2022, p. 317.

[27] Judgement No 10/2017 (confirmed on appeal by judgment no. 31/2020 and in cassation by judgment no. 480/2020 filed on 4 March 2021).

[28] Similarly, on 28 July 2020 the GIP (Investigating Judge) of the Court of Messina sentenced to twenty years of imprisonment three jailers for the crime of criminal association (art. 416 co. 2, 5 and 6), for the crimes of torture (art. 613-bis) and seizure for the purpose of extortion (art. 630 c.p.) carried out against migrants detained in Libya in the Zawiya camp. On this case see G. Mentasti, "Centri di detenzione in Libia: una condanna per il delitto di tortura (art. 613 bis c.p.). Nuove ombre sulla cooperazione italiana per la gestione dei flussi migratori", *Sistema Penale*, 2 October 2020, <https://sistemapenale.it/it/scheda/mentasti-gip-messina-centri-detenzione-libia-condanna-carcerieri> (10/22).

trying to reach his mother, resident in Italy: the Italian Court made this decision taking into account on the one hand the fact that he could not receive adequate medical treatment either in Nigeria or Libya and on the other the systematic violation of migrants' rights in Libya.[29]

Another very interesting case was the decision of the GIP (Investigating judge) in Trapani of 23 May 2019, overturned by the Court of appeal but finally confirmed by the Court of Cassation in December 2021.[30] It concerned two migrants, accused of aggressive behaviour and mutiny against the command of the ship Vos Thalassa. The rebellion was due to the fact that the crew was about to send these two migrants back to the Libyan Coast Guard, after intercepting them at sea with more than sixty other migrants. The Court, despite ascertaining violent and threatening behaviour by the defendants, acquitted them because it recognized self-defence as justification for their behaviour, dictated by the need to defend their right not to be pushed back to a country (Libya) where their fundamental rights would have been put at risk (in particular

[29] See F.L. Gatta, "A "way out" of the human rights situation in Libya: the humanitarian visa as a tool to guarantee the rights to health and to family unity", *Cahiers de l'EDEM*, August 2019.

[30] On the GIP decision see L. Masera, "*La legittima difesa dei migranti e l'illegittimità dei respingimenti verso la libia (caso Vos Thalassa)"*, *Diritto Penale Contemporaneo,* 24 July 2019, C. Ruggiero, "Dalla criminalizzazione alla giustificazione delle attività di ricerca e soccorso in mare – Le tendenze interpretative più recenti alla luce dei casi Vos Thalassa e Rackete", *Diritto, Immigrazione e Cittadinanza*, 2020; on the Court of appeal see F. Vassallo Paleologo, "Dopo la sentenza della Corte di Appello di Palermo sul caso Vos Thalassa, quale tutela per i diritti fondamentali nel Mediterraneo centrale?", *ADIF,* 12 July 2020, <https://www.a-dif.org/2020/07/12/dopo-la-sentenza-della-corte-di-appello-di-palermo-sul-caso-vos-thalassa-quale-tutela-per-i-diritti-fondamentali-nel-mediterraneo-centrale/> (10/22); L. Masera, "I migranti che si oppongono al rimpatrio in Libia non possono invocare la legittima difesa: una decisione che mette in discussione il diritto al non refoulement", *Sistema Penale*, 21 July 2020, <https://www.sistemapenale.it/it/scheda/masera-appello-palermo-vos-thalassa-migranti-rimpatrio-libia-legittima-difesa > (10/22), A. Natale, "Il caso Vos Thalassa: il fatto, la lingua e l'ideologia del giudice", *Questione giustizia*, 23 July 2020, <https://www.questionegiustizia.it/articolo/caso-vos-thalassa-il-fatto-la-lingua-e-l-ideologia-del-giudice> (10/22); on the Cour of Cassation decision see L. Masera "La Cassazione riconosce la legittima difesa ai migranti che si erano opposti al respingimento verso la Libia", *Sistema Penale*, 22 July 2022, <https://sistemapenale.it/it/scheda/masera-cassazione-legittima-difesa-per-migranti-che-si-erano-opposti-al-respingimento-verso-libia?out=print> (10/22).

the right not to suffer torture and other inhuman and degrading treatment).

Finally, the decision of the Tribunale of Naples of 21 October 2021[31] is worthy of note. The court sentenced the captain of the Asso 28 - a tugboat on duty in July 2018 at the Sabratha offshore oil platform in international waters - to one year of imprisonment for having sent back to a Libyan patrol boat off the port of Tripoli over one hundred migrants (including minors) rescued near the platform.[32] The judgment has been strongly welcomed by human rights associations such as Amnesty International and ASGI, since it expresses a clear condemnation of the practice of refoulements to Libya (in this case operated by private boats and coordinated by the Italian authorities).

4. Conclusion

In conclusion, although I am aware that nowadays the focus is on the Ukrainian situation,[33] especially since the historical decision of the European Union of March 2022 which for the first time applied the directive on temporary protection, my proposal for the way forward is that the rejection of the MoU as it is today should be a priority, together with the evacuation of migrants still trapped in Libyan detention centres, the creation of safe and legal ways to reach Europe, and more generally the abandonment of policies of externalized border controls and/or externa-

[31] See C. Pagella, "Sulla rilevanza penale dello sbarco su suolo libico di migranti soccorsi in acque internazionali", *Sistema Penale*, <https://www.sistemapenale.it/it/scheda/rilevanza-penale-sbarco-su-suolo-libico-di-migranti-soccorsi-in-acque-internazionali> (10/22).

[32] More specifically, for the crimes of "arbitrary disembarkation and abandonment of people"(referred to in art. 1155 of the Navigation Code), and of "abandonment of a minor" (referred to in art. 591 of the Penal Code).

[33] See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection. On this decision see, ex multis, D. Thim, "Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice'", *EU Immigration and Asylum Law and Policy*, 7 March 2022, <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> (10/22).

lized asylum systems, or at least the introduction of strong substantive and procedural guarantees for the protection of migrants and asylum seekers.[34]

[34] See, *ex multis,* T. Gammeltoft-Hansen, J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation*, Routledge, London and New York, 2017; V. Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford University Press, Oxford, 2017; A. Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility,* Routledge, London and New York, 2019 and more recently *Refugee Law Initiative Declaration on Externalization and Asylum, International Journal of Refugee Law,* 2022, p. 1 ff.