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Is It Lawful to Save Human Lives at Sea? The Duty to Rescue, place of Safety and Principle of Non-refoulement in Italian Case-law*

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Abstract [En]: This contribution aims to analyze Italian case-law concerning NGOs involved in search and rescue activities in the Mediterranean, and will focus on the notion of 'place of safety' that emerges from it. In recent years there has been a campaign in media and political discourse that has resulted in the adoption of law aimed at criminalizing activities conducted at sea by NGOs. Nevertheless Italian courts, taking inspiration from an integrated interpretation of international obligations regarding both maritime law and human rights, have consistently absolved NGOs of wrongdoing, arguing that they have acted in compliance with the duty to rescue at sea. Italian Courts, among them the Supreme Court (Corte di Cassazione), have promoted the principle of non-refoulement as an essential elements in the identification of a place of safety for persons rescued at sea, who must be protected regardless of other considerations, and without any form of discrimination.

Abstract [It]: Il contributo intende analizzare la giurisprudenza italiana di merito e di legittimità resa con riguardo alle ONG impegnate nelle attività di ricerca e soccorso nel Mediterraneo, soffermandosi sulla nozione di luogo di sbarco sicuro che ne emerge. Negli ultimi anni si è assistito ad una campagna mediatica e politica di criminalizzazione delle ONG, sfociata nell'adozione di provvedimenti normativi che ne ostacolano le attività di salvataggio, prevedendo sanzioni amministrative o penali nei confronti delle stesse. I tribunali italiani, ispirandosi ad una lettura integrata degli obblighi internazionali sul diritto del mare con quelli sui diritti umani, hanno costantemente assolto tali attori, ritenendo abbiano agito in ottemperanza dell'obbligo di soccorso. La giurisprudenza ha valorizzato il principio di non-refoulement quale elemento essenziale per l'individuazione del place of safety delle persone soccorse in mare, di cui va salvaguardata la sicurezza al di là di qualsiasi altra considerazione e senza discriminazione alcuna.

Keywords: migration by sea; duty to rescue; search and rescue operations; place of safety for disembarkation; human rights; principle of non-refoulement; NGOs; criminalization
Parole chiave: Migrazioni via mare; obbligo di soccorso; operazioni di ricerca e soccorso; luogo di sbarco sicuro; diritti umani; principio di non respingimento; ONG; criminalizzazione

* Articolo sottoposto a referaggio.

1. Introduction

Between 2015 and 2018 NGOs involved in search and rescue operations in the central Mediterranean brought around 120,000 people to safety, and became the clearest symbol of solidarity with those fleeing poverty, war, and persecution.[1] In spite of that – or maybe precisely because of that – various European governments began a concerted campaign of criminalization, aimed at discrediting and bringing to a halt the search and rescue operations carried out by humanitarian organizations.[2]

In Italy the strategy to fight NGOs' operations has been organized on two levels, governmental and judicial, which initially coincided but then proceeded autonomously and divergently.[3] As regards the activity of administrative authorities and the government, a full analysis of which would fall outside the scope of the present work, this has taken the form of: the adoption of documents without mandatory legal value (Minister Minniti's *code of conduct*[4]) and *ad hoc* laws (the "*Sicurezza bis*" decree[5] and the Lamorgese decree[6]); a "closed ports" policy, reiterated opportunistically during the pandemic as well – though only in relation to ships under foreign flags that have carried out rescues at sea;[7] and, more recently, the commencement of government inspections and detainment in port of NGO ships on various grounds, including failure to comply with navigation requirements, carrying an excessive number of passengers, and even environmental infringements.[8] As regards legal measures, without making any claims to comprehensiveness, it should be enough to recall that the "*Sicurezza bis"* decree gave the Interior Ministry, along with the Ministry of Defense and the Ministry of Infrastructure and Transport, the power "to limit or prohibit the entry, transit, or stopover of ships in territorial seas, except [in the case of] naval ships or ships in non-commercial government service, for reasons of order and public safety", i.e., whenever the

[1] AI, Punishing Compassion. Solidarity on Trial in Fortress Europe, 2020, p. 54. On NGOs' operations at sea, see G. BEVILACQUA, *Italy Versus NGOs: the Controversial Interpretation and Implementation of Search and Rescue Obligations in the Context of Migration at Sea*, in The Italian Yearbook of International Law, 2019, pp. 11-27; S. CARRERA, R. CORTINOVIS, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean Sailing Away from Responsibility?*, CEPS Paper, in Liberty and Security in Europe, June 2019; V.J. SCHATZ, M. FANTINATO, *Post-Rescue Innocent Passage by Non-governmental Search and Rescue Vessels in the Mediterranean*, in The International Journal of Marine and Coastal Law, 2020, pp. 740–771.

[2] FRA, June 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights, 2021.

[3] L. MASERA, *Il contrasto amministrativo alle ONG che operano soccorsi in mare, dal codice di condotta di Minniti, al decreto Salvini bis e alla riforma Lamorgese: le forme mutevoli di una politica costante*, in Questione giustizia, 15 June 2021.

[4] Code of Conduct for NGOs Undertaking Activities in Migrants' Rescue Operations at Sea, 2017.

[5] Legislative Decree no. 53, 14 June 2019, converted with changes by law no. 77, 8 August 2019. On the "*Sicurezza bis*" decree, see G. CATALDI, *Il "decreto sicurezza bis" alla prova degli impegni internazionali dello Stato in materia di diritto del mare. Alcune osservazioni*, in Diritti umani. Cronache e battaglie, no. 3, 2019, pp. 439-454.

[6] Legislative Decree no. 130, 21 October 2020, converted with changes by law no. 173, 18 December 2020.

[7] Inter-ministerial decree no. 150, 7 April 2020; for critical considerations of this, see A. ALGOSTINO, *Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati*, in Questione giustizia, 21 April 2020.

[8] F. DE VITTOR, *Il Port State Control sulle navi delle ONG che prestano soccorso in mare: tutela della sicurezza della navigazione o ostacolo alle attività di soccorso?*, in Diritti umani e diritto internazionale, 2021, pp. 103-128; L. MASERA, *Il contrasto amministrativo*, cit. On this point, see also the observations made by the Court of Ragusa (sez. civ.), transcript of the hearing of 16 June 2021, in particular p. 10.

conditions exist as stipulated in Art. 19, §2, (g) of the United Nations Convention on the Law of the Sea (UNCLOS),[9] with regard to violations of the existing laws of immigration. In the event that the aforementioned prohibition was violated by the ship captain, the imposition of a severe penalty was previsioned, consisting of the payment of between €150,000 and €1,000,000, as well as the seizure of the vessel. Right from the start the law testified to the spirit with which it had been adopted, namely, as a deterrent aimed at humanitarian organizations involved in sea rescues: and indeed the "*Sicurezza bis*" decree was immediately implemented against the *Sea Watch 3*, an NGO ship. This was the case at the origin of a significant decision made by the Court of Cassation,[10] which we will return to in greater detail. The deterrent and repressive apparatus prepared by the "*Sicurezza bis*" decree was subsequently modified by the Lamorgese decree, although this confirmed the possibility of limiting or prohibiting the transit or stopover of foreign ships in territorial seas (the reference to entry was excised), except in the case of naval ships or ships in non-commercial government service. The financial penalty was changed (it now ranged from €10,000 to €50,000), and allowance was made for the imprisonment of the master of the ship in violation of the prohibition for up to two years. In the new legislation it was made clear that the order of prohibition could not be issued in the event of rescue operations communicated immediately to the Rescue Coordination Center and to the vessel's flag State, and carried out in accordance with the guidelines issued by the authorities responsible for search and rescue operations at sea; furthermore Italian authorities, in providing guidelines to ships involved in rescues, would have to comply with "obligations deriving from international conventions regarding maritime law, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and national, international, and European laws regarding the right to asylum". This is an important qualification in light of the practices witnessed so far, which have often seen NGOs instructed not to intervene and instead cede operations to the Libyan coastguard, or to disembark survivors in unsafe places.[11]

Nonetheless, these changes are not enough to overcome a legal system aimed at criminalizing organizations involved in fulfilling international obligations of sea rescue,[12] and appear somewhat

[9] United Nations Convention on the Law of the Sea, adopted on 16 November 1994, and implemented by Italy with law no. 689/1994.

[10] Court of Cassazione (sezione terza penale), judgement of 6 January 2020, no. 6626. On this judgement see C. PITEA, S. ZIRULIA, *L'obbligo di sbarcare i naufraghi in un luogo sicuro: prove di dialogo tra diritto penale e diritto internazionale a margine del caso Sea Watch*, in Diritti umani e diritto internazionale, 2020, pp. 659-687; we would also direct readers to G. BEVILACQUA, A. DEL GUERCIO, *La vicenda* Rackete*: profili di compatibilità con il diritto internazionale del mare e dei diritti umani*, in Diritti dell'uomo. Cronache e battaglie, no. 1, 2020, pp. 29-64, and the bibliography it includes.

[11] On this subject, see S. ZIRULIA, *Dai porti chiusi ai porti socchiusi: nuove sanzioni per le navi soccorritrici nel Decreto Lamorgese,* in ADiM Blog, Analisi & Opinioni, March 2021.

[12] On this issue, see P. DE SENA, M. STARITA, *Navigare fra istanze "stato-centriche" e "cosmopolitiche": il caso "Sea-Watch" in una prospettiva conflittuale*, in SIDIBlog, 14 July 2019.

ambiguous, aimed as they are at achieving their effect almost exclusively at a media level.[13] Moreover, the Italian policy is part of the European Union's wider strategy, whose primary aim is to discourage departures to Europe at any cost.[14]

In this paper we aim to draw attention to the jurisprudence[15] delivered by Italian tribunals with regard to the duty to rescue those in danger at sea and the notion of a place of safety, and verify its compatibility with international obligations regarding human rights, and in particular the principle of non-refoulement. We will proceed by reviewing the judgments made so far by Italian judges, and then reconstruct the content of the obligation to rescue those at sea and prohibition on expulsion established at international level, and which must also be implemented in Italian law, in accordance with Articles 10, 11 and 117 of the Constitution.

2. Jurisprudence on the Duty to Rescue and Safe Places of Disembarkation

In this section we will examine Italian jurisprudence on the duty to rescue, beginning with that ruled on substantial grounds. We will focus above all on the famous judgment given on the *Cap Anamur* case of 2009, even though this is not directly connected to recent events, and in particular to the criminalization of solidarity consolidated in Europe from 2017 onwards.[16] We will then proceed with an analysis of the more recent jurisprudence, which concerns, in the majority of cases, search and rescue operations conducted by NGOs in the central Mediterranean. We will conclude the section by dwelling on the judgment of the Court of Cassation on the *Sea Watch 3* case.

2.1. Italian Case-Law ruled on Substantial Grounds: The *Cap Anamur* Case

The *Cap Anamur* judgment, with which we will begin this inquiry, offers, as will be illustrated, certain undoubtedly analogous elements to the *Sea Watch 3* case, both in its factual circumstances and the conclusions reached by the two courts. In the first case the ship's master and first mate, along with the president of the German humanitarian organization, were accused of abetting illegal immigration under Article 12 of the law on immigration.[17] They had, in the summer of 2004, rescued thirty-seven people on

[13] L. MASERA, *Il contrasto amministrativo*, cit., p. 12 ss.
[14] On this "political design", see F. MARCELLI, *La salvaguardia della vita umana in mare come obbligo di jus cogens degli Stati*, in G. BEVILACQUA (ed.), *Sicurezza umana negli spazi navigabili: sfide comuni e nuove tendenze*, Editoriale scientifica, Napoli, 2021, p. 49 ff.
[15] Making reference above all to sentences and cases whose transcriptions are accessible.
[16] Court of Agrigento (Prima sezione penale), judgment of 7 October 2009, no. 954; for further consideration of this, see F. VASSALLO PALEOLOGO, *Il caso Cap Anamur. Assolto l'intervento umanitario*, in Diritto immigrazione e cittadinanza, no. 2, 2010, pp. 87-102.
[17] Legislative decree, 25 July 1998, no. 286 (*Testo unico sull'immigrazione*).

board an inflatable raft that was in difficulty in international waters, and had brought them for disembarkation on Italian territory.

The rescue operation had taken place on 20 June 2004, and the *Cap Anamur* had then sailed for Lampedusa, believed to be "the safest [nearby] port according to international law, i.e., a place in which human rights, medical assistance, and legal conditions for the treatment of migrants would all be guaranteed" (p. 12). Following the docking in Porto Empedocle on 12 July 2004, the three defendants were arrested and the vessel was seized. The Court of Agrigento, in its judgment of 7 October 2009, argued that the act for which the captain, first mate, and president of the German humanitarian organization were prosecuted, while possibly involving the criminal circumstances alleged by the prosecution, was nonetheless "justified by extenuating circumstances stipulated in Art. 51 of the Penal Code, in this instance the fulfillment of a duty imposed by international law" (p. 26). These extenuating circumstances referred to a given objective: the rescue of people in difficulty, who, the judges declared, were "'victims of a shipwreck' first, 'migrants' or 'asylum seekers' second" (*ibid.*).

Recalling the international treaties on maritime rights, the judges argued that the master of the *Cap Anamur* had the *legal obligation* to bring the people in peril at sea to safety and take them to a safe place, which may only provisionally be a ship. Once again, the judges highlighted that "the foundation of the legal duty to rescue, understood as a whole", consisted "not only of the need to free the ship from the 'burden' of handling the shipwreck victims, but also, and above all, of the need to guarantee to them *the universally recognized right to be brought to land*" (italics added). The defendants had thus carried out a rescue operation required by international and Italian law that could only end with disembarkation. It should be highlighted that even at that point Libya, despite having the ports closest to the rescue location, was not considered safe, as fundamental human rights were not guaranteed there. Also worthy of note – given current dynamics, too – is the passage pointing out that the issue of identifying the State responsible for examining asylum requests is entirely separate from the issue of identifying a place of disembarkation after rescue, which cannot be determined according to the criteria established by Regulation (EC) no. 343/2003 (known as "Dublin II").

2.1.2. More Recent Italian Case-Law

Moving on to more recent jurisprudence, which deals primarily with rescue operations undertaken in the last few years by NGOs in the central Mediterranean, the cases relevant to the current study are numerous. We should note above all the decree with which the Judge for Preliminary Investigation

(*Giudice per le indagini preliminari* – GIP) of Ragusa[18] dismissed the request made by Prosecution of preventive seizure of the vessel, following the Captain's refusal to hand over to the Libyan coastguard the shipwreck victims it had rescued in the Libyan SAR zone. In this case the grounds for justification, which allows us to exclude *fumus commissi delicti*, was identified in the state of necessity provided for by Article 54 of the Penal Code, which, according to the GIP, applies not only to the immediate peril faced by the rescued person, but also to whatever may happen in the event of disembarkation in an *unsafe place*. Given the violence and abuse endured by migrants in Libya, the country cannot be considered a safe place for disembarkation.

It is worth highlighting that the Tribunal of Ragusa, confirming the decision of the GIP, held that Libya, in light of the country's uncertain and conflictive internal political situation, could not be considered safe even after the signing of the Memorandum of Understanding on 2 February 2017,[19] meaning that this document could not be invoked as a guarantee of the observance of migrants' fundamental rights.[20] On this point we should recall the established case-law of the Strasbourg Court, which argues that simply having signed international agreements that stipulate respect for human rights is not enough to exclude the responsibility of the Contracting Parties in cases where foreigners are to be expelled. The *de facto* situation must always be verified,[21] since the European Court of Human Rights aims to offer protection that is practical and effective, rather than theoretical and illusory.

Moving on with the reconstruction of the evolving mosaic of Italian jurisprudence concerning the rescue of migrants at sea, of note is the request for dismissal drafted by the Public Prosecutor of Palermo in regard to criminal proceedings in which unknown persons were supposed to have committed crimes of criminal association (Art. 416, comma 6, Penal Code) and abetting illegal immigration into the national territory (Art. 12, decree-law no. 286/1998).[22] In the ruling, after having recalled the international obligations of maritime law, mention is made of the documents on human rights that are to regulate rescue operations and disembarkation; and according to these, the crew of the *Sea Watch* decided correctly to bring the rescued migrants to Italian territory. Among the principles listed is that of non-refoulement,

[18] Tribunal of Ragusa, Office of the Judge for preliminary investigation, Decree rejecting the request for preventive seizure (*Decreto di rigetto di richiesta di sequestro preventivo*), 16 April 2018; Public Prosecutor - Court of Palermo (Procura della Repubblica presso il Tribunale di Palermo), Request for dismissal (*Richiesta di archiviazione*), Procedure no. 9039/17 R.G.N.R. mod. 44. On the latter we direct the reader to M. PATARNELLO, *Dissequestrata la nave Open Arms: soccorrere i migranti non è reato*, in Questione giustizia, 10 April 2018.

[19] Memorandum of Understanding on Cooperation in the Field of Development, Fight against Illegal Immigration, Trafficking in Human Beings and Smuggling and on Enhancement of Border Security, 2 February 2017.

[20] On the cooperation between Italy and Libya see A. LIGUORI, Migration Law and the Externalization of Border Controls. European State Responsibility, Routledge, 2019.

[21] *Hirsi and others v. Italy*, application no. 27765/09, GC, judgement of 23 February 2012.

[22] Public Prosecutor - Court of Palermo, request for dismissal (*Procura della Repubblica presso il Tribunale di Palermo, richiesta di archiviazione*), 28 May 2018. This recalls the judgement made by the GIP of Ragusa on the *Open Arms* case, analysed above.

which, on the advice of UNHCR, involves the "humanitarian" duty of all coastal States "to allow ships in trouble to seek shelter in their waters and grant asylum, or, at least, issue a measure of temporary protection to the people onboard requesting asylum".[23] The judge highlights in consequence that, "since the humanitarian vessel had rescued migrants who found themselves in *danger*, the action is justified" according to the rule referred to in Art. 51 of the Penal Code, i.e., "having fulfilled a duty imposed by an international legal standard".[24] Furthermore, the rescue operations undertaken by the *Sea Watch* "certainly constitute rescue operations and humanitarian assistance to migrants in distress", and thus do not amount to a crime, in accordance with Art. 12 comma 2 of decree-law no. 286/98.

As regards the choice of the place of disembarkation, this is to be determined both according to maritime law and in respect of the fundamental rights of rescued persons. The document goes on to say that:

"*the legal duty to save the lives of migrants* and to ensure the respect of humanitarian principles once disembarkation has taken place require a substantive interpretation of Art. 98 of UNCLOS: it follows that *the nearest port, then, must not be identified solely with reference to geographic position, but must instead, necessarily, be whichever guarantees respect of the aforementioned rights*. It thus comes as no surprise that the *Sea Watch* preferred to disembark on Italian shores: on the contrary, this is the logical consequence of everything outlined above, and appropriate management of rescue operations" (p. 6, italics added).

The request for dismissal received by the GIP highlights how "the complete lack of cooperation from the State of Malta in the management of search-and-rescue events" and the conditions of political and administrative instability encountered in Libyan territory exclude these territories from being considered valid alternative safe places.

In another example, the *Von Thalassa* case,[25] a case that is unrelated to NGO operations, the GIP of Trapani, on the basis of a comprehensive reconstruction of the international obligations of maritime law and the protection of human rights, stated that "the identification of a safe port for the disembarkation of people whose lives are in danger is an integral part of maritime search and rescue duties" (p. 26). In accordance with the SOLAS Convention,[26] the SAR Convention, the 2004 amendments, and the IMO guidelines on the treatment of persons rescued at sea, [27] the place of safety (POS) is where the lives and safety of the shipwreck victims are no longer in danger, and where primary needs may be satisfied,

[23] Executive Committee 32nd session, Conclusion No. 23 (XXXII) – 1981, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea; Conclusion No. 38 (XXXVI) – 1985, Rescue of Asylum-Seekers In Distress At Sea.
[24] Public Prosecutor - Court of Palermo, request for dismissal, cit., p. 5.
[25] Tribunal of Trapani, Office of Judge for preliminary investigation, judgement of 23 May 2019. For more on this, see L. MASERA, *La legittima difesa dei migranti e l'illegittimità dei respingimenti verso la Libia (caso* Vos-Thalassa*)*, in Diritto Penale Contemporaneo, 24 June 2019.
[26] International Convention for the Safety of Life at Sea (SOLAS), adopted on 1 November 1974, implemented in Italy with Law No. 313/1980.
[27] Resolution MSC.167 (78) del 20.05.2004, *Guidelines on the treatment of persons rescued at sea.*

"whenever persons rescued at sea, and not simply those involved in shipwrecks, also qualify – in terms of status – as 'migrants/refugees/asylum seekers', meaning they are thus subject to the guarantees and procedures of international protection, interpretation of the term 'safe' (in reference to the place of disembarkation) brings with it additional conditions that are linked to the *necessity of not violating fundamental human rights*, as enshrined in international human rights law… preventing 'disembarkations' in places that are 'unsafe', which would translate into open violations of the principle of non-refoulement, the prohibition on 'collective expulsions', and which, more generally, would be deleterious to the 'international protection' rights given to refugees and asylum seekers."[28]

The judge furthermore specified that, according to the international law of the sea, "migrants rescued at sea [had] a *genuine individual right to shelter in a POS (place of safety)*, a complementary right to the duty taken on by the signatory States of the conventions" on the duty to rescue.[29]

Therefore, GIP of Trapani sustains, it was inconceivable for Libya to be considered a safe place (p. 32) at the time that the Memorandum of Understanding with Italy was signed, and also at the time of the event in question, an assessment confirmed by UNHCR, which noted the ongoing unrest in Libya, its lack of an asylum system, the impossibility for vulnerable people to obtain protection, and the bad conditions in which migrants were detained. Given that migrants had encountered serious violence in Libya, they had "*a genuine individual right to shelter in a POS*, a symmetrical right to the duty assumed by the signatory States of the conventions. The migrants… acted in defense of even more fundamental human rights, such as the right to life and physical integrity", which one may protect with self-defense, in accordance with Art. 52 of the Penal Code (p. 43). Indeed, disembarkation in Libya would have been a violation of the principle of non-refoulement, which, in addition to being enshrined in international law and EU law, "has assumed binding and customary status" (p. 37). Whenever migrants and refugees are rescued at sea, "the need to prevent disembarkation from occurring in territory where their lives and

[28] Tribunal of Trapani, Office of Judge for preliminary investigation, judgment of 23 May 2019, p. 27.
[29] *Ibid.*, p. 46.

freedom may be threatened is important in determining what constitutes a safe place" (p. 47). [30] This position was confirmed by the Supreme Court in the decision of 16 December 2021.[31]

More recently the GIP of Agrigento dismissed charges against the Captain of the crew of the *Sea Watch 3*, who in May 2019 had rescued 47 people in international waters off the coast of Libya and brought them to Lampedusa. During disembarkation the ship was seized by the police, and the Captain put under investigation. According to the judges, the rescuers had acted "out of the necessity to save people who were trying to cross the Mediterranean on board dangerous vessels", and did so in accordance with national and international obligations that require "lives at sea to be saved".[32] Libya could not be considered a place of safety, and therefore the only realistic possibility, according to the GIP, was shelter in Italy. The definitive dismissal came on 23 December 2021, and was based on the justifications already put forward by the GIP. Captain Carola Rackete "acted in the conformity with her duty to rescue, as established by national and international maritime law". Furthermore - and this is also of great importance to what will be discussed further below - the judges noted that "rescue ships cannot be considered temporary 'places of safety', not even in the case of negotiations among Member States or because of the search for available accommodation in the reception system for asylum seekers. The responsibility of flag states cannot be put before the responsibility of coastal states asked to provide a place of safety and able to indicate a port of disembarkation in the nearest place of safety". This goes without exception, even "during the COVID state of emergency"[33].

At the same time the Public Prosecutor of Agrigento requested the dismissal of charges against the crew of the *Mare Jonio*, a ship run by the NGO *Mediterranea*, who on 10 May 2019 had rescued 20 shipwreck survivors in the Libyan SAR and brought them for disembarkation in Italy, without, however, asking the Libyan authorities for a POS. In the opinion of the judges the crew's conduct was appropriate, since

[30] This legal approach has been questioned by the Appeal Court of Palermo (Corte di appello of Palermo, IV Sezione Penale, judgment of 3 June 2020, no. 1525). Referring to the Public Prosecutor's arguments in support of the decision to appeal, the Court held that the principle of non-refoulement, which, as has been seen, was central in the analysis made by the Judge for preliminary investigation, is not a right, but a "condition of operation for the States conducting the rescue", and is not to be included among "migrants' personal rights" (p. 4). We find this interpretation of the principle of non-refoulement unacceptable. While the prohibition is undoubtedly a State's duty, it is also a personal right, as can be established in the national and supranational treaties that formalize it, as well as the laws governing international bodies. We will return to this point shortly. On the ruling see F. CANCELLARO, *Caso Vos Thalassa: una discutibile pronuncia della Corte d'Appello di Palermo sui rapporti tra legittima difesa e non-refoulement*, in ADiM Blog, August 2020; 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*, in Questione giustizia, 21 July 2020. The Supreme Court rejected the decision of the Appeal Court of Palermo in the *Von Thalassa case* on the basis of the right not to be returned to an unsafe place (Court of Cassazione (sezione sesta penale), judgement of 16 December 2021, no. 19708). We should also note that the preliminary hearing on the conduct of Matteo Salvini, as Interior Minister, in the *Gregoretti* case, closed without moving on to prosecution. He was remanded, and accused of kidnapping and refusing his duties by the Judge for preliminary investigation of Palermo as part of the *Open Arms* case, which originated with the refusal to disembark 147 migrants rescued in international waters, in the Libyan SAR zone.

[31] Court of Cassazione (sezione sesta penale), judgement of 16 December 2021, no. 19708.

[32] *Migranti. Archiviazione anche per Sea Watch. Così si sfalda la dottrina anti Ong*, in Avvenire, 21 October 2021.

[33] Tribunal of Agrigento, decree of dismissal, 23 December 2021.

Libya, according to the note issued by UNHCR, was not a country that was safe for migrants and refugees, given reports of them undergoing torture, abuse, rape, sexual violence, and human trafficking, sometimes carried out by State officials themselves. Accordingly, the Captain of a ship cannot be asked to disembark rescued persons in Libya, nor can specific SAR certifications be asked of an NGO.[34]

2.2. Italian Jurisprudence Ruled on Procedural Grounds: The Court of Cassation Judgment in the *Sea Watch 3* Case

We now come to the ruling made on 16 January 2020 by the Court of Cassation in regard to the case of the humanitarian ship *Sea Watch 3*, a case that began with Captain Carola Rackete's decision to enter Italian territorial waters and dock in the port of Lampedusa, and there allow the disembarkation of migrants rescued in international waters seventeen days earlier. This disembarkation took place in spite of a banning order issued by the Interior Ministry, in accordance with Art. 1 of the so-called "*Sicurezza bis*" decree, adopted barely one day previously. Among other things, it was the first time the Supreme Court offered its own interpretation of the duty to rescue those in distress at sea.

No sooner had she disembarked than Carola Rackete was put under arrest and accused of resisting a public official (Art. 337 of the Penal Code) and resistance and violence against a warship (Art. 1100 of the Naval Code), charges made, respectively, for having failed to divert her ship's course towards Lampedusa, and for bumping into a Guardia di Finanza vessel during docking maneuvers in port. However, the GIP of Agrigento, ruling out any criminal aspect of the Captain's actions, did not confirm her arrest because she had had acted in accordance with Art. 51 of the Penal Code.[35] The Supreme Court then rejected the appeal made by the Public Prosecutor of Agrigento against the GIP's ruling. The latter, on 19 May 2021, upheld the request for dismissal of the charges made against the captain, agreeing with the initial assessment made by the Court of Cassation and confirming that Carola Rackete had acted on the basis of the justification referred to in Art. 51 of the Penal Code.[36] As we have seen, the definitive dismissal came on 23 December 2021.

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[34] https://www.avvenire.it/attualita/pagine/chiesta-archiviazione-per-mare-jonio-soccorrere-non-e-reato. Although it does not fall within the type of operations examined in this study, we wish to note that on 13 October 2021 the Court of Naples convicted the Captain of the private ship *Asso 28*, belonging to the August Offshore company, for bringing over a hundred people rescued at sea to Libya in July 2018. While the court's arguments will only be made available in three months, what has so far emerged is that the court held that the Captain's actions could be considered crimes of "disembarkation and arbitrary abandonment of people", in accordance with Art. 1155 of the Italian Code of navigation and "abandonment of a minor", in accordance with Art. 591 of the Penal Code. https://www.asgi.it/primo-piano/libia-condanna-respingimento/.

[35] Tribunal of Agrigento, Office of Judge for preliminary investigation, order of 2 July 2019.

[36] Tribunal of Agrigento, Office of Judge for preliminary investigation, decree of dismissal (*Decreto di archiviazione*), 14 April 2021, which accepted the request of the Public Prosecutor - Court of Agrigento, 19 January 2021. For initial comments see F. VASSALLO PALEOLOGO, *Si archivia anche il caso* Rackete *ma i soccorsi umanitari rimangono nel mirino*, in *ADIF*, 3 June 2021.

This is not the place for a detailed illustration of the facts the Supreme Court ruled on. We will simply note that, given the GIP of Trapani's reconstruction of relevant legislation regarding search and rescue operations, the Supreme Court rejected the restrictive reading offered by the Public Prosecutor of Agrigento, who had argued that to fulfill the duties of maritime and human rights law to which Italy is bound it would have been enough to take the persons in distress at sea on board, and keep them in safety on the ship. The Supreme Court, on the other hand, holds – and its position is entirely in keeping with international maritime legislation – that the duty to rescue does not end with bringing the persons in distress onboard a ship, "but involves the *accessory and consequent duty* of disembarking them in a safe place (the so-called 'place of safety')" (par. 9, italics added). As regards the identification of a port of disembarkation, the Court of Cassation draws attention to the relevant international sources of information, among them the SAR Convention[37] and the IMO guidelines on the treatment of persons rescued at sea. It seems particularly noteworthy that the Supreme Court should specify that a ship at sea may only be considered a safe place temporarily, not just because it may be exposed to hazardous weather conditions, but above all because "it does not allow for the respect of the fundamental rights of the rescued persons", which include the "right to make a request for international protection…, a request that may certainly not be made onboard a ship" (par. 9). An extensive reading of the duty to rescue is thus offered, which goes beyond the rescue itself and the taking onboard of persons in distress at sea, and beyond even the disembarkation of those persons on land; though disembarkation is an *accessory and consequent* element of the duty to rescue, it also involves the subjective right of *requesting asylum*. This is a constitutionally-grounded interpretation that is based on a systematic and organic reading of the legal sources to which Italy is bound, in particular the Constitution, which enshrines the right to asylum in Art. 10, comma 3, and international and customary laws and conventions, which, in accordance with Art. 10, comma 1 and Art. 117 of the Italian Constitution, have primacy over domestic legislation. Among these is the international duty to rescue, which, since it has general application, receives the constitutional protection of Art. 10, comma 1, which legalizes rescue operations even when these are potentially in conflict with penal law,[38] as in the case in question. In light of the Supreme Court's judgment, the duty to rescue persons in distress at sea must be fulfilled completely, from taking the shipwreck victims onboard to their disembarkation in a place of safety and recognition of their right to request international protection. Although it is not mentioned explicitly, the Court of Cassation's interpretation is inspired by the principle of non-refoulement, which is the *conditio sine qua non* for people to enter a national territory

[37] International Convention on Maritime Search and Rescue ("SAR"), adopted on 27 April 1979, and implemented by Italy with D.P.R. no. 662/1994.
[38] V. M. STARITA, *Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave privata*, in Diritti umani e diritto internazionale, 2019, p. 40.

and request international protection,[39] and is in line with the Italian jurisprudence ruled on substantial grounds that for years has supplied a human rights-oriented interpretation of the concept of place of safety.

2.3. The Definition of a 'place of safety' in Italian Jurisprudence

The cases described above show the consolidation of a constitutionally oriented interpretation of the duty to rescue and definition of a place of safety for disembarkation, which are interpreted in accordance with Italy's international obligations and on the basis of Articles 10, 11 and 117 of the Constitution. This benchmark is formed of fundamental human rights, above all the principle of non-refoulement, a right that have also been recognized by the European Court of Human Rights.[40]

Without wishing to dwell too long on a reconstruction of the relevant international sources, it seems appropriate to at least run through them briefly. Article 98 of UNCLOS is the cornerstone of international maritime law insofar as it codifies the duty of solidarity at sea. In paragraph 1 it establishes the duty of the State to: "demand that the master of a ship under its flag, so far as it is possible for her/him to do so without putting the ship, crew or passengers at risk:

a) provides assistance to anyone found in distress at sea;

b) proceeds as quickly as possible to the rescue of those in peril, if it is known they are in need of assistance, to the degree that can be reasonably expected of her/him;

c) provide assistance to the other ship's crew and passengers if alongside it, and also, where possible, to communicate to the other ship the name of her/his own, as well as its port of registry, and the nearest port at which the ship in distress may stop."

This is a duty to which the State is bound, but which translates indirectly into the duty of the shipmaster,[41] who, apart from rare exceptions, cannot be exempted.[42] Furthermore, the duty of the master of *any* ship to rescue persons in distress at sea, so far as she/he is able to do so without putting her/his vessel and the people on board at risk, had already been included in Art. 10 of the International Convention on Salvage[43] and regulation 33.4 of SOLAS, which makes explicit reference to private ships. Moreover, if the master of a ship is not exempted from rescuing persons in distress due to the order of the State under

[39] See also Tribunal of Ragusa, Office of Judge for preliminary investigation, Decree rejecting the request for preventive seizure (*Decreto di rigetto di richiesta di sequestro preventivo*), 16 March 2018. This stance was confirmed by the Court of Review (*Tribunale del riesame*) of Ragusa, 11 May 2018. L. MASERA, *L'incriminazione dei soccorsi in mare: dobbiamo rassegnarci al disumano?*, in Questione giustizia.

[40] *Hirsi and others v. Italy*, cit., para. 134 and 202.

[41] On this issue see I. PAPANICOLOPULU, *Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative*, in Diritto immigrazione e cittadinanza, no. 3, 2017, p. 11; Id., *International Law and the Protection of People at Sea*, Oxford, 2018.

[42] M. STARITA, *Il dovere di soccorso in mare*, cit., p. 5 ss.

[43] International Convention on Salvage, adopted on 28 April 1989, and implemented by Italy with law no. 129/1995.

whose flag her/his ship is sailing, or at the request of the coordination center of the SAR zone in which those persons are located, the duty subsists in cases of autonomous initiative as well, whenever a shipwreck or persons in conditions of peril are encountered.[44] Interference from the vessel's owner, or charterer, or the ship's company, or indeed any other person, is not admissible either.[45]

International maritime law thus requires, whether directly or indirectly, that the master of *any* ship, whether public or private, and including the vessels used by humanitarian organizations, take action and give assistance to *any* person who finds her/himself in distress in *any* maritime zone, "regardless of the nationality or status of such a person or the circumstances in which that person is found".[46] *Distress* is defined as a situation "wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance".[47] Even if the UNCLOS, SOLAS and SAR Conventions do not specifically address migration, as they were adopted to regulate the classic scenario of people being rescued at sea, the obligation to provide assistance must be implemented for all people without discrimination based on nationality, legal status or reason of the journey.[48]

Returning to Article 98 of UNCLOS, paragraph 2, this commits the Contracting Parties to promoting the establishment and permanent functioning of an adequate and effective search and rescue service to protect maritime security, collaborating where necessary with neighboring States through regional agreements. The SAR Convention provides for the establishment of search and rescue regions for which each coastal State is responsible for, although the relevant regulations do not exclude that a State may operate outside these, where circumstances require. All the coastal States of the Mediterranean have arranged their own SAR zones and have communicated these arrangements to the IMO. Nonetheless, recent years have witnessed decreasing commitment by these States to their search and rescue duties, and continual conflicts of jurisdiction, which usually see the involvement of Italy, Malta, and more recently Libya, with detrimental effects on the right to life of the people attempting to reach Europe.[49] We want to recall that the duty to maintain adequate and effective SAR service is an obligation of conduct upon each coastal State, "meaning that each coastal State can be considered independently responsible for the violation of this obligation if the inadequacy or inefficiency of its SAR service contributes to loss of life

[44] I. PAPANICOLOPULU, *Immigrazione irregolare,* cit., p. 14. The duty to rescue has a corresponding rule in the Italian Naval Code, which criminalizes (in Art. 1158) any shipmaster who fails to comply with it.
[45] Chapter 5, Rule 34-1 SOLAS, as modified in 2004.
[46] SAR Convention, Chapter 2.1.10. Cf. Rule 33.1 SOLAS. In the literature, see T. SCOVAZZI, *Human Rights and Immigration at Sea*, in R. RUBIO-MARÍN (ed.), *Human Rights and Immigration*, OUP, Oxford, 2014, p. 225.
[47] Convention on Salvage, Annex, para. 1.3.11.
[48] G. CATALDI, *Introduction*, in Italian Yearbook of International Law 2021, p. 5; P. TURRINI, *Between a "Go Back!" and a Hard (To Find) Place (Of Safety): on the Rules and Standards of Disembarkation of People Rescued at Sea*, Ivi, p. 29 ff., p. 34.
[49] On this subject see G. CATALDI, *Search and Rescue of Migrants at Sea in Recent Italian Law and Practice*, in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (eds.), *Migration and Asylum Policies*, Editoriale scientifica, Napoli, 2020, p. 11 ss.

at sea".[50] Furthermore, in this legal framework, the failure to rescue people can be determined by the violation by two or more States of the same obligation to cooperate.[51]

The UNCLOS, SOLAS and SAR Conventions establish that a rescue operation can be considered to have concluded only when the victims of a shipwreck have been disembarked in a place of safety,[52] a role that can only temporarily be played by the rescuing ship.[53] Nonetheless the aforementioned treaties do not identify the places of disembarkation exhaustively, but are limited to reminding coastal States of the duty to collaborate with the States in whose SAR zones the rescue has taken place, in order to relieve the master of the ship in question of the responsibility of the rescued persons *as quickly as possible*.[54] The State in whose SAR zone the rescue has occurred does not necessarily have to provide a place of disembarkation; it does, however, have to assist in the identification of such a place.[55]

Guidelines for the identification of a port of destination are contained in several non-binding documents adopted by the IMO, which combine international maritime law with rules protecting refugees and human rights. In accordance with paragraph 6.19 of the guidelines on persons rescued at sea, disembarkation may not proceed in a place with regard to which the rescued persons express a fear of persecution. Further, in the manual produced in conjunction with UNHCR, it is specified that a place of safety is a location where the rescue operation can be considered to have concluded, and where, in addition to satisfying fundamental human needs (such as food, shelter, and medical care), the safety and

[50] F. DE VITTOR, M. STARITA, *Distributing Responsibility between Shipmasters and the Different States Involved in Sar Disasters*, in Italian Yearbook of International Law, 2021, p. 77 ff., p. 88.

[51] *Ivi*, p. 90.

[52] Para. 3.1 and 4.8 of the amendments to the SAR and SOLAS Conventions, RIS. MSC 155(78), 20 May 2004. On this subject see C. DANISI, *La nozione di «place of safety» e l'applicazione di garanzie procedurali a tutela dell'individuo soccorso in mare*, in Rivista internazionale dei diritti umani, 2021, p. 395 ff.

[53] Para. 6.13, *Guidelines on the treatment of persons rescued at sea*, cit.

[54] Para. 3.1.9 SAR Convention; 9 IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea), 2004, paras. 6.13-6.14 The reconstruction offered by the Tribunal of Catania, Office of Judge for preliminary investigation, in relation to the *Gregoretti* case on 9 August 2021, seems totally incompatible with international sources. In the Judge's view, since the POS and disembarkation are not associated with a mandatory timeframe, disembarkation does not have to take place "immediately", but only "within a reasonably quick time", which may be as long as 2-3 days, so that necessary logistics can be put in place for the reception of a vessel (pp. 97-98). In fact, no international treaty legitimizes any delay in sheltering asylum seekers to allow for organizing their allocation to reception centers, or even to different countries. Furthermore, the GIP makes a distinction, unsupported by international maritime law, between identification of POS and disembarkation, when the end of a rescue operation, as shown above, is disembarkation itself, meaning that identification of a place of safety is merely a preliminary step towards guaranteeing that the persons on board reach land in accordance with their fundamental rights. The judgment also seems problematic if we consider the relationship between international and national sources, since the legal basis for legitimizing a delay in assignation of the POS, downgrading its urgency to give "adequate time" for evaluation of the necessary logistics and availability of European partners capable of hosting the refugees, is an agreement made by a technical committee on 12 February 2019 – that is, nothing but an internal working document. No delay of the sort exists in the international treaties on maritime law, which insist instead on the speedy disembarkation of the rescued persons.

[55] Par. 2.5 Resolution MSC.167(78) (adopted in May 2004 by the MSC together with the amendments to the SAR and SOLAS conventions). On this subject see F. DE VITTOR, M. STARITA, *Distributing Responsibility*, cit.

lives of the survivors are no longer under threat.[56] Thus, in the event that disembarkation may lead to a violation of the principle of non-refoulement, the identified place cannot be called safe.[57]

The principles described above therefore demonstrate clearly that a port of disembarkation must be determined with respect for human rights. Such an interpretation also comes from the documents adopted by the Council of Europe, in particular Resolution 1821(2011), and the Recommendation of the Commissioner for Human Rights adopted in 2019.[58] This emphasizes again that the safety of the place of arrival must be evaluated in accordance with maritime law, human rights, and international laws regarding the protection of refugees.[59] Among other things, it noted the role of the master of the ship, who is in the most appropriate position to identify such a place, and who should thus not receive instructions that may lead to the disembarkation of rescued persons in an unsafe place.[60]

What stands out in particular in the framework described above is the principle of non-refoulement, which was first codified in Art. 33.1 of the Geneva Convention in 1951 concerning refugees as defined in Art. 1A. Nonetheless the aforementioned article allows exceptions when a person is considered to be a danger or threat to the security of the country in which she/he resides; this includes conviction for a particularly serious crime or felony (par. 2).

A wider subjective application is characteristic, on the other hand, of the principle of non-refoulement that has been established in international systems for the protection of human rights beginning with the jurisprudence regarding the expulsion of aliens in accordance with Art. 3 of the ECHR, which establishes the prohibition of torture and inhuman and degrading treatment or punishment. From the article in question the Strasbourg Court has derived, through the mechanism of protection *par ricochet*, the absolute and inviolable ban on expelling or deporting a non-citizen to a territory in which s/he would run the risk of undergoing treatment harmful to her/his dignity.[61] This prohibition concerns everyone, and not solely refugees, has an absolute and inviolable value, and does not allow balancing, even in the case of danger to public order and safety, since it has been derived from the ban on torture, which, according to the Strasbourg Court, is one of the fundamental values of a democratic society.[62]

The prohibition of expulsion obtained from Articles 6 (right of way) and 7 (ban on torture and inhuman and degrading treatment or punishment) of the International Covenant on Civil and Political Rights by

[56] UNHCR, IMO, *Rescue at sea: A guide to principles and practice as applied to migrants and refugees*, 2015.
[57] UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, 2017.
[58] CoE COMMISSIONER FOR HUMAN RIGHTS, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, 2019.
[59] *Ibid*., p. 11.
[60] See also IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, FAL.3/Circ.194 (2009), para. 2.3.
[61] N. MOLE, C. MEREDITH, Asylum and the European Convention on Human Rights, Council of Europe Publishing, 2000.
[62] *Saadi v. Italy*, Application no. 37201/06, Grand Chamber, judgement of 28 February 2008, para. 139.

the UN Human Rights Committee, and codified in Article 3 of the UN Convention on Torture, has a similar scope.[63]

The principle of non-refoulement has been expressly brought into question with regard to sea migrations since as early as the Indochina crisis, in the case of which the Executive Committee of the UNHCR upheld the principle's applicability even in the case of mass exodus. In particular, it specified that "in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge, and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis. In all cases the fundamental principle of non-refoulement – including *non rejection* at the frontier – must be scrupulously observed." [64]

Accordingly, in the opinion of both the ExCom of UNHCR and scholars,[65] from the principle of non-refoulement we may derive the right of entry to a State's territory, at least temporarily, in order to present one's application for asylum.

The peremptoriness in all circumstances of the aforementioned prohibition and the general application[66] have been reiterated both regarding rescue operations, including those that take place in international water or the SAR zone of a non-EU State,[67] and interception operations, whenever a State exercises its own jurisdiction, even outside its borders.[68] In this respect the Strasbourg Court has stated that "the specificity of the maritime context cannot lead to the establishment of a space without rights, within which individuals would not be subject to any legal system capable of providing them with enjoyment of the rights and guarantees set out by the Convention, and which States have pledged to recognize with people within their jurisdiction".[69] In consequence, in such circumstances too the principle of non-refoulement, pursuant to Art. 3 of the ECHR, must be complied with, as well as the prohibition of collective expulsion referred to in Art. 4 of Prot. 4, from which we may derive, moreover, the duty to

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[63] C.W. WOUTERS, International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, Leiden University, Leiden, 2009.

[64] ExCom 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees, 21 October 1981.

[65] G.S. GOODWIN-GILL, J. MCADAM, The Refugee in International Law, Oxford University Press, Oxford, 2007, p. 257 ss.; J.C. HATHAWAY, The Rights of Refugees under International Law, Cambridge University Press, Cambridge, 2005, p. 370 ss.

[66] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2017, p. 15. This opinion is shared by scholars, including J. ALLAIN, *The jus cogens nature of non-refoulement,* in International Journal of Refugee Law, no. 4, 2001, p. 533 ss.; F. MARCELLI, cit.

[67] OHCHR, *Lethal Disregard Search and rescue and the protection of migrants in the central Mediterranean Sea*, 2021, p. 19. Cf. OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders (2014), I. A.1, II.A.2, II.A.5.*

[68] UNHCR, *Advisory Opinion*, cit. On this subject see also S. TREVISANUT, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea", Leiden Journal of International Law, no. 3, 2014, pp. 661-675.

[69] *Hirsi and others v. Italy*, cit., par. 169.

identify people, conduct personal interviews, and enable access to asylum procedures. It is obvious that such operations cannot take place on board a vessel, both because a rescue operation must conclude as quickly as possible, since, as mentioned previously, a ship may only temporarily be a safe place; and because the crew do not have the necessary training to process and examine asylum requests, as the European Court of Human Rights has argued itself.[70]

Given the framework outlined above, UNHCR has ruled that, following a rescue or interception operation, "before disembarking, transferring, or otherwise delivering or returning a person who may be in need of international protection to the territory or jurisdiction of another State, States need to ensure that the person concerned:

- will be admitted and protected against *refoulement* there;
- will have access to fair and efficient procedures for the determination of refugee status or, as applicable, other forms of international protection;
- will be treated in accordance with international refugee law and human rights standards."[71]

3. The Duty to Rescue and Principle of Non-Refoulement in European Law

It seems appropriate at this juncture of the analysis to take a glance at the European Union framework, within which the principle of non-refoulement is recognized, and stipulated in both the primary (Article 78 TFEU; Article 19 EU Charter of Fundamental Rights) and secondary sources on asylum, immigration, and combatting trafficking. The institutions and agencies of the EU, as well as the Member States when EU law is implemented, are required to comply with the principle. Even Frontex regulations[72] and the Council's decision regarding maritime border surveillance[73] clearly include the principle of non-refoulement. Moreover the Council's decision, albeit in a way that lacks clarity and force, attempts to regulate the definition of the place of disembarkation both in the case of interception and search and rescue operations at sea. Nonetheless we must bear in mind that the rules and guidelines defined here are applied only in operations coordinated by Frontex, and thus do not concern those conducted by Member States, much less those ascribed to NGOs.

[70] *Ivi,* par. 185.
[71] UNHCR, *Advisory Opinion*, cit., par. 6. Cf. OHCHR, *Lethal Disregard*, cit., pp. 16-17.
[72] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.
[73] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; on this see A. DEL GUERCIO*, Controllo delle frontiere marittime nel rispetto dei diritti umani: prime osservazioni sulla decisione che integra il Codice delle frontiere Schengen*, in Diritti umani e diritto internazionale, 2011, pp. 193-200.

If we come to more recent developments, while the new Pact on Migration and Asylum[74] expressly claims that "providing assistance to persons in danger at sea is a moral duty and an obligation under international law", the priority of the planned measures is not the safety of human life at sea.[75] As has been shown, "the focus… is neither on the protection of seaborne migrants and refugees nor on the elimination of the structural factors that push them to take the sea to reach safety in the first place. The main concern is with managing mixed flows and countering irregular arrivals, on the basis that "dangerous attempts to cross the Mediterranean continue to bring great risk and fuel criminal networks".[76] Furthermore, from the new Pact and its accompanying documents there emerges a specious correlation between sea rescues carried out by private entities, above all NGOs, and the reinforcement of criminal networks that manage human trafficking,[77] along with a deleterious impact on the systems with which Europe manages asylum seeking, migration, and its borders.[78] The most substantial measure mentioned by the Commission "to prevent perilous voyages and illegal crossings" is cooperation with the countries of origin and transit, in line with the priorities and general immigration strategy that emerges from the Pact.[79] On the basis of the role of coordination undertaken in the transfer of almost two thousand disembarked people following rescue operations carried out by private ships, a mechanism of solidarity is proposed for disembarkations, laid down in the proposal of regulation of the management of asylum and migration.[80] This is not the place for a minute examination of the document, for which we would direct the reader to the existent scholarly literature on the matter, which is somewhat skeptical as regards the effectiveness of the mechanism planned by the Commission.[81] We will limit ourselves to noting that the response to the disembarkations following search and rescue operations relies once again on the *voluntary* participation of

[74] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions on a New Pact on Migration and Asylum COM/2020/609 final, 23 September 2020.
[75] For a more general view see V. MORENO LAX, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment*, in umigrationlawblog.eu, 3 February 2021.
[76] *Ibid.*
[77] On this point see M. STARITA, *Il Patto sulle migrazioni e l'asilo della Commissione europea del 23 settembre 2020 e il dovere di soccorso in mare*, in M. D'ARIENZO, M. L. TUFANO, S. PUGLIESE, *Sovranazionalità e sovranismo in tempo di COVID-19*, Cacucci editore, Bari, 2021, p. 281. See also E. CUSUMANO, M. VILLA, *Sea Rescue NGOs: a Pull Factor of Irregular Migration?*, in Migration Policy Centre, issue 22, November 2019, deny the aforementioned link.
[78] *Ibid.*, p. 15.
[79] A. LIGUORI, *Il nuovo Patto sulla migrazione e l'asilo e la cooperazione dell'Unione europea con i Paesi terzi: niente di nuovo sotto il sole?*, in Diritti umani e diritto internazionali, 2021, pp. 1-18.
[80] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.09.2020, PART IV, SOLIDARITY, Artt. 45-49.
[81] G. CATALDI, *Le sauvetage des migrants en Méditerranée*, paper presented at the conference "Dublin en pratique – les récents développements juridiques dans l'UE et en Suisse avec un regard sur le 70ème anniversaire de la CSR", University of Basel; C. FAVILLI, *La solidarietà flessibile e l'inflessibile centralità del sistema Dublino*, in Diritti umani e diritto internazionale, no. 1, 2021, pp. 85-101; F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in EU migration law blog, 20 October 2020; M. STARITA, *Search And Rescue Operations Under The New Pact On Asylum And Migration*, in Sidiblog, 8 November 2020.

Member States, which, on the basis of the estimation of annual arrivals to the southern frontier carried out by the Commission, may choose what form their "contribution of solidarity" takes, and do not necessarily need to put themselves forward for the relocation – and therefore the reception – of people rescued at sea, since they may also choose to take measures of repatriation of citizens of non-member countries who lack permission to stay or technical and operational support (Art. 45). Accordingly, individual Member States choose how to determine the contribution they intend to offer in response to the Commission's request, following a rather complicated procedure defined in Articles 47-49 of the proposed regulation.[82] It should be specified, moreover, that only people who have disembarked following search and rescue operations may benefit from relocation, and not those who have arrived by sea on their own, and that the former, in any case, are ì put through the pre-screening procedure at the border.[83]

In the final analysis, it should be made clear that in the proposed regulation, as well as in the other documents that accompany the Pact, no references are made to the identification of a safe place of disembarkation, or to the definition of European Union operations aimed primarily at the protection of human lives at sea. This is in line with the trend of recent years.[84] The priorities, as stated previously, are the management of the border, including through cooperation with third States that do not respect human rights,[85] and the fight against organized criminals and traffickers. Indeed, the Pact makes no reference to the issue – which is a priority so far as arrivals at sea are concerned – of the disengagement of coastal States, which are primarily responsible for search and rescue operations at sea, nor does it refer to the scarcity of naval arrangements aimed at rescue rather than other aims (such as the fight against organized crime groups and human traffickers).[86] It is thus no surprise that the activity of private entities, and NGOs in particular, remains essential for the protection of human life at sea. This is confirmed in two non-binding documents that accompany the new Pact on Immigration and Asylum.

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[82] The mechanism of solidarity, as has been shown (C. FAVILLI, *La solidarietà flessibile*…, cit., p. 95), reproduces the contents of the Malta Declaration of 23 September 2019, signed by France, Germany, Italy, and Malta, but inserts them into the EU institutional framework. On the Declaration see CIR, *L'accordo di Malta sui migranti. Scheda tecnica*, in www.cir-onlus.org, 2019.

[83] L. JAKULEVIČIENĖ, *Re-decoration of existing practices? Proposed screening procedures at the EU external borders*, in EU migration law blog, 27.10.2020.

[84] This operation (UNAVFOR Med-Operation SOPHIA), implemented between June 2015 and March 2020 in the central Mediterranean, was aimed primarily not at protecting life at sea, but at combatting human traffickers, and was part of the EU strategy for stabilizing Libya. On this subject see A. ANNONI, *Il ruolo delle operazioni Triton e Sophia nella repressione della tratta di esseri umani e del traffico di migranti nel Mediterraneo centrale*, in Il Diritto dell'Unione europea, No. 4, 2017, p. 829 ss.; G. BEVILACQUA, *The Use of Force against the Business Model of Migrant Smuggling and Human Trafficking to Maintain International Peace and Security in the Mediterranean*, in G. CATALDI (ed.), *A Mediterranean Perspective On Migrants' Flows In The European Union: Protection Of Rights, Intercultural Encounters And Integration Policies*, Editoriale scientifica, Napoli, 2016, p. 119 ss.

[85] V. MORENO-LAX, *The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm*, in Journal of Common Market Studies, 2018, pp. 119-140.

[86] M. STARITA, *Search And Rescue Operations*, cit.

The Guidance adopted by the Commission,[87] in spite of its ambiguity, is welcome, insofar as it urges Member States to avoid criminalizing humanitarian assistance and to fulfill the obligations that stem from international maritime law. In fact, it is an EU directive that allows Member States to penalize whomever intentionally aids a citizen of a non-member State to enter or transit her/his national territory.[88] The Commission explains that the legislation in question makes allowance for legal penalties to be avoided when a private individual's behavior is aimed at providing humanitarian assistance, and urges Member States to distinguish between activities undertaken to provide humanitarian assistance and those aimed at encouraging illegal entry and transit (Art. 1, par. 2).[89] Scholars have argued that this document is formulated in ambiguous terms because, in the face of the duty to rescue at sea stipulated by international law, European law, and the facilitation directive (article 1) in particular, seems to give to Member States the option - rather than the obligation - not to sanction private actors that offer humanitarian assistance.[90] Moreover, if we bear in mind the punitive framework and criminalizing rhetoric that have been consolidated in many European regulations, we fear that a mere request, and an ambiguously expressed one at that, without any proposal for modifying the facilitation directive, indicates that no substantial changes to the existing regime can be expected in the short term, particularly given the contents of another document accompanying the Pact.

By this we refer to the recommendation on cooperation between Member States,[91] which reiterates that "providing assistance to any persons found in distress at sea is a legal obligation of Member States established in international customary and conventional law" (par. 1), and that search and rescue operations require "rapid disembarkation in a place of safety", with respect for the rights enshrined in the EU Charter, and in particular the principle of non-refoulement, as well as international customary and conventional human rights and maritime law, especially the guidelines of the Maritime Safety Committee (MSC) of the International Maritime Organization (IMO) regarding the treatment of persons rescued at sea (par. 7). As well as the aforementioned document, the Commission expressly refers to the SAR Convention in order to reaffirm the principles that must guide identification of a place of safety (par. 10). It is worth noting that Member States are called to cooperate with each other and with the European Commission to ensure increased safety at sea (recommendation 2). The Recommendation also

[87] *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence,* 2020/C 323/01. See also European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised.

[88] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Art. 1, para. 1.

[89] *Commission Guidance*, cit., p. 5. On the recommendation's ambiguities, see F. DE VITTOR, *Il Port State Control sulle navi delle ONG*, cit.

[90] M. STARITA, *Il Patto sulle migrazioni e l'asilo,* cit., p. 286.

[91] *Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities.*

refers to the establishment of an interdisciplinary Contact Group that would involve various participants (including NGOs and universities), with the aim of studying the rules applicable to rescue operations and developing good practices (par. 16). However, the document is not without its problems.[92] First of all, it does not contain any invitation to collaborate with NGOs, despite being highlighted the leading role played by NGOs in saving human lives at sea. Moreover they are also not provided supportive measures, it instead urges Member States to strengthen administrative controls over such actors, as "it is…a matter of public policy, including safety, that these vessels be suitably registered and properly equipped to meet the relevant safety and health requirements associated with this activity, so as not to pose a danger to the crew or the persons rescued" (par. 12). However, as can be easily verified, the safety of persons rescued at sea in recent years has been put at risk not by NGOs' possible non-compliance with international standards, but by insufficient collaboration among European States and delays in assigning ports of disembarkation.[93] The approach that emerges in the Commission's document is one that is wary of NGOs, which, as mentioned above, seem to be associated, among other things, with responsibility for the encouragement of criminal organizations.[94]

This framework, which we have briefly outlined, does not seem to facilitate the management of sea migrations in conformity with international obligations – and thus, above all, greater involvement of EU Member States in rescue operations – nor does it move beyond the mindset that seeks to criminalize NGOs.

4. Conclusions

This study has allowed us to bring into focus the concept of place of safety developed by Italian judges on the basis of international sources, guided by respect for human rights, and in particular the principle of non-refoulement. If NGOs, with their operations in the central Mediterranean, fulfill a function of 'enforcement' of international rules regarding sea rescues,[95] national judges contribute by clarifying the content and scope of those rules, revealing the legitimacy of private actors' activities, and bringing the government to task for its failure to meet its own responsibilities. Furthermore, we should highlight that the events that have been seen in recent years in Italy have made manifest the detachment between State powers, with on one side the executive, undisputed protagonist of the war being waged on NGOs, and on the other the judiciary, bastion – with a few exceptions – of human rights as guaranteed in international law, to which Italy is bound by Articles 10, 11 and 117 of its Constitution.

[92] F. DE VITTOR, *Il Port State Control sulle navi delle ONG*, cit.
[93] M. STARITA, *Search and Rescue Operations*, cit.
[94] Par. 9.
[95] P. DE SENA, M. STARITA, *Navigare fra istanze "stato-centriche" e …,* cit.

We must note regretfully that at the moment of writing European States are in a state of inertia so far as their search and rescue duties are concerned; cooperation with the Libyan coastguard has continued,[96] there has been news of dramatic shipwrecks, numerous NGO ships are detained in ports by authorities, charged with lacking safety equipment on board[97] and failing to comply with environmental regulations,[98] and EU-level agreements regarding a shared search and rescue operation in the Mediterranean and the redistribution of rescued shipwreck victims have not been reached.[99] Nor has there been any effect from the decision of the Human Rights Committee,[100] which viewed the Italian authorities as failing to meet the obligations of due diligence deriving from Article 6 of the Covenant on Civil and Political Rights when, in October 2013, they failed to respond quickly to a vessel in distress with around three hundred people on board, who subsequently drowned.[101]

The rather problematic initiatives undertaken within the EU framework do not seem to favor any solution to the management of sea migrations either. As has been frequently pointed out, by refusing a port of disembarkation Italian authorities have brought into question the Dublin III regulation, along with the disproportionate responsibilities that it places on States along the Europe southern border. Regardless, it should be noted that the proposed regulation of the management of asylum and migration confirms the current Dublin system, and therefore does not go in the direction desired by the European Parliament, which hoped to see a radical change of operational logic.[102] Beyond the mechanism of solidarity in the case of search and rescue operations, or crises and force majeure – a mechanism whose effectiveness, incidentally, arouses considerable skepticism – responsibility for examining requests for international protection, and therefore responsibility for hosting the people making the requests, continues to fall on

[96] Strongly opposed by the O.O.I.I. and also by the European Parliament, *Stop Cooperation with and Funding to the Libyan Coastguard*, MEPs Ask, 27 April 2020; OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020; *UNHCR Position On The Designations Of Libya As A Safe Third Country And As A Place Of Safety For The Purpose Of Disembarkation Following Rescue At Sea*, September 2020; UNSC, *Despite Calls for Libyan National Army Ceasefire Amid COVID-19 Pandemic, Unabated Fighting Could Push Libya to New Depths of Violence*, 19 May 2020.

[97] Migranti. Nuovo fermo amministrativo per la Sea Watch 3. Trasportava "troppi" naufraghi, 22 March 2021.

[98] Migranti: chiusa inchiesta su tre ong, 21 indagati, 3 March 2021.

[99] Migranti: Lamorgese a Ue, redistribuire i salvati in mare, 10 May 2021.

[100] Human Rights Committee, *A.S., D.I., O.I. and G.D.*, com. n. 3042/2017, decision of 27 January 2021. On this subject see G. CITRONI, "No More Elusion of Responsibility for Rescue Operations at Sea: the Human Rights Committee's Views on the Case A.S., D.I., O.I. and G.D. v. Italy and Malta", OpinioJuris, 9 March 2021; C. PITEA, "The Applicability of Human Rights Treaties to Search and Rescue Operations in the High Seas: A Landmark Decision of the UN Human Rights Committee", Criminal Justice Network, 4 March 2021.

[101] This is in reference to the so-called "*naufragio dei bambini*", in which more than two hundred people lost their lives, among them sixty children. It should be noted that on 19 January 2021 criminal proceedings were initiated against the Commander in chief of the Italian Navy and the Coast Guard on duty at the time of the sinking, both of them accused with dereliction of duty and aggravated mass murder for having made decisions that led to the fatal delay in rescuing the shipwreck victims.

[102] M. DE FILIPPO, *The Dublin Saga and the Need to Rethink the Criteria for the Allocation of Competence in Asylum Procedures*, in V. MITSILEGAS, V. MORENO-LAX, N. VAVOULA (eds.), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, Brill, 2020, p. 196 ff.

the Member State of first entry. In this respect, a solution has not been reached that simultaneously safeguards the requirements of the southern border States and those of central and northern Europe; and a solution that, first and foremost, guarantees rescued persons and potential asylum seekers prompt disembarkation in a place of safety that will ensure the protection of their right to life, the principle of non-refoulement, and the right to asylum. It would be essential for the coastal States to fulfill their obligations of maritime law, and above all that they guarantee a permanent functioning search and rescue service in their area of responsibility, without refusing prompt response wherever the need arises, to avoid the repetition of dramatic shipwrecks such as that in which scores of children perished. The EU, too, could do its part, with a maritime operation aimed primarily at sea rescues, linking Frontex activities to *de facto* the respect of fundamental rights, which are at the basis of the European project. It would be welcome if cooperation with the Libyan coastguard were to be suspended, at least until Libya has a single government capable of enforcing the rule of law. Humanitarian corridors should be established to bring migrants held in Libyan detention centers into Europe. The recent experience in Afghanistan has shown that when the political will is there, Western governments are capable of evacuating thousands of people. This is all the easier given the geographic proximity of Libya to Europe, and the partnership already in force. Above all, so far as the focus of this study is concerned, European governments' criminalization of private entities, and in particular NGOs, must cease. The EU could do more towards this, for instance by revisiting the facilitation directive and providing more straightforward guidance to Member States. The jurisprudence we have examined shows plainly that rescue at sea is an unavoidable duty for any shipmaster. In consequence, NGOs are not committing any crime, but are in fact implementing a fundamental rule of international law. Rather than bringing NGOs to tribunals for the activities they undertake in the Mediterranean, greater collaboration between these actors and national authorities would be welcome, particularly in the disembarkation phase, a critical moment for any rescue operation, if serious violations of the rights of the persons involved are to be avoided.