

The access to the asylum procedure and the *non-refoulement* principle

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Focus on Italy: the policy of "closed harbors"



The human rights of rescued people - in particular vulnerable groups, including minors - may be at risk

The "Security-bis Decree" no. 53 of 14 June 2019 (1)

- **Article 1** : it gives the Italian Minister of the Interior the faculty of adopting formal measures limiting or prohibiting vessels engaged in the discharge of persons in violations of the laws of the State, the entry, transit or stop in the territorial sea, except for military or government non-commercial vessels, for security reasons or when the conditions set out by Article 19, §2, (g), of the Montego Bay Convention are met
- **Article 2**: it increases administrative fines of between 150,000 and 1 million euros on shipmasters and it imposes immediate seizure of the ship for entering Italian waters without authorization or failure to obey instructions

The "Security-bis Decree" no. 53 of 14 June 2019 (2)

▶ Critical profiles:

- On the one hand, treaty provisions on SAR activities at sea do not imply any obligation to allow access to the harbors of a State Party to the vessels that have carried out the rescue operation
- On the other hand, if the captain of the ship decides to enter the harbor because of a situation of distress (i.e. threat to the life and the physical and mental well-being of persons on board), the flag State of the vessel cannot be accused of committing a wrongful act, despite the coastal State's prohibition
- So, the Decree Law poses questions about the respect of the following international standards on human rights and refugee protection:
 - The **right to life** (Art. 2 ECHR)
 - The **prohibition of torture and inhuman or degrading treatment** (Art. 3 ECHR) and the **principle of *non-refoulement***, considered as a *jus cogens* law
 - The **prohibition of collective expulsions of aliens** (Art. 4 Protocol no. 4 ECHR)
- ❖ **These provisions have been partially modified by the decree law n. 130/2020.**

The case of *Sea Watch 3*

- Sea-Watch 3 is a ship flying the flag of the Netherlands, operated by the German non-governmental organization Sea-Watch.
- In the past it has been used as a supply for platforms on the high seas, now it is used for search and rescue (SAR) of shipwrecked people in areas off the Libyan coast.
- **June 2019**
- Sea watch-3 recovered 53 people in the waters of the Libyan SAR zone, of which 11 were immediately brought ashore for medical reasons, while the remaining 42 remained on board. The ship remained in a **waiting position in international waters off Lampedusa without permission to enter.**
- On 21 June, Commander Carola Rackete and several citizens of several African states applied to the **European Court of Human Rights for a provisional injunction to force Italy to let the ship in.**

- On 25 June, the court rejected the urgent request, as provisional measures are provided for only if there was an "immediate risk of irreparable harm". The situation on board the ship therefore did not justify any form of coercion towards Italy, which had in any case provided assistance to injured persons, women and children.
- On 26 June, the ship entered Italian territorial waters, despite the threat of heavy sanctions. Salvini called on the judiciary to act quickly, declaring that Italy was not a "berth for illegal immigrants" and that it was "a Dutch ship of a German non-governmental organization, which welcomes migrants off Libya".
- As soon as disembarked, the captain was arrested because according to public prosecutors she clearly disobeyed an order by the authorities and her conduct wasn't justifiable due to acts necessary to avert the risk of a serious danger. Prosecutors claimed that the ship was constantly monitored and assisted by authorities so the state of necessity was not there.

Court ruling of the preliminary judge on 2° July 2019

- The **captain's obligations of rescuing lives at sea** can be considered concluded only after the **disembark in a place of safety**
- This obligation stems from:
 - a) 1982 United Nations Convention on the Law of the Sea (UNCLOS) which provides that **the master of a ship must render assistance to any person in distress at sea and proceed to their rescue** AND that the state of the territorial waters in which the boat is located must authorize passage to a ship to provide assistance
 - b) 1974 Safety of Life at Sea (SOLAS) and 1979 SAR (Maritime Search and Rescue) Conventions
 - c) Legislative Decree 286/98 stating that the captain and national authorities are **required to provide relief and assistance to those arriving** irregularly in the territory or **following a rescue operation**.

International Law

National Law

The judge cleared the Captain of Sea Watch 3 of all charges brought against her.

Appeal by public prosecutor.

Court ruling of the court of cassation on 20° February 2020

- Ruling of preliminary judge is upheld
- In line with international treaties the captain had the duty of rescuing and complete the operation
- There is a close **connection between the duty to complete the Search and Rescue operation on land and the concrete opportunity for those on board to effectively being able to claim asylum**
- Confirmed there was no reason to detain the captain

The inter-ministerial decree no. 150/2020

Due to the pandemic emergency, a decree issued by the Minister of Infrastructure and Transport in agreement with the Ministry of Foreign Affairs and International Cooperation, the Ministry of the Interior and the Minister of Health issued an inter-ministerial decree introducing two rules:

Art. 1

(Scope of)

l. For the entire duration of the national health emergency resulting from the spread of the COVID-19 virus, Italian ports do not ensure the necessary requirements for the classification and definition of Place of Safety ("safe place"), as provided for by the Hamburg Convention, on maritime search and rescue, for rescue cases carried out by naval units flying a foreign flag outside the Italian SAR area.

Art. 2

(General provisions)

1. The provisions of this decree take effect from the date of its adoption and for the duration of the health emergency period referred to in the resolution of the Council of Ministers of January 31, 2020 (Now 30 April 2021).

Although Decree generically refers, in its preamble, to both the "ECHR" and to the 1951 Geneva Convention relating to the Status of refugee, it seems to be totally in contrast with the internal Constitutional rules and international treaty law, which the Italian State must comply with.

The inter-ministerial decree no. 150/2020

Critical Profiles of the Decree:

From a rationality point of view:

- The decree is justified ex. art. 32 of the Constitution as the state of emergency and stress of the health facilities would not be able to cope with emergencies for external subjects → this is not plausible as the same art. 32 extends the right to health to all individuals and not just to Italian citizens. Criticisms to the government's choice:
- a) the transfer, after the rescue, to another ship is inadequate.
- b) the justification for which keeping the ports open would guarantee fewer health rights to residents is senseless.

From the Internal law sources point of view:

- The Interministerial Decree is an administrative act that affects fundamental rights → A Secondary law source is not subject to a 'constitutionality review' → the only verification of legitimacy instrument, pursuant to art. 134 of the Constitution is the Regional Administrative Tribunals appeal.
- Art. 10 Italian Constitution co. 1 and co. 2 → directly prescriptive incorporates rights of international customary rank within it → *ex multis* right to provide aid as provided for by the Hamburg SAR Convention → the obligation to provide aid does not end in the act of rescuing the castaways from danger at sea, but to take them to a 'safe place' → 'safe place' has a natural incompatibility with "quarantine ships" (also for health reasons) → Cass. III Section Criminal Decision. n. 6626/2020 "*a ship at sea, which in addition to being at the mercy of adverse weather events, does not allow respect for the fundamental rights of the people rescued*".

The inter-ministerial decree no. 150/2020

From an international Law sources point of view:

- Geneva Convention related to the Status of Refugees of 1951 art. 33 "*principle of non-refoulement*".
- ECHR art. 2 "*right to life*" art. 3 "*prohibition of torture and other inhuman or degrading treatment*" also as developed by the ECtHR *ex multis* Hirsi Jamaa c. Italy: a State is obliged to respect the principle of *non-refoulement* even when it carries out rescues in international waters, when State has an effective control of asylum seekers.
- Additional Protocol N. 4 Article 4 ECHR "*Prohibition of collective expulsions of foreigners*".
- Charter of Fundamental Rights of the European Union art. 19 on the "*prohibition of collective expulsions*".
- International Covenant for Civil and Political Rights and other international law principles sets minimum standards that provide to protect the entry, at least a temporary protection, for the applicants for international protection in order to determine their *status* and therefore they are legitimate to stay until the end of the procedure

Sea Watch case 3 / Alan Kurdi sea Eye Vessel → rescue duty are based on international and EU law which translates into a “duty to land in a *safe place*”.

In summer 2020, ARCI lodged an appeal against the decree behind the Lazio TAR (Administrative Court), requiring the cancellation of the deed and the suspension of the executive effectiveness.

TAR ruled on 22 April 2020 with a decree of the single judge, who reject the precautionary request supporting the health situation, saying that due to the emergency related to Covid-19 it is impossible for the State to provide a “*safe place*” without compromising the “*functionality of the health, logistic and security structures dedicates to containing the contagion*” for those reason Tar decision fully receiving the reasons behind the decree.

On May 20, 2020, the previous ruling was confirmed by the collegial session, reserving the merit for the July hearing, reasons have not yet been filed.

On this aspect there is a concrete risk of returning to the management of entry flows by sea through administrative acts, as in the period of adoption of the security decree bis, violating the fundamental rights of *ius cogens* mandatorily established by International law.

The use of «Quarantine ships»

► Facts and figures

- Quarantining newly arrived migrants on board ferries moored off shore in several ports in the south of the country
- 10000 migrants confined on quarantine ships as of November 2020
- 2 investigations about 2 unaccompanied minors dead after disembarking from quarantine vessels, allegedly as a consequence of **lack of proper health assistance onboard**

► Legal basis

Civil Protection Decree 12 of April 2020

- Appoints the Civil Liberties and Immigration Department of the Italian Ministry of Interior, together with the Italian Red Cross, as responsible for managing the procedures related to the fiduciary quarantine and isolation of migrants arriving at sea
- Establishes that ships can be used for the medical surveillance period with regard to individuals rescued at sea who cannot be given a ‘place of safety’

The use of «Quarantine ships»

► Critical profiles

- Deprivation of liberty and a breach to of the right to movement
- Violation of the non-discrimination principle
- Breach of the SAR Convention and in contrast with the Court of Cassation ruling on 20 February 2020 on the conclusion of Search and Rescue operations
- Extension to migrants arrived through spontaneous disembarkations and to asylum seekers and foreign nationals holding resident permits already hosted in reception centres
- No clarity about the reception protocols followed onboard the quarantine ships
- Lack of information provision
- No contact with a legal representative
- No dedicated assistance for victims of torture and other vulnerable groups
- No access to asylum
- Violation to the right to adequate health assistance

► Critical profiles related to the rights of minors

- No best interest assessment
- No immediate appointment of a guardian as foreseen by the Zampa Law
- No dedicated reception facilities



"Security-bis
Decree" no. 53
of 14 June
2019

The case of Sea
Watch 3

Inter-
ministerial
Decree no. 50
of 7 April 2020

The use of
"quarantine
ships"

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