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UNIVERSITÀ DEGLI STUDI DI URBINO CARLO BO

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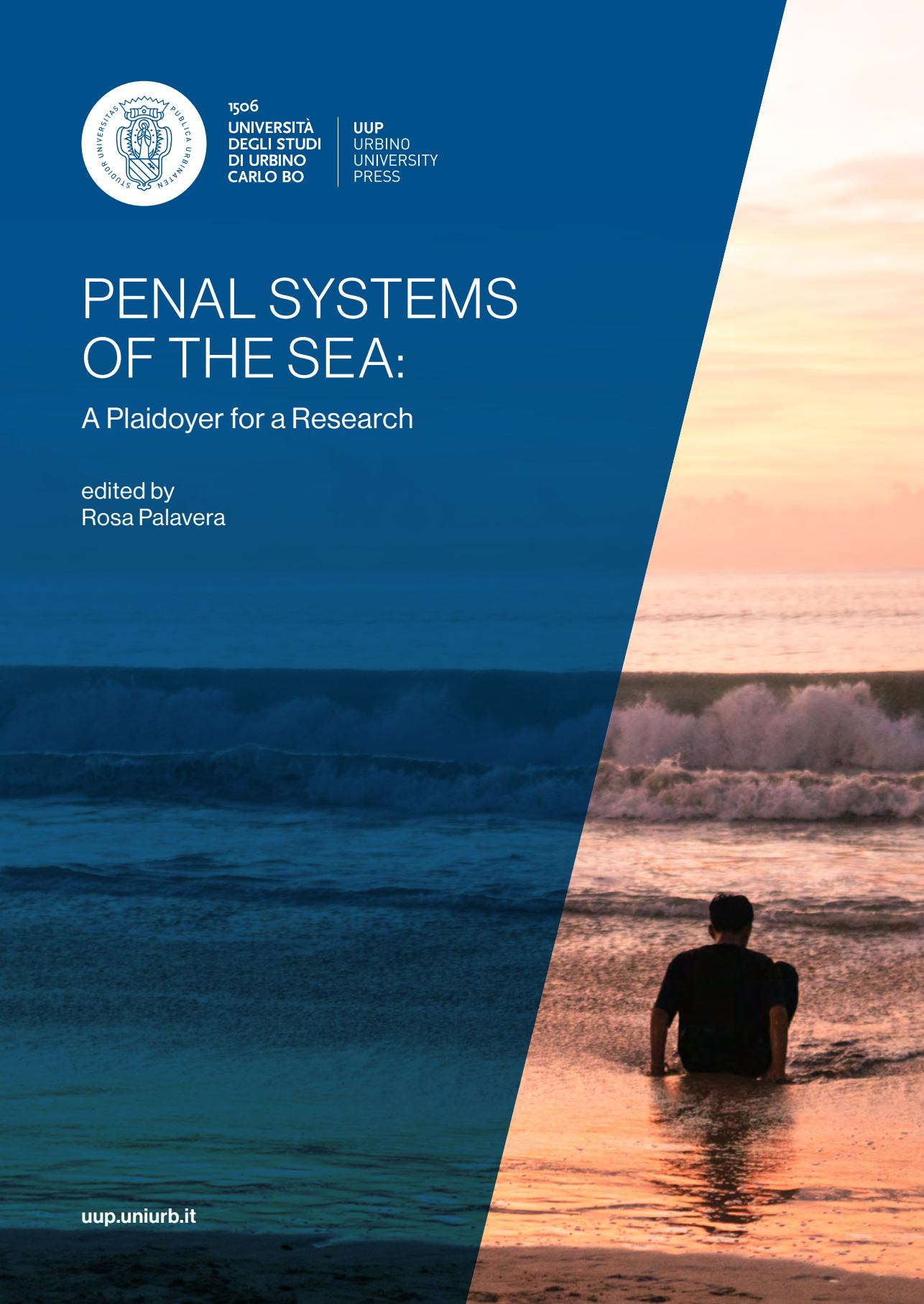
# PENAL SYSTEMS OF THE SEA:

## A Plaidoyer for a Research

edited by
Rosa Palavera



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Studies and notes following the meeting Penal Systems of the Sea: "Liquid Law" or Hard Case?, Università degli Studi di Urbino Carlo Bo, Urbino, Italy, May 24th, 2024.

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# SOMMARIO

# MULTILEVEL NORMATIVITY OF MIGRANT SEA RESCUE BETWEEN STATE DUTIES AND INDIVIDUAL GUARANTEE POSITIONS

Filomena Pisconti
Università degli Studi di Bari Aldo Moro

## 1. FOREWORD

The set of laws on sea rescue is contained in a multilevel and integrated system of national and international rules that provide complex and often overlapping legal obligations. In this complex network, a differentiation must be made between rules of international law governing the rescue of shipwrecked persons, often referred to as rules of the law of the sea, and rules of European law, concerning the right of asylum. The prerogatives of national laws are incorporated into this complex system.

Looking at international law as a remedy for the dysfunctions of state law or as the «law of the good» or «law of the righteous» does not allow one to perceive the dimension of rescue at sea in the complex multilevel normativity, in which it is embedded, characterised by obscurities or legislative gaps that judicial authority attempts to fill with axiological claims and by a growing tension between legal context under which search and rescue operations were originally framed and current political reality.

## 2. SEA RESCUE AS AN (INTER)STATE DUTY. RECONSTRUCTION OF INTERNATIONAL AND SUPRANATIONAL LAW

The obligation to safeguard human life at sea constitutes a long-standing principle of maritime solidarity (Camarda 1994; Rizzo 1992; Papanicolopulu 2016), as well as being enshrined in numerous international conventions and, even earlier, defined as an integral part of customary law

(Momtaz 1991; Oxman 1997), so its fulfilment by States is part of the more general framework of humanitarian laws.

On the obligation to rescue, international conventional law is unanimous: first, with regard to flag States, Article 98, 1st subparagraph of U.N.C.L.O.S. (United Nations Convention on the Law of the Sea) requires every State to oblige the captain of every vessel to proceed expeditiously to the rescue of any person in danger of perishing at sea.

The S.O.L.A.S. Convention (International Convention for the Safety of Life at Sea) requires the commander to proceed with all speed, to render assistance to persons in distress and, in the event that it is not possible to take appropriate action, to communicate the reasons that prevented it and to inform the competent search and rescue service; the text specifies, in addition, three situations of exemption from the obligation, in the event that the commander is unable to proceed to rescue or for unreasonable or unnecessary rescue[1].

Also, the S.A.L.V.A.G.E. Convention (International Convention on Assistance) provides for the captain's obligation to rescue any person in danger of disappearing at sea[2].

It is clear from every law that the obligation to aid arises only after the occurrence of the life-threatening event, while the obligation to set up appropriate search and rescue systems is antecedent than the occurrence of navigation, which is why it must be fulfilled earlier, even before the navigation accident or «distress» situation occurs.

International conventions do not allow rescue events to be qualified as irregular migration events, nor do they discriminate against those to be rescued or rescuers, depending on whether search and rescue activities are carried out either on an occasional way or occur on an ongoing one: in all cases, the safeguarding of human life at sea and respect for people's fundamental rights must prevail.

The activity of coordinating and arranging rescue and search operations, on the other hand, is the prerogative of coastal States.

The issue of coordination of rescue operations at sea is closely related to the system of regionalisation of the international search and rescue system, regulated by the latest version of the International Convention on Maritime Search and Rescue S.A.R., which provides for the division of the sea into «search and rescue regions», commonly referred to as S.A.R.

1 Chapter V.

2 Article 10 par. 1.

zones, defined as areas of coordination of search services, i.e., of «defined dimensions associated with a rescue coordination centre within which search and rescue services are provided»[3].

The establishment of an S.A.R. zone must be made by agreement with the States involved and its delimitation does not prejudice state boundaries: it «is not related to and shall not prejudice the delimitation of any boundary between States»[4].

Thus, «the SAR zone thus delimits an inside and an outside from which significant consequences arise in terms of responsibility for the coastal State» (Barnabò 2020: 379)[5], in which it does not exercise its sovereignty or jurisdiction, but it serves as a functional division for the recognition of obligations and responsibilities, not for the exercise of rights.

The ultimate duty of the coastal State responsible for the S.A.R. zone is to lead the shipwrecked people to a safe landing site in a reasonable time, defined P.O.S. (Place of safety).

The coordination of rescue and assistance operations for the ship must conform with the general rules and principles regarding the protection of human rights, particularly as they acknowledge the existence of essential and complementary guarantees related to the right to migrate «that justify the provision of the duty to save human life at sea on all occasions of danger to the life and safety of the migrant 'person'» (Pisconti 2022: 17).

Indeed, in this area, international human rights law and refugee law have been influential in establishing some criteria useful in defining the notion of «place of safety», that is the place where rescue operations must be concluded.

The 2004 I.M.O. resolutions - MSC 153 (78), which amended the SOLAS Convention, MSC 155 (78), which modifies SAR Convention and MSC 167 (78) bearing "Guidelines on the Treatment of Persons Rescued at Sea"- require States to coordinate and cooperate to ensure that ship masters are relieved of their obligations to assist rescued persons and to arrange and carry out disembarkation in a safe place as soon as possible.

The international conventional framework, however, has some significant gaps, given the absence in both sea rescue Treaties and customary law, of a substantive or procedural standard for identifying with certainty

3 Annex to the SAR Convention, Chapter 1 - Terms and definition.

4 Parr. 2.1.4 and 2.1.7 of Chapter 2 - Organisation and Coordination, Annex to the SAR Convention.

5 All texts quoted from Italian sources are translated by the Author.

where rescued persons are to be disembarked, especially in the absence of an agreement between States.

It is the responsibility of the competent State in the S.A.R. region to assume coordination of rescues and, likely, to provide the «place of safety», or at least of the first State contacted to provide an indication of a P.O.S. of disembarkation as the final operation, until the competent State assumes coordination.

The only really uncontroversial aspect is that the duty of the State close to the rescue site is not to automatically provide a safe harbour, but to coordinate operations and locate a safe haven that could also be outside its borders, thus leaving uncertain the identification, among many possible ones, of the coastal State that has to carry out and complete the disembarkation of the rescued migrants.

More problematic, of course, is the situation in which the State, which would be competent under the established delimitation of S.A.R. zones, fails to intervene, or fails to respond within a reasonable time, whereby it could legitimately deny the landing by exercising the power to prohibit entry into its territorial seas. Nor does the SAR Convention provide any clear textual indication suggesting that the first contact's State is automatically responsible for designating the port of landing, leaving the problem, therefore, of how to identify the coastal State that is to take charge of the landing.

Although generally the ship captains ready to intervene will also communicate the «distress» situation to their flag State, the whole system of sea rescue clearly establishes that the coordination and arrangement of appropriate measures to ensure the effectiveness of rescue are taken over by coastal States.

The power to interdict territorial seas is a prerogative recognised in international law and also affects the identification of the specific P.O.S.

Article 18 of the U.N.C.L.O.S. recognises, in fact, the right of «swift and continuous» passage, unless it is for stopping and anchoring referred to ordinary navigational events or situations of relief to persons, ships or aircraft in distress or danger, and «inoffensive», meaning that it must not cause harm to the fundamental interests of the Nation, internal peace, order and security.

In the case of offensive passage, the State regains full power to protect its borders by taking all measures it deems necessary to prevent to deny the entry, stay or transit in its waters of ships, especially when loading or unloading people in violation of the coastal State's immigration laws.

Such a provision, therefore, would legitimise strict choices of state authorities, such as measures to prohibit entry into territorial waters or naval blockades, evidently leaving out the circumstance that the transport of irregular migrants to a safe port is imposed by the need to guarantee them a place of safety as shipwrecked persons, whose legal status is completely indifferent to the cogent force of international obligations.

Finally, in EU law, the duty to rescue was reiterated by EU Regulation No. 656/2014, which establishes in Article 9 the obligation to assist «any vessel or person in distress at sea (...) regardless of the nationality or status of such a person or the circumstances in which that person is found».

Thus, from a content perspective, it does not conflict with the content of international obligations, but nothing more specifies, especially with regard to the last act of the rescue, namely the disembarkation.

## 3. HERMENEUTICAL PROBLEMATICS OF INTERNATIONAL SOURCES ON SEA RESCUE

The salvage of people in danger of being lost at sea, the finding of a place of safety and the identification of a venue for disembarkation are regulated by so different laws that «certainly contributed to challenge the unity, coherence and quality of the political response at national and international level» (Zamuner 2019: 977).

On the exact identification of the P.O.S., another important aspect concerns the identification of safe harbour as the closest port to the rescue site.

Neither the notion of «place of safety» nor the criteria for locating the place for disembarkation are addressed in the texts of SOLAS and SAR Conventions.

A definition of the expression «place of safety» is only provided by the 2004 IMO Guidelines as «a location where rescue operations are considered to terminate. 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. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination».

The amended conventions and guidelines cannot say conclusively that there is one and only one place of safety for each rescue operation nor that IMO establishes precise criteria which may be used to identify such a place.

Indeed, an important criterion to identify the place of safety comes from human rights law rather than the law of the sea; according to the guidelines, «the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea»[6].

This is due to the principle of *non-refoulement*, provided for in Article 33 of the Refugee Convention, in regional refugee law instruments and other human rights treaties (Trevisanut 2008; Fisher-Lescano, Löhr, Tohidipur 2009; *Gammeltoft*-Hansen 2011) which apply to every migrant rescued by ships flying the flag of a ECHR State, wherever the operation takes place.

It is an essential protection under international human rights, refugee, humanitarian and customary law, that prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations.

However, in the case of the Lazio Regional Administrative Court[7], following the Italian authorities' assignment of ports too far from the rescue area, the applicant ship Geo Barents, flying the Norwegian flag and chartered by Médicins sans Frontiére, invoked Rule 33 of par. 1.1. of S.O.L.A.S. Convention, which states the need for immediate disembarkation «as soon as reasonably possible», and par. 3.1.9 of Ch. III of SAR Convention, which enunciates the need for immediate disembarkation «as soon as reasonably possible». These conditions would only be realised if safe places are assigned close to the rescue site.

The administrative court pointed out that in no interpretation of P.O.S., nor in existing international norms, do the concepts of safe harbour and near harbour coincide.

The International Maritime Conventions do not, in fact, contemplate punctual indications about it: the treaties define in a negative sense the notion of a safe place characterised by broad and flexible definition, thus leaving a certain margin of discretion for its designation. There is no standard that precisely indicates the distance from the P.O.S., nor the necessary and reasonably acceptable days of navigation.

6 Para. 6.12 and 6.17 of Guidelines IMO.

7 See Lazio Regional Administrative Court, 19 June 2023, Judgment No. 10402.

Although rescue operations should be perfected by disembarkation at a safe place in the shortest time and with the least possible deviation by the rescue unit, and States should ensure the necessary coordination and cooperation so that ship captains deviate as little as possible from the intended route[8], the administrative judge excludes that the concept of safe port includes the concept of physical proximity («*vicinitas*») between the place of rescue and disembarkation, since the correct identification of the notion of safe port must take into account, above all, other factors, such as the expeditious assignment, the prompt rescue of migrants, the actual situation on board, and the logistical aspects related to need not to crowd the disembarkation territories.

The obvious is reiterated, namely that the captain is not obliged to reach a P.O.S. in the same flag State (if a closer one is available): the Grand Chamber of the Court of Justice of the EU in its judgment of 1 August 2022[9] specified that the flag State must be informed in a timely manner by the ship's captain and must render all possible assistance in cooperation with coastal States, without any obligation to provide a safe port.

According to the European Commission's Recommendation of 23 September 2020 No. 1365 the flag State has a responsibility related to the control of requirements for the purpose of ship registration, but that does not extend to the assignment of the obligation to designate a safe port of landing.

Admittedly, the allocation of unjustifiably too far ports of disembarkation contradicts the principle of fair («*ex bona fide*») cooperation among States in rescue matters, and thus it remains controversial whether the choice to locate burdensome and harassing ports respects the human rights of shipwrecked people.

The dynamics of rescue at sea are also affected by the content of Council Directive 2002/90/EC of 28 November 2002 and Framework Decision 2002/946/JHA (so-called Facilitators Package) regarding, respectively, the definition of aiding and abetting illegal entry, transit and stay and the strengthening of the criminal framework for the suppression of aiding and abetting illegal entry, transit and stay.

8 SAR Convention, Chapter 3, para. 3.1.9; SOLAS Convention, Chap. V - Reg. 33, par. 1.1.

9 Sea Watch e.V. v. Ministry of Infrastructure and Transport and Others, Joined Cases C-14/21 and C-15/21.

The absence of the purpose of profit among the substantive elements in the European definition of the crime of aiding and abetting irregular entry has legitimised member States to equip themselves with incriminating laws susceptible to attracting not only the activities of actual traffickers but also the conduct of those who, for solidarity reasons, lead migrants to European shores during rescue or assistance activities.

Many voices (Spena 2019; Cusumano, Villa 2019; Minetti 2020; Zirulia 2020; Mitsilegas 2021) have outlined the critical aspects of the European legislation: the package is defined as follows:

> «This updated study concludes that the Facilitators' Package is essentially a bad law that is not fit for purpose in the evolving political and legal context of the EU; nor does it provide an adequate response to the challenges posed by recent changes in the trends of migrant and refugee arrivals, which have largely been met by an increasingly transnational European civil society that has come to the aid of Member States that have been unprepared or unwilling to offer a sufficient welcome that respects human dignity and human rights» (Carrera et al 2018: 106).

The provision, moreover, of the mere option (and not a specific obligation) to introduce causes of exclusion of punishment for humanitarian assistance conduct is not sufficient to prevent any risk of «over-criminalisation» for the conduct of humanitarian workers at sea.

Only eight member States (including Italy and France, in contrast to the German and Spanish criminal laws, which do not provide any explicit exemptions) have endowed themselves with humanitarian exemptions, introducing provisions with uncertain and blurred boundaries.

In the «Kinsa case», brought to attention of the Court of Justice of the EU by Italian Court of Bologna[10] regarding the compatibility, validity, and interpretation of EU regulations on the Facilitators Package with certain rights under the Charter of Fundamental Rights of the European Union, it was highlighted that the incrimination obligations under EU law result in a disproportionate restriction of the rights of both «smugglers» and the «smuggled». This is particularly clear where these obligations impose severe criminal sanctions on anyone who voluntarily facilitates irregular entry, without requiring profit-making as a constitutive element, nor explicitly mandating exemption from liability for those acting with humanitarian and altruistic purposes, including rescue efforts.

10 Court of Bologna, Div. I, Ord. 17 July 2023.

This is the first time the Court of Justice has been called upon to rule on the validity and legitimacy of the incrimination obligations of the Facilitators Package, and should «the courts in Luxembourg come to the conclusion that the incrimination obligations enshrined therein are, in whole or at least in part, incompatible with the protection of the fundamental rights of the persons involved, then it would be possible to try to transfer these conclusions to the field of national criminal law» (Zirulia 2023: 363): the very ambiguous wording of aiding and abetting conduct raises serious questions about how to frame humanitarian activity in the Mediterranean.

The theory of the so-called «criminalisation of solidarity», in the context of sea rescues, is based on the absence of a careful reflection about the role of European criminal law in the context of migration policies. From this perspective, the preliminary question represents a new and important episode in the European debate on the protection of human rights through the instrument of criminal law, since the criminalisation of NGOs or other non-state actors carrying out search and rescue operations would constitute a violation of international law.

While waiting for the ruling, the new Directive proposed by the Commission on 28 November 2023[11] specifies that member States are obliged to criminalise intentional assistance to the entry, transit, and stay of irregular migrants, for profit and where there is a high risk of causing serious harm to the person (Article 3, par. 1), while there continues to be no reference to an exclusion of liability for humanitarian activities, this highlights that any real signs of reform in this area remain unclear.

The lack of regulation of the recovery and rescue activities of those defined as the main actors in sea rescue, i.e., NGOs, who often intervene to rescue people in distress, also affects the dynamics of rescues.

As is well known, NGO vessels differ from public vessels of States in that they have the aim of rescue as their exclusive purpose, do not enjoy the rights provided by the law of the sea for State vessels, and the consent of the coastal State to the landing of rescued persons is required.

Since they are private entities, NGOs do not have legal status. Therefore, the private individuals who make up these NGOs will be personally liable for violations of international law in cases of omissions and actions, in accordance with the rules of individual criminal responsibility.

11 Directive of the European Parliament and of the Council Brussels, 28.11.2023 COM (2023) 755 final.

Obligations imposed on the captain by the U.N.C.L.O.S., S.O.L.A.S. and S.A.R. conventions extend to captains of NGOs who are regularly contacted by state search and rescue centres replacing state rescue equipment.

NGOs are said to have taken over a state public function, dispossessing States of their sovereign rights in a situation of institutional absence.

The current situation is, in fact, quite different from the one descripted by ordinary and supranational laws that identify States and not private third parties as the main actors, revealing, in fact, a regulatory gap concerning competences and responsibilities.

Within this framework, the Italian codes of conduct signified a normative experiment in rules with the declared intent of regulating the work of NGOs.

The first document, titled the Voluntary Code of Conduct for Search and Rescue Operations Undertaken by Non-Governmental Civil Society Organizations in the Mediterranean Sea, drafted in 2017 by some NGOs on a voluntary basis, was followed by one prepared by the Italian government, also in 2017, leading up to the most recent decree-law No. 1 of 2 January 2023, containing urgent provisions for the management of migration flows, which was converted into law with amendments on 24 February 20233, No. 15, so-called «Piantedosi Decree» or also, improperly, the NGO Code of Conduct.

In the first text «there is no mention (except for a footnote) of rules of the law of the sea and maritime law that also regulate navigation and rescue at sea. Since it is not the product of the processes of creating norms of international law, its content is not binding per se (...)» (Papanicolopulu 2017: 23).

The second document drafted by the Government is presented as a normative text of unilateral regulation of the NGOs' activities, having not found a legislative development in agreement with the organisations.

We exclude (Martens 2002; Marchesi 2006; Ciciriello 2008; Mussi 2017) the relevance of the code of conduct as a legal instrument of international law or European Union law, as it is more of a domestic law instrument.

Furthermore, it does not have the formal characteristics of ordinary laws or similar law acts, nor does it include coercive measures or sanctions in the event of non-compliance with the conduct outlined therein.

Similarly, the possibility of qualifying the code of conduct adopted by the Italian authorities among the sources of secondary law, with regula-

tory nature, seems also to have to be ruled out, lacking an express competence recognised by ordinary law.

The codes of conduct testify to the international community's awareness of the need to clarify the regulatory regime applicable to NGO rescue cases, especially regarding crucial aspects.

Lastly, in its ruling of 1 August 2022, the Grand Chamber of the Court of Justice of European Union, about a question referred for a preliminary ruling by the Sicilian Regional Administrative Court on two detention orders for Sea Watch 3 and Sea Watch 4 by Italian port authorities, extended the application of Directive 2009/16/EC to port State controls to be carried out on vessels flying a flag other than its own, to vessels used by humanitarian organisations.

In international law, the activities carried out by a ship at sea are subject to different jurisdictional regimes, involving the establishment of distinct obligations and faculties in the hands of different States involved: first, the regime of the flag State, which is responsible for the control of all technical and administrative matters of the ship, and that of the port State, which grants powers to verify the substantive correspondence between the safety certificates held by the vessel and its actual condition.

The Luxembourg Court held that the port State may not require proof that such ships have certificates other than those issued by the flag State or that they comply with all the requirements applicable to a different classification, notwithstanding the possibility of taking any corrective action it deems necessary, appropriate and proportionate if the inspection reveals deficiencies. The port State cannot then make the lifting of a ship's detention conditional on that ship having certificates other than those issued by the flag State.

The Court establishes a kind of hierarchy of laws, where it recalls that the implementation of the maritime distress obligation also produces consequences with regard to the control of safety regulations at sea, holding that the exceptional and extraordinary situation of distress at sea and the related obligation to provide rescue takes precedence over all existing safety obligations, «which remain partially suspended to the extent that this is necessary to enable rescue operations» (Papanicolopulu, Losi 2023: 17).

Although the Court has been very convinced in emphasizing that the rules concerning sea rescue operations the most relevant within the international legal framework, it is nonetheless necessary to adopt specific European and international regulations that, in accordance with the content

of Recommendation (EU) No. 2020/1365 of the European Commission, about cooperation among member States regarding operations conducted by privately owned or operated vessels for the purpose of search and rescue activities, uniformly establish safety standards and certificates for private vessels that are routinely used and intended for search and rescue operations at sea for people.

The Piantedosi Decree of 2023 (Pisconti 2023; Masera 2023) established that ships engaging in systematic search and rescue at sea must operate «in accordance with and be maintained in compliance with the certifications and documents issued by the flag State for the purpose of navigational safety, pollution prevention, certification and training of maritime personnel as well as living and working conditions on board», almost as if to introduce a burdensome regime for obtaining authorization and specific safety requirements for NGOs, because of, for the first time, an explicit reference to private vessels permanently dedicated to maritime rescue of people at sea.

However, until uniform European and international regulations are established regarding safety standards and certifications for private vessels engaged in search and rescue operations at sea, the provisions of the new decree apply solely to ships flying the flags of individual states that, within their respective legal systems, provide for the issuance of appropriate certifications and documentation for carrying out these maritime search and rescue activities

## 4. SEA RESCUE AS AN INDIVIDUAL GUARANTEE POSITION OF THE SHIP'S CAPTAIN AFTER THE "RACKETE" RULING. CONCLUSIONS

The discussion on the multilevel system of sea rescue law leads to final considerations on the individual guaranteed position of the captain during search and rescue operations.

The establishment of a state's obligation to conduct sea rescue operations only gains significance if it strengthens the individual duty of rescue for the ship's captain, whether the vessel is public or private. Therefore, if international law places the obligation on States to require the captain to fulfil the duty of rescue, individuals themselves have an authentic duty of enforcement of that very obligation.

The recognition of the pre-existence of the captain's right not to be hindered either by private individuals or by States for his activities is explained by reason of a moral argument, certainly - «since that of rescue is, first and foremost, a moral duty that is imposed before and independently of any rule of positive law» (Starita 2019: 39) - and legal.

In the best-known cases of criminalization of the conduct of captains involving the Italian State, such as Iuventa and Open Arms (Barberini 2017; Masera 2018; De Vittor 2018), case law has attempted to qualify the captains' autonomous choices about disembarkation, disregarding the authorities' instructions to halt operations, as conduct of Article 12 of the Consolidated Act on Immigration (Legislative Decree of 25 July 1998, No. 286), so as a hypothesis of aiding and abetting immigration, regarding the transportation of illegal migrants into territorial waters.

In the notorious Rackete case[12], it was clarified that the duty to rescue does not end with the act of removing shipwrecked people from the danger of being lost at sea but entails a secondary and consequential obligation on the captain to land them in a safe place.

The rescue duty cannot be considered fulfilled by rescuing the shipwrecked people on the ship and keeping them on it, as this would undermine the right to apply for international protection, which certainly cannot be done on the ship.

In the context of rescue operations, «the Rackete case thus marks both the peak and the end of a period of bitter and explicit conflict between humanitarian workers and the institutional system, which is unprecedented in the history of our country» (Masera 2022), as it recognises that the ship's captain cannot be prevented from disembarking and that his conduct is expressive of the fulfilment of the duty to rescue under Article 51 of the Italian Criminal Code

The application of Article 51 of the Italian Criminal Code is imposed by that particular antinomian situation of conflict of duties that occurs whenever two legal norms of a prescriptive nature, one of command - in this case, that relating to the obligation to rescue - and the other of prohibition - referring to the criminal offenses charged against NGO members for aiding and abetting illegal entry, or private violence, or resisting a public official or other special crimes in navigation - characterise the conduct in opposing terms.

12 Italian Supreme Court of Criminal Cassation, III Criminal Div., Judgment No. 6626 of 20 February 2020.

The rescue obligation cannot be terminated because of ministerial directives or administrative orders prohibiting transit, stopping or entry, because the hierarchical international law of the sea, which recognises and requires the ship's captain to disembark shipwrecked persons in safe harbour, cannot support criminalisation as consequence of acts performed as a necessary condition imposed by national and international norms.

Placing, by Italian case law, the dimension of rescue at sea within in the dimension of so-called «antigiuridicità» of crime, under the guarantee of so called «scriminante» of Article 51 of the Italian Criminal Code, means to have recognised that the criminal court has performed two operations:

> «has identified a conflict between norms, specifically the incriminating norm and the one attributing a duty, and resolved the conflict in favour of the latter, not on the basis of classical criteria but on the basis of the use of an hierarchical criterion with an axiological nature, which prioritises a fundamental duty imposed by an international norm, reflecting a supreme principle of solidarity at sea and involving an assessment of the values at stake, in line with the hierarchical nature of the duty that also has constitutional protection under Article 10, first paragraph of Italian Constitution» (Pisconti 2022: 174).

The implications of an international regulation, that does not allow for the clear and definitive identification of the State obliged to permit disembarkation, do not affect the duties of the captain, who is required to ensure the prompt disembarkation of passengers at the port he deems safest or is justified in contravening any state directives that prevent docking, based on a margin of discretionary assessment identified by the effective protection of the fundamental rights of the individuals entrusted to his care.

All of this is in keeping with a correct interpretation of rescue regulations, whereby the rights of people rescued at sea should take precedence over the legitimate interest of States in controlling their borders.

The transposition of international obligations onto the captain in the Italian legal system has occurred in the provisions of Articles 498 of the Italian Navigation Code (Royal Decree No. 327 of 20 March 1942) with reference to the duty of assistance, which presupposes a situation of objective danger of loss of the ship or aircraft at sea or in inland waters, or 490 of the Navigation Code, according to which the captain of the ship or aircraft, in the event of inability to manoeuvre or resume flight, due to a dangerous situation, must attempt the rescue of persons on board or lost at sea.

Also relevant is Article 1113 of the Navigation Code, which punishes the failure to fulfil the duty of cooperation between public institutions and private entities in carrying out the rescue, in case the authority exercises the ordering power of the provision of any means and crew deemed necessary or, again, Article 1155 of the Navigation Code, which punishes the conduct of the captain who arbitrarily disembarks a crew member or passenger or abandons them and prevents their return on board[13].

Thus, the ship's captain, as a «subject» holder of prerogatives and duties, is also the holder of a right «versus other private parties and, above all, States» to ensure that the performance of those duties incumbent upon him is not obstructed; this is «*ius ad officium*, or a right to the full exercise of the function attributed to them by international law» (Starita 2019: 40).

Admittedly, judges do not have the necessary expertise for the purpose of identifying a P.O.S., but the issue of safe disembarkation will be relevant into case law when discussing the consequences of regulatory gaps and decision-making gaps of States on the rights of abandoned persons in danger of their lives.

The captain's right to duty to international law is a right that is functional to the fulfilment of the duty of rescue itself, so if international law places an obligation on States to require the captain to fulfil the right of rescue in its entirety, it is obvious that he expects States themselves not to hinder its fulfilment.

The indeterminacy of laws, characterizing the multi-level system of sea rescue, contributes to increase the disparity between the general and abstract norms and the specific cases to which it is applied. This often requires a legal resolution to be found in a temporal and social context that is entirely different from the one in which law was developed, leaving a degree of interpretative discretion that seems impossible to eliminate.

It is precisely on the exact identification of the place of safety that the violation of the principle of *non-refoulement* by the governments of the European Union has been noted on several occasions, starting precisely

13 The case of the Asso 28 ship involves an Italian vessel that, on 30 July 2018, returned 101 migrants to Tripoli after rescuing them in the Mediterranean Sea, resulting in an offense that had never previously involved a national maritime vessel. After detecting the presence of an inflatable boat with 101 migrants on board, the captain allowed the individuals to be transferred to the boat, which then made its way to the Libyan coast. They were subsequently transferred onto a Libyan patrol boat, leading to significant harm due to their collective rejection, an action prohibited by international conventions. The Italian Supreme Court (Italian Supreme Court of Criminal Cassation No. 4557 of 17 February 2024) upheld the captain's conviction.

with the signing of the Memorandum of Understanding of 2 February 2017 between the Italian and Libyan governments, which led to the creation of a Libyan coast guard, committed to bringing refugees back to Libyan territory, or the establishment of a vast S.A.R zone under Libyan jurisdiction, within which to coordinate all search and rescue events, that would result in the arrival of shipwrecked individuals at a Libyan port:

> «here is another emblematic example of how the darker side of the law can overshadow even established rules, such as those developed to define a POS, which doctrine has tended to interpret clearly, but which certain case law, as a result of practices as novel as they are specific, is now beginning to question or struggle to handle» (Sciurba 2021: 9).

Still, today S.A.R. zones are invoked by States themselves as a limit beyond which they abdicate responsibility, for the luck of shipwrecked people, the rescue responsibilities, the assignment of a safe port of disembarkation, and the recognition of a Libyan S.A.R. zone in which the founding principles of international human rights law can be violated.

In the face of the ambiguities of the norms, the risk of making prevail to the generic defence of national borders over clearly identified rights, which correspond to institutional duties, creates a struggle in the central Mediterranean for the precise assertion of legal positions and obligations.

The need to consolidate and guarantee such positions in the matter of relief could be, in the context of the principles that to this day still underlie international law, a valid hermeneutical criterion to be considered in ascertaining violations of law and consequent responsibilities that are repeatedly hided by attempts to criminalise civil aid.

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