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in the Italian and International Legal  
Systems

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# Countering Migrant Smuggling and Human Trafficking Through Special Investigative Techniques: Transnational Undercover Operations in the Italian and International Legal Systems\*

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**Abstract [En]:** The adoption of international coordination measures to spread the use of 'special investigative techniques' to combat organised crime effectively is encouraged by Article 20 of the United Nations Convention against Transnational Organised Crime. The paper examines the Italian legal framework, amended by a new law passed in 2019, on an evolving legal tool such as the "undercover operations" involving, or taking place in more than one State. The article seeks to establish whether and to what extent Italy is complying with its international commitments in this field.

**Abstract [It]:** L'adozione di misure di coordinamento internazionale per diffondere l'uso di "tecniche investigative speciali" volte a combattere efficacemente la criminalità organizzata è incoraggiata dall'articolo 20 della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale. Lo scritto esamina il quadro giuridico italiano, modificato da una nuova legge approvata nel 2019, relativo ad un istituto giuridico in evoluzione come quello delle "operazioni sotto copertura" che coinvolgono, o si svolgono in più di uno Stato. L'articolo cerca di stabilire se e in quale misura l'Italia stia rispettando i suoi impegni internazionali in materia.

**Summary:** 1. Introduction. 2. Transnational undercover operations: the challenges of international cooperation and the international legal framework in short. 3. The new Italian legal regime relating to undercover operations after the entry into operation of Law Decree No. 53/2019. 4. The new Italian Statute's purpose to 'strengthen the investigative coordination in the field of crimes related to illegal immigration': a reached target or a missed opportunity? 5. Conclusion.

## 1. Introduction

According to Article 20 of the United Nations Convention against Transnational Organized Crime,<sup>1</sup> named "Special investigative techniques", the States Parties are allowed to take the necessary measures,

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\* Articolo sottoposto a referaggio.

<sup>1</sup> Palermo, 12-15, December 2000, in force 29 September 2003 (from now on "Unctoc" or "Palermo Convention"), art. 20, para 1. See: P. WILLIAMS, D. VLASSIS, *Combating Transnational Organized Crime: Concepts, Activities, and Responses*, London, 2001; UNODC, *Legislative Guides: United Nations Convention against Transnational Organized Crime*, New York, 2004; A. MCLEAN, *Transnational Organized Crime – A Commentary to the UN Convention and its Protocols*, Oxford, 2007; G. POLIMENI, *The Notion of Organised Crime in the United Nations Convention against Transnational Organized Crime*, in S. CARNEVALE, S. FORLATI, O. GIOLO (editors) *Redefining Organised Crime: A Challenge for the European Union?*, Oxford, 2017, pp. 57-74;

to organize '[i]f permitted by the basic principles of its domestic legal system ... and under the conditions prescribed by its domestic law, undercover operations'. The provision is aimed at 'effectively combating organized crime'. Its meaning and scope is not limited to operations only involving the territorial State, as is made clear by the text of the second paragraph of the same article, stating that 'States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level'. The purpose of the present writing is to discuss these pioneering, conventional tools in connection with the Italian legal framework on the evolving topic of "undercover operations" involving, or taking place in, more than one state. Some of these investigation techniques were improved in Italy by a new statute approved by Parliament in 2019.<sup>2</sup> Although the new Italian rules about undercover investigations, as we will try to show below, present several noteworthy aspects, they have not yet received any particular comments. We'll try to discuss here the statute, inter alia, in order to try to establish whether and the degree to which Italy is meeting its international commitments on the matter.

## **2. Transnational undercover operations: the challenges of international cooperation and the international legal framework in short**

Scholars and practitioners recognize that conducting investigations involving multiple states that can lead to a effective judicial outcome is very expensive and demands a deep knowledge (not only of international and European rules but also) of territorial States' legal systems in order, inter alia, to accurately collect the necessary criminal evidence, when considering that under general international law the judicial admissibility of evidence is primarily a matter of regulation by national law (*lex loci*). It is well known in the practice of law enforcement officials that if the national requirements of validity of the collected

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<sup>2</sup> The present writing deals mainly with special investigations conducted by covert law enforcement agents; among other types of special investigation techniques there are surveillance, interception of communication, controlled deliveries, informants, joint investigation teams, hot pursuit, witness protection, and so on. Each of these techniques requires to set up a differentiated legislative framework.

evidence are not scrupulously met and observed in the absence of special agreements<sup>3</sup>, they may not be used in the trial.<sup>4</sup>

Without due international coordination, other problems may arise in order to ensure, where appropriate, the exercise of the jurisdiction, as for instance in criminal matters of smuggling and trafficking wholly committed abroad by foreign citizens. The Italian Supreme Court has ruled that criminal jurisdiction for those offences may be established only if there is “an adequate legal basis” enabling derogations from the general principle of public international law of territorial jurisdiction. According to the Supreme Court, a detailed international agreement is required “even if such crimes are related to other crimes that have rooted the Italian jurisdiction”.<sup>5</sup>

Consequently, cross border policing efforts are often likely to turn out to be weak due to a lack of both detailed instruments of coordination and information among States and a clear-cut legal and operational arrangement.<sup>6</sup>

It is worth noting that certain limitations are contemplated in regional and/or international monitoring systems protecting basic Human Rights.<sup>7</sup> For instance, the European Court of Human Rights (ECtHR),

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<sup>3</sup> The best legal tool is, without doubt, to provide for a mutual recognition of evidence. The principle, that can have extraordinary implications for speeding up the gathering of evidence in criminal proceedings, means that the executing authority is obliged to recognise and ensure execution of the request of the other country. The execution is to be carried out in the same way and under the same modalities as if the investigative measure concerned had been ordered by a judicial authority belonging to the executing country. This ambitious target seems still far to be reached, even tacking into consideration the current framework of cooperation on criminal matters according to art. 82, para. 2 of Treaty on the Functioning of the European Union (TFEU). See: M. KUSAK, *Mutual admissibility of evidence and the European investigation order: aspirations lost in reality*, in *ERA Forum*, 2019, pp. 391-400; S. RUGGERI, *Transnational Prosecutions, Methods of Obtaining Overseas Evidence, Human Rights Protection in Europe*, in *Human Rights in European Criminal Law*, London: 2015; F. ZIMMERMANN, S. GLASER, A. MOTZ, *Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order*, in *European Criminal Law Review*, Volume 1, Issue 1, 2011, pp. 56-80.

<sup>4</sup> About the «legal tenability» as part of the ‘results’ of these investigative instruments: E.W. KRUISBERGEN, D. DE JONG, E.R. KLEEMANS *Undercover Policing: Assumptions and Empirical Evidence*, in *British Journal of Criminology*, 2011, pp. 394-412.

<sup>5</sup> Corte di Cassazione, Judgement, No. 48250 of 12 September – 12 December 2019. See: M. CASTELLANETA, Italian Supreme Court on irregular migration, crimes committed in Libya and Italian jurisdiction, 29 November 2019, available here: [www.marinacastellaneta.it/blog/la-corte-di-cassazione-si-pronuncia-su-immigrazione-irregolare-reati-commessi-in-libia-e-giurisdizione-italiana-italian-supreme-court-on-irregular-migration-crimes-committed-in-libya-and-italian-j.html](http://www.marinacastellaneta.it/blog/la-corte-di-cassazione-si-pronuncia-su-immigrazione-irregolare-reati-commessi-in-libia-e-giurisdizione-italiana-italian-supreme-court-on-irregular-migration-crimes-committed-in-libya-and-italian-j.html).

<sup>6</sup> See N. BOISTER, *The Cooperation Provision of the UN Convention against Transnational Organized Crime: A ‘Toolbox’ rarely used?*, in *International Criminal Law Review*, 2016, pp. 39-70. This is one of the reasons why the European Union in view of supporting, streamlining and facilitating cross-border operations and information exchange adopted at least two detailed practical guides on the topic: *The European Manual on cross-border operations*, Brussels, 11 September 2017, 11840/17 (491 pages), and *The Manual on Law Enforcement Information Exchange*, containing all the practical information necessary for carrying out cross-border operations (116 pages).

<sup>7</sup> About monitoring mechanisms in the field of human trafficking: S. FORLATI, *Monitoring compliance with international obligations in the field of human trafficking: towards a “systemic integration” of control mechanisms?*, in S. MARCHISIO, C. CURTI GIALDINO, R. CADIN, L. MANCA (eds.), *Scritti in memoria di Maria Rita Saule*, Napoli, 2014, pp. 621-636.

although it is aware of the need for adequately combating serious crimes,<sup>8</sup> including by employing special investigation techniques and in particular undercover operations,<sup>9</sup> has clarified that certain tricky investigative instruments are incompatible with the European Convention on Human Rights (ECHR)<sup>10</sup> insofar as that they may interfere with the guarantees prescribed by Article 6 ECHR.<sup>11</sup> Accordingly, the Italian Supreme Court, fully complying with these principles stated that investigative techniques resulting in an induction or incitement to crime of the subject under investigation are not allowed. The undercover agent may not commit illegal actions other than those expressly declared not punishable by the Italian Law or closely related to them as instrumental.<sup>12</sup>

Sometimes, the inability to improve policing cooperation across borders it is attributable to scarce mutual trust ‘in the ability and willingness of states to combat crime’, even if ‘they have (but also give) little reason to trust others’.<sup>13</sup> These difficulties, which are also known to affect cooperation between EU Member States from the outset,<sup>14</sup> are often explained by international lawyers as an (enduring) problem of retained

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<sup>8</sup> A list of serious crimes that are regulated at EU level can be found in Article 83 (1) TFEU. It includes terrorism and other crimes such as computer crime, organised crime, money laundering, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, corruption and counterfeiting of means of payment. For the relevant instruments of EU Criminal Law see: Council of the European Union, *European Union instruments in the field of criminal law and related texts*, Brussels, December 2019. Among scholars, on the topic: V. MITSILEGAS, *EU Criminal Law*, Oxford, Portland, 2009; V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES, *Research Handbook on EU Criminal Law*, London, 2016.

<sup>9</sup> «The Court would like to stress that it is not blind to the difficulties encountered by the authorities in combating serious crimes and the need for more sophisticated methods of investigation sometimes required in this context. In principle, the Court’s case-law does not preclude reliance, at the investigation stage of criminal proceedings and where the nature of the offence so warrants, on evidence obtained as a result of an undercover police operation (...). ECHR, *Khudobin v. Russia*, Judgment, Third Section, Application no. 59696/00, 26 October 2006, par. 128.

<sup>10</sup> The Court thus sought to distinguish the figure of the agent provocateur, as incompatible with the Convention, from that of undercover agent, which is permissible: «Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution». ECHR, *Ramanauskas c/ Lithuania*, Judgement (GC), Application no. 74420/01, 5 February 2008, para. 55.

<sup>11</sup> «However, the use of undercover agents must be restricted; the police may act undercover but not incite». ECHR, *Khudobin v. Russia*, quoted, para 128. The same principle was already set out in 1998 in the case *Teixeira de Castro v. Portugal*: «The use of undercover agents must be restricted, and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place ... that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement». ECHR, *Teixeira de Castro v. Portugal*, Judgement (Chamber), Application No. 44/1997/828/1034, 9 June 1998, para. 36.

<sup>12</sup> *Corte di Cassazione*, Judgement n. 38488, 28 May – 9 October 2008, *Cuzzucoli et al.*

<sup>13</sup> C. FOCARELLI, *International Law as Social Construct. The Struggle for Global justice*, Oxford, 2012, p. 378.

<sup>14</sup> See the *Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Brussels, 2 December 2009, para. 1.2.1: «Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different systems in the Member States will thus be one of the main challenges for the future». It was already clear at that time that, given the different standards of protection of fundamental rights in national legal systems, the key to overcoming

sovereignty. But they can undermine the main purpose of the Unctoc ‘to promote cooperation to prevent and combat transnational organized crime more effectively’. This is the reason why Article 27 of the Palermo Convention is wholly devoted to creating a framework of legal measures aimed at enhancing treaty cooperation among the States Parties according to the best available techniques. In the absence of such treaties, Article 20(3) provides that States’ ‘decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis’. The States Parties are also bound to ‘take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned’. A detailed legislative framework to overcome mutual distrust in the area of judicial cooperation in criminal matters is strongly recommended also between Member States of the European Union<sup>15</sup>.

### **3. The new Italian legal regime relating to undercover operations after the entry into operation of Law Decree No. 53/2019**

The Italian law which ratified the Palermo Convention and broadened its range of utilization<sup>16</sup>, is relatively recent.<sup>17</sup> It is to be noted that Italy has shown a special interest in combating the phenomenon of smuggling since the late 1990s by proposing to adopt a Convention specifically to combat migrant smuggling at sea to the International Maritime Organisation (IMO) with a view to criminalising the

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the obstacles due to lack of mutual trust had to be the harmonization of those standards: «The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the European Union» (ibid., para. 2.4.).

<sup>15</sup> «Almost 20 years later, an exploration of the different judicial cooperation situations covered by these principles shows that the amount of trust respectively required is still inversely proportionate to the degree of legislative precision. While the legislature tries to overcome this deficit, having understood that common rules foster confidence, the obligation to trust one another without exception will remain a quandary as long as there is no procedural safeguard to prevent a presumably impeding fundamental rights violation. It indeed appears that the overall valid model of complementary responsibilities fails where trust is withheld, occasionally betrayed or inherently unjustified in view of certain Member States’ disrespect for the rule of law». D. DÜSTERHAUS, *In the Court(s) We Trust - A Procedural Solution to the Mutual Trust Dilemma*, in *Freedom, Security & Justice: European Legal Studies*, 2017, n. 1, p. 26 ss. *Id.*, *Judicial Coherence in the AFSJ – Squaring Mutual Trust with Effective Judicial Protection*, in *Review of European Administrative Law*, 2015, n. 2, p. 151 ff. In the same vein: V. MITSILEGAS, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford, 2016; K. LENAERTS, *La vie après l’avis: exploring the principle of mutual (yet not blind) trust*, in *Common Market Law Review*, 2017, p. 805 ff.

<sup>16</sup> A limited use of special investigations techniques was at first foreseen in the framework of laws governing narcotic drugs and psychotropic substances, prevention, treatment and rehabilitation of drug addiction, by virtue of art. 97 of Presidential Decree No. 309, 9 October 1990, in O.J. no. 67 of 31 October 1990. Then in the framework of fight to terrorism after the attack to the twin Towers (art. 4, of Law-decree, no. 374, 18 October 2001, converted by Law no. 438, of 15 December 2001, in O.J. no. 293 of 18 December 2001, *Disposizioni urgenti per contrastare il terrorismo internazionale*) and trafficking of persons (see: Law no. 228, of 11 agosto 2003, *Misure contro la tratta di persone*, in O.J. no. 195 of 23 August 2003).

<sup>17</sup> Article 9, Law no. 146 of 16 March 2006, in O.J. no. 85 of 11 April 2006, available at [www.parlamento.it/parlam/leggi/06146l.htm](http://www.parlamento.it/parlam/leggi/06146l.htm).

smuggling of migrants at sea under international law<sup>18</sup>. The IMO's Legal Committee, however, observed that the Italian proposal was primarily a matter of international criminal law that went beyond maritime issues, that is, beyond the IMO's mandate. As a result, the Italian proposal became the matrix of a specific Protocol against the Smuggling of Migrants by Land, Sea and Air to be added to the Palermo Convention.<sup>19</sup> Despite these efforts, Italy actually ratified the Unctoc about seven years afterwards. In the meantime, Italian Law No. 146 of 2006 provided under Article 51 of the Italian Criminal Code the immunity of a comprehensive category of undercover judicial police officers.<sup>20</sup> However, the law was vaguely drafted and it was amended in 2010 as part of an extraordinary plan against the mafias<sup>21</sup>, but even the updated version did not provide for any allocation of financial resources to be appropriately implemented.

One can think, therefore, that the Italian legislator, has been induced to introduce “undercover police operations” as a special technique of investigation because it was one of the formal requirements to become a party to the Palermo Convention rather than being an opportunity to a better fighting against domestic and transnational crime networks according to recognised international best practices in conducting investigations. It may be noteworthy, therefore, to see it under the light of a recent Law Decree, commonly called “*Decreto sicurezza*” (literally ‘security Decree’), which contains some specific provisions concerning undercover operations.<sup>22</sup>

#### **4. The new Italian Statute's purpose to ‘strengthen the investigative coordination in the field of crimes related to illegal immigration’: a reached target or a missed opportunity?**

For the first time, the new Statute allots 3 million euros in the three-year period 2019/2021 to ‘implement the use of the investigative tool for undercover operations’, and, in particular – this being the first statement puzzling the interpreter, as we are about to make clear – to reimbursement ‘resulting from the

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<sup>18</sup> IMO Legal Committee, Proposed Multilateral Convention to Combat Illegal Migration by Sea, IMO Doc LEG 76/11/1 (1 August 1997). On the topic: A. KIRCHNER, L. SCHIANO DI PEPE, ‘International Attempts to Conclude a Convention to Combat Illegal Migration’ *International Journal of Refugee Law*, 1998, n. 4, pp. 662-674.

<sup>19</sup> United Nations Office on Drugs and Crime (‘UNODC’), *Travaux Préparatoires of the Negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006), p. 451. See also A. SCHLOENHARDT, J. DALE, ‘Twelve Years On: Revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air’, *Zeitschrift für Öffentliches Recht/ Journal of Public Law*, 2012, pp. 129-156.

<sup>20</sup> Some commentators argued about the fact that these categories are even too wide and indefinite. Given the delicate nature of the tasks assigned to the law enforcement officers, the norm may not help to preserve and protect some specific features inherent in this type of activity: see, as for instance, article 9(1) and (2) of the Unctoc.

<sup>21</sup> Art. 8, Law no. 136 of 13 August 2010, *Extraordinary plan against the mafias, and delegation to the Government on anti-mafia legislation*, in O.J. no. 195 of 23 August 2010.

<sup>22</sup> Law decree No. 53 of 14th June 2019, *Disposizioni urgenti in materia di ordine e sicurezza pubblica*, O.J. No. 138 of 14th June 2019 (from now on “*Decreto sicurezza*”). The converted law is No. 77 of 8 August 2019, O.J. No. 186 of 9th August 2019.

participation of law enforcement officers from States with which special agreements have been signed *for their deployment on national territory*<sup>23</sup>. Moreover, the budget allocation provided for in the “*Decreto sicurezza*” is defined as ‘urgent’ and ‘necessary’ also in order to meet the demand ‘to strengthen the investigative coordination in the field of crimes related to illegal immigration’, and ‘the instruments to combat this phenomenon’.<sup>24</sup>

Let us state right away that, faced with such a premise, one would have expected wide interventions in scope, in particular effective interventions in the pursuit of the overall objectives of the Palermo Convention and also suitable to provide the competent Authorities with the whole range of technical instruments and well-trained human resources. However, the new provision turns out to be surprising for a number of reasons.

Firstly, it is hardly understandable the reason why such a provision narrows its aim and scope to supply funds and technical equipment only to foreign law enforcement officers operating in Italy and does not include the Italian officers who are deployed abroad. The investigations aimed at dismantling the international networks of smugglers and traffickers who irregularly take migrants to Italy, may involve, as hinted at above, the use of significant economic resources and require specific activities even abroad. Compliance with it is not only a matter of indispensable logistical and organizational prerequisite. Rather, it is a *logical consequence of the transnationality of the crimes involved*. In other words, it is necessary to provide for the deployment of adequate means and equipment for the tasks to be carried out, as well as a sufficient number of specifically trained law enforcement officials<sup>25</sup> who are empowered to discover (at the price of prolonged and complex investigation’s activities) the techniques and complicity strategies used to evade national controls, in each of the States where migrants transit. In fact, such investigations have not been actually and wholly accomplished so far by giving a name and a face to each member of the criminal associations involved, not even to the founders and main beneficiaries of such associations’ financial proceeds. This is of course a target that is very hard to be reached in general. Therefore, if there is insufficient evidence to support a prosecution or if it will take too long or if prosecutions prove too costly, efforts to reach at least a partial disrupting of a criminal group are usually better than doing nothing at all<sup>26</sup>.

It is noteworthy that smugglers have created over time a well-established organizational model in each of the States where they operate. It is a well-proven operational model which can be described according to

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<sup>23</sup> See Art. 4 of “*Decreto sicurezza*” (italics added).

<sup>24</sup> Ibid.

<sup>25</sup> See in this sense, Article 29 of the Palermo Convention: «Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel».

<sup>26</sup> Unodc, *Toolkit to Combat Smuggling of Migrants. Tool 7- Law enforcement and prosecution*, Vienna, September 2010, p. 14.



a “horizontal”, rather than vertical, structure that requires highly targeted investigative activities in order to be successfully fought. The aim of these investigations is to reconstruct the route taken by the migrants transferred backwards, no doubt a really hard task since the criminal organisations involved usually act on the basis of a model that provides for a segmentation of criminal conduct in which each member of the organization plays a minor role (e.g. driver or food supplier or guardian of the areas in which the migrants pass, and so on). For this reason, none of the participant in the organization is made aware of what happens before and after his/her (very limited) contribution to the criminal project.

Such a fragmentation of conduct that takes place in different States is not only an effective method of reducing individual responsibilities. It is also a system that can provide the organisational leaders of the organization with a greater guarantee of impunity since none of the individual member knows their identity. Thus, it is understandable the reason why countering these criminal networks need a very complex investigation requiring, in order to bring about successful outcomes, to take place within the framework of a high level of coordination between the various enforcement and judicial authorities of the States involved, with due respect for the criteria set out for the exercise of national jurisdiction, as well as the procedural and substantive guarantees provided for by the respective domestic legal systems. As we noted above, however, the *Decreto sicurezza* is not concerned with strengthening the tools and resources available to Italian agents operating abroad. As said, the scope of application of its Article 4 is aimed at the exclusive benefit of operations that will be carried out by foreign officers found in the Italian territory. Such a limitation sounds even more surprising when considering that at the time when the *Decreto sicurezza* was approved the Italian Government had just been “downgraded” in the annual ranking drawn up by the US Department of State of States engaged in the fight against trafficking.<sup>27</sup> This important report adopts the standards set by the *Human Trafficking Victims Protection Act*<sup>28</sup> as its assessment parameter. In the shift from “Tier 1” in 2018 (State that fully complies with these standards), to “Tier 2” in 2019 (State that does not fully comply with these standards), the international reputation of the Italian Government suffered a severe blow. In so doing, Italy has lost the opportunity to notifying its willingness to commit itself towards conferring to the new Statute a wider scope and a different approach to transnational investigations. Interestingly, in the US Government’s 2020 report<sup>29</sup> Italy’s downgrading to

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<sup>27</sup> United States Department of State, *Trafficking in Persons Report 2019*, June 2019, available here: [www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf](http://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf).

<sup>28</sup> Available here: [www.state.gov/international-and-domestic-law/](http://www.state.gov/international-and-domestic-law/). The US legislation on this topic is continuously improved and emended. A new bill on the same topic, at the time of this writing about to be implemented, is available here: <https://www.congress.gov/bill/115th-congress/senate-bill/1312>.

<sup>29</sup> United States Department of State, *Trafficking in Persons Report 2020*, June 2020, available here: [www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf](http://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf).

the "Tier 2" position was reaffirmed.<sup>30</sup> In the same report, inter alia, the US Department of State strongly recommended to enhance data exchange among different ministries, and make public a database on investigations, prosecutions, and convictions, including sentencing data and to a national action plan<sup>31</sup>. It can therefore be said, as foreseeable, that there has been no particular recognition of the positive effects of the new Italian law, neither in terms of the international reputation of Italy, nor in terms of adequacy of its willingness to reach a more effective fight against migrant smuggling. It can be added that a Parliament made up of large groups of political forces which proudly declared themselves to be "sovereignist" seemed to have renounced the exercise of their powers of checking the Government. Such a control could be reached, for example, by providing maximum time limits to the duration of operations (with possible extensions subject to authorization by the both Houses), by specifying the equipment offered, the minimum rank and training level of the law enforcement agent to be involved, whether and what type of immunity from civil and criminal cases is provided for to the foreign agents, and so on. As noted, Article 4 of the *Decreto sicurezza* has given rise to concerns for other reasons as well. It claims that there is a situation of extraordinary necessity and urgency which would justify the use of a faster procedure for approving laws – a procedure that the Italian Constitution considers exceptional<sup>32</sup> – and, hence, a derogation from the ordinary legislative path. In the same period in which the *decree* was approved as a law, according to the official data released by the Italian Ministry of the Interior, the landings of migrants decreased by more than ninety percent.<sup>33</sup> It is thus unclear what extraordinary reasons of necessity and urgency may justify the attribution to the Minister of the Interior, by urgent decree, even of the power to close ports for 'violations of the laws of immigration in force'.<sup>34</sup>

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<sup>30</sup> According to the data collected in the 2020, the Italian Government reported fewer trafficking investigations, prosecutions, and convictions compared to the prior reporting period: «In 2019, the Ministry of Interior (MOI) reported investigating 135 persons for trafficking, a decrease compared to 314 in 2018 and 482 in 2017, reported from both the MOI and Ministry of Justice (MOJ). The MOI also reported investigating and arresting 117 persons under Article 600 for slavery, compared to 417 in 2018 and 513 in 2017, as reported by the MOJ». *Ibid.*, p. 276.

<sup>31</sup> *Ibid.*, p. 276. «In 2019 the MOI supported a program to provide victims of labour exploitation, including labour trafficking, with shelter and legal services. Local governments provided additional funds to victim assistance programs, although the government did not report amounts». Moreover, «NGOs reported inconsistent quality standards of assistance programs across regions». (*ibid.* p. 277). On the topic, see: E. ZANIBONI, *Money for Nothing, Push-back 'for Free': On the (Missed) Implementation of the CEAS and the New Italian Agenda for Asylum Seekers Reception*, in *Diritti umani e diritto internazionale*, 2019, pp. 257-291.

<sup>32</sup> See art. 77 of the Italian Constitution: «The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law».

<sup>33</sup> A daily update on the official data can be found here: [www.interno.gov.it/sites/default/files/2020-06/cruscotto\\_statistico\\_giornaliero\\_30-06-2020.pdf](http://www.interno.gov.it/sites/default/files/2020-06/cruscotto_statistico_giornaliero_30-06-2020.pdf)

<sup>34</sup> See art. 1, para. 1 of *Decreto Sicurezza*.

## 5. Conclusion

Beyond legal “labels” and political proclamations focussed on the sensitive topic of managing illegal migrant flows, Italy has undertaken a first effort to make the special investigation techniques compliant with its international obligations. It is doubtful whether it will reach the targets. From the evidence provided so far, the rules of *Decreto Sicurezza* providing for financial support to undercover operations hosting foreign law enforcement agents on the Italian territory, apparently focused on the fight against criminal networks managing irregular migration, will be possibly exploited to a greater extent in the context of investigations about other transnational crimes. For example, to prevent and suppress other ‘serious crimes’,<sup>35</sup> like terrorism or illicit drug networks or financial criminal offences or the growing threats posed by organ trafficking.<sup>36</sup> The new provision about undercover missions that can take place in Italy is drafted in a very succinct way. By accepting lack of clear-cut rules, the Parliament has granted the Government, and in particular the Ministry of the Interior, an unpredictable blank cheque.

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<sup>35</sup> See above fn. no. 8.

<sup>36</sup> See UNODC, *Trafficking in Persons for the Purpose of Organ Removal. Assessment Toolkit*, Vienna, 2015. S. GAWRONSKA, *Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal*, in *New Journal of European Criminal Law*, volume 10, issue no. 3, pp. 268-286.