

THE IMPACT OF THE NEW ITALIAN SECURITY REGULATION ON THE SEARCH AND RESCUE OF MIGRANTS AT SEA

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On 15 June 2019, Decree Law No 53 of 14 June 2019, named Security Decree bis, entered into force in Italy, establishing new provisions on order and public security, converted into Law No 77 of 8 August 2019. The Decree deals also with preventing and combating illegal immigration at sea. It modifies the current Italian Immigration Law. The Decree provides that the Italian Minister of the Interior, with respect to his role as coordinator among the competent national authorities in checking borders and international obligations, can limit and prohibit the access, transit and anchorage of vessels in the territorial sea. These measures can be adopted for security reasons, or, if the current immigration law has been breached, as provided by UNCLOS, and shall be adopted by the Minister of the Interior in agreement with the Minister of Transport and the Minister of Defence, after informing the Prime Minister. According to the Decree, if the shipmaster of the vessel does not comply with such a decision, he will be subjected to a pecuniary penalty.

On 22 October 2020, Decree Law No 130 of 21 October 2020 entered into force in Italy, amending the provisions of the Italian Immigration Law which were introduced by the Security Decree bis. The new Decree provides that the Minister of the Interior cannot limit and prohibit the transit and anchorage of vessels in the territorial sea if search and rescue operations are immediately communicated to the competent rescue coordination centre and the flag State. These operations must be undertaken according to the instructions given by the competent authority in compliance with international obligations related to the Law of the Sea and refugee status. If the shipmaster does not comply with the measure adopted by the Minister of the Interior, he will be subjected to a criminal and a pecuniary penalty.

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This paper aims to analyse the Security Decree bis and its impact on Maritime Law. Such an analysis is also based on a consideration of recent rulings of the Italian Courts related to measures prohibiting the access of vessels carrying migrants rescued at sea to territorial waters. Recent developments in the Italian security regulation are also examined.

Keywords: Security Decree bis; public security; Minister of the Interior; maritime border; Minister of Transport; territorial sea; innocent passage; access to port; search and rescue; migrant; shipmaster.

1. INTRODUCTION

On 15 June 2019, Decree Law No 53 of 14 June 2019 entered into force in Italy, laying down urgent provisions regarding order and public security, named Security Decree *bis*¹ that confers the power on the Italian Minister of the Interior²

¹ Regarding the Security Decree *bis* in the Italian doctrine, see Codini, E., *Immigrazione: cresce la necessità di strumenti ordinari*, *Guida al diritto* (29) 6 July 2019; Natale, A., *A proposito del decreto sicurezza-bis*, *Questione Giustizia* 20 June 2019; Salamone, L. V. M., *La disciplina giuridica dell'immigrazione clandestina in mare*, La Tribuna, Piacenza, 2019, 401 ff.; Zirulia, S., *Decreto Sicurezza bis: novità e profili critici*, *Diritto Penale Contemporaneo* 18 June 2019 (<https://archivioldpc.dirittopenaleuomo.org/d/6738-decreto-sicurezza-bis-novita-e-profilo-critici>) (23 March 2020); Vampa, R., *Al ministro dell'Interno la decisione sull'entrata nel "mare territoriale"*, *Guida al diritto* (29) 6 July 2019; Nave confiscata subito alla prima violazione del divieto di ingresso, *Guida al diritto* (38) 14 September 2019; Cattaldi, G., *L'impossibile "interpretazione conforme" del decreto "sicurezza bis" alle norme internazionali sul soccorso in mare*, at <https://www.asgi.it/notizie/limpossibile-interpretazione-conforme-decreto-sicurezza-bis-norme-internazionali-soccorso-in-mare/> (23 March 2020). Regarding the illegal immigration and safeguard of human life at sea, see: Fornari, M. N., *Soccorso di profughi in mare e diritto di asilo: questioni di diritto internazionale sollevate dalla vicenda della nave Tampa*, *La Comunità Internazionale* 2002, 61 ff.; Comenale Pinto, M. M., *Immigrazione clandestina e salvaguardia della vita umana in mare*, *Rivista del diritto della navigazione* 2011, 585 ff.; Leanza, U.; Graziani, F., *Poteri di enforcement e di jurisdiction in materia di traffico di migranti via mare: aspetti operativi nell'attività di contrasto*, *Rivista di diritto della navigazione* 2014, 669 ff.

² According to Article 11.1-*bis* of Legislative Decree No 286 of 25 July 1998, regarding the consolidated act of provisions concerning immigration regulations and conditions of third country nationals (*Decreto legislativo 25 luglio 1998 n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), the Italian Minister of the Interior, having conferred, where necessary, with the National Committee for Public Order and Security, issues measures necessary for the unified coordination of checks on the Italian maritime and land borders. Additionally, the Minister of the Interior promotes coordination measures between the competent Italian authorities in preventing and counteracting illegal immigration at sea.

to limit and deny for security reasons the access, transit and anchorage of vessels in the territorial sea.

This Decree was enacted within the so-called “closed ports” policy adopted by the Italian Government from 2018 to 2019 to curb migration flows arriving from Africa, denying the access to ports of vessels with migrants rescued at sea on board. Such a ban was mainly issued in relation to vessels operated by non-governmental organisations flying a foreign flag, and was exclusively devoted to the search and rescue of migrants in the Mediterranean Sea.³ The strategy of the Italian Government aimed to disengage competent national authorities from the search and rescue of migrants at sea, reducing their direct involvement and discouraging non-governmental organisations from carrying out such activities.

Before the enactment of the Security Decree *bis*, the Minister of the Interior issued several directives to prohibit entry into the territorial sea. These were considered necessary to ensure the orderly management of migration flows towards Italian coasts and to prevent the passage of vessels throughout the territorial sea not consistent with international law.⁴ The Minister requested the competent national authorities to ensure that masters and shipowners of private vessels carrying out search and rescue operations complied with the relevant national and international regulations. Additionally, these authorities should verify that the masters and shipowners complied with the rules on the technical seaworthiness of vessels involved in salvage operations. Furthermore, the authorities were required to prevent the obligations established by international conventions on maritime search and rescue from being exploited, and to implement the regulation on immigration.

According to the content of the mentioned directives, smugglers exploited international maritime search and rescue obligations to permit the illegal entry of irregular migrants to Italy. Salvage operations undertaken by private vessels, flying the Italian flag or a foreign flag, in waters outside Italian jurisdiction, and the transfer of migrants rescued at sea off the European coast, could have been considered “indirect” cooperation with smugglers, encouraging the illegal en-

³ Among the directives issued by the Minister of the Interior, see directives No 14100/141(8) of 18 March 2019, 4 April 2019 (vessel *Alan Kurdi*), 15 April 2019 (vessel *Mare Ionio*) and 15 May 2019 (vessel *Sea Watch 3*) on rules for the coordination of the check of maritime borders and illegal immigration under Article 11, Legislative Decree No 286/1998. According to Article 1 of Law No 121 of 1 April 1981 on the new Italian system of public security administration (*Nuovo ordinamento dell'Amministrazione della pubblica sicurezza*), the Italian Minister of the Interior is the National Authority for Public Security that safeguards order and public security, adopting relevant measures.

⁴ Zirulia, S., *Decreto Sicurezza bis: novità e profili critici*, *op. cit.*

try of these migrants in Italy. Although search and rescue operations were not coordinated by the Italian authorities, it was pointed out that masters requested these authorities to identify a place of safety to disembark the rescued migrants. Furthermore, masters refused to comply with the instructions given by other search and rescue coordinators, heading their vessels towards the Italian coast without any authorisation or condition specifically provided for by international regulations. Smugglers took advantage of these kinds of behaviour which could increase the risk of human casualties at sea and violate national and European regulations on checks of maritime borders and illegal immigration. According to the Minister of the Interior, the activities carried out by private vessels to search for and rescue migrants at sea could also favour the access of terrorists to the national territory.

Therefore, military and police authorities had to verify that masters and shipowners complied with national and international regulations on search and rescue, public order and security, immigration, and the instructions given by competent national authorities to prevent the illegal entry of irregular migrants in Italy.

The directives issued by the Italian Minister of the Interior were criticised because of the progressive restrictions imposed on search and rescue operations carried out by the vessels owned or operated by non-governmental organisations, jeopardising the fundamental rights of migrants.⁵

On 22 October 2020, Decree Law No 130 of 21 October 2020⁶ entered into force in Italy, amending the provisions of the Italian Immigration Law which had been introduced by the Security Decree *bis*. The new Decree was adopted to clarify some issues related to the previous regulation according to constitutional and international principles, complying with the remarks made by the President of the Italian Republic in promulgating Law No 77/2019 that converted the Security Decree *bis* into law.

⁵ Zirulia, S., *Ibid.*

⁶ Regarding Decree Law No 130 of 21 October 2020, see Cognini, P., *Le modifiche ai decreti-sicurezza* at <https://www.meltingpot.org/Le-modifiche-ai-decreti-sicurezza-Illustrazione-aggiornata.html#.X5WxBYhKg2x>.

2. MARITIME SEARCH AND RESCUE, INNOCENT PASSAGE AND ACCESS TO PORTS: GENERAL ASPECTS

The adoption of the Security Decree *bis* and its conversion into law makes it difficult to balance international rules on search and rescue and the rights of migrants.⁷

The duty to give assistance to ships in distress and to rescue persons on board is consolidated in international law, reflecting customary law on salvage obligations implemented for the first time by Article 11 of the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, adopted in Brussels on 23 September 1910.⁸

At the international level, search and rescue operations are regulated by conventions establishing the rights and responsibilities of flag States, transit States and coastal States. These legal instruments provide that masters of ships have the legal duty to rescue persons in distress at sea.

During the search and rescue operations of migrants in distress at sea, their status takes second place. This is why the provisions of international conventions related to these operations primarily apply in such events.

Article 98.1 of the United Nations Convention on the Law of the Sea (UNCLOS), concluded at Montego Bay on 10 December 1982 and which entered into force on 16 November 1994,⁹ provides that every contracting State shall require

⁷ Regarding international rules related to search and rescue of migrants at sea, see Mallia, P., *Migrants Smuggling at Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*, Martinus Nijhoff Publishers, Leiden-Boston, 2010, 96 ff.; Di Filippo, M., Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developments in the Mediterranean Sea in Del Vecchio, A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague, 2014, 9 ff.; Pitto, S.; Zuppa, L., Il difficile bilanciamento tra regole internazionali per il coordinamento delle operazioni di soccorso e rispetto dei diritti dei migranti: riflessioni a partire dai casi “Open Arms” e “Diciotti”, *Diritto marittimo* 2020, 23.

⁸ The Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, adopted in Brussels on 23 September 1910, was modified by the Protocol of 27 May 1967, and replaced by the 1989 SALVAGE Convention. The former was implemented in Italy by Law No 606 of 12 June 1913. Regarding salvage, see Gaskell, N. J. J., The International Convention on Salvage 1989, *Int'l Estuarine and Coastal J.*, 4, 1986, 268; Reeder, J., *Brice on Maritime Law of Salvage*, 5th ed., Sweet & Maxwell Ltd, London, 2011.

⁹ UNCLOS was implemented in Italy by Law No 689 of 2 December 1994. Regarding the Law of the Sea, see Shaw, M. N., *International Law*, 6th ed., Cambridge University Press, Cambridge-New York, 2008, 553 ff. There are 157 State Signatories and 168 State Parties to UNCLOS.

the master of a ship flying its flag to render assistance to any person in danger of being lost at sea. This assistance must be rendered without endangering the ship, the crew, or the passengers. The master must proceed with all possible speed to the rescue of persons in distress. The obligation of the master must be fulfilled without exception or discrimination with respect to the legal status of the persons who need assistance.

The International Convention on Salvage 1989 (SALVAGE Convention), which entered into force in Italy on 14 July 1996,¹⁰ defines a “salvage” operation as any activity carried out to assist a vessel or any other property in danger in navigable waters or in any other waters of any kind. Unlike the 1910 Brussels Convention and Italian law, the SALVAGE Convention considers assistance and rescue jointly within the notion of “salvage”.¹¹ It provides that contracting States shall ensure that every master of a ship flying its flag must, so far as he or she can do so without serious danger to their ship and persons thereon, give assistance to any person in danger of being lost at sea. These States shall adopt measures necessary to enforce the mentioned duty. The shipowner is not liable for a breach of the master’s duty to render the assistance.¹² The SALVAGE Convention deeply affected the regulation established by the Italian Navigation Code (INC),¹³ replacing the provisions which were inconsistent.¹⁴

The International Convention for the Safety of Life at Sea 1974 (SOLAS Convention), which entered into force in Italy on 11 September 1980,¹⁵ provides that the shipmaster, on receiving a signal that a ship is in distress, must proceed with

¹⁰ The SALVAGE Convention was implemented in Italy by Law No 29 of 12 April 1995. There are 74 State Parties to the SALVAGE Convention.

¹¹ Article 1.a of the SALVAGE Convention.

¹² Cf. Art 10 of the SALVAGE Convention. Regarding salvage of persons in distress at sea, see Reeder, J., *Brice on Maritime Law of Salvage*, *op cit.*, § 2-262 ff; Marino, A., Il rifiuto di prestare soccorso a persone in pericolo di perdersi in mare: inosservanza del dovere e responsabilità, in *Sicurezza e libertà nell’esercizio della navigazione* (a cura di M. P. Rizzo-C. Ingratoci), Giuffrè, Milan, 2014, 307 ff.

¹³ Articles 489-500 of the Italian Navigation Code (INC).

¹⁴ Lefebvre d’Ovidio, A.; Pescatore, G.; Tullio, L., *Manuale di diritto della navigazione*, Giuffrè, Milan, 15th ed., 676; Marino, A., Il rifiuto di prestare soccorso a persone in pericolo di perdersi in mare: inosservanza del dovere e responsabilità, in *Sicurezza e libertà nell’esercizio della navigazione*, *op. cit.*, 309.

¹⁵ The SOLAS Convention was implemented in Italy by Law No 313 of 23 May 1980. There are 166 State Parties to the SOLAS Convention.

all speed to give assistance to the persons in distress.¹⁶ After the *Tampa* case,¹⁷ the Convention was amended in 2004 by resolution MSC.153(78) of 20 May 2004, adopted by the IMO Maritime Safety Committee. This resolution clarified that search and rescue operations are carried out regardless of the nationality or status of persons in distress at sea or the circumstances in which they are found. Additionally, disembarkation must be undertaken as soon as possible in a place of safety. The contracting State responsible for the SAR region where such persons were rescued must provide this place of safety or ensure that it is provided by other States within a reasonable time.

Article 98.2 of UNCLOS provides that every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service related to safety on the sea and, where circumstances so require, by way of mutual regional agreements devoted to cooperating with neighbouring States for this purpose.

Search and rescue services are regulated by the International Convention on Maritime Search and Rescue 1979 (SAR Convention), which entered into force in Italy on 2 July 1989.¹⁸ This Convention establishes a comprehensive regulation related to the provision of assistance to any person in distress at sea regardless of the nationality or status of such a person or the circumstances in which that person is found.¹⁹ In the first chapter of the SAR Convention, “search” is defined as an activity organised by a rescue coordination centre to find persons in distress. “Rescue” is defined as an operation to save persons in distress, providing for their primary medical or other needs, and delivering them to a place of safety.²⁰ According to the Convention, contracting States, individually or in cooperation with other States, contribute to develop and support search and rescue services to ensure

¹⁶ See § 1-1, Chapter V, Regulation 33 of the SOLAS Convention. Additionally, see Resolution MSC.153(178) (adopted on 20 May 2004), Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended.

¹⁷ In 2001 the Australian maritime authority denied entry to national ports to the Norwegian ship, *Tampa*, which rescued 438 asylum seekers at sea. The situation was defused by Nauru which accepted the asylum seekers in exchange for compensation.

¹⁸ The SAR Convention was implemented in Italy by Law No 147 of 3 April 1989. Regarding the SAR Convention, see Di Filippo, M., Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developments in the Mediterranean Sea, *op. cit.*, 13 ff.; Leanza, U., International Security and Powers of Enforcement at Sea in Del Vecchio, A. (ed), *International Law of the Sea: Current Trends and Controversial Issues*, 103, 106 ff. There are 113 State Parties to the SAR Convention.

¹⁹ Article 2.1.10 of the SAR Convention.

²⁰ See Chapter I, § 1.3.1 and 1.3.2 of the SAR Convention.

that assistance is rendered to any person in distress at sea.²¹ They shall establish appropriate national procedures for the overall development, coordination, and improvement of search and rescue services. To this end, contracting States establish search and rescue regions which should be adjacent and, if possible, non-overlapping. The delimitation of these regions is not related to and does not prejudice the delimitation of any border between States.²² Furthermore, contracting States establish rescue coordination centres for their search and rescue services and rescue sub-centres. If necessary, they coordinate their search and rescue authorities with those of the neighbouring States.²³ The contracting State responsible for the search and rescue region in which such assistance is rendered exercises primary responsibility for coordinating the operations to guarantee that survivors are disembarked from the assisting ship and delivered to a place of safety.²⁴ Contracting States coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the planned route, provided that releasing the shipmaster from these obligations does not further endanger the safety of life at sea.²⁵ According to national laws, rules, and regulations, these States shall authorise immediate access of their territorial sea for the purpose of searching for the position of maritime casualties and rescuing the survivors.²⁶ If a coordination rescue centre or sub-centre is notified of an emergency and is unaware of other centres taking appropriate action, it shall undertake an appropriate initiative and confer with neighbouring centres to designate one centre to assume responsibility for the search and rescue operations.²⁷

According to the guidelines of the treatment of persons rescued at sea, adopted by the IMO on 20 May 2004,²⁸ the State responsible for the SAR region

²¹ See Chapter II, § 2.1 of the SAR Convention. According to the Annex, Chapter I, § 1.3.11 of the SAR Convention, “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”.

²² See Chapter II, § 2.1.3 and 2.1.7 of the SAR Convention.

²³ See Chapter III, § 3.1.1 of the SAR Convention.

²⁴ See Chapter V, Regulation 33, § 1.1 of the SOLAS Convention.

²⁵ See Chapter III, 3.1.9 of the SAR Convention. Resolution MSC 155(78) adopted on 20 May 2004, Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979 as amended.

²⁶ See Chapter III, § 3.1.2 of the SAR Convention.

²⁷ See Chapter V, § 5.3.4.1 of the SAR Convention.

²⁸ See Resolution MSC.167(78), adopted on 20 May 2004, Guidelines on the Treatment of Persons Rescued at Sea. These guidelines aim at guiding Governments and shipmasters

where search and rescue operations take place must provide survivors with a place of safety. The disembarkation of survivors must be effected as soon as reasonably practicable, considering the specific circumstances of the case.²⁹ This place is considered the location where the rescue operations are terminated. This is where the survivors' safety is no longer threatened and where their fundamental human needs (such as food, shelter, and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or last destination.³⁰ Regarding the care of the survivors, the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, jointly adopted by the IMO and the International Civil Aviation Organization (ICAO), provides that the survivors must be delivered to a place of safety as quickly as possible.³¹

The Italian SAR region was established by Article 6 of the Decree by the President of the Republic of 28 September 1994 No 662 related to the implementation of the SAR Convention.³² The Italian Ministry of Infrastructures and Transport ("Ministry of Transport") is the authority in charge of executing this convention. The Italian Maritime Rescue Coordination Centre (IMRCC) is the General Command of the Body of the Harbour Offices (MARICOGECAP) that ensures the coordination of search and rescue operations within the national SAR region and maintains contact with the coordination centres of the other States. According to the Italian Navigation Code, the national maritime authority undertakes search and rescue operations. This authority can order that private vessels and their crew are put at their disposal to carry out these operations.³³ After the amendments of the SAR Convention, the General Command of the Body of the Harbour Offices adopted by Directive Sop 009/15, the so-called Standard Operating

about humanitarian obligations and other obligations under international law dealing with the treatment of persons rescued at sea.

²⁹ See § 2.5 and § 2.6 of Resolution MSC.167(78).

³⁰ See § 6.12 of Resolution MSC.167(78). Additionally, see Annex to the SAR Convention, § 1.3.2.

³¹ The International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual is published in three volumes covering organisation and management, mission coordination and mobile facilities.

³² Decree of the President of the Italian Republic No 662 of 28 September 1994, Regulation implementing Law No 147 of 3 April 1989 concerning accession to the International Convention on Maritime Search and Rescue, adopted in Hamburg on 27 April 1979 (*Decreto del Presidente della Repubblica 28 settembre 1994 n. 662, regolamento di attuazione della legge 3 aprile 1989 n. 147, concernente adesione alla convenzione internazionale sulla ricerca ed il salvataggio marittimo, adottata ad Amburgo il 27 aprile 1979*).

³³ Article 69 and 70 INC.

Procedures, is tasked to identify a place of safety within the operations of the search and rescue of migrants at sea coordinated by the IMRCC. According to these procedures, the Department of Civil Liberties and Immigration of the Ministry of the Interior has the duty to assign the place of safety.³⁴

Even though several legal instruments deal with the search and rescue of persons in distress at sea, regulation of this subject-matter is incomplete. In Resolution A.920 (22) adopted on 29 November 2001, the Assembly of the International Maritime Organization (IMO) recalled the master's duty to render assistance to any person in danger of being lost at sea and the need for cooperation between parties and public authorities involved in salvage operations in order to ensure the successful saving of lives. In this regard, the Assembly pointed out the need to ensure that the lives of persons on board ship are safeguarded while awaiting their delivery to a place of safety. To this end, it requested the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to review the main international conventions (the SAR Convention, the SALVAGE Convention, the SOLAS Convention, and the FAL Convention) and any other IMO instruments related to maritime salvage for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness, or other inadequacies. In the light of such a review, the aforementioned committees should adopt suitable measures devoted to guaranteeing that survivors receive assistance regardless of their nationality, status, or the circumstances in which they are found. Survivors, including undocumented migrants, asylum seekers, refugees, and stowaways, must be treated on board ship in accordance with relevant IMO instruments and international agreements and long-standing humanitarian maritime practice. These measures must ensure that ships which have saved persons in distress at sea are able to deliver them to a place of safety.

The relationships between the duty to save persons at sea and the power of the Minister of Transport to deny the passage of vessels carrying rescued migrants through the territorial sea to reach a place of safety is the main issue that the Italian authorities have been dealing with since the Decree examined in this article entered into force.

Regarding the rights of passage, Article 17 UNCLOS provides that ships of all States enjoy the right of innocent passage through the territorial sea in which

³⁴ Munari, F., *Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana*, *Diritto marittimo* 2020, 328, 346 ff.

the coastal State exercises its sovereignty.³⁵ “Passage” is defined by the Convention as navigation through the territorial sea for the purpose of crossing that sea without entering internal waters, calling at a roadstead or port outside internal waters, for the purpose of proceeding to or from internal waters, or a call at such a roadstead or port. This passage must be continuous and expeditious.³⁶ It can include stopping and anchoring, but only insofar as the same are incidental or ordinary navigation, are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. The passage of a ship is innocent if it is not prejudicial to the peace, good order, or security of the coastal State.³⁷ This passage must be performed according to international law. The passage of a foreign ship is prejudicial to the peace, good order, or security of the coastal State if in the territorial sea it engages in the “loading or unloading” of any commodity, currency, or person contrary to the immigration laws and regulations of the coastal State or carries out any other activity not having a direct bearing on passage.³⁸ The coastal State shall not prohibit the innocent passage of foreign ships through the territorial sea except in accordance with the Convention. In particular, such a State shall not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage or discrimination in form or in fact against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State³⁹. If the passage of a ship does not comply with the conditions provided by the Convention, the coastal State may prevent non-innocent passage in its territorial sea.⁴⁰ Such a State can temporarily suspend in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapon exercises.⁴¹

Regarding access to ports, the Law of the Sea does not exclude coastal States from closing their ports. International law does not provide the right of access

³⁵ Regarding the innocent passage of a ship in territorial sea, see Vukas, B., *The Law of the Sea: Selected Writings*, Martinus Nijhoff Publishers, Leiden-Boston, 2004, 133 ff.; Shaw, M. N., *International Law, op. cit.*, 570 ff.

³⁶ Article 18.2 UNCLOS.

³⁷ Article 19 UNCLOS. In this regard, see Vukas, B., *The Law of the Sea: Selected Writings, op. cit.*, 135.

³⁸ Article 19.g and i UNCLOS.

³⁹ Article 24 UNCLOS. In this regard, see Shaw, M. N., *International Law, op. cit.*, 571 ff.

⁴⁰ Article 25 UNCLOS.

⁴¹ Regarding the legal regime of the territorial sea, see Morrison, A. P., *Place of Refuge for Ships in Distress*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, 53 ff.; Leanza, U., *Il diritto degli spazi internazionali, I, La tradizione*, Turin, 1999, 97 ff.

to a foreign port. Ports are internal waters and subject to the sovereignty of the coastal State.⁴² Therefore, these States can decide to allow or deny access of a foreign ship unless otherwise agreed. According to Article 25 UNCLOS, if a ship is proceeding to internal waters or a call at port outside internal waters, coastal States have the right to prevent any breach of the conditions to which the admission of ships to internal waters or to this call is subject. Nevertheless, sovereignty over internal waters cannot be considered absolute. International bilateral or multilateral agreements and international tribunals can limit this sovereignty.⁴³ The Convention and Statute on the International Regime of Maritime Ports of 1923 (Geneva Convention 1923), ratified by Italy on 16 October 1933, establishes the reciprocal right of access to, and equality of treatment within, ports. Nevertheless, the Convention was ratified by a limited number of States and does not reflect the right of entry into ports under customary international law.⁴⁴ According to this Convention, coastal States can deny access to its ports in the event of an emergency affecting the safety of the State or the fundamental interests of the country. This is possible in exceptional cases, and for a short period.⁴⁵ The

⁴² Barnes, R., *Refugee Law at Sea*, *International & Comparative Law Quarterly*, vol. 53 (January 2004), 47, 57.

⁴³ Morrison, A. P., *Place of Refuge for Ships in Distress*, *op. cit.*, 54.

⁴⁴ Barnes, R., *Refugee Law at Sea*, *op. cit.*, 58. The ratifications and the definitive accessions to the Convention and Statute on the International Régime of Maritime Ports are those of the following: Austria, Belgium, the British Empire (this ratification shall not be deemed to apply in the case of the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, or the Irish Free State and India), Newfoundland, Southern Rhodesia, Bahamas, Barbados, Bermuda, British Guiana, British Honduras, British Solomon Islands Protectorate, Brunei, Ceylon, Cyprus, Falkland Islands and Dependencies, Fiji, Gambia, Gibraltar, Gilbert and Ellice Islands, Gold Coast, Grenada, Hong-Kong, Jamaica, Kenya, Leeward Islands, Malay States, Mauritius, Nigeria, Palestine, St. Helena, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Somaliland, Straits Settlements, Tanganyika Territory, Tonga, Trans-Jordan, Trinidad and Tobago, Zanzibar, Malta, Australia, New Zealand, India, Czechoslovakia (former), Denmark, Estonia, France, Germany, Greece, Hungary, Iraq, Italy, Japan, Mexico, The Netherlands, Netherlands Indies, Surinam and Curacao, Norway, Sweden, Switzerland, Thailand, Yugoslavia (former). Actions subsequent to the assumption of depositary functions by the Secretary-General of the United Nations were the following: Accessions: Burkina Faso, Côte d'Ivoire, Madagascar, Malaysia Marshall Islands, Monaco, Morocco, Nigeria, Trinidad and Tobago Vanuatu, Zimbabwe; Successions: Antigua and Barbuda, Croatia, Cyprus, Czechia, Fiji, Malta, Mauritius, Slovakia, St. Vincent, and the Grenadines; Denunciation: Thailand. For further information, see <https://treaties.un.org>.

⁴⁵ Article 16 of the Convention and Statute on the International Régime of Maritime Ports of 1923. About this Convention, see Morrison, A. P., *Place of Refuge for Ships in Distress*, *op. cit.*, 58 ff.

Convention on Facilitation of International Maritime Traffic of 1965 (the FAL Convention) provides the possibility to deny access to a port to preserve public morality, order and security, or to prevent the introduction or spread of diseases or pests affecting public health, animals, or plants.⁴⁶ The entry of a ship into port can also be denied for security reasons. According to the SOLAS Convention, this denial can be provided if the shipmaster intending to enter a port of another contracting State does not comply with the provision of part A of the ISPS Code.⁴⁷ According to the Italian Navigation Code, the Harbour Master regulates and controls the entry and exit of ships to and from the port.⁴⁸

3. THE SECURITY DECREE *BIS*

The Security Decree *bis* (“Decree”) was converted into law, with amendments, by Law No 77 of 8 August 2019.⁴⁹ The enactment of the Decree was preceded by the adoption of Decree Law No 113 of 4 October 2018, named Security Decree, which was converted into law, with amendments, by Law No 132 of 1 December 2018. It lays down urgent provisions on international protection and immigration, public security and measures for the functioning of the Minister of the Interior and the organisation and functioning of the national agency for the administration and allocation of assets seized and confiscated from organised crime.

The Decree comprises eighteen articles divided into three chapters. It was adopted by the Italian Government to introduce urgent measures to counter unlawful practices due to loopholes in international law and regulations on public security. Concerning these unlawful practices, the Decree aims to increase the

⁴⁶ Article 5.2 of the FAL Convention. In Italy, the FAL Convention was implemented by Law No 831 of 8 May 1971 which entered into force on 24 November 1972. Regarding the FAL Convention, see Alexandrowicz, Ch. H., *Convention on Facilitation of International Maritime Traffic and International Technical Regulation*, *International & Comparative Law Quarterly*, vol. 15, issue 3, July 1966, 621. There are 124 State Parties to the FAL Convention.

⁴⁷ See Chapter XI-2 (Special Measures to Enhance Maritime Safety), Regulation 9, paragraph 2.4 and 2.5 of the SOLAS Convention. See also Article V(b) of the SOLAS Convention.

⁴⁸ Article 63 INC and Article 59 of the Regulation for the Implementation of the Navigation Code (Maritime Navigation) (*Regolamento per l'esecuzione del Codice della Navigazione - Reg. Mar. Nav.*).

⁴⁹ Law No 77 of 8 August 2019 on conversion into law, with amendments, of Decree Law No 53 of 14 June 2019, laying down urgent provisions on order and public security (*Conversione in legge, con modificazioni, del decreto-legge 14 giugno 2019, n. 53, recante disposizioni urgenti in materia di ordine e sicurezza pubblica*), which entered into force on 10 August 2019.

coordination of investigation activities on illegal immigration, implementing the current legal instruments to face and combat this phenomenon. This Decree was approved, given also the current international geopolitical situation that could favour new migratory flows at sea with the risk of the infiltration of terrorists.

Regarding the provisions on illegal immigration and public security related to maritime law, the Decree modified Articles 11 and 12 of the current Italian regulation on immigration, Legislative Decree No 286 of 25 July 1998 on the consolidated act of provisions concerning immigration regulations and conditions of third-country nationals. These articles are included in the chapter dedicated to urgent provisions for the fight against illegal immigration, and for order and public security.

The Decree introduces new paragraphs, Article 11, paragraph 1-*ter* and paragraph 6-*bis-quater*. These new paragraphs are related to the check of maritime borders and the regulation of illegal immigration at sea.

According to the new paragraph 1-*ter* of Article 11 of the aforementioned Legislative Decree No 286/1998, introduced by Article 1 of the Decree, the Minister of the Interior is the coordinator of actions carried out by the competent national authorities⁵⁰ to cope with illegal immigration at sea. According to international obligations, the Minister can limit and deny, for security reasons, the access, transit and anchorage of vessels throughout the territorial sea.

Additionally, under the mentioned Article 19, paragraph 2.g UNCLOS, the Minister can limit and deny access to the territorial sea if a ship embarks and disembarks persons contrary to Italian immigration law. The access of a ship to the territorial sea cannot be limited or denied to military vessels and to vessels undertaking non-commercial government services (i.e. public security, fire prevention, environment protection, public service, natural disaster, oceanographic scientific research of the marine environment). The Minister of the Interior can limit and deny the access of a vessel to the territorial sea only in agreement with the Minister of Defence and Minister of Transport, and by informing the Prime Minister. The Decree does not specify the legal nature of the measure adopted by the Minister of the Interior under the new paragraph 1-*ter* of Article 11.

A previous draft of Article 1 of the Decree provided an amendment of Article 12 of Legislative Decree No 286/1998, adding a new paragraph 6-*bis*. According to this paragraph, any vessels, whether for pleasure or fishing, illegally carrying migrants in international waters had to comply with the relevant international

⁵⁰ Carabinieri, Financial Guard (*Guardia di Finanza*), Navy (*Marina Militare*) and Harbour Masters Corps - Coast Guard (*Corpo delle Capitanerie di Porto - Guardia Costiera*).

conventions and instructions given by competent SAR coordinators and competent national authorities. This provision should also have been applicable to the salvage of migrants at sea or to the towage of their means of transport.⁵¹

It must be noted that according to the Italian Navigation Code the power to limit and deny access in territorial waters is assigned to the Minister of Transport.⁵² According to Article 83 INC, for reasons of public order and maritime security, the Italian Minister of Transport can limit or deny the access, transit and anchorage of merchant vessels throughout the territorial sea. The Minister of Transport must take these measures in agreement with the Minister of the Environment when they are devoted to protecting the environment in the relevant areas.⁵³

A first draft of Article 2 of the Decree provided the amendment of the mentioned Article 83 INC, repealing the words “for public order” (“*di ordine pubblico*”). Therefore, the Minister of Transport could have denied or limited the access, transit, and stopping of merchant vessels only for maritime security reasons. Additionally, a previous draft of the aforementioned Article 2 of the Decree provided for the introduction of a second paragraph of Article 83 INC, bestowing upon the Minister of the Interior the power to limit and deny the transit and stopping of merchant, pleasure, and fishing vessels in the territorial sea for reasons of public order and security, and according to the mentioned Article 19.2.g UNCLOS.

3.1. The Penalty Regime

Under the new paragraph 6-*bis* of Article 12 of Legislative Decree No 286/1998, introduced by Article 2 of the Security Decree *bis*, the shipmaster must comply with international law. Furthermore, he or she must comply with the

⁵¹ See draft of the Decree Law laying down urgent provisions regarding order and public security (*Decreto-legge recante disposizioni urgenti in materia di ordine e sicurezza pubblica*).

⁵² Under Article 42, c, of Legislative Decree No 300 of 30 July 1999, the Italian Minister of Transport also has competences related to maritime transport, port control, maritime state property, and maritime safety and security. The Italian General Command of the Harbour Masters Corps - Coast Guard is a body of the Ministry of Infrastructures and Transport. The competences of the Italian Coast Guard are established in Articles 132-138 of Italian Legislative Decree No 66 of 15 March 2010 (Italian Code of the Military Legal System) and Article 13 of the Italian Prime Ministerial Decree No 72 of 11 February 2014. The Italian Harbour Masters Corps - Coast Guard also has the duty to coordinate salvage operations, monitor and control maritime activities and ensure maritime safety and security.

⁵³ Lefebvre d'Ovidio, A.; Pescatore, G.; Tullio, L., *Manuale di diritto della navigazione*, op. cit., 93.

prohibitions and limitations provided by the Minister of the Interior in agreement with the other Ministries. If the master of the vessel does not comply with the measures adopted by the Minister of the Interior, he or she is considered liable. Besides criminal penalties, the amount of the pecuniary penalty is between EUR 150,000 and EUR 1,000,000.

Therefore, the Decree establishes direct liability of the master, who must comply at the same time with the measure adopted by the Minister and the obligation to save lives at sea.⁵⁴

The shipowner is jointly liable according to Article 6 of Law No 689 of 24 November 1981 on criminal system amendments. This article provides that the “owner of the asset” used to commit an offence is jointly liable to pay the amount due by the persons liable, unless he or she proves that such an asset has been used without consent. This article refers to the shipowner who under Italian law is not always identified as the disponent owner (*armatore*) of the vessel. Therefore, the Decree does not take into account that the ownership of a vessel does not always presume the quality of the disponent owner of such a vessel. The owner (*proprietario*) and disponent owner of a vessel could be different entities.⁵⁵

Before the conversion of the Decree into law, Article 2, which introduced paragraph 6-*bis* of Article 12 of Legislative Decree No 186/1998, provided that if the master did not comply with the measures adopted by the Minister of the Interior, he or she would have been subjected to a pecuniary penalty between EUR 10,000 and EUR 50,000, besides criminal penalties. Additionally, it should be noted that a previous draft of the Decree provided a pecuniary penalty between EUR 3,500 and EUR 5,500 for each foreigner carried on board the vessel.

The new paragraph 6-*bis* of Legislative Decree No 286/1998, introduced by Article 2.1 of the Decree, provides for the confiscation and the immediate precautionary seizure of the vessel committing the relevant offences.⁵⁶ The previous

⁵⁴ Vampa, R., *Nave confiscata subito alla prima violazione del divieto di ingresso*, *op. cit.*

⁵⁵ According to Article 265 INC, the disponent owner (operator) of a ship must make a declaration at the Ship Register Office. Otherwise, the shipowner, strictly speaking, is presumed also to be the disponent owner of the ship. Under Article 274 INC, the disponent owner is liable for the conduct of the crew and the obligations of the master with respect to the ship and the freight. The disponent owner is not liable if the master does not comply with his or her personal obligations, such as the salvage obligation, which are provided for by national and international regulations in light of his or her role.

⁵⁶ Benvenuti, M., Paper for the hearing on 30 July before the Presidency of Commission I (Constitutional Affairs) of the Italian Senate within the examination of the draft law laying down the “Conversion of the Decree Law 14 June 2019 No 53 laying down urgent provisions on order and public security” (Relazione per l’Audizione resa il 30 luglio 2019

version of the Decree established the confiscation and the immediate seizure of the vessel involved in repeated unlawful activities. The shipowner and the disponent owner must bear all costs related to the custody of the seized vessel.

The sanctions provided by the Decree are imposed by competent local prefects. In a previous draft of the Decree, this function was assigned to the competent Harbour Masters Corps - Coast Guard.

According to the new paragraph 6-*ter* of Article 12 of Legislative Decree No 286/1998, introduced by Article 2.1 of the Decree, seized vessels can be transferred on request by the prefects to the custody of the coast guard, military navy, or other public authorities. These vessels are designated for institutional activities. The relevant management costs are borne by these public authorities.

Under the new paragraph 6-*quarter* of Article 12 of Legislative Decree No 286/1998, introduced by Article 2.1 of the Decree, if the seizing measure cannot be revoked, the vessel is transferred to state property. Following this, the vessel can be assigned on request to the public authority that is operating it. A vessel that is not assigned can also be sold for parts. If the vessel is useless or remains unsold for two years, it is destroyed.

Regarding the penalty regime related to Article 83 INC, Article 1102 INC provides for arrest of up to two years and a pecuniary penalty up to EUR 516 if the master of the vessel does not comply with the measures adopted by the Italian Minister of Transport to prohibit and limit the access of that vessel to the territorial sea. Additionally, Article 1103 INC establishes accessory pecuniary penalties: temporary suspension of professional titles and a ban from exercising professional activity.

A previous draft of the Decree provided for the suspension or withdrawal of the licence, authorisation or concession delivered by the competent administrative authority according to the relevant activity and means of transport.

In terms of the penalty regime, the Security Decree *bis* pointed out the significant increase in the amount of the pecuniary penalty from between EUR 10,000 and EUR 50,000 to EUR 150,000 and EUR 1,000,000. On the enactment of this Decree, the President of the Italian Republic noted in a letter sent to the Prime

dinanzi all'Ufficio di Presidenza della Commissione I (Affari costituzionali) del Senato della Repubblica nell'ambito dell'esame del disegno di legge recante "Conversione in legge del decreto-legge 14 giugno 2019 n. 53, recante disposizioni urgenti in materia di ordine e sicurezza pubblica") at <https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/marco-benvenuti/audizione-resa-il-16-ottobre-2018-innanzi-all-ufficio-di-presidenza-della-commissione-1a-affari-costituzionali-del-senato-della-repubblica> (23 March 2020).

Minister that the sum of the minimum pecuniary penalty had risen by fifteen times and the maximum penalty by twenty times compared to the first version of the Decree.⁵⁷ Additionally, the compulsory seizure of the vessel in any case is provided for. It is no longer subjected to the repetition of unlawful behaviour. The President also stressed that the Decree does not provide any distinctive criteria (type of vessel, activity, and reason for carrying persons on board) to establish the amount of the penalty. It may be possible to distinguish between a vessel carrying illegal migrants and a vessel rescuing migrants in distress at sea. It seems unreasonable to adopt a measure providing for such a serious penalty without considering these distinctive criteria. Moreover, the President drew attention to the position of the Italian Constitutional Court that stressed, as already mentioned, the need for proportion between pecuniary penalties and relevant offences.⁵⁸ These considerations were shared by the Italian doctrine.⁵⁹

4. THE “OPEN ARMS” AND “SEA WATCH 3” CASES

After the enactment of the Security Decree *bis*, the Minister of the Interior, having consulted with the Minister of Defence, the Minister of Transport and the National Public Security Committee, and informing the Italian Prime Minister, adopted several measures to deny the access, transit and anchorage of vessels within the territorial sea according to the new paragraph 1-*ter*, Article 11 of Legislative Decree No 286/1998, as introduced by the Decree.

Among these measures, the Italian Minister of the Interior on 1 August 2019 prohibited access to the territorial sea of a Spanish vessel, *Open Arms*, operated by the non-governmental organisation Proactiva Open Arms with one hundred migrants on board, mainly from Africa, who were rescued at sea. This vessel sat off the Italian territorial sea for several days until the ban on entry was lifted by the Regional Administrative Tribunal of Latium. The Italian judges considered that the vessel *Open Arms* was in “distress”, as indicated by the Minister of the Interior, namely in “a situation wherein there is a reasonable certainty that a person, a vessel, or other craft is threatened by grave and imminent danger

⁵⁷ Official Statement of the Italian Presidency of the Republic on 4 October 2018, *Security Decree and Immigration: Mattarella enacts and writes to Conte (Decreto Sicurezza e Immigrazione: Mattarella emana e scrive a Conte)* at <https://www.quirinale.it/elementi/18098> (23 March 2020).

⁵⁸ Italian Constitutional Court 10 May 2019 No 112.

⁵⁹ Benvenuti, M., *op. cit.*

and requires immediate assistance”.⁶⁰ Therefore, under UNCLOS,⁶¹ the Italian judges considered the measure to deny access to the vessel *Open Arms*, carrying migrants rescued at sea in the Italian territorial sea, contradictory. Therefore, they decided to suspend the effects of the mentioned measure.⁶²

In February 2020, the Italian Supreme Court of Cassation upheld the ordinance delivered by the judge of the preliminary investigation of the Tribunal of Agrigento which, pursuant to Article 385 of the Italian Code of Criminal Procedure, released from his obligations the master of the vessel *Sea Watch 3*, carrying migrants rescued at sea into an Italian port.⁶³ The shipmaster did not comply with the measure adopted by the Minister of the Interior on 15 June 2019 under Article 11.1-*ter* of Legislative Decree No 286/1998, by running a blockade of a vessel operated by the Italian Financial Police.⁶⁴ Therefore, according to Article 337 of the Italian Criminal Code (ICC) and Article 1100 INC, the master was charged with the following criminal offences: resisting arrest⁶⁵ and violence against a warship.⁶⁶ The Italian Supreme Court of Cassation considered that

⁶⁰ Chapter I, § 1.3.13 of the SAR Convention.

⁶¹ See Law No 689 of 2 December 1994 on the ratification and accession of the United Nations Convention on the Law of the Sea, with annexes and final act (Montego Bay 10 December 1982) (*Ratifica ed esecuzione della Convenzione delle Nazioni Unite sul diritto del mare, con allegati e atto finale (Montego Bay 10 dicembre 1982)*).

⁶² Decree of the Administrative Regional Tribunal of Latium, Ch. I-*ter*, 14 August 2019 No 5479 (*Decreto cautelare monocratico del Tar Lazio, Sezione Prima Ter, 14 agosto 2019 n. 5479*).

⁶³ See Tribunal of Agrigento, Office of the Judge of the Preliminary Investigation, ordinance on the request to validate arrest and enforce precautionary measures of 2 July 2019 (*Ordinanza sulla richiesta di convalida di arresto e di applicazione della misura cautelare*). According to Article 385 of the Italian Code of Criminal Procedure (*Codice di procedura penale*), arrest or temporary detention is not permitted when the criminal offence was committed either in the line of duty, while exercising a right, or in the case of an exemption, considering the facts. *Contra* Tribunal of Rome, College for Ministerial Crimes, 21 November 2019 No 6. About the *Sea Watch* case, see Masera, L., La Cassazione sul caso Rackete: la strategia dei porti chiusi è contraria alla disciplina dei soccorsi in mare, at <https://www.asgi.it/asilo-e-protezione-internazionale/la-cassazione-sul-caso-rackete-la-strategia-dei-porti-chiusi-e-contraria-alla-disciplina-dei-soccorsi-in-mare/> (26 February 2020).

⁶⁴ Italian Court of Cassation (Third Chamber) 20 February 2020 No 6626. In this regard, see Morselli, C., La natura di nave da guerra della motovedetta V. 808 al vaglio della Cassazione (a proposito dell’arresto non convalidato di Carola Rackete), in *Archivio Penale* (1) 2020 (<http://www.archiviopenale.it/File/Download?codice=642800cc-3e6c-4644-aca3-3f73aed1dac9>) (23 March 2020).

⁶⁵ Article 337 ICC (Italian Criminal Code).

⁶⁶ Article 1100 INC. Under the first paragraph of this article, the master or the officer of a vessel that commits acts against a national warship may be sentenced to between three and ten years in jail. Regarding this provision, see Righetti, G., *Trattato di diritto marittimo*, I-1, Giuffrè, Milan, 1987, 688 ff.

these criminal offences were justified under Article 51 of the Italian Criminal Code because the master of a vessel in distress was fulfilling the obligation to save lives at sea.⁶⁷ In this regard, the Court pointed out that a vessel at sea cannot be considered a place of safety. The Court stressed that according to the guidelines on the Treatment of Persons Rescued at Sea, adopted by the Maritime Safety Committee of the International Maritime Organization (IMO) and annexed to the SAR Convention, a place of safety “is a location where rescue operations are considered terminated. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter, and medical needs) can be met. Furthermore, it is a place from which transportation arrangements can be made for the survivors’ next or final destination”.⁶⁸ Moreover, the Court highlighted that under these guidelines “an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. [...] Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made”. The Court considered also that the fundamental rights of persons rescued at sea cannot be respected on board a vessel in distress. The obligation to rescue these persons does not end by embarking them on board a vessel. They have the right to apply for international protection under the 1951 Refugee Convention. This application cannot be made on board a vessel. In this regard, the Court pointed out that according to Resolution No 1821/2011 of the Council of Europe,⁶⁹ “it is clear that the notion of ‘place of safety’ should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights”.⁷⁰ Finally, the Court considered that the mentioned resolution is an essential interpretative criterion applicable to define “place of safety” in international law, although it is not a direct source of law.

⁶⁷ According to Article 51 ICC, exercising a right or carrying out a duty provided by a provision and lawful order of a public authority precludes criminal liability.

⁶⁸ See IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, adopted on 20 May 2004. See paragraphs 6.12 and 6.13.

⁶⁹ See Resolution 21 June 2011 No 1821 of the Council of Europe, The interception and rescue at sea of asylum seekers, refugees, and irregular migrants.

⁷⁰ See § 5.2 of Resolution No 1821/2011 of the Council of Europe.

5. CONSIDERATIONS ON THE SECURITY DECREE *BIS*

The provision of the Security Decree *bis* (“Decree”) that assigns to the Minister of the Interior the authority to limit and deny the access of vessels to the territorial sea reflects the ongoing process in Italy to reorganise the national authorities and the structure of public bodies in ensuring safety and security. This process has been undertaken to face new forms of crime and terrorism which have reached a global dimension. Italian public bodies directly involved in the transport sector do not assume a direct role in this process, which could only have a negative impact on actions carried out to guarantee security in the transport sector (activities and infrastructures).

In July 2019, during hearings before the Constitutional Committee of the Italian Senate to examine the bill on the conversion into law of the Decree, it was pointed out that the provision giving the Minister of the Interior the authority to deny and limit the entry of vessels in the territorial sea conflicts with the authority to coordinate maritime and land border checks.⁷¹ The Decree does not provide that the Minister of the Interior must agree with the Minister of Foreign and International Cooperation and the Minister of the Economy and Finance on the adoption of a measure to deny access, transit, and anchorage throughout the territorial sea. According to Article 11.1 of Legislative Decree No 286/1998, the Italian Minister of Foreign Affairs and International Cooperation has an important role in strengthening and coordinating the external border checks and in maintaining international relations with the flag States of vessels whose entry, transit, and anchorage in the Italian territorial waters is denied or limited. Additionally, the Finance Police have specific functions in ensuring maritime security under the authority of the Minister of the Economy and Finance.⁷²

It was also correctly stressed that the new paragraph 1-*ter* of Article 11 of Legislative Decree No 286/1998, introduced by the Decree, overlaps with Article 83 INC. According to these provisions, the authority to deny access, transit, and anchorage in the territorial sea is assigned to the Minister of the Interior and to the Minister of Transport, respectively. The wording of these provisions is the same: “for public order” (“*motivi di ordine pubblico*”) and “order and public

⁷¹ Benvenuti, M., *op. cit.*

⁷² Article 2.1.c, No 1, Legislative Decree No 177 of 19 August 2016 laying down provisions on the rationalisation of police functions and of the takeover of the State Forestry Corps, according to Article 8.1.a, Law 7 No 124 of August 2015 on the reorganisation of the public administration (*Disposizioni in materia di razionalizzazione delle funzioni di polizia e assorbimento del Corpo forestale dello Stato, ai sensi dell'articolo 8, comma 1, lettera a), della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche*).

security reasons“ (“*motivi di ordine e sicurezza pubblica*“). Therefore, the enactment of the mentioned paragraph 1-*ter* would have produced a partial tacit repeal of Article 83 INC. This partial repeal should have been clearly provided for by the Decree.⁷³

Furthermore, it was considered that the same provision should not have been applicable to vessels undertaking search and rescue operations at sea in favour of migrants or asylum-seekers who leave their countries to flee persecution or other human rights violations, such as torture. The Italian legislator should have adopted different rules, depending on the activity carried out by the vessels.⁷⁴ Search and rescue operations are not undertaken to embark and disembark persons infringing national immigration rules, but according to international conventions. The rescued migrants and asylum seekers are exercising a right that takes effect when the vessel enters the territorial sea. Therefore, the passage of a vessel that undertakes search and rescue operations cannot be considered non-innocent passage in territorial sea. Moreover, Article 10-*ter* of Legislative Decree No 286/1998 provides that a migrant arriving in the national territory after being rescued at sea must be taken to a hotspot. This implies that the rescued migrant must be promptly disembarked from the vessel.

It was also pointed out that the new paragraph 1-*ter* of Article 11 of Legislative Decree No 286/1998, introduced by Article 1 of the Decree, does not refer to military vessels. Therefore, these provisions do not apply with respect to the Italian Coast Guard vessels which often carry out search and rescue operations in favour of migrants at sea. With respect to non-military vessels, governmental and non-commercial services not flying the Italian flag, the mentioned new paragraph 1-*ter* of Article 11 of Legislative Decree No 286/1998 partially applies, as international rules on non-innocent passage apply, only to vessels of third countries.⁷⁵

In August 2019, the President of the Italian Republic promulgated Law No 77 of 8 August 2019 that converted Decree Law No 53/2019, with amendments, into law. He sent a letter to the Presidents of the Italian Chamber of Deputies and the Senate, and to the Italian Prime Minister with some comments that seem to be consistent with Italian doctrine and jurisprudence.⁷⁶ In this letter, the Presi-

⁷³ Benvenuti, M., *op. cit.*

⁷⁴ Comenale Pinto, M. M., *Immigrazione clandestina e salvaguardia della vita umana in mare*, *op. cit.*, 588 and 589.

⁷⁵ Article 19.2 UNCLOS.

⁷⁶ Official Statement of the Italian Presidency of the Republic, *Security Decree bis: Mattarella enacts and sends a letter to the Presidents of the Senate, Chambers of Deputies and Council of Min-*

dent of the Italian Republic considered it necessary to review the mentioned law in the near future. He pointed out that according to the new paragraph 1-*ter* of Article 11 of Legislative Decree No 286/1998, as introduced by Article 1 of Law No 77/2019, access to the Italian territorial sea can be limited or denied according to Italy's international obligations. Additionally, the President stressed that paragraph 6-*bis* of Article 12 of Legislative Decree No 286/1998 establishes that the master of the vessel must comply with "international obligations". This paragraph refers to the above-mentioned international conventions dealing with the search and rescue of persons in distress at sea: UNCLOS, SAR, SOLAS, SALVAGE and FAL Conventions. In this regard, it should be noted that on the occasion of the enactment of the first Security Decree, the President pointed out to the Prime Minister the need to consider the constitutional and international obligations of the Italian Republic, even if they were not explicitly mentioned in the Decree.⁷⁷

The remarks made by the President of the Italian Republic are fully accessible.

As correctly pointed out by the doctrine, the Security Decree *bis* cannot provide more powers and limitations than those already established by UNCLOS, which establishes when contracting States can intervene towards a vessel of a third country. The duty to save life at sea implies that the entry of a ship into the territorial sea with persons rescued on board cannot be considered unlawful conduct, provided such a ship aims merely at disembarking these persons. Italian jurisprudence is unanimous in assessing that life salvage at sea is an obligation established by international law.⁷⁸ Additionally, the duty to rescue persons in distress at sea prevails over rules and agreements devoted to countering illegal immigration. According to international conventions dealing with maritime search and rescue, it is not possible to deny access to a ship that aims at completing its duty to save life at sea. This is also not possible if search and rescue operations have been carried out outside the territorial sea. Moreover, all States involved in search and rescue operations have the obligation to assign a place

isters (Comunicato della Presidenza della Repubblica Italiana, Decreto sicurezza bis: Mattarella promulga e invia lettera ai Presidenti di Senato, Camera e del Consiglio dei Ministri) at <https://www.quirinale.it/elementi/32100> (23 March 2020).

⁷⁷ See the Official Statement of the Italian Presidency of the Republic of 4 October 2018, *Security Decree and Immigration: Mattarella enacts and writes to Conte (Decreto Sicurezza e Immigrazione: Mattarella emana e scrive a Conte)* at <https://www.quirinale.it/elementi/18098> (23 March 2020).

⁷⁸ *Ex multis*, see It. Cass., I Crim Ch., 27 March 2014 No 14510 and, IV Crim. Ch., 20 March 2018 n. 14709; It. Trib. Catania, Ministerial Offences, Report 7 December 2018 (filed on 22 January 2019).

of safety and to release the shipmaster that saved persons at sea from his or her humanitarian and legal obligations. Furthermore, rescue operations end when such persons disembark in a place of safety with respect to their physical integrity and full enjoyment of fundamental human rights. The maritime search and rescue rules also apply to ships operated by non-governmental organisations which carry out search and rescue activities. If a State does not comply with these rules, other States are not exempted from fulfilling the duties provided by the mentioned international conventions. All persons rescued at sea have the right to reach a place of safety. In addition, the state of necessity is determined by the means employed by migrants to cross the Mediterranean Sea and the facts. The international provision related to the duty to save life at sea is applicable because of this state of necessity. Therefore, search and rescue operations undertaken by a non-governmental organisation are lawful in the light of the inaction of the competent national authorities.⁷⁹ Finally, measures adopted by the Minister of the Interior to automatically deny under the Security Decree *bis* the passage of ships carrying persons rescued at sea throughout the territorial waters should be considered unlawful as they seem to be inconsistent with international law. These measures appear to be based on the presumption that the persons saved in order to be disembarked are illegal migrants. On the contrary, the passage of these ships is lawful as it is related to search and rescue operations and the duty to reach a place of safety. The Decree introduces a narrow interpretation of the right to innocent passage through the territorial sea that is not consistent with the provisions of international conventions related to the exercise of this right which have been implemented in the Italian legal system, prevailing over other national laws under Article 117.1 of the Italian Constitution.

On 20 August 2019, a few days after the conversion of the Decree into law, the Italian Government collapsed. A new government coalition was sworn in on 5 September 2019. In the days following, the Prime Minister agreed with the comments made by the President of the Italian Republic on the Decree, considering it necessary to adopt a different structural approach to introduce instruments favouring the integration of legal migrants within a homogeneous legal framework and a new European immigration policy. Therefore, the Prime Minister pointed out that the Decree should have been revised according to the comments made by the President, acting together with the other EU Member States.

⁷⁹ Cataldi, G., *L'impossibile "interpretazione conforme" del decreto "sicurezza bis" alle norme internazionali sul soccorso in mare, op. cit.*

6. JOINT DECLARATION OF INTENT ON A CONTROLLED EMERGENCY PROCEDURE

On 23 September 2019 in La Valletta, the ministries of the interior of Italy, Malta, France and Germany adopted a joint declaration of intent on a controlled emergency procedure, Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism, related to search and rescue operations on the high seas and disembarkation of asylum seekers and migrants.⁸⁰ The joint declaration provides for a relocation distribution system of asylum seekers and migrants rescued in the Mediterranean Sea and disembarked in Italy and Malta among all the other participating Member States.⁸¹ It does not consider individual persons arriving in Europe also via makeshift crafts. The mechanism is an emergency measure that aims to guarantee the orderly disembarkation of rescued migrants in a place of safety, ensuring their fast relocation in the national territories of the participating EU Member States. The decision to adopt a relocation distribution system is consistent with the mentioned resolution MSC.167(78) that promotes cooperation among the States to find suitable places of safety for migrants rescued at sea, considering the circumstances and risks.⁸² The mechanism is limited

⁸⁰ Later Ireland, Luxemburg and Portugal signed the joint declaration.

⁸¹ According to the fast track mechanism adopted by the joint declaration, the relocation of migrants and asylum-seekers should not take more than four weeks and must be coordinated by the European Commission. However, the participating States did not establish the procedures, percentages, or selection criteria to be adopted to implement the new relocation distribution system. Additionally, this mechanism is limited to persons disembarked following search and rescue operations undertaken on the high seas and under the responsibility of the Italian and Maltese governments. Furthermore, the declaration of intent that introduces the above-mentioned mechanism is not an instrument that is legally binding. It is implemented on a voluntary basis. Moreover, the declaration is a temporary agreement. It is classified as a pilot project that will be valid for not less than six months and may be renewed subject to the agreement of the participating EU Member States or terminated in the case of abuse by third parties. The agreement can be suspended in the light of an increased number of persons to be relocated. The relocation mechanism is only devoted to migrants rescued in the Mediterranean Sea. It does not consider individual persons arriving in Europe via makeshift crafts. Besides, this mechanism is an emergency measure.

⁸² See International Maritime Organization (IMO), Resolution MSC.167(78), adopted on 20 May 2004, Guidelines on the Treatment of Persons Rescued at Sea. Regarding EU law, a relocation system was established under Article 17.2 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or by a stateless person, named the Dublin Regulation. Nevertheless, relocations according to this mechanism were not satisfactory because only a few EU Member States

to persons disembarked following search and rescue operations undertaken on the high seas and under the responsibility of the Italian and Maltese governments. In the event of excessive migratory pressure, the new relocation mechanism provides that Member States can offer on a voluntary basis an alternative place of safety for disembarking rescued migrants, informing in doing so the European Commission. Persons rescued by State-owned vessels must be disembarked in the territory of their flag State. According to the declaration, shipmasters carrying out search and rescue operations must comply with instructions given by the competent Rescue Coordination Centre without obstructing the search and rescue activities carried out by the Coast Guard.⁸³ The participating EU Member States encourage the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) to support the disembarkation of asylum seekers and migrants in full respect of human rights. The joint declaration was presented at the Justice and Home Affairs Council in October 2019 and at the Strategic Committee on Immigration, Frontiers and Asylum meeting in November 2019. Nevertheless, disagreements persisted among participating EU Member States in favour of mandatory relocation involving all Member States, and those arguing for a more flexible approach to solidarity.⁸⁴ The EU Commission launched a process to elaborate standard operating procedures based on the declaration, which led to common understanding among participating Member States and is currently applied.⁸⁵ According to information provided by the Italian Ministry of the Interior on the relocation of migrants landing on Italian shores, the number of persons redistributed in the

implemented it. Additionally, improvements could be carried out in the procedures following the disembarkation. In the joint declaration, the participating States decided to establish a fast track mechanism for the relocation of asylum seekers and migrants based on commitments made before their disembarkation.

⁸³ In addition, the joint declaration provided that masters must not turn off on-board automated information system (AIS) transponders. Additionally, they must not send light signals or any other form of communication to encourage the departure and embarkation of vessels from African shores. Moreover, they must not block search and rescue operations by coast guard vessels, including the Libyan Coast Guard.

⁸⁴ In this regard, see European Asylum Support Office Report 2020 at <https://easo.europa.eu/asylum-report-2020/24-temporary-arrangements-disembarkation-and-relocation#150>.

⁸⁵ EU Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Progress Report on the Implementation of the European Agenda on Migration (2019) COM(2019) 481 Final, at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20191016_com-2019-481-report_en.pdf.

European Union from September 2019 to the end of January 2020 amounted to 464.⁸⁶

On 23 September 2020, the European Commission proposed a new Pact on Migration and Asylum that comprises the adoption of a proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109, including a new solidarity mechanism.⁸⁷

7. RECENT DEVELOPMENTS IN THE ITALIAN SECURITY REGULATION

In the light of several remarks and criticisms by Italian judges and academics regarding the “closed ports” policy and the recent initiative carried out at the international level by Italy and several European Member States in order to adopt new instruments to cope with migrant flows crossing the Mediterranean Sea towards the European coast, the new Italian Minister of the Interior submitted a plan to the government to amend the Security Decree *bis*.

The COVID-19 emergency has delayed the presentation of a draft of the regulation amending provisions introduced by the Decree.

According to this plan submitted by the Minister of the Interior, the government adopted Decree Law No 130⁸⁸ of 21 October 2020 to solve issues that arose after the entry into force and implementation of Decree Law No 113 of

⁸⁶ See the website of the Italian Ministry of Interior at <https://www.interno.gov.it/it/notizie/verso-parigi-68-richiedenti-asilo> (updated 27 January 2020).

⁸⁷ See Communication from the EU Commission on a New Pact on Migration and Asylum, 23 September 2020, COM(2020) 609 final; Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 concerning the status of third-country nationals who are long-term residents, and the proposed Regulation (EU) xxx/xxx [Asylum and Migration Fund], 23 September 2020, COM/2020/610 final.

⁸⁸ Decree Law No 130 of 21 October 2020, Urgent provisions on immigration, international and complementary protection, amendments of Articles 131-*bis*, 391-*bis*, 391-*ter* and 588 of the Italian Criminal Code, and measures related to the denial of access to public establishments and places of public gathering, and to combat the unlawful use of the web and regulation of the National Guarantor for the Rights of Persons Detained or Deprived of Personal Freedom (*Decreto-legge 21 ottobre 2020 n. 130, Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale*).

4 October 2020 on international protection, immigration, and public security,⁸⁹ and the Security Decree *bis*. Decree Law No 130/2020 also aims to respond to the considerations made by the President of the Italian Republic in promulgating the Security Decree *bis*.

Decree Law No 130/2020 entered into force on 22 October 2020, modifying Article 11.1-*ter* and Article 12.6-*bis-6-quater* of Legislative Decree No 286/1998, which had been introduced by the Security Decree *bis*.

Article 1.2 of Decree Law No 130/2020 establishes that, subject to Article 83 INC, the Minister of the Interior, in conjunction with the Minister of Defence and the Ministry of Transport, and after informing the Prime Minister, can limit and deny the transit or stopping of vessels through the territorial sea for reasons of security and public order or according to Article 19.2.(g) UNCLOS, limited to infringements of immigration law, save military vessels and government vessels operating for non-commercial purposes. This provision does not apply if search and rescue operations are immediately communicated to the competent rescue coordination centre and the flag State of the vessel. These operations must be undertaken according to the instructions given by the competent authority for search and rescue at sea. The instructions must be consistent with international obligations related to the Law of the Sea and refugee status. Consideration should also be given to the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime, which aims to combat the smuggling of migrants by sea through an integrated approach, favouring cooperation among the contracting States and combining measures of prevention and repression of this crime together with measures devoted to protecting the rights of the victims.⁹⁰

⁸⁹ Decree Law No 113 of 4 October 2018, converted into Law No 132 of 1 December 2018 with amendments, Urgent provisions on international protection and immigration, public security, and measures for the functioning of the Ministry of the Interior, the organisation and functioning of the National Agency for the administration and use of the properties seized and confiscated from organised crime (*Decreto-legge 4 ottobre 2018, n. 113, convertito, con modificazioni, dalla legge 1° dicembre 2018, n. 132, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*).

⁹⁰ The Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime was adopted in New York on 15 November 2000, and entered into force on 28 January 2004. The Italian Republic ratified and implemented this Protocol by Law No 146 of 16 March 2006, Ratification and implementation of the Convention and Protocols of the United Nations against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000 and

If the measures adopted by the Minister of the Interior are not complied with, Decree Law No 130/2020 provides that Article 1102 INC applies together with a penalty between EUR 10,000 to EUR 50,000.

According to new Decree Law No 130/2020, the Minister of the Interior still has the power to deny or limit the access of vessels to the territorial sea. However, he or she cannot deny or limit the entry of vessels into the territorial waters as provided by the Security Decree *bis*. The new provision still does not establish the legal nature of the measure adopted by the Minister of the Interior. Under Article 83 INC and Article 1.2 of Decree Law No 130/2020, the Minister of Transport and the Minister of the Interior can both deny or limit the transit and stopping of a vessel in the territorial sea for reasons of public order and security. This could cause an overlapping of measures which could also be contradictory.

Under Article 1.2 of Decree Law No 130/2020, the Minister of the Interior can adopt only measures related to the transit and stopping of vessels in the territorial sea in conjunction with the Ministry of Defence and the Ministry of Transport, after informing the Prime Minister. The Security Decree *bis* did not provide that the Minister of the Interior had to inform in advance the Prime Minister. Article 1.2 does not establish that the measures of the Minister of the Interior must be consistent with the international obligations as established by the Security Decree *bis*. Nevertheless, this provision excludes the adoption of such measures towards a vessel carrying out search and rescue operations according to the procedure provided by the SAR Convention and other international conventions relating to the Law of the Sea and refugee status. In these regards, the new Decree Law No 130/2020 establishes that the instructions given by the competent authority during search and rescue operations must also comply with the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime, which provides for rules to be applied if there are reasonable grounds to suspect that a vessel flying the flag of contracting States is engaged in the smuggling of migrants at sea.⁹¹ According to the Protocol, the implementation of these rules should be consistent with the obligations under international law and all appropriate measures to protect and preserve the rights of persons on board the

31 May 2001 (*Legge 16 marzo 2006 n. 146, Ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale, adottati dall'Assemblea generale il 15 novembre 2000 ed il 31 maggio 2001*). Law No 146/2006 entered into force on April 12, 2006. See Salamone, L. V. M., *La disciplina giuridica dell'immigrazione clandestina via mare*, *op. cit.*, 138, 144.

⁹¹ Cf. Article 8, Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime.

vessel.⁹² In this regard, the remarks made by the President of the Italian Republic in promulgating the Security Decree *bis* about the need to consider international obligations related to search and rescue, and the protection of human rights, seem to be answered.

Regarding the penalty regime, Decree Law No 130/2020 reduces the amount of the penalty in the case of an infringement of the measure adopted by the Ministry of the Interior to the extent established by the Security Decree *bis* before its conversion into Law No 77/2019.⁹³ Additionally, the provision related to the confiscation and the immediate precautionary seizure of the vessel is repealed. This new penalty regime would have been consistent with the considerations made by the President of the Italian Republic in promulgating the Security Decree *bis* about the need to consider constitutional principles and in particular the principle of proportionality between penalties and offences. However, according to Article 1.2 of the new Decree Law, if the shipmaster does not comply with the measure adopted by the Ministry of the Interior, a custodial sentence of up to two years is established under Article 1102 INC, in addition to the mentioned penalty of between EUR 10,000 and EUR 50,000. The liability of the owner and/or the disponent owner of the vessel is not established. Therefore, the penalty regime seems still to be too strict compared with the offence committed.⁹⁴ Any distinctive criteria to establish the amount of the penalty is still not provided. Additionally, the aforementioned article does not reference the national authority that imposes the penalty.

Decree Law No 130/2020 confirms the choice made by the Italian governments to adopt a Decree Law to introduce new provisions related to controversial legal issues such as immigration and security. This choice alters the nature of this legal instrument which, according to the Italian Constitution, could be enacted only in specific and extraordinary circumstances. The procedure devoted to converting the new Decree Law No 130/2020 into law could be the opportunity to revise the provision introduced by Article 1.2 in order to avoid persistent discrepancies between the Italian Navigation Code⁹⁵ and Immigration Law⁹⁶ and to match the new penalty regime to the actual gravity of the offence committed by the shipmaster. This will contribute to elaborating a uniform legal framework consistent with constitutional and international principles.

⁹² Cf. Article 16, *Ibid.*

⁹³ Article 2 of the Security Decree Law *bis*.

⁹⁴ Cognini, P., *Le modifiche ai decreti-sicurezza*, *op. cit.*

⁹⁵ Article 83 INC.

⁹⁶ Article 1.2 of Decree Law No 130/2020.

BIBLIOGRAPHY

Books:

1. Lefebvre d'Ovidio, A.; Pescatore, G.; Tullio, L., *Manuale di diritto della navigazione*, 15th ed., Giuffré, Milan, 2019, pp. XXXIV-878.
2. Mallia, P., *Migrants Smuggling at Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*, Martinus Nijhoff Publishers, Leiden-Boston, 2010, pp. XLVI-296.
3. Leanza, U., *Il diritto degli spazi internazionali, I, La tradizione*, Giappichelli, Turin, 1999, pp. XXIV-440.
4. Morrison, A. P., *Place of Refuge for Ships in Distress*, Martinus Nijhoff Publishers, Leiden-Boston, 2012, pp. XIX-416.
5. Reeder, J., *Brice on Maritime Law of Salvage*, 5th ed., Sweet & Maxwell Ltd, London, 2011, pp. LXXXI-995.
6. Righetti, G., *Trattato di diritto marittimo, I-1*, Giuffré, Milan, 1987, pp. XXVIII-2067.
7. Salamone, L. V. M., *La disciplina giuridica dell'immigrazione clandestina in mare*, La Tribuna, Piacenza, 2019, pp. XXXI-670.
8. Shaw, M. N., *International Law*, 6th., Cambridge University Press, Cambridge-New York, 2008, pp. CLXVI-1542.
9. Vukas, B., *The Law of the Sea, Selected Writings*, Martinus Nijhoff Publishers, Leiden-Boston, 2004, pp. VII-359.

Book Chapters:

1. Di Filippo, M., Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developments in the Mediterranean Sea in Del Vecchio, A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague, 2014, pp. 9-28.
2. Leanza, U., International Security and Powers of Enforcement at Sea in Del Vecchio, A. (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, Eleven International Publishing, The Hague, 2014, pp. 103-108.
3. Marino, A., Il rifiuto di prestare soccorso a persone in pericolo di perdersi in mare: inosservanza del dovere e responsabilità, in *Sicurezza e libertà nell'esercizio della navigazione* (a cura di M. P. Rizzo-C. Ingratoci), Giuffré, Milan, 2014, pp. 307-326.

Articles:

1. Alexandrowicz, Ch. H., Convention on Facilitation of International Maritime Traffic and International Technical Regulation, *International & Comparative Law Quarterly*, vol. 15, 1966, pp. 621-659.

2. Barnes, R., Refugee Law at Sea, *International & Comparative Law Quarterly*, vol. 53, 2004, pp. 47-77.
3. Codini, E., Immigrazione: cresce la necessità di strumenti ordinari, *Guida al diritto*, (29) 6 luglio 2019, pp. 8-10.
4. Comenale Pinto, M. M., Immigrazione clandestina e salvaguardia della vita umana in mare, *Rivista del diritto della navigazione*, 2011, pp. 585-615.
5. Fornari, M. N., Soccorso di profughi in mare e diritto di asilo: questioni di diritto internazionale sollevate dalla vicenda della nave Tampa, *La Comunità Internazionale*, 2002, pp. 61-78.
6. Gaskell, N. J. J., The International Convention on Salvage 1989, *International Estuarine and Coastal Journal*, vol. 4, 1989, pp. 268-287.
7. Leanza, U.; Graziani, F., Poteri di enforcement e di jurisdiction in materia di traffico di migranti via mare: aspetti operativi nell'attività di contrasto, *Rivista di diritto della navigazione*, 2014, pp. 669-719.
8. Morselli, C., La natura di nave da guerra della motovedetta V. 808 al vaglio della Cassazione (a proposito dell'arresto non convalidato di Carola Rackete), *Archivio Penale* (1) 2020 (<http://www.archiviopenale.it/File/Download?codice=642800cc3e6c-4644-aca3-3f73aed1dac9>) (23 March 2020).
9. Munari, F., Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana, *Diritto marittimo*, 2020, pp. 328-362.
10. Natale, A., A proposito del decreto sicurezza-bis, *Questione Giustizia* 20 giugno 2019 (https://www.questionegiustizia.it/articolo/a-proposito-del-decreto-sicurezza-bis_20-06-2019.php).
11. Papanicolopulu, I., Tutela della sicurezza o violazione del diritto del mare?, *Quaderni di SIDIblog* n. 6/2019, pp. 28-34.
12. Pitto, S.; Zuppa, L., Il difficile bilanciamento tra regole internazionali per il coordinamento delle operazioni di soccorso e rispetto dei diritti dei migranti: riflessioni a partire dai casi "Open Arms" e "Diciotti", *Diritto marittimo*, 2020, pp. 23-45.
13. Vampa, R., Al ministro dell'Interno la decisione sull'entrata nel "mare territoriale", *Guida al diritto*, (29) 6 luglio 2019, pp. 36-39.
14. Vampa, R., Nave confiscata subito alla prima violazione del divieto di ingresso, *Guida al diritto*, (38) 14 settembre 2019, pp. 57-63.
15. Zirulia, S. Decreto Sicurezza bis: novità e profili critici, *Diritto Penale Contemporaneo*, 18 giugno 2019 (<https://archiviodpc.dirittopenaleuomo.org/d/6738-decreto-sicurezza-bis-novita-e-profil-critici>) (23 March 2020).

Other:

1. Benvenuti, M., Relazione per l’Audizione resa il 30 luglio 2019 dinanzi all’Ufficio di Presidenza della Commissione I (Affari costituzionali) del Senato della Repubblica nell’ambito dell’esame del disegno di legge recante “Conversione in legge del decreto-legge 14 giugno 2019 n. 53, recante disposizioni urgenti in materia di ordine e sicurezza pubblica”, at <https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/marco-benvenuti/audizione-resa-il-16-ottobre-2018-innanzi-all-ufficio-di-presidenza-della-commissione-1a-affari-costituzionali-del-senato-della-repubblica> (23 March 2020).
2. Cataldi, G., L’impossibile “interpretazione conforme” del decreto “sicurezza bis” alle norme internazionali sul soccorso in mare, at <https://www.asgi.it/notizie/limpossibile-interpretazione-conforme-decreto-sicurezza-bis-norme-internazionali-soccorso-in-mare/> (23 March 2020).
3. Cognini, P., Le modifiche ai decreti-sicurezza, at <https://www.meltingpot.org/Le-modifiche-ai-decreti-sicurezza-Illustrazione-aggiornata.html#.X5WxBYhKg2x>.
4. Masera, L., La Cassazione sul caso Rackete: la strategia dei porti chiusi è contraria alla disciplina dei soccorsi in mare, at <https://www.asgi.it/asilo-e-protezione-internazionale/la-cassazione-sul-caso-rackete-la-strategia-dei-porti-chiusi-e-contraria-alla-disciplina-dei-soccorsi-in-mare/> (26 February 2020).

Sažetak:

**UTJECAJ NOVOG TALIJANSKOG ZAKONODAVSTVA O
SIGURNOSNOJ ZAŠTITI NA PRONALAŽENJE I SPAŠAVANJE
MIGRANATA NA MORU**

Dana 15. lipnja 2019. godine u Italiji je stupila na snagu Uredba sa zakonskom snagom broj 53 od 14. lipnja 2019. nazvana Sigurnosna uredba bis (dalje u tekstu: Uredba), kojom su utvrđena nova pravila o redu i javnoj sigurnosti, naknadno pretočena u Zakon broj 77 od 8. kolovoza 2019. godine. Članak 1. Uredbe posvećen je sprječavanju i borbi protiv nezakonite imigracije na moru. Njome se mijenja postojeći talijanski Zakon o imigraciji. Uredbom je propisano kako talijanski ministar unutarnjih poslova, u skladu s njegovom ulogom koordinatora nadležnih nacionalnih tijela, kada je riječ o kontroli granica i međunarodnim obvezama, može zabraniti pristup, tranzit i privez brodova u teritorijalnom moru. Te mjere mogu biti određene iz sigurnosnih razloga ili ako je prekršen važeći imigracijski zakon, kako je propisano čl. 19. Konvencije Ujedinjenih naroda o pravu mora (1982.), a može ih odrediti ministar unutarnjih poslova u dogovoru s ministrom prometa i ministrom obrane, uz obvezu obavještanja predsjednika Vlade. Sukladno čl. 2. Uredbe, ako zapovjednik broda ne postupi u skladu s naprijed navedenom odlukom kaznit će se novčanom kaznom. Cilj ovog rada je analizirati utjecaj odredbi Uredbe na pomorsko pravo. U obzir će se uzeti i recentne odluke talijanskih sudova koje zabranjuju pristup brodovima koje prevoze migrante spašene u talijanskim teritorijalnim morskim vodama te ostale promjene u talijanskoj imigracijskoj politici.

Ključne riječi: Sigurnosna uredba bis; javna sigurnost; ministar unutarnjih poslova; granice na moru; ministar prometa; teritorijalno more; neškodljivi prolazak; pristup luci; traganje i spašavanje; migrant; zapovjednik broda.