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## *Recent Developments*



# Reframing Special Protection and Immigration as an Emergency: Italy's Not-So-Novel Approach

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### Abstract

The Italian government has decided to resort to a national state of emergency to manage recent migration flows. This approach, which has been used previously, aims at expanding the existing reception system. This is also accompanied by a set of measures, as outlined in *Decreto Legge* No. 20/2023, which adopt a more restrictive stance. This decree further restricts the possibility to grant special protection to asylum seekers and prosecutes more severely the participation in human trafficking operations. This paper analyses the latest developments in Italian law and outlines the legal issues they have raised.

### Keywords

state of emergency – migration – humanitarian protection – human trafficking – asylum

## 1 Introduction

The first half of 2023 witnessed significant developments in Italy's approach to migration. Notably, the Meloni government declared a state of emergency and suspended special protection, among other amendments. This intervention needs to be seen in conjunction with the two decrees published at the end of 2022 imposing restrictions on non-governmental organizations ("NGO") humanitarian vessels in Italian territorial waters. This decision generated a great deal of debate about Italy's international obligations.<sup>1</sup> This paper delves into the legal aspects and implications of the state of emergency declared in April 2023 in Italy and the legislative developments of *Decreto Legge* No. 20 of 10 March 2023 ("Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare"), *Gazzetta Ufficiale*, No. 59 of 10 March 2023.

## 2 State of Emergency and Migration Management

In Italy, the state of emergency has emerged as a significant governmental mechanism to tackle extraordinary circumstances. This is perhaps motivated by its close connection to the field of civil protection. It was used during the 2000s as a means of managing migration flows. Such a practice has become so prevalent that there is even discourse surrounding the "normalization" of the emergency.<sup>2</sup> This Section focuses on the legal basis used for this declaration, highlighting the constitutional provisions and relevant legislation. Additionally, legal concerns raised regarding the declaration's publication and the limitations of the appointed authority are analyzed. Furthermore, the discussion questions the necessity of a state of emergency in the context of migration and the potential challenges faced.

### 2.1 *Legal Framework and Historical Context*

On 26 February 2023, a boat that had departed from Turkey shipwrecked in Cutro, off the coast of Calabria. This tragedy resulted in the loss of at least

1 See CHIANESE, "The Role of Flag States of NGO Vessels under Italy's New Migration Policy", *The Italian Review of International and Comparative Law*, 2023, pp. 185-199.

2 CAMPESI, "Between Containment, Confinement and Dispersal: The Evolution of the Italian Reception System before and after the 'Refugee Crisis'", *Journal of Modern Italian Studies*, 2018, p. 493.

94 lives.<sup>3</sup> Irregular arrivals to Italian coasts have virtually quadrupled in the first three months of 2023 compared to the previous year.<sup>4</sup> In this scenario, the Italian government agreed to declare a state of national emergency on 11 April 2023 for a duration of 6 months.

Although the Italian Constitution does not envisage a state of emergency clause, some provisions include extraordinary government powers. Article 77 of the Italian Constitution enables the Government to adopt provisional measures with the force of law in exceptional circumstances of necessity and urgency. These measures are required to be passed into law by the legislative chambers within 60 days. Meanwhile, Article 120 provides for the government to exercise substitute powers over subnational authorities in circumstances demanding immediate action and centralized decision-making.

The specific legal instruments regulating the state of emergency are embedded in the civil protection discipline, Law No. 225 of 24 February 1992 (“Istituzione del Servizio Nazionale della Protezione Civile”), *Gazzetta Ufficiale*, No. 64 of 17 March 1992, further supplemented by *Decreto Legislativo* No. 2 of 2 January 2018. The latter decree empowers the Council of Ministers to initiate the declaration, upon the recommendation of the President of the Council of Ministers, or the President of the relevant region or autonomous province under Article 24. This provision applies to unforeseen catastrophes of human or natural origins and the declaration is limited to a defined period.

The government has exercised its extraordinary powers regarding natural disasters and health emergencies such as the COVID-19 pandemic.<sup>5</sup> In terms of migration management, the state of emergency has become a recurring tool for the Italian government since the crisis in Albania in 1997, which led to a large influx of Albanians into Italy.<sup>6</sup> The government declared a state of emergency to address the “serious emergency situation resulting from the exceptional influx”.<sup>7</sup> A nationwide state of emergency was also declared in

3 ANSA, “Recuperato Corpo 94ma Vittima Naufragio Cutro, è Adulto”, 15 April 2023, available at <[https://www.ansa.it/calabria/notizie/2023/04/15/recuperato-corpo-94ma-vittima-naufragio-cutro-e-adulto\\_71c05fd7-eff8-4093-97b6-bc1d3b5cf8dd.html](https://www.ansa.it/calabria/notizie/2023/04/15/recuperato-corpo-94ma-vittima-naufragio-cutro-e-adulto_71c05fd7-eff8-4093-97b6-bc1d3b5cf8dd.html)>.

4 The number of migrants disembarked in Italian coasts was of 27.280 between January and March 2023. In 2021, this number was 6.832 in the same period. See Italian Ministry of Home Affairs, “Sbarchi e Accoglienza dei Migranti: tutti i dati”, available at <<https://www.interno.gov.it/it/stampa-e-comunicazione/dati-e-statistiche/sbarchi-e-accoglienza-dei-migranti-tutti-i-dati>>.

5 See RONGA, “Il governo nell'emergenza (permanente): sistema delle fonti e modello legislativo a partire dal caso Covid-19”, *Nomos—Le attualità del diritto*, 2020, p. 1 ff.

6 See SCIORTINO, EVANS, “The Albanian Crisis: Social Panic and Italian Foreign Policy”, *Italian Politics*, 1997, pp. 209-226.

7 *Decreto Legge* No. 60 of 20 March 1997 (“Interventi straordinari per fronteggiare l'eccezionale afflusso di stranieri extracomunitari provenienti dall'Albania”), converted into Law No. 128 of 19 May 1997, *Gazzetta Ufficiale*, No. 114 of 19 May 1997.

2002 and renewed every year until 2007.<sup>8</sup> In 2008 it was decreed only for the regions of Sicily, Calabria, and Puglia.<sup>9</sup> In the same year, the state of emergency was again declared nationwide on an annual basis until 31 December 2011.<sup>10</sup> In April 2011, due to the immigration influx caused by the Arab Spring, the Italian government had declared a “state of humanitarian emergency in North Africa”.<sup>11</sup> Its adoption aimed at redistributing asylum seekers between regions and municipalities according to demographic criteria.

## 2.2 *Legal Concerns and Motivation*

The 2023 state of emergency has posed a number of legal questions about its implementation. Firstly, the declaration was not officially published in the Official Journal (“Gazzetta Ufficiale”) until 8 May,<sup>12</sup> while the appointment

8 *Decreto del Presidente del Consiglio di Ministri* (“DPCM”) of 20 March 2002 (“Dichiarazione dello stato di emergenza per fronteggiare l’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 68 of 21 March 2002; DPCM of 11 December 2002 (“Proroga dello stato di emergenza per fronteggiare l’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 297 of 19 December 2002; DPCM of 7 November 2003 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 265 of 14 November 2003; DPCM of 23 December 2004 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 304 of 29 December 2004; DPCM of 28 October 2005 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 260 of 8 November 2005; DPCM of 16 March 2007 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di extracomunitari”), Gazzetta Ufficiale, No. 72 of 27 March 2007.

9 DPCM of 14 February 2008 (“Proroga dello stato d’emergenza per proseguire le attività di contrasto dell’eccezionale afflusso di cittadini di Stati non appartenenti all’Unione europea”), Gazzetta Ufficiale, No. 40 of 16 February 2008.

10 DPCM of 25 July 2008 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di cittadini extracomunitari”), Gazzetta Ufficiale, No. 175 of 28 July 2008; DPCM of 18 December 2008 (“Proroga dello stato di emergenza per proseguire le attività di contrasto all’eccezionale afflusso di cittadini extracomunitari”), Gazzetta Ufficiale, No. 1 of 2 January 2009; DPCM of 19 November 2009 (“Proroga dello stato di emergenza per proseguire le attività di contrasto e di gestione dell’afflusso di extracomunitari”), Gazzetta Ufficiale, No. 274 of 24 November 2009; DPCM of 17 December 2010 (“Proroga dello stato di emergenza per proseguire le attività di contrasto e di gestione dell’afflusso di extracomunitari”), Gazzetta Ufficiale, No. 305 of 31 December 2010.

11 DPCM of 7 April 2011 (“Dichiarazione dello stato di emergenza umanitaria nel territorio del Nord Africa per consentire un efficace contrasto all’eccezionale afflusso di cittadini extracomunitari nel territorio nazionale”), Gazzetta Ufficiale, No. 83 of 11 April 2011.

12 The Council of Ministers issued a press release on 11 April announcing the state of emergency. See Italian Council of Ministers, “Press Conference No. 28”, 11 April 2023, available at <<https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-28/22332>>. However, it was not published in the Gazzetta Ufficiale until 8 May (Gazzetta Ufficiale, No. 10 of 8 May 2023).

of Commissioner Valerio Valenti was already published on 19 April.<sup>13</sup> Such an extraordinary procedure would require a certain formality according to transparency rules.<sup>14</sup>

Moreover, it should be noted that Valenti's appointment does not encompass the regions of Val d'Aosta, Emilia Romagna, Tuscany, Campania, and Puglia. Consequently, his authority is limited to the remaining regions and autonomous provinces, even though the state of emergency encompasses the entirety of the national territory.

At the same time, the real need to declare a state of emergency has also been questioned. The motivation for its declaration lies in the need to create different first reception centers, and expulsion and repatriation centers with an increased budget of 5 million euros. Nonetheless, prior legal provisions already foresee the use of extraordinary reception measures to accommodate asylum seekers when "the availability of places in the centers is temporarily exhausted".<sup>15</sup> The use of the state of emergency should be firmly justified. It is necessary to consider that if it becomes a common practice to extend the reception system, it could undermine the rights of migrants and asylum seekers.

### 3 Developments of *Decreto Legge No. 20/2023*

The *Decreto Legge No. 20/2023*<sup>16</sup> was adopted by the Council of Ministers on 10 March 2023. It was subsequently passed into law as Law No. 50/2023,<sup>17</sup> after approval by both Parliamentary Chambers and published on 5 May. The amendments are related to work permits, the fight against *agromafia*, expulsion procedures, and repatriation centers. Of particular relevance are the precepts related to the crime of human trafficking and the elimination of special protection, which will be detailed in a separate Section.

The decree provides for regular flows of workers to be planned every three years and gives preference to countries of origin that discourage irregular

<sup>13</sup> Order No. 984 of 19 April 2023.

<sup>14</sup> Art. 3 of *Decreto Legislativo* No. 33 of 14 March 2013 ("Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni"), *Gazzetta Ufficiale*, No. 80 of 5 April 2013 guarantees the right to public access to and knowledge of documents subject to public access.

<sup>15</sup> Art. 11 *Decreto Legislativo* No. 142 of 18 August 2015 ("Decreto accoglienza"), *Gazzetta Ufficiale*, No. 214 of 15 September 2015.

<sup>16</sup> *Decreto Legge* No. 20 of 10 March 2023.

<sup>17</sup> Law No. 50 of 5 May 2023, *Gazzetta Ufficiale*, No. 104 of 5 May 2023.

migration.<sup>18</sup> Foreigners who complete vocational and civic-linguistic training abroad, organized on the basis of the needs of the specific productive sector, will also be able to obtain work permits.<sup>19</sup> The general renewal period for residence permits is extended to three years.<sup>20</sup> Additionally, certain staff members involved in agri-food crime prevention are granted the status of judicial police officers.<sup>21</sup>

The maximum period of detention in repatriation centers is increased from 30 to 45 days for foreigners from States with repatriation agreements.<sup>22</sup> The decree allows for faster procedures by establishing and expanding detention centers, with a temporary derogation from the Public Contracts Code.<sup>23</sup> Expulsion procedures for convicted foreigners are simplified, eliminating the need for validation by the *Giudice di Pace*.<sup>24</sup>

Regarding the Lampedusa hotspot, until 31 December 2025, the Ministry of the Interior can enlist the Italian Red Cross for crisis management.<sup>25</sup> Temporary transfers of migrants to other facilities on the mainland are also envisaged. A medicalized station will be established on the island to ensure timely emergency interventions and protect the health of both residents and migrants.

### 3.1 *The End of Special Protection?*

Individuals not qualifying for international protection could be granted a residence permit in Italy on humanitarian grounds before 2018.<sup>26</sup> This form of protection could be conceded on various grounds, such as health or age-related factors, risks of severe violence or political instability, and exposure to famine or other environmental disasters. The decision to grant humanitarian protection was conducted on an individualized basis.

A series of immigration measures were introduced in 2018 under the leadership of Matteo Salvini as Minister of the Interior.<sup>27</sup> Humanitarian protection was abolished as a distinct legal status and replaced by a new category called special protection (“*protezione speciale*”).<sup>28</sup> Under the new provisions,

18 *Ibid.*, Art. 1.

19 *Ibid.*, Art. 3.

20 *Ibid.*, Art. 4.

21 *Ibid.*, Art. 5.

22 *Ibid.*, Art. 10 bis.

23 *Ibid.*, Art. 6.

24 *Ibid.*, Art. 9.

25 *Ibid.*, Art. 5 bis.

26 Art. 32, para. 3, *Decreto Legislativo* No. 25 of 28 January 2008, in conjunction with Art. 5, para. 6, *Decreto Legislativo* No. 286 of 25 July 1998.

27 *Decreto Legge* No. 113 of 4 October 2018, converted into Law No. 132 of 1 December 2018, *Gazzetta Ufficiale*, No. 281 of 3 December 2018.

28 *Ibid.*, Art. 1.

special protection could only be granted in very limited circumstances, mainly for individuals affected by natural disasters, victims of domestic violence, or exploited labor. A drastic reduction in the number of permits issued with the introduction of this new policy took place between 2018 and 2019.<sup>29</sup>

In 2020, under the second Conte government, a new decree,<sup>30</sup> *Decreto Legge* No. 130 of 21 October 2020 (“Decreto immigrazione e sicurezza”), *Gazzetta Ufficiale*, No. 261 of 21 October 2020, reinstated some of the guarantees previously eliminated. Although it did not reintroduce humanitarian protection as such, it did invoke the compliance with international obligations regarding the prohibition of expulsion and refoulement and the revocation of the residence permit (“permesso di soggiorno”).<sup>31</sup> In particular, the Decree did not allow expulsion or refoulement when this could violate the right to respect for family and private life, enshrined in Article 8 of the 1950 European Convention on Human Rights.<sup>32</sup> Furthermore, the decree reintroduced the possibility of converting a special protection permit into a work permit.<sup>33</sup> Subsequently, due to this less restrictive approach, in 2021 and 2022 there was again a trend towards an increase in the issuance of these permits.<sup>34</sup>

Under Article 7 of Decree 20/2023, there is a reinstatement of certain restrictions on special protection. This provision explicitly prohibits the conversion of special protection permits, calamity, and medical treatment permits into work permits. The reference to respect for private and family life is removed from the text, although Italy is still bound by its international

29 The *Savini Decree* was enacted in October 2018, thus the reduction was still not noticeable in that year. A total of 19,970 humanitarian protection permits were granted according to the Eurostat database during 2018 (20,014 according to the Italian Government). The number is similar to that of 2017, 19,515 (20,166 according to the Italian Government). However, there was a substantial decrease in the number of permits granted in 2019, only 1,385 permits (616 according to the Italian government). Although humanitarian protection no longer exists after 2018, special protection permits are counted in this category.

30 *Decreto Legge* No. 130 of 21 October 2020, converted into Law No. 173 of 18 December 2020, *Gazzetta Ufficiale*, No. 314 of 19 December 2020.

31 *Ibid.*, Arts. 1.1(a) and 1.1(e).

32 The Decree directed the competent authorities to assess the nature and effectiveness of family ties, current social integration, the duration of the residence in Italy, and the existence of family, cultural or social links with the country of origin. Exceptions could be made when deemed necessary for reasons of national security, public order, or health protection in accordance with the 1951 Refugee Convention of the UN Refugee Agency and the Charter of Fundamental Rights of the European Union.

33 Art. 1.1(f) *Decreto Legge* 130/2020.

34 7,080 special protection permits were granted in 2021, while 10,865 were conceded in 2022, according to the Eurostat database. The Italian government has only published 2021 data, according to which 7,092 special protection permits were granted.



obligations. Calamity permits may only be granted if the calamity is contingent and exceptional and not only serious, as previously provided for. Moreover, the renewal of calamity permits is limited to a maximum duration of six months.

The statements of the premier at a press conference pointed out that the humanitarian protection granted in Italy was an “additional protection compared to what happens in the rest of Europe”.<sup>35</sup> However, this status exists in other Member States of the European Union.<sup>36</sup> Specifically, the states that granted the most permits based on humanitarian grounds in 2022 along with Italy, were Germany, Spain, Ireland, and the Netherlands.<sup>37</sup>

One of the consequences resulting from this restrictive approach may be the potential loss of a pathway that could offer protection to future climate migrants. The Italian *Corte Suprema di Cassazione* had already recognized in 2021<sup>38</sup> that climatic conditions in the country of origin could be grounds for granting humanitarian protection.<sup>39</sup> These individuals, displaced due to environmental factors, may not fit neatly into the existing categories of protection, raising concerns about their vulnerability and the adequacy of legal frameworks to address their needs.

### 3.2 *Human Trafficking and Criminalization of Irregular Migration*

Article 8 of *Decreto Legge No. 20/2023* introduces a series of amendments to *Decreto Legislativo No. 286* of 25 July 1998 (“Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero”), *Gazzetta Ufficiale*, No. 191 of 18 August 1998. Firstly, it increases the penalty for human trafficking in Article 12(1) from 1 to 5 years to 2 to 6 years imprisonment. In the case of the aggravated offense of Article 12(3), the penalty of 5 to 15 years increases to 6 to 16 years.

35 Italian Prime Minister, “Visit to Ethiopia”, 15 April 2023, available at <[https://www.youtube.com/watch?v=\\_su35Xiz6AM&t=359s&ab\\_channel=PalazzoChigi](https://www.youtube.com/watch?v=_su35Xiz6AM&t=359s&ab_channel=PalazzoChigi)>.

36 See Congresso dei Deputati e Senato della Repubblica, “Decreto-legge immigrazione e sicurezza pubblica”, 2018, pp. 35-51, available at <<https://documenti.camera.it/Leg18/Dossier/Pdf/D18113B.Pdf#page=48>>.

37 Member States which granted highest number of first instance humanitarian permits in 2022 in descending order were: Germany with 30,020 permits; Spain with 20,925; Italy with 10,865; Ireland with 2,085; and the Netherlands with 890. See Eurostat, “First instance decisions on asylum applications by type of decision – annual aggregated data”, available at <https://ec.europa.eu/eurostat/databrowser/view/TPS00192/default/table?lang=en>.

38 Ordinance No. 5022 of 24 February 2021, *Corte Suprema di Cassazione*.

39 See VONA, “Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?”, *The Italian Review of International and Comparative Law*, 2021, pp. 146-158.



In addition, it introduces a new Article 12 bis, punishing the subjection during the journey to life-threatening conditions, inhuman, or degrading treatment if they result in death or injuries of one or more individuals. The death of a single person shall carry a penalty of imprisonment of 15 to 24 years. If the result is serious injury, the punishment amounts to 10 to 20 years imprisonment. If more than one person dies or is seriously or very seriously injured, the penalty shall be from 20 to 30 years.

In the speech delivered by the Italian Prime Minister after the tragedy in Cutro, considerable emphasis was placed on addressing the issue of human trafficking. Meloni insisted that the message of the Italian government was that “it is not convenient to enter Italy illegally, it is not convenient to pay the smugglers [...]”.<sup>40</sup>

The new decree aims to strengthen penalties for individuals involved in such activities. The punishable actions encompass a range of actions, including promoting, directing, organizing, and financing human trafficking operations. Besides, one of the most relevant novelties is that offenses may be prosecuted even if committed outside the Italian territory.

Notably, an absence of differentiation exists concerning the various roles involved in human trafficking. Consequently, individuals who profit from this criminal activity are prosecuted like those who control the vessel during the journey.<sup>41</sup> The convergence of these roles may further blur the line between victims and perpetrators, rendering it even more difficult to effectively combat human trafficking and ensure appropriate accountability.

#### 4 Concluding Remarks

In conclusion, the analysis of the new legislative measures in Italy indicates a concerning trajectory. While these measures could be seen as a response to the lack of solidarity from other EU Member States, it is crucial to examine their potential consequences from a human rights perspective.

<sup>40</sup> President of the Council of Ministers, “Press Conference No. 24”, 9 March 2023, available at <<https://www.governo.it/it/articolo/conferenza-stampa-del-consiglio-dei-ministri-n-24-l-introduzione-del-presidente-meloni/22020>>.

<sup>41</sup> According to the report “From Sea To Prison”, four categories of captain can be distinguished: (i) the forced migrant-captain who is “forced to drive the boat shortly after the moment of departure”; (ii) the migrant-captain by necessity, who takes charge of the boat in an emergency; (iii) the remunerated migrant-captain, who does not form part of the organization; and (iv) the organization captain, who has “an economic interest in its success” (ARCI Porco Rosso, Alarm Phone, “From Sea to Prison: The Criminalization of Boat Drivers in Italy”, 2021, pp. 24-28, available at <<https://fromseatoprison.info/>>).

The repeated use of extraordinary powers in migration management denotes a lack of long-term vision. Rather than reacting to immediate challenges, there is a need to develop alternative and sustainable solutions addressing the root causes of irregular migration. This includes establishing legal channels in countries of origin, enabling individuals to apply for international protection without resorting to irregular and hazardous routes.

Of great concern is the reduction of safeguards in expulsion procedures, which puts vulnerable individuals at risk of persecution or harm upon return to their countries of origin. Additionally, the virtual disappearance of special protection eliminates a key avenue for future climate migrants who could have otherwise overcome the limitations of the 1951 refugee definition. Lastly, the toughening of penalties for those involved in migrant smuggling could have adverse consequences. It is the last links in the chain that will probably be punished, while criminal networks will continue to operate across borders.