

MIGRATION AND ASYLUM POLICIES SYSTEMS



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MIGRATION AND ASYLUM POLICIES SYSTEMS

CHALLENGES AND PERSPECTIVES

edited by

GIUSEPPE CATALDI
ADELE DEL GUERCIO ANNA LIGUORI

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Migration and Asylum Policies Systems



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SEARCH AND RESCUE OF MIGRANTS AT SEA IN RECENT ITALIAN LAW AND PRACTICE

GIUSEPPE CATALDI*

1. Introduction. Italian initiatives aimed at countering the arrival of boats with migrants rescued at sea

It is well known that, with the downsizing of the “Balkan route” following the 2016 agreement between EU Member States and Turkey as well as the policy of closure implemented by the so-called “Visegrad group”’s countries, 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 the government of Tripoli on 2 February 2017¹, 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 “Minniti Code” of July 2017, which set a series of

* University of Naples “L’Orientale”, Project Coordinator – Chief Leader of the Jean Monnet Network “MAPS – Migration and Asylum Policy Systems”.

¹ In comment to which reference should be made to A. Liguori, “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; A. Spagnolo, “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.

rules to be followed by NGOs, through very questionable provisions². 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 migration by sea at all costs, including through a progressive detachment from the international commitments undertaken, as we will try to demonstrate. At the time of writing various appeals are pending before the Constitutional Court and, in the political arena, amendments are being discussed.

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.

² On the “Minniti Code” see M. Ramacciotti, “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.; F. Ferri, “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.

2. The right of innocent passage as “revisited” by Article 1 of the so-called “security bis” decree n. 53/2019

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 State³. 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”.

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:

³ On the right of innocent passage see G. Cataldi, *Il passaggio delle navi straniere nel mare territoriale*, Giuffrè, Milano, 1990.

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 unanimous⁴.

3. Search and Rescue Obligations according to International Law

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 to promote “the establishment, operation and maintenance of an adequate and effective search and rescue service”⁵.

⁴ 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.

⁵ “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

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 money⁶. In particular, the 20 May 2004 IMO (International Maritime Organization) 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 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

and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose”.

⁶ 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.

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 entitled⁷.

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

⁷ In this regard, see the clear statements of the GIP of Trapani, *cit.* For the doctrine please refer to T. Scovazzi, “Human Rights and Immigration at Sea”, in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, OUP, Oxford, 2014, p. 225 ff.

and take them to a safe place “in the shortest possible time”. 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 proceed against former Italian Minister of the Interior, Matteo Salvini, in the case of the Spanish-flagged *Open Arms* vessel chartered by the NGO *Pro-Activa Open Arms*.

The governmental interpretation of the right of innocent passage as provided in the “security *bis* decree” is quite clear in various directives of the Ministry of the Interior.

First of all, Directive No 14100/141(8), dated 4 April 2019, regarding the *Alan Kurdi* ship, flying the German flag and belonging to the NGO *Sea Eye*, without mentioning the international obligations referred to above, nor the rules to be applied in the event of a state of emergency, categorically and incontrovertibly affirmed that the flag State in this case was competent “to assume a specific role of control and coordination of the subsequent activities to be carried out by the naval organization”. Thus any transit of the vessel *Alan Kurdi* through the maritime area under Italian jurisdiction in breach of the provisions on immigration would necessarily be a non-innocent passage. This because the Italian authorities “did not coordinate the event in question nor did it take place in waters of national responsibility”. It

was therefore instructed to order the vessel to refrain from entering and transiting Italian territorial waters.

But, in the case in point, a request to allocate a POS had been submitted to several States. To Libya, which did not reply, or replied only after much delay, and which, in any case, for the reasons already indicated, is to be considered “out of the game”; to Malta, whose reluctance, in light of the non-ratification of the 2004 amendments, is well known and not surprising; to Tunisia, a relatively safe country, but not equipped to satisfy the needs of the migrants and, according to the opinion of the NGO operators, a country lacking a complete legislation on the subject of international protection, and which, in any case, also did not reply. Does it make sense to discuss the possible violation by these States of their international commitments? We do not think so, as in this case we are considering the position of Italy. In the light of the scope of the rules that have been summarily described, the obligation of Italian authorities to attribute the POS once requested is all too evident, especially in the absence of a reply from other States. In order to escape this logical consequence, the Rome Tribunal, section for ministerial offences, in its decree of 21 November 2019 by which it dismissed the allegations made against former Minister of the Interior Salvini with reference to the *Alan Kurdi* affair, stated that these rules do not apply to operations carried out by ships professionally engaged in search and rescue at sea. The conclusion, again according to this Tribunal, would be that, in the absence of specific rules, only the flag State can be said to be obliged to assume the resulting responsibilities and that unfortunately, as the flag state in this case was Germany, a country far from the theatre of operations, in the end ... no one is responsible.

However, the differentiation of the regime for NGOs whose mission is rescue as opposed to state-owned or private vessels that are involved “by chance” in rescuing people in danger appears arbitrary and, above all, is not provided for in the rules on the matter; this presumption of “forcing *ad libitum*” the rules indirectly attributed to NGOs appears neither legitimate nor justified. The Rome Tribunal, in a single stroke, presumes to annul the right and duty of the ship's captain to assess a specific situation which arises, and the obligations of States built up over the years by the Conventions mentioned and

the amendments which have been adopted⁸. But, in light of the practice and the rules themselves on Search and Rescue, there is no other model, and the solution of relying exclusively on the flag State in the absence of intervention by the SAR State is precisely what the Hamburg Convention, particularly with the 2004 amendments, sought to prevent through the mechanism of solidarity and co-responsibility of all the States involved! The Public Prosecutor's Office too, in its request for dismissal in the same case, points out that the 1979 Hamburg Convention, in section 5.3.4.1. provides that "when a rescue coordination centre or secondary rescue centre is informed of the existence of an emergency phase and ignores whether other centres are taking the appropriate measures, it undertakes to take the necessary measures and contacts neighbouring centres with a view to designating a centre to take immediate responsibility for the operations".

Even more explicit in expressing prejudice against the activities of NGOs and the need to enforce the rules on SARs mentioned above is another directive of the same Ministry, issued just a few days after (15 April 2019) the one already examined, this time concerning the vessel *Mare Jonio*, flying the Italian flag. In fact, the directive requires that the vessel in question must ensure that it complies with the instructions given (i.e. not to enter Italian waters), expressly stating in the recitals that "interventions by private vessels in specific and limited sea areas, which result in the preventive and intentional transport of migrants to the European coasts, materialize, also for publicity activities, a 'mediated' cooperation which, in fact, encourages the sea crossings of foreign citizens not in regular possession of a stay permit and promotes, objectively, their illegal entry into the national territory". The directive therefore abides by that idea, which was at the basis of the European "rejection" of the Italian *Mare Nostrum* operation, but is completely contradicted by practice, according to which an effective Search and Rescue activity provides an incentive

⁸ 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 F. De Vittor, M. Starita, "Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters", *Italian Yearbook of International Law*, 2018, p. 82 ff.; M. Starita, "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.

(“taxi effect” as defined at the time of *Mare Nostrum*) to departures⁹. 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*”¹⁰, 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 a significant number of rescues”. The “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

⁹ See in this regard the paper by E. Cusumano, M. Villa, “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 G. Bevilacqua, “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.

¹⁰ 2019/2755(RSP)B9-0154/2019, <http://www.europarl.europa.eu/doceo/document/B-9-20190154_EN.html>(06/20).

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 environment¹¹. However, the requirement for authorisation to transit remains a practice considered incompatible with freedom of navigation. In order to overcome the evident discrepancy with the rules of the provisions issued by the Italian legislator, the Rome Tribunal, in the decision mentioned above, made a logical and factual reversal of the situation and competences in the Search and Rescue field represented by the decision, according to which, unlike in cases where the State acts directly, ships belonging to humanitarian organizations “once the rescue has been carried out, autonomously choose the route to travel and the country to turn to for the indication of a POS”. But according to the facts, there is no “autonomy”; on the contrary, the difficulty of having to act in the absence of indications from the States emerges. Hence the impossibility of defining the passage as non-innocent.

4. Conclusions

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

¹¹ On this point please refer to G. Cataldi, “Problèmes généraux de la navigation en Europe”, in Rafael Casado Raigon (ed.), *Europe et la mer, II Colloque de l’Association internationale du droit de la mer*, Bruylant, Bruxelles, 2005, p. 127 ff.

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 decree *bis*” 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 jurisprudence, which continues to affirm the primacy of legality, both domestic and international, without surrendering to pressures of alleged exceptional necessity and urgency¹².

¹² 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 decree *bis*”), forcing the “blockade” opposed by the military authorities and leading the migrants rescued on 12 June 2019 to a safe place for disembarkation.