Managing migration in the Mediterranean Sea: From mythology to remote surveillance, the compatibility of the Italian strategy with international law of the sea

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1. Introduction

Examining migration trends in the Mediterranean Sea from a global perspective could lead us to the conclusion that Aeneas also left traces of himself and his journey in the legal world, as well as in that of art and literature. If we focus in particular on instruments of international law, it can be seen that those that regulate the phenomenon of migration, in the awareness that the journey brings us not only a wealth of knowledge but also dangers and adversities, are multiple and diverse.

Consider firstly the Declaration proclaimed in New York by the United Nations General Assembly in the aftermath of the two world wars of the so-called short century,[1] where the possibility of leaving any country, including one's own, became a genuine right, universally recognised for

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1. We borrowed the expression used by the British historian Eric Hobsbawm to refer to the events of the 20th century in his famous book entitled 'The Short Century'.

each individual.[2] A few years later, in 1951, the Geneva Convention relating to the Status of Refugees also included the importance of providing protection to those who flee for justified fear of being persecuted on the grounds of race, religion, nationality, membership of a particular social group or political opinion.[3] Other international treaties, on the other hand, take into account the dangers and adversities faced by those who, more or less voluntarily, travel by sea, just like Aeneas. We refer here, above all, to the United Nations Convention on the Law of the Sea (the Montego Bay Convention), where provisions regarding the exercise of police powers in relation to suspicious foreign ships coexist with provisions aimed at safeguarding the safety of ships, crews and passengers.[4] While on the subject of maritime safety, it should be recalled that two other specific conventions concern, respectively, safeguarding human life at sea (the SOLAS Convention)[5] and regulating search and rescue activities (the SAR Convention). [6]

Regulating migration by sea, however, also exposes legal practitioners to a number of issues that are not easy to resolve. If, on the one hand, international cooperation can lead to the adoption of agreements aimed at regulating global phenomena such as migration, which clearly involve the interests of several states, on the other hand, implementing the commitments resulting from such cooperation into national law can be very complex. From this perspective, it is beyond doubt that the case of Italy

2. Article 13 of the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations, in Paris, on 10 December 1948 in Resolution 217 A, UN Doc. A/810 (1948), 71.

3. Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951.

4. United Nations Convention on the Law of the Sea, adopted in Montego Bay on 10 December 1982.

5. SOLAS Convention, adopted on 1 November 1974 by the International Conference on Safety of Life at Sea convened by the International Maritime Organisation.

6. SAR Convention, adopted in Hamburg on 27 April 1979.

is particularly complex. The geographical characteristics of the Italian peninsula, which, with over 7,000 kilometres of coastline, extend into the heart of the Mediterranean Sea, have made it, since ancient times, a territory greatly affected by the phenomenon of migration by sea. Moreover, since the uprisings that have become known as the Arab Spring, migratory flows from the North African coast have increased markedly. Statistics released by the United Nations High Commissioner for Refugees (UNHCR) show that over the past eight years, more than 2.3 million migrants and refugees have crossed the Mediterranean Sea to reach the southern shores of the European continent.[7]

That said, the various governing bodies of Italy have resorted to a number of measures in an attempt to cope with the increase in migration flows.[8] In some cases, these have been innovative and effective solutions. In other cases, however, a questionable and short-sighted security-based logic has prevailed. In view of this complicated background, which is still in the process of being defined, it is considered necessary to analyse Italy's strategy for managing migratory pressure on its southern coasts. To this end, we will begin with a detailed description of the most important choices made by Italy, individually and within the institutional framework of the European Union (EU) (Section 2*).* Given the perspective of the analysis, we will look at the compatibility of such choices with the complex set of rules of international law of the sea which give rise to a series of very precise obligations for Italy, both as a coastal State and as

7. United Nations, *High Commissioner for Refugees* (UNCHR).

8. The increase in migratory flows towards Italy has had a major impact on the Italian legal system, the first reaction of which was to declare a state of humanitarian emergency. See Decree of the President of the Council of Ministers, *Declaration of the state of humanitarian emergency in the national territory in relation to the exceptional influx of citizens from North African countries (Dichiarazione dello stato di emergenza umanitaria nel territorio nazionale in relazione all'eccezionale afflusso di cittadini appartenenti ai paesi del Nord Africa)* No. 11A02242, 12 February 2011, in the Italian Official Journal (*Gazzetta Ufficiale)* General Series No. 42 of 21-02-2011.

a flag State. Special attention will be dedicated to the assessment of the ethical and legal implications deriving from the use of new technologies for controlling migration flows at the main EU external sea border (Section 3).

2. Managing migration flows: From maritime patrolling to remote surveillance

It is perhaps well-known by now that handling migration in the Mediterranean Sea involves two challenges: action must be taken against suspected traffickers and smugglers, and against migrants whose lives are in grave danger. The measures adopted by Italy to address this dual challenge are many and varied. For ease of explanation and analysis, these measures are analysed below in four phases.

2.1 The humanitarian crisis and the proactive intervention of the Italian authorities in relief and law enforcement activities

The first phase began with a very specific date that is engraved in our collective memory: 3 October 2013. On this date, over 360 people lost their lives in a single shipwreck a few nautical miles from the island of Lampedusa. However, this event was destined to be memorable for another reason: it triggered significant reactions from Italian institutions, first and foremost in terms of safeguarding human life at sea.

In fact, it led to the now well-known *Mare Nostrum*: a military operation, purely humanitarian in nature, which was established by the Italian government on 18 October 2013. Although the operation was

coordinated by the Italian Navy, it involved several national and European authorities. These air and sea forces patrolled a very large part of the Mediterranean Sea, stretching well beyond the outer limits of Italian territorial waters, mainly in order to rescue migrants from Libya and then disembark them in Italy.[9] More than 150,000 people were rescued as a result of this operation. Yet, it was a victim of its own success and ended on 31 October 2014. Both Frontex and domestic political opposition believed that *Mare Nostrum* itself was actually causing migration to increase. The argument was that migrants were induced to leave the Libyan coast due to the high probability of being intercepted and rescued by the Italian authorities in a large sea area.

In this first phase, humanitarian search and rescue (SAR) initiatives coexisted with lesser-known law enforcement activities to counter migrant smuggling. The coordination of these initiatives was entrusted to the Italian Anti-Mafia Directorate (*Direzione Nazionale Antimafia* or "DNA") at the instigation of the regions – which are governed by the District Directorates (*Direzioni Distrettuali*) – mostly affected by the management of the landings: Reggio Calabria, Lecce, and, above all, Catania). Following a request to act by the aforementioned District Directorates, the DNA proceeded to prepare guidelines (*atto di indirizzo*)[10] addressed to District Prosecutors' Offices and to judicial police bodies to coordinate the intervention of Italian air-naval units in international waters, if the offence notified concerned criminal association[11] and if the latter was aimed at aiding and abetting illegal

9. For a more in-depth look at the authorities involved and the *modus operandi* of *Mare Nostrum*, see the dedicated section of the Navy website: https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-concluse/Pagine/mare-nostrum.aspx.

10. DNA, Guidelines, 2014.

11. Under Article 416(6) of the Italian Criminal Code.

immigration.[12] Basically, if the criminal conduct led to the presumption of a connection with the territory of the Italian State, the plan was to intervene in international waters as well, both against mother ships and minor vessels. Several hundreds of suspected traffickers have been arrested in this period in compliance with the contents of the DNA's guidelines.

2.2 The involvement of non-governmental organisations and European authorities

The starting point of the second phase was the discontinuation of *Mare Nostrum*, which had a series of significant consequences in terms of the management of migration flows in the Mediterranean. While Italy remained committed to both SAR and law enforcement activities, both its role and its contribution changed with respect to the two types of activity.

As regards SAR, the institutional vacuum post-*Mare Nostrum* was filled by the intervention of private air and sea vessels, mostly operated by non-governmental organisations (NGOs) of different nationalities. In this phase, NGO crews patrolled the areas of sea where most distress events occurred, provided first aid and, if sufficiently equipped, transferred rescued persons to a safe landing place which, in most cases, was an Italian port.[13] The area covered by the private units roughly corre-

12. Referred to in Article 12.3 of the Legislative Decree of 25 July 1998, no. 286, Consolidated text on the law of immigration and rules concerning the status of foreigners (*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), the so-called consolidated text on immigration, in the Italian Official Journal (*Gazzetta Ufficiale*) of 18 August 1998, no. 191. Among the extensive literature, see Seline Trevisanut, *Immigrazione irregolare via mare diritto internazionale e diritto dell'Unione europea* (Jovene, 2012) 187 ss.

13. On the subject of safe place of disembarkation, according to Chapter 3.1.9 of the Annex to the SAR Convention: "[States] Parties shall co-ordinate and co-operate 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 ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea". In this regard, see Adele del Guercio, 'Is It Lawful to Save Human Lives at Sea?' (2022) Federalismi.it, ISBN 1826-3534, 53-75.

sponded to that in which those coordinated by the Navy had previously operated, extending from Italian territorial waters to the border of those of Libya, where no governmental SAR service existed either. In this second phase, however, rescue coordination reverted to the Coast Guard.[14]

With regard to activities to counter migrant smuggling, in this second phase, Italy actively contributed to patrolling the Mediterranean Sea, taking part in both police operations coordinated by Frontex and a full-fledged military operation. The first in a long series of police operations was called Operation Triton. Officially launched on 1 November 2014, Operation Triton was the result of a compromise reached between European institutions and the Italian government, which hoped that, after *Mare Nostrum* ended, it would be continued at the European level. Its mandate and the broader one of the subsequent Operation Triton Plus, however, remained focused on the protection of the EU's external maritime border and were far from being humanitarian operations.[15] The next operation in which Italy also actively participated was called EUNAVFOR MED. Military in nature, it was set up within the framework of the *Common Foreign and Security Policy* (CFSP)[16] on 18 May 2015 and aimed to 'disrupt the business model of smugglers in the Southern Central Mediterranean'.[17] Initially, its mandate appeared to be particu-

14. On non-governmental rescue, see Eugenio Cusumano, 'Emptying the Sea with a Spoon?' (2017), Marine Policy Vol 75, January 2017, 91-98.

15. See Frontex Annual Report on the Implementation of Regulation 656/2014, Warsaw, 9 July 2015, tp://frontex.europa.eu/assets/About_Frontex/Governance_documents/Sea_Surveillance/Sea_Surveillance_report_2014.pdf. On Operation Triton, see also: 'Frontex launches joint operation Triton', January 2017.

16. European Parliament, 'Politica Estera: obiettivi, strumenti e risultati', available at <https://www.europarl.europa.eu/factsheets/it/sheet/158/politica-estera-obiettivi-strumenti-e-risultati-conseguiti>.

17. Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern and Central Mediterranean (EUNAVFOR MED), in OJ L 122/31 of 19 May 2015. See in particular Art. 1 and Recital (5).

larly ambitious: the air-naval units involved could carry out detentions, inspections, seizures, and hijackings. They could also take all necessary measures against vessels and related means suspected of being used for people smuggling and trafficking, both in international and Libyan territorial waters. The carrying out of such actions within Libyan waters was, however, subject to a UN Security Council resolution or the consent of the Libyan state.[18] The resolution was adopted, but it only authorised the use of police powers in international waters. Libyan consent, on the other hand, was never given.

As regards the results achieved in this phase, the Italian Coast Guard reports for 2016 made no distinction between when Frontex and EUNAVFOR MED assets intervened for law enforcement activities and when they intervened for SAR activities. Nevertheless, it is clear from the same reports that the number of people actually rescued using governmental resources was overall much lower than the number rescued by non-governmental units.[19]

2.3 Towards the reduction of responsibility and the regularisation of irregular flows

The year 2017 marked the beginning of a longer phase in which Italy gradually moved away from having any responsibility for migration management in the Mediterranean Sea. Although the increase in flows from Libya and, later on, from Tunisia too, continued unabated, several of Italy's governing bodies distanced themselves from the need to inter-

18. CFSP Decision, Art. 2. On this topic, Laura Salvadego, 'Il rispetto dei diritti umani fondamentali nel contrasto al traffico di migranti' (2017) Il Diritto Marittimo, CXIX, Berlingieri, 1122-1150.

19. General Command of the Italian Harbour Master - Coast Guard Body, *Attività nel Mediterraneo Centrale*, 2017, available at <https://www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ITA.pdf>.

vene at sea in both SAR and law enforcement activities. At least three circumstances demonstrate this trend.

Firstly, in early 2017, Italy officially reactivated cooperation with the Libyan authorities and signed a genuine bilateral treaty delegating SAR initiatives to the Libyan Coast Guard. In 2020, over 11,900 people were intercepted by these authorities and returned to Libya.[20] Although the requirements set by the IMO to establish a SAR zone were still lacking and, above all, although Libya is not considered a safe country,[21] this agreement has been regularly renewed to date.[22]

Secondly, the interventions at sea carried out by the Libyan partners gradually became irreconcilable with the rescues carried out by non-governmental units. This is explained by the fact that the Italian authorities, well supported by European institutions,[23] first discouraged and then hindered the NGOs' SAR activities. From being a factor in attracting migrants, the latter actually became the subject of a series of investiga-

20. United Nations Office for the Coordination of Humanitarian Affairs (OCHA). (2020). Libya Situation Report. United Nations, *High Commissioner for Refugees* (UNHCR). (2018). UNHCR Position on Returns to Libya - Update II, September 2018. And International Organisation for Migration (IOM), Missing Migrants, tracking deaths along migratory routes.

21. Numerous NGOs and international organisations have officially declared that Libya cannot be considered a safe country. Most recently, see Amnesty International, Between the Devil and the Deep Blue Sea. Europe Fails Refugees and Migrants in the Central Mediterranean, 2018, 17 ff., www.amnesty.org; UNHCR, IOM, Joint Statement: International Approach to Refugees and Migrants in Libya Must Change, 11 July 2019, www.unhcr.org. The courts have also made declarations to this effect as well. Thus, for example, with regard to the case-law at the national level, see the order rejecting the request for preventive seizure of 16 April 2018 of the Court of Ragusa, Office for Preliminary Investigations, confirmed by the Court of Review of Ragusa on 11 May 2018 in the Open Arms case; see Francesca De Vittor, 'Soccorso in mare e favoreggiamento dell'immigrazione irregolare' (2018) Diritti Umani e Diritto Internazionale, Vol 12, 443-452.

22. Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Republic of Italy, Rome, 2 February 2017.

23. Frontex, Annual Report, cit.

tions and judicial enquiries. The effect produced by these investigations and the related criminal and administrative proceedings[24] was to prevent the carrying out of SAR activities, causing a major reduction in the number of private units operating in the area.

Thirdly, at the same time as judicial action, in terms of domestic legislation, the government took various measures that restricted the humanitarian initiatives of NGOs in both international and Italian territorial waters. We recall the most significant ones. First of all, on 7 August 2017, the Italian Minister of the Interior, again with the unanimous support of his European counterparts, adopted an ambiguous document, the so-called Minniti Code, containing a series of equally ambiguous rules of conduct which aimed to circumscribe the rescues of non-governmental units and favour Libyan interventions.[25] The rules of conduct, while non-binding on paper, were followed in 2018 and 2019 by two well-known security decrees[26] and various implementing ministerial

24. For an overview of proceedings against private actors involved in SAR activities in the Mediterranean, see Fundamental Rights Agency, '2019 update - NGO Ships involved in Search and rescue in the Mediterranean and Criminal investigations', 2019, https://fra.europa.eu.

25. Italian Ministry of the Interior, Code of Conduct for NGOs engaged in rescue operations of migrants at sea, 2017 (*Codice di condotta per le ONG impegnate nelle operazioni di salvataggio dei migranti in mare*), available on the Ministry's official website: https://www.interno.gov.it/sites/default/files/codice_condotta_ong.pdf. Regarding the support of European institutions, it should be recalled that at the informal meeting of Justice and Home Affairs Ministers held on 6 July in Tallinn, under the Estonian Presidency, the EU Home Affairs Ministers welcomed the Code of Conduct. The Italian initiative was also included in the 'Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity', presented by the European Commission on 4 July 2017.

26. Decree-Law No. 113/2018, in conjunction with Conversion Law No. 132/2018, in the Official Journal of 3 December 2018, No. 281; Decree-Law No. 53/2019, in the Official Journal of 14 June 2019, No. 138; the rules of which were amended by Decree-Law No. 130/2020, in the Official Journal of 21 October 2020, No. 130.

decrees[27] through which the Italian government laid down further conditions for the innocent passage of foreign-flagged non-governmental vessels in Italian territorial waters as well.

Some five years after the start of this third phase, the security-based approach that guides the trend towards a reduction of responsibility for immigration flows does not seem forward-looking. UN data show a kind of *regularisation* of *irregular* flows along the central Mediterranean route. Most of the irregular crossings to the EU take place in this area.[28] Not even the Covid-19 pandemic has deterred migrants from setting sail from the North African coast. Thus, Frontex detected more than 35,600 irregular crossings in 2020, compared to a figure of 14,000 in 2019. And in the first four months of 2022 alone, over 18,000 crossings were counted.[29]

2.4 Consolidating the process of reducing responsibility and moving towards remote surveillance

The Italian authorities' gradual reduction of responsibility for the management of irregular migration by sea should also be examined in light of the broader European institutional context regarding the control of the external maritime border of the European Union, which has identified integrated border management as one of its priorities. Thus, the

27. For example, a measure issued by the Minister of the Interior, in agreement with the Minister of Defence and the Minister of Infrastructure and Transport, dated 1 August 2019, notified by e-mail, ordering 'as of now' the prohibition of entry, transit and stopover of the ship OPEN ARMS 'in national territorial seas.' This measure was also adopted in accordance with the aforementioned Security Decree bis; see footnote 4 above.

28. UNODC, Observatory on Smuggling of Migrants, West Africa, North Africa and the Central Mediterranean - Key Findings on the Characteristics of Migrant Smuggling in West Africa, North Africa and the Central Mediterranean, 20 May 2021, available at <https://www.unodc.org/res/som/docs/Observatory_Storymap_1_Final_2021.05.19.pdf>.

29. FRONTEX, Migratory Map, Detections of illegal border-crossings statistics.

European Border and Coast Guard was established by EU Regulation 2019/1896, which came into force in Italy on 4 December of the same year. This Regulation highlighted the ever-increasing need to effectively monitor the crossing of external borders in order to ensure a higher level of internal security within the EU. Such monitoring involved implementing a series of systems to control migration flows, in particular as regards coordinating the activities of the various agencies operating in this area, such as the European Police Office (EUROPOL), the European Maritime Safety Agency (EMSA) and the European Border Surveillance System (EUROSUR). Of particular importance is the latter, which is managed by Frontex, using big data technologies, including satellite images and vessel registration services. Its specific aim was to monitor cross-border traffic. This system represented an important shift from the simplest control systems at sea to radar and satellite surveillance solutions at the European level focused on principles of standardisation and automation of the exchange of information between networks and SAR systems. It was therefore the technological element that enabled the implementation of a surveillance integration framework known as common pre-frontier intelligence, which allowed images collected by EMSA's drones to be immediately evaluated by the coastguards of States with territorial responsibility and simultaneously sent to the European Agency for the Management of Operational Cooperation at the External Borders of EU Member States, which is part of the EUROSUR system. These surveillance technologies aimed to improve 'situational awareness' at sea, in other words, the ability to monitor, detect, identify, locate, and understand irregular cross-border activities in order to find grounds for response measures. This is achieved by combining new information with already acquired knowledge and being more effective in reducing security threats at, along or near the external borders.

National management of migration flows thus became strategically integrated at the European level, with national border control planning

coordinated with the development plans of other Member States. In other words, Member States retained immediate responsibility for managing their own borders, while the Agency would coordinate their actions. The Agency's activities would therefore complement the efforts of Member States.

The second – more operational – level of integration consisted of a timely exchange of information and data that was as comprehensive as possible between Italy, the other Member States, and the EU. This revolved around the EUROSUR system, considered to be the real hub of integrated management.

3. The compatibility of domestic implementation measures with international maritime law

A description of the measures taken by Italy over the last ten years to manage irregular migration in the Mediterranean Sea shows, first of all, a progressive geographical retreat of the scope of such measures laid down by the various authorities involved from the high seas to Italy's territorial waters. While in the first phase, the aeronaval assets coordinated by the Navy and the police forces coordinated by the DNA went as far as the high seas for both SAR initiatives and policing. In the second phase, *Mare Nostrum* ended and Italian military units took part in various joint operations, coordinated at a European level. These joint operations gradually reduced their working mandate and were downsized even further in the third and final phase examined, in which the Government limited/prohibited the access of rescuers, both public and private, even in its own territorial waters. It is clear that this practice has implications in international maritime law. It could be argued that as Italy's commitment to managing migratory flows weakens, a greater number of provisions are violated.

Thus, when, in October 2013, the Italian authorities responded to the humanitarian emergency by setting up the *Mare Nostrum* operation, they fully implemented the rescue obligations under the aforementioned Montego Bay Convention.[30] Indeed, as is well known, under Article 98(1) of that Convention, Italy, as a flag State, must require masters of ships flying its flag to render assistance to anyone at sea in distress.[31] Furthermore, under the next paragraph of the same article, Italy, this time as a coastal State, must promote the establishment and operation of an SAR service to protect maritime safety.[32] However, while it is undisputed that rescue actions can and should be provided in any area of the sea, the use of police powers in extraterritorial waters is rather the result of repeatedly having recourse to an interpretation of the law. This can be seen first of all from the above-mentioned directive in which the DNA, in coordinating different police forces, explained that in order to take action against suspected traffickers, a causal link must be presumed between the crime, partially or totally perpetrated on the high seas, and the territory of the Italian State.[33] On this point, it is worth noting that, according to the DNA, such a link exists when the alleged traffickers have intentionally used the rescue procedures to activate the intervention of the Italian authorities. This is because when migrants reach the coast and enter Italian territory, the condition of "procuring illegal entry, the consummation of which did not stop in international waters, but, through the resources used in rescue activities, also took place in the territory of the State" can be considered to have been fulfilled.[34] The idea of resorting to this inter-

30. Montego Bay Convention, cit. Other aspects of the relief obligation are regulated by the SOLAS Convention, cit. and the SAR Convention, cit.

31. Ibid., Art. 98(1).

32. Ibid., Art. 98(2).

33. DNA, Guidelines, cit.

34. Ibid., 31, para h-8.

pretation has subsequently been endorsed by the Italian courts, at first instance, on appeal, and by the Court of Cassation, which have used it to establish their criminal jurisdiction over the alleged traffickers. As a result, the case law of the courts has established that the conduct carried out in extraterritorial waters is linked to that which takes place in territorial waters, where the action of the rescuers is carried out. The rescuers are obliged to intervene because of the obligations entered into at the international level to avert a more serious evil.[35]

This approach has its own overall coherence that is confirmed by both Italian and international law. With regard to the former, it is sufficient to recall that the Italian courts have also recently affirmed their jurisdiction with respect to other transnational criminal offences that appeared to end in international waters but which, in reality, had a connection with Italian territory.[36] With regard to international maritime law, since the first half of the last century, there has been a general tendency for coastal states to assert their claims in the waters adjacent to their shores. Initially, the pretext used for this was precisely to identify a causal link between an apparently exclusively maritime matter, such as illegal fishing, and the territory of the coastal state. In the decades that followed, this practice of

35. Italian Supreme Court (Criminal Division), Sec. I, judgment of 23 January 2015. See in this regard, Irini Papanicolopulu, 'Immigrazione irregolare via mare ed esercizio della giurisdizione: il contesto normativo internazionale e la recente prassi italiana', 1-22, in Irini Papanicolopulu (et al.), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea* (Giappichelli, 2016).

36. Finally, the Italian Supreme Court confirmed its jurisdiction over a case of international drug trafficking, in which the alleged traffickers were apprehended in international waters yet continued their criminal action in Italian territorial waters. See the judgment of the Italian Supreme Court (Sec. IV Criminal) of 20 February 2019, no. 269; Italian Supreme Court (Sec. III Criminal), judgment of 21 June 2019, no. 27691. On the subject, Marco Ferruglio, 'Libertà di navigazione e contrasto al traffico internazionale di stupefacenti: una recente pronuncia della Corte di Cassazione sui limiti all'esercizio della giurisdizione in alto mare su navi battenti bandiera straniera', *Il Diritto Marittimo*, 2020, p. 126 ss.; Marina Castellaneta, 'La Cassazione sulla giurisdizione italiana per illeciti a bordo di una nave straniera', 28 June 2019.

coastal States became consolidated and unequivocally extended to other criminal areas. The logic behind this process remains that of protecting the interests and security of the coastal State with respect to offences that apparently only take place on the high seas. The same logic, moreover, also guides the rule on territorial sovereignty. As is well known, this is the oldest rule of customary international law on the delimitation of the governing power of any state. Various and well-known theories justify the exercise of territorial sovereignty. However, they all revolve around how to conceive the relationship between the exercise of sovereign powers and the related territorial community.

With the transition to the second phase, the maritime scenario began to change, and consequently, the compatibility of Italian practice with international maritime law began to diminish. The termination of *Mare Nostrum* created a gap - which has yet to be filled - regarding the obligation under Article 98(2) of the Montego Bay Convention. This is despite the fact that this provision requires Italy - and every coastal State who is a party to the Convention - to establish a SAR service that is *adequate* and *effective,* while also functioning on a *permanent basis*. At this intermediate stage, however, Italian air-sea units are engaged in occasional rescue and in military and police activities within the framework of joint operations coordinated at the European level. This commitment could ensure the implementation of the rescue obligation under Article 98(1)[37] and the cooperation obligations under the Palermo Protocol,[38] which, as mentioned in the introduction of this article, aims to prevent and stop the transnational smuggling of migrants and, at the same time, safeguard its victims.

37. Montego Bay Convention, cit., Art. 98(1).

38. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, done at New York on 15 November 2000.

In the third phase, the first provision and subsequent renewals of the Memorandum of Understanding with the Libyan government, along with the adoption of the package of restrictive measures regarding the entry into and transit through Italian territorial waters, consolidated the process of retreat and the simultaneous initiation of a new approach, namely the concealment of the actors involved in the management of sea migration flows. Particular attention should be paid here to the blurring of the legal difference between rescuers and migrant smugglers that took place. In fact, during this stage, members of NGOs who intervened to fill the institutional void left due to both Italy ending *Mare Nostrum* and the EU not replicating a similar operation were charged with the crime of aiding and abetting illegal immigration or other related offences. Such a practice is difficult to reconcile with the approach taken by the Italian courts described above, according to which rescuers must intervene to avert a state of necessity that is desired, caused, and foreseen by other subjects, namely the traffickers. Moreover, Italian judges have remained faithful to this approach and, even more recently, they have excluded the criminal liability of NGO members by applying the principle of the state of necessity, the fulfilment of the duty to rescue, and other exemptions. With respect to the compatibility of this process of concealment, it is worth mentioning the judgement of the Canadian Supreme Court in *Ocean Lady*.[39] In this case, the Canadian Supreme Court excluded the liability of rescuers for aiding and abetting illegal immigration by directly referring to the essence of the Palermo Protocol.[40] The national immigration laws of Canada and the other Contracting Parties to the Protocol should give full effect to this judgment. According to the approach taken by the Supreme Court,

39. Supreme Court of Canada, *R. v. Appulonappa*, judgment No. 35958 of 27 November 2015. In the same vein, see the almost contemporaneous decision of the same court, I Supreme Court of Canada, *B010 v. Canada (Citizenship and Immigration)*, judgment of 27 November 2015, nos. 35388, 35677, 35685, 35688.

40. Palermo Protocol (n 38).

which we fully support, it is clear from the main provisions of the Palermo Protocol[41] that a clear dividing line must be drawn between traffickers and rescuers. While the former act for profit, the latter act out of solidarity. This interpretation is confirmed in the *travaux préparatoires* of the Protocol, where it is expressly stated that the profit motive is an essential element of the offence defined in the provisions of the Protocol, in the absence of which the offence of migrant trafficking cannot be said to exist.[42]

As for the fourth and final phase, the analysis of the measures taken over the last decade was related to the imminent challenges posed by the advent of new technologies. In particular, in the area of maritime security, it was observed how the air-sea patrolling initiatives of the Mediterranean Sea have been successively complemented by a series of surveillance initiatives, only possible thanks to the use of advanced technologies, such as satellites, radar, and drones. Like air-sea patrolling, remote surveillance is also intended to strengthen the security of the EU's maritime borders. However, innovation also has a dark side. The new surveillance methods, in fact, can be easily reconciled with both the process of retreat, which started in the second phase, and the blurring of roles between actors involved. The implications of this are essentially ethical in nature. The fear is that the use of new technologies in the management of migration flows by sea could mean an incontrovertible form of reduction of responsibility of the state authorities called upon to intervene. Finally, on a strictly legal level, the increasing use of this kind of technology entails further risks concerning the compatibility of maritime surveillance resources

41. Ibid., esp. in Art. 6.

42. Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime on the work of its first to eleventh sessions, including the Addendum on Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, UN Doc. A/55/383/Add. 1, 3 November 2000, esp. at paras. 88 and 91. See also, more recently, UNODC, Issue Paper: The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol, Vienna, 2017.

with international human rights mechanisms. Such risks essentially concern the right to privacy of migrants themselves, who are particularly exposed to new forms of control concerning their personal data, which can be captured through the aforementioned surveillance tools, but also, at an everyday level, through the web, social networks, applications, and other digital technologies that shorten the distances between countries in exchange for precious personal information.

4. Conclusion

The starting point of this analysis is the recognition that Italy has been involved in the management of migratory flows in the Mediterranean Sea since the time of Aeneas. It is then seen how, over the period of time examined, Italy has always been engaged in both humanitarian and law enforcement activities. However, what has changed profoundly over the last decade is both the ways in which this commitment has been put into practice and those with whom, in the different phases, the Italian authorities have cooperated.

With regard to how Italy's involvement in managing such flows has evolved, this article describes a significant process of retreat by the Italian authorities from the high seas to its territorial waters. The umpteenth massacre, that of Crotone, led to a further retreat - one might say to the mainland - since the Italian patrol boats did not set sail, despite the fact that the event in question, which was reported, took place only a few metres away from the Calabrian coast.[43] This process of retreat, to

43. Alessia Candito, *Crotone, strage di migranti: 23 ore prima del naufragio partito l'allarme per una barca in difficoltà* (*La repubblica*, 1 March 2023), available at <https://www.repubblica.it/cronaca/2023/03/01/news/naufragio_crotone_allarme_23_ore_prima_migranti_calabria-390118802/>.

which technological progress has clearly contributed, is at odds with both domestic and international practice on cooperation in countering organised maritime crime and on rescuing and safeguarding the rights of victims of such offences. With regard to those involved, certain governing bodies of Italy have, for various reasons, repeatedly sought and, over time, obtained the support of various entities, both public and private, most recently European institutions.

Without wishing to ignore the difficulties involved in managing migratory phenomena, especially during the most acute moments, the approach taken at both the Italian and European levels can only be described as astonishing. A feeling of fear prevails, expressed through a lack of solidarity. Nonetheless, we would like to conclude with a wish, one that prompted us to contribute to this volume, namely the hope that the exchange of views among scholars and professionals who are strongly engaged in international law of the sea may help to bridge the existing gap of responsibility and lead us back to the indelible traces of Aeneas' civilisations.