MIGRATION AND ASYLUM POLICIES SYSTEMS

MAPS
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UNIVERSITÀ DEGLI STUDI DI NAPOLI
"L'Orientale"

Co-funded by the
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MIGRATION AND ASYLUM POLICIES SYSTEMS

CHALLENGES AND PERSPECTIVES

edited by

GIUSEPPE CATALDI
ADELE DEL GUERCIO ANNA LIGUORI

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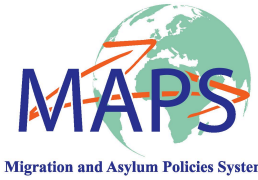

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INDEX

PART II
Migration and Asylum Policies Systems: challenges and perspectives under European law and jurisprudence

Part III
The Stakeholders Point of View

Preface

This book is the first publication delivered within the *Jean Monnet* Network on *MIGRATION AND ASYLUM POLICIES SYSTEMS* (MAPS), born within the context of the past experiences of Jean Monnet activities carried out in the University of Naples "L'Orientale", and involving, as partners, universities of other nine different European countries: National and Kapodistrian University of Athens; University of A Coruña; University Jean Moulin Lyon 3; University of Malta; University of Innsbruck; Queen Mary University of London; University Goce Delcev-Stip; University Sarajevo School of Science and Technology (SSST); Stiftung Europa-Universität Viadrina Frankfurt (Oder).

According to the aim of MAPS – i.e highlighting key changes and best practices relating to general principles and safeguards of asylum systems, at the same time analysing weaknesses and the compliance with international law obligations to protect asylum seekers, refugees and migrants in general – on 23rd September 2019 the First Workshop, on "Migration and Asylum Policies Systems, challenges and perspectives", took place at University of Naples "L'Orientale".

Essays included in this volume are excerpts from the lectures given during the Workshop, concerning a critical appraisal of the national legal systems of most of MAPS Partners (in the first Part), to which contributions on topical issues concerning Asylum and Migration under European Law are added (in the second Part), as well as, in the third Part, the speeches delivered at the Workshop in Naples from Antonio Di Muro (UNHCR) and Riccardo Gatti (ONG *Open Arms*).

On the basis of the Project, other publications will follow. The hope is that they will be able to testify an increased attention from national and international institutions to the issue of migration governance, with a view to respecting fundamental human rights as consolidated in the second half of the last century and now included in the Constitutions and international treaties ratified by European States. Unfortunately, the provisional balance of this first part of the work carried out within MAPS is not encouraging, and the advent of the Covid-19 pandemic has further made it problematic the respect of

fundamental principles, in many cases overwhelmed by emergency legislation. Of course there is no question here of denying the need to resort to extraordinary measures in such worrying circumstances, but it seems paradoxical that once again migrants and asylum seekers may risk to incur in unbearable consequences.

PART I

Migration and Asylum Policies Systems:
challenges and perspectives under national legal orders

SEARCH AND RESCUE OF MIGRANTS AT SEA IN RECENT ITALIAN LAW AND PRACTICE

GIUSEPPE CATALDI*

1. Introduction. Italian initiatives aimed at countering the arrival of boats with migrants rescued at sea

It is well known that, with the downsizing of the "Balkan route" following the 2016 agreement between EU Member States and Turkey as well as the policy of closure implemented by the so-called "Visegrad group"'s countries, the progressive and consequent pressure in the central Mediterranean, and especially on Italy, has led to a series of initiatives by successive Italian governments, initiatives aimed at countering the arrival in the ports of the Peninsula of boats with people rescued at sea. Two are the guidelines followed, obviously connected to each other: the "outsourcing" of the migratory phenomenon's management, which began in particular through the "Memorandum of Understanding on migrants" stipulated with the government of Tripoli on 2 February 2017[1], and the "disengagement" with respect to Search and Rescue activities at sea, gradually limiting the direct involvement and above all discouraging these operations by NGOs, "guilty" of attracting rescued persons to the Italian jurisdiction. The first act of this phase can be considered the enactment of the "Minniti Code" of July 2017, which set a series of

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[1] In comment to which reference should be made to A. Liguori, "The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights", *Rivista di diritto internazionale*, 2018, p. 1228 ff,; ID., *Migration Law and The Externalisation of Border Controls*, Routledge, London and New York, 2019; A. Spagnolo, "The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice", *Italian Yearbook of International Law*, 2018 p. 211 ff.

rules to be followed by NGOs, through very questionable provisions[2]. Among the latter we would like to point out here, since it constitutes a precedent with respect to interpretation of the right of innocent passage by the regulations subsequently adopted in Italy, and on which we shall dwell, the commitment "not to enter Libyan territorial waters, except in situations of serious and imminent danger that require immediate assistance, and not to hinder the activity of Search and Rescue (SAR) by the Libyan Coast Guard, in order not to hamper the possibility of intervention by the competent national Authorities in their territorial waters, in compliance with international obligations". This is, of course, an untenable demand for a ship flying a foreign flag, since it would be required not to exercise its right of innocent passage through the territorial waters of a third State! Subsequently, in perfect harmony with the political winds blowing through Europe and facilitated by the lack of solidarity shown by the European Union's partners in the management of landings, the new Italian government undertook, starting in June 2018, a series of measures aimed at closing ports to all vessels (in the case of the ship *Diciotti* also to an Italian military ship!) with migrants on board, rescued at sea. And so, in 2018 and 2019, the two so called "security decrees" arrived. These decrees provide, among other things, measures to combat the phenomenon of irregular migration by sea at all costs, including through a progressive detachment from the international commitments undertaken, as we will try to demonstrate. At the time of writing various appeals are pending before the Constitutional Court and, in the political arena, amendments are being discussed.

In the few pages that follow I would like to dwell in particular on a single aspect of the "security decree *bis*" (n. 53/19 converted by law n. 77 of 8 August 2019) which concerns the interpretation of the right of innocent passage in the territorial sea, an institution codified by the United Nations Convention on the Law of the Sea signed in Montego Bay in 1982 (hereinafter UNCLOS) and ratified by Italy with law n. 689 of 22 December 1994.

[2] On the "Minniti Code" see M. Ramacciotti, "Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di Search and Rescue (SAR)", *Rivista di diritto internazionale*, 2018, p. 213 ff.; F. Ferri, "Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee"*, Diritti umani e diritto internazionale*, 2018, p. 189 ff.

2. The right of innocent passage as "revisited" by Article 1 of the so-called "security bis" decree n. 53/2019

Article 1 of the "security *bis*" decree inserts in Article 11 of Legislative Decree No 286 of 25 July 1998, the new paragraph 1-ter by which it attributes to the Minister of the Interior, in his capacity as national authority of public security, in the exercise of the coordination functions attributed to him by law, the power to restrict or prohibit the entry, transit or stopping of ships in the territorial sea, with the exception of military vessels and ships on non-commercial government service, for reasons of public order and security, or when he deems it necessary to prevent the "prejudicial" or "non-innocent" passage of a specific ship in relation to which the conditions set out in Article 19, paragraph 2, letter g) of UNCLOS can be fulfilled - limited to violations of immigration laws.

The right of innocent passage, referred to in Articles 17 et seq. UNCLOS, consists of the right of each State to transit with its ships (private and public) through foreign territorial seas provided that such transit is harmless, i.e. does not disturb the "peace, good order and security" of the coastal State[3]. This is provided for in Article 19, first paragraph, UNCLOS, which reproduces the same rule contained in Article 14 of the 1958 Geneva Convention on the Territorial Sea. In the second paragraph, however, Article 19 UNCLOS, unlike the 1958 version, lists a series of activities whose commission by the foreign ship automatically renders its passage not innocent. One of the activities is the one mentioned in Article 1 of the decree in question, namely "the loading or unloading of materials, currency or persons in violation of customs, tax, health or immigration laws and regulations in force in the coastal state".

The right of passage belongs to any vessel which enters the territorial waters of a foreign State only for the purpose of crossing them, whether it subsequently enters the internal waters of that State (incoming passage), comes from those waters with the intent of reaching other destinations (outgoing passage) or, finally, only transits parallel to the coast, without entering the internal waters (lateral passage). The passage must be rapid and continuous, save for the exceptions provided for in the last part of art. 18, par. 2, UNCLOS:

[3] On the right of innocent passage see G. Cataldi, *Il passaggio delle navi straniere nel mare territoriale*, Giuffré, Milano, 1990.

activities necessary for ordinary navigation and, what is more relevant in our case, situations of force majeure, danger and need to provide assistance to ships and aircraft in danger.

I believe this necessarily synthetic description of the institute is sufficient to reveal the perplexities raised by the formulation of Art. 1. Such article, in fact, provides for two distinct hypotheses with regard to the power to limit or prohibit the entry, transit or stopping of ships in the territorial sea: either for reasons of order and public safety, or when the passage is prejudicial or not innocent under Art. 19, para 2, letter g) UNCLOS. However, it is not clear how the two hypotheses can be distinguished. In other words, Art. 19 UNCLOS allows "for reasons of public order and safety" to restrict or prohibit the passage of a foreign ship. The assumption is that such passage is not innocent. Consequently, the passage of ships exercising the right of innocent passage cannot, as a general rule, be prevented, while measures can be taken to prevent non-innocent passage (Art. 25 UNCLOS). The special provision included in Article 11 of Legislative Decree no. 286 of 25 July 1998 certainly cannot give new and additional powers to limit the right of innocent passage beyond those already provided for under Articles 19 and 25 UNCLOS and which constitute the perimeter within which the coastal State can take action against the foreign ship. It is worth remembering that the existence of a primary legal framework obviously does not change the system of supranational sources (ratified by Italy) within which such measures are inserted and with which they are required to comply pursuant to Art. 10, 11 and 117 of the Italian Constitution. This is also expressly provided for by the decree in question, which contains a specific reference to the necessary "compliance with international obligations".

What, therefore, is the rationale upon which the rule in Article 1 is based, given that it is not possible to introduce new limits to the right of innocent passage, nor is it conceivable that the purpose is a mere restatement of those principles?

The answer must necessarily take account of practice in implementing this provision. As it appears from the cases that have occurred so far, the will of the legislator appears to be the following: except for cases in which the Italian coastal authorities have expressly authorized the entry into the territorial sea of a ship with migrants rescued on board, such entry is to be considered contrary to "public order and public safety", since the absence of authorization means, in

the light of the rules on search and rescue at sea that we shall soon examine, refusal to assign the POS (Place of Safety), a refusal based, in this case, on the responsibility of another State. This will to qualify the passage *ex ante* as innocent or not is therefore functional to the policy of "closure of national ports".

The measure of port closure is not in itself excluded by the law of the sea, since ports fall within the exclusive sovereignty of the State. There is no right of entry into a foreign port under international law, since the port is located in internal waters, and unless an international agreement has been reached, the coastal State may choose whether or not to admit a foreign ship (unlike the territorial sea, where all States enjoy the right of innocent passage). Article 25 of UNCLOS also provides that the State may refuse entry if the ship violates national immigration regulations. However, any ship has the right to enter a port if it is itself in a situation of distress, or if the persons on board are in difficulty. In this case, the rule of "force majeure" or the "state of necessity", already provided for and codified by the 1923 Convention on the Regime of Sea Ports, applies. In these cases the refusal to accept a ship into a port constitutes a violation of the duty to safeguard human life at sea, unless a simple intervention (e.g. medical or mechanical repair) carried out on board can be sufficient to put an end to the state of necessity, without proceeding to the entry into the port. In the specific case of possible asylum seekers on board, when the ship is in internal waters and therefore under the jurisdiction of the coastal State, said coastal State must verify, person by person, whether or not the requirements have been met, otherwise it would be in violation of its obligations according to human rights standards, in particular the obligation of *non-refoulement* under the 1951 Geneva Convention on refugees and the European Convention on Human Rights (ECHR) as interpreted by the Court of Strasbourg.

Therefore, the entry into the territorial sea of a ship carrying people already rescued in fulfilment of the international obligation to save human life at sea is legitimate, and must be considered as an innocent passage, because landing in a *Place of Safety* is functional to the completion of rescue operations; in the same way, obviously, the entry into the territorial sea in order to rescue people in danger at that moment must be considered as an innocent passage. Neither of the two activities can be considered to have been carried out in violation of national immigration laws, provided that the purpose of the ship is

related to the rescue obligations. On this point, Italian case law is abundant and almost unanimous[4].

3. Search and Rescue Obligations according to International Law

A few words on rescue obligations. They are first of all embodied in Article 98 UNCLOS, which codifies a very ancient principle of customary law, namely the obligation to rescue persons in distress at sea, without any geographical indication or limitation, and also specifying the need for the State to promote "the establishment, operation and maintenance of an adequate and effective search and rescue service"[5].

[4] Among the many decisions: Court of Agrigento 7 October 2009, no. 954 in the *Cap Anamur* case; request for dismissal of the Palermo Public Prosecutor's Office,15 June 2018, in the case involving the ship *Golfo Azzurro* of the NGO *Iuventa*; Court of Ragusa, office for preliminary investigation decree of rejection of the request for preventive seizure, 16 April 2018, confirmed by the Ragusa Court of Review (*Tribunale del riesame*), 11 May 2018 in the *Open Arms* case; *Corte di Cassazione*, Criminal section I, judgment 27 March 2014, no. 14510 and *Corte di Cassazione*, Criminal section IV, judgment 30 March 2018, no. 14709, which on the subject of the subsistence of Italian jurisdiction in relation to conduct, alternatively qualified as humanitarian aid operations or aiding and abetting illegal immigration, which took place on the high seas, noted that "*the rescue intervention is a duty under the International Conventions on the Law of the Sea*"; Court of Catania, 7 December 2018, which with reference to the *Diciotti* case underlines that "*the obligation to save life at sea is a precise duty of States and prevails over all bilateral rules and agreements aimed at combating irregular immigration"*; GIP (Judge for the preliminary investigation) of Trapani, decision 3 June 2019, in the *Vos-Thalassa* case, which recognizes the exemption of legitimate defense in the case of migrants rescued and protested with force the compulsory accompaniment to Libya; *Corte di Cassazione*, Criminal section I, 23 January 2015, n. 3345, on the subject of "mediated author", i.e. rescue operations provoked by the same smugglers who determine the responsibility of the latter but certainly not of those who provide rescue at sea.

[5] "*1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on*

More detailed are the provisions of the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 Hamburg Convention on Search and Rescue at Sea (SAR). These two conventions were amended in 2004, following the case of the Norwegian ship *Tampa*, which in 2001 picked up 438 Afghan asylum seekers at sea but was banned by the Australian authorities from entering their ports for more than a week, generating a diplomatic crisis with Norway, until the situation was resolved by "outsourcing" the management of the matter to the State of Nauru, which accepted the asylum seekers in exchange for money[6]. In particular, the 20 May 2004 IMO (International Maritime Organization) Maritime Safety Committee Resolution made it clear that the Search and Rescue operation only ends with the disembarkation (in the shortest possible time and with the minimum possible diversion of the voyage undertaken by the rescuer ship) of the rescued persons in a safe place; that the government responsible for the SAR region where the survivors were recovered is required to identify the safe place of disembarkation and to either provide it directly or ensure that it is provided by another state; that a safe place cannot be considered as the ship performing the rescue, except for a limited time, and that neighboring coastal states, as well as the flag state and any state involved (e.g. because it is the nation state of the majority of the crew or passengers) cannot be considered to be exempted from liability, especially if the government responsible for the SAR region is unwilling or unable to intervene.

With regard to the latter, it should be stressed that the concern has been, especially since 2004, to broaden as far as possible the "titles" of competence and thus the scope of the States potentially responsible. The rules of the two SOLAS and SAR Conventions, as well as IMO recommendations, are based on cooperation ("*the coordination by one state of rescue action does not free other states*", as the IMO states in its recommendations). In fact, the first maritime rescue centre that becomes aware of a case of danger, even if the event affects the SAR area of another country, must take the necessary

and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose".

[6] Incidentally, this is the so-called "*Pacific Solution*", i.e. specific to the Pacific Ocean, which inspired many European governments that, by their own admission, consider it as a good practice to imitate.

urgent action and then continue to coordinate the rescue until the authority responsible for the area takes over the coordination. The State to which the Coordination Centre which first received the news, or which has in any case taken over the coordination of the rescue operations, has the obligation to identify a safe place on its territory where the rescue operations can be completed by the disembarkation of the shipwrecked persons, provided that it is not possible to reach agreements with a State that may be closer to the area of the event, regardless of any consideration regarding the status of the shipwrecked persons.

It is equally clear, however, that there are two problems with the application of these rules in the central Mediterranean. The first is that Malta, which has a very large SAR area, has not, however, ratified the 2004 amendments and, in view of the limits of its territory and the means at its disposal, it disputes its competence to direct rescue operations in its SAR (unless Maltese flag vessels are involved, which is a very rare hypothesis), which, moreover, overlaps with the Italian one in several places.

Different but no less problematic is the issue of the Libyan SAR. This country, which still lacks an effective government that controls the entire territory, although it has declared that it has assumed responsibility for search and rescue in the (large) sea area north of its coasts, does not even have an efficient coordination centre for rescue operations. Moreover, and most significantly, Libya cannot at this time be considered, by almost unanimous recognition, as a safe place of landing from the point of view of protection of fundamental human rights. Indeed, it is clear that the place of disembarkation is understood as "safe" when both physical security and the enjoyment of human rights are no longer in danger. Corollary to this principle is the right, as well as the obligation, to provide the Place of Safety, a right to which the rescued persons are entitled[7].

The obligation to save human life at sea, therefore, is obligatory for both States (according to art. 98, par. 1 UNCLOS) and masters of ships (according to Chapter V, reg. 33 SOLAS, as well as national rules on the matter, such as for example art. 489 of Italian navigation code). This obligation requires the master to assist persons in distress

[7] In this regard, see the clear statements of the GIP of Trapani, *cit*. For the doctrine please refer to T. Scovazzi, "Human Rights and Immigration at Sea", in Ruth Rubio-Marin (ed.), *Human Rights and Immigration*, OUP, Oxford, 2014, p. 225 ff.

and take them to a safe place "in the shortest possible time". In other words, the event of rescue at sea continues until the master has disembarked the persons in a safe place, and its entry into the territorial sea and ports of a State cannot be seen in a different light. The passage of a ship which has rescued persons in distress, even outside the territorial sea, cannot therefore be precluded if the ship intends to enter in order to finalize its obligation to save human life at sea. This is required by the conventional rules on the rescue and salvage of persons at sea already mentioned, which provide for coordination between the States involved. Thus the inaction or failure by other States to fulfil their obligations is wholly without merit.

Consequently, there can be no automatic refusal of the right of passage by virtue of its preventive qualification as not harmless if the vessel hosts persons rescued at sea. Correctly, the Court of Palermo, section for ministerial crimes, by decision of January 30, 2020 acknowledged (on p. 37), that art. 11 paragraph 1 *ter* inserted in Legislative Decree 286/98 can only be interpreted, in the light of UNCLOS rules cited, as meaning that the prohibition of entry must refer "only to cases of illegal immigration not related to a rescue operation at sea". As a result, the Court asked the Senate for authorization to proceed against former Italian Minister of the Interior, Matteo Salvini, in the case of the Spanish-flagged *Open Arms* vessel chartered by the NGO *Pro-Activa Open Arms*.

The governmental interpretation of the right of innocent passage as provided in the "security *bis* decree" is quite clear in various directives of the Ministry of the Interior.

First of all, Directive No 14100/141(8), dated 4 April 2019, regarding the *Alan Kurdi* ship, flying the German flag and belonging to the NGO *Sea Eye,* without mentioning the international obligations referred to above, nor the rules to be applied in the event of a state of emergency, categorically and incontrovertibly affirmed that the flag State in this case was competent "to assume a specific role of control and coordination of the subsequent activities to be carried out by the naval organization". Thus any transit of the vessel *Alan Kurdi* through the maritime area under Italian jurisdiction in breach of the provisions on immigration would necessarily be a non-innocent passage. This because the Italian authorities "did not coordinate the event in question nor did it take place in waters of national responsibility". It

was therefore instructed to order the vessel to refrain from entering and transiting Italian territorial waters.

But, in the case in point, a request to allocate a POS had been submitted to several States. To Libya, which did not reply, or replied only after much delay, and which, in any case, for the reasons already indicated, is to be considered "out of the game"; to Malta, whose reluctance, in light of the non-ratification of the 2004 amendments, is well known and not surprising; to Tunisia, a relatively safe country, but not equipped to satisfy the needs of the migrants and, according to the opinion of the NGO operators, a country lacking a complete legislation on the subject of international protection, and which, in any case, also did not reply. Does it make sense to discuss the possible violation by these States of their international commitments? We do not think so, as in this case we are considering the position of Italy. In the light of the scope of the rules that have been summarily described, the obligation of Italian authorities to attribute the POS once requested is all too evident, especially in the absence of a reply from other States. In order to escape this logical consequence, the Rome Tribunal, section for ministerial offences, in its decree of 21 November 2019 by which it dismissed the allegations made against former Minister of the Interior Salvini with reference to the *Alan Kurdi* affair, stated that these rules do not apply to operations carried out by ships professionally engaged in search and rescue at sea. The conclusion, again according to this Tribunal, would be that, in the absence of specific rules, only the flag State can be said to be obliged to assume the resulting responsibilities and that unfortunately, as the flag state in this case was Germany, a country far from the theatre of operations, in the end ... no one is responsible.

However, the differentiation of the regime for NGOs whose mission is rescue as opposed to state-owned or private vessels that are involved "by chance" in rescuing people in danger appears arbitrary and, above all, is not provided for in the rules on the matter; this presumption of "forcing *ad libitum*" the rules indirectly attributed to NGOs appears neither legitimate nor justified. The Rome Tribunal, in a single stroke, presumes to annul the right and duty of the ship's captain to assess a specific situation which arises, and the obligations of States built up over the years by the Conventions mentioned and

the amendments which have been adopted[8]. But, in light of the practice and the rules themselves on Search and Rescue, there is no other model, and the solution of relying exclusively on the flag State in the absence of intervention by the SAR State is precisely what the Hamburg Convention, particularly with the 2004 amendments, sought to prevent through the mechanism of solidarity and co-responsibility of all the States involved! The Public Prosecutor's Office too, in its request for dismissal in the same case, points out that the 1979 Hamburg Convention, in section 5.3.4.1. provides that "when a rescue coordination centre or secondary rescue centre is informed of the existence of an emergency phase and ignores whether other centres are taking the appropriate measures, it undertakes to take the necessary measures and contacts neighbouring centres with a view to designating a centre to take immediate responsibility for the operations".

Even more explicit in expressing prejudice against the activities of NGOs and the need to enforce the rules on SARs mentioned above is another directive of the same Ministry, issued just a few days after (15 April 2019) the one already examined, this time concerning the vessel *Mare Jonio*, flying the Italian flag. In fact, the directive requires that the vessel in question must ensure that it complies with the instructions given (i.e. not to enter Italian waters), expressly stating in the recitals that "interventions by private vessels in specific and limited sea areas, which result in the preventive and intentional transport of migrants to the European coasts, materialize, also for publicity activities, a 'mediated' cooperation which, in fact, encourages the sea crossings of foreign citizens not in regular possession of a stay permit and promotes, objectively, their illegal entry into the national territory". The directive therefore abides by that idea, which was at the basis of the European "rejection" of the Italian *Mare Nostrum* operation, but is completely contradicted by practice, according to which an effective Search and Rescue activity provides an incentive

[8] On the obligations and the right/duty of the master of the ship to obey international law, and on the relationship with the competence of the State, please refer to F. De Vittor, M. Starita, "Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters", *Italian Yearbook of International Law*, 2018, p. 82 ff.; M. Starita, "Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave privata", *Diritti umani e diritto internazionale*, 2019, p. 5 ff.

("taxi effect" as defined at the time of *Mare Nostrum*) to departures[9]. In this regard, it is necessary to recall what has already been said, namely that the international obligations mentioned, in particular Article 98 UNCLOS, commit States to carry out search and rescue activities directly, to this end promoting "the establishment and permanent operation of an adequate and effective search and rescue service to protect maritime and air safety". In the motion for a resolution submitted to the European Parliament on 21 October 2019 by the Committee on Civil Liberties, Justice and Home Affairs, "*on Search and Rescue in the Mediterranean*"[10], and rejected by 290 votes against, 288 in favour and 36 abstentions, the following is emphasized: NGOs rescuing migrants were nominated in 2018 for the *Sakharov* Prize; after the Italian operation *Mare Nostrum* (ceased on 31 October 2014) there were no State SAR actions in the Central Mediterranean; and finally on 26 September 2019 the EU Operation Sophia was extended until 31 March 2020 but only for air operations. Therefore, NGOs have limited themselves to occupying a space left (maliciously) free by States reluctant to fulfil their obligations and thus creating problems for commercial navigation. In a statement of 11 June 2018, the *International Chamber of Shipping* in London (the World Shipowners' Association) not incidentally pointed out that "if NGO ships are unable to land people rescued in Italy in Italian ports, this will also have significant consequences for merchant ships (...), which will again have to participate in a significant number of rescues". The "security decree *bis*" therefore violates the spirit and the letter of the international rules mentioned so far from two different points of view. First because there is a clear prejudice with respect to the rescue activities of NGOs, and secondly because the ultimate goal is, once again, the idea that the landing should take place "anywhere except in

[9] See in this regard the paper by E. Cusumano, M. Villa*,* "Sea Rescue NGOs: a Pull Factor of Irregular Migration?*",* in *Policy Brief. Migration Policy Centre. Robert Schuman Centre for Advanced Studies. European University Institute,* Issue 2019/22*,* November 2019. The authors, basing their research on data and facts, effectively demonstrate how wrong this assumption is. More in general, on the relationship between NGOs and Italian authorities on the subject, refer to G. Bevilacqua, "Italy versus NGOs: The controversial Interpretation and Implementation of Search and Rescue Obligations in the context of Migration at Sea", *Italian Yearbook of International law*, 2018, p. 11 ff.

[10] 2019/2755(RSPP)B9-0154/2019, <http://www.europarl.europa.eu/doceo-/document/B-9-20190154_EN.html9>(06/20).

Italy". In fact, in this regard, it should be remembered that, on various occasions, different arguments have indicated that a State other than Italy is competent: in the case of the ship *Mare Jonio*, flying the Italian flag, the initial responsibility for landing, according to the Italian authorities, did not lie with the flag State but with the State of the nearest port. Furthermore, it was claimed that since the vessel was not in the Italian SAR, it was not possible for the POS to be identified in an Italian port! On the contrary, the priority of a rescue vessel landing in its own flag State was already invoked by the Italian Government in events involving the vessels *Aquarius* (UK flag), *Sea Watch 3* (Netherlands), *Open Arms* (Spain). In the latter case, reference was also made to the nearest port (Malta), and the country of the SAR region (Libya), while in the case of the refusal of Italian ports to the vessel *Aquarius*, reference was made, as an alternative to the flag (UK), to the ownership of the vessel or the nationality of the NGO (France), or to the waters where the vessel was located at the time of the ministerial declarations (Malta).

The infringement to the letter of the international rules on the subject emerges, as we have attempted to demonstrate, from the claim to qualify *a priori* as offensive the passage into the territorial sea of ships engaged in "unauthorized" rescue operations. In this regard, it should be recalled, first of all, that, despite the different interpretations that States have reserved to the relevant provisions of UNCLOS (Articles 17 - 26), the right of innocent passage without the need for prior authorization is, in fact, recognized to all foreign ships, including warships, even by States which, during the Third Conference on the Law of the Sea as well as in their domestic laws, had affirmed the need for authorization by the coastal State or prior notification of passage. This conclusion is further supported, in the most recent practice, by the attitude of States such as Finland or Sweden, which have abandoned their original position in favour of the legitimacy of the imposition by the coastal State of the obligation of prior notification of passage; at the time of ratification of UNCLOS, in fact, they have not deposited any interpretative declaration in this respect. A development in customary law in the sense of the legitimacy of at least the condition of prior notification of the passage of nuclear-powered ships and ships carrying radioactive or other intrinsically hazardous or noxious substances has, in our view, occurred in recent years, mainly as a result of the practice of European States, but this is

in the light of an increased sensitivity to values of common interest, and we stress values of common interest, such as health and the environment[11]. However, the requirement for authorisation to transit remains a practice considered incompatible with freedom of navigation. In order to overcome the evident discrepancy with the rules of the provisions issued by the Italian legislator, the Rome Tribunal, in the decision mentioned above, made a logical and factual reversal of the situation and competences in the Search and Rescue field represented by the decision, according to which, unlike in cases where the State acts directly, ships belonging to humanitarian organizations "once the rescue has been carried out, autonomously choose the route to travel and the country to turn to for the indication of a POS". But according to the facts, there is no "autonomy"; on the contrary, the difficulty of having to act in the absence of indications from the States emerges. Hence the impossibility of defining the passage as non-innocent.

4. Conclusions

In conclusion, it should be reaffirmed that the means used to cross the Mediterranean, and the factual circumstances, lead, *ab initio*, to a state of necessity and therefore the application of the customary rule on the duty to render assistance codified in Article 98 UNCLOS. Especially in the light of the absence of direct state intervention, the legality of the actions carried out by NGOs' is beyond doubt. It is worth remembering that according to the *Missing Migrants Project* of the *International Organization for Migration* (IOM), of the 3,514 people who died in 2017 in an attempt to emigrate, whose identity has been verified, as many as 2,510 have lost their lives in the Mediterranean. Moreover, despite a significant drop in arrivals, the route from Libya to Europe remains, according to UNHCR, the deadliest migration route in the world. In 2018 it was five times more fatal than in 2015, mainly due to the reduction in search and rescue activities off the Libyan coast. These figures need no comment. Consequently, the automatic denial of the right of passage under the

[11] On this point please refer to G. Cataldi, "Problèmes généraux de la navigation en Europe", in Rafael Casado Raigon (ed.), *Europe et la mer, II Colloque de l'Association internationale du droit de la mer*, Bruylant, Bruxelles, 2005, p. 127 ff.

administrative measures issued in application of the "security *bis* decree" is illegitimate because it is incompatible with the international rules on the matter (art. 17 ff. UNCLOS). This refusal, while recalling Italy's SAR obligations, is motivated by an alleged intention to land irregular migrants, on the basis of actions carried out "in full autonomy". The entry into the territorial sea, on the other hand, when linked to the Search and Rescue activity and to the right/duty that a POS be assigned, is, as such, perfectly legitimate. With regard to that part of the "security decree *bis*" which deals with search and rescue at sea, in our humble opinion there is a need for a profound change, in light of the evident contradiction with the functioning of the international rules on the subject, as is also apparent from the absolutely prevailing jurisprudence, which continues to affirm the primacy of legality, both domestic and international, without surrendering to pressures of alleged exceptional necessity and urgency[12].

[12] In addition to the case law cited above, see recently *Court of Cassation*, 3rd Criminal Chamber, judgment No 112 of 20 February 2020, in the case of *Carola Rackete*, commander of the vessel *Sea Watch 3*. For the Supreme Court, the latter, from the beginning to the end of the rescue operations, acted in full compliance with the obligations imposed by international law, including therefore the decision not to comply with the prohibition to enter the territorial sea and an Italian port (prohibition issued in execution of the "security decree *bis*"), forcing the "blockade" opposed by the military authorities and leading the migrants rescued on 12 June 2019 to a safe place for disembarkation.

THE RIGHT TO ASYLUM IN ITALY

ADELE DEL GUERCIO*

1. Introduction

The right to asylum is recognized by Italian law at a Constitutional level in a form that goes beyond the limits observed in other Constitutional traditions[1] and in International Law.[2] Article 10, para. 3, of the Italian Constitution states that: "A foreigner who is prevented in his country from the effective exercise of democratic freedoms guaranteed by the Italian Constitution has the right to asylum in the territory of the Republic, according to the conditions established by law".

Such a broad formulation was desired by the Constituents, who had undergone exile due to their antifascist stance as dissidents and partisans, and who were therefore well aware of how essential is to find hospitality and asylum abroad when democratic freedoms were denied in one's own country, and one risked arrest, detention, torture, and other serious violations of one's rights.

Nevertheless, the Constitution refers to an *ad hoc* law, never adopted, for implementation of the right to asylum stipulated in Art. 10, para. 3. In the absence of any comprehensive framework, the Court of Cassation has had to provide guidance regarding application of the Constitutional right to asylum, specifying, with an important judgment in 1997, that this was a personal right that could be directly invoked by those who claimed they could benefit from it.[3] In the wake

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[1] For instance the French tradition, from which the Italian Constitution drew inspiration. See P. Bonetti, *Prospettive di attuazione del diritto costituzionale di asilo in Italia*, available at: <http://briguglio.asgi.it/immigrazione-e-asilo/1999/giugno/bonetti-asilo.html> (07/20).

[2] L. Neri, "Il principio di umanità alla prova dell'abrogazione del permesso di soggiorno per motivi umanitari", in Mariacristina Molfetta, Chiara Marchetti (eds.), *Il diritto di asilo. Report 2019*, Fondazione Migrantes, Editore Tau, Roma, 2019, p. 145 ff., in particular p. 146.

[3] Corte di Cassazione, judgement No. 4674, 26 May 1997.

of this judgment, numerous Constitutional asylum requests were registered from foreign citizens, among these the application submitted by the well-known leader of the PKK, Abdullah Ocalan, detained in a maximum security prison in Imrali, Turkey. In 1999 the Court of Rome recognized, *in absentia*, Ocalan's right to asylum as stipulated in Article 10, para. 3, of the Constitution.[4]

Without a comprehensive legal framework, the structuring of the Italian asylum system was made possible through the implementation of International Law, particularly the Geneva Convention[5] and the Schengen Agreements,[6] which introduced refugee status and the first form of humanitarian protection, as well as EC/EU law on asylum,[7] In particular we have to mention the directives 2004/83/EC (the so-called "Qualification Directive")[8] and 2005/85/EC (otherwise known as "Procedures Directive"),[9] which introduced subsidiary protection and regulated the procedures for examination of requests for international protection presented within Italian territory or at the borders.

2. The forms of protection of asylum seekers recognized by Italian law

In the light of the aforementioned normative framework, an asylum seeker has the right to enter and stay in Italian territory in order to have his or her situation examined by the appropriate authorities (Territorial Commissions: administrative bodies responsible for examining asylum requests in the first istance) sand may not be refused entry, in accordance with Article 19 of the Law on

[4] Court of Rome, judgement No. 49565, 1 October 1999.

[5] Incorporated into Italian law with Law 24 July 1954, No. 722.

[6] L. Neri, "Il principio di umanità", cit., pp. 149-150.

[7] P. Bonetti, "Il diritto d'asilo in Italia dopo l'attuazione della direttiva comunitaria sulle qualifiche sugli status di rifugiato e di protezione sussidiaria", *Diritto, immigrazione e cittadinanza*, 1, 2008, p. 14.

[8] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, implemented by Italy with legislative decree No. 251/2007.

[9] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

immigration.[10] Refusal of entry at the border is also forbidden in the case of unaccompanied minors, women who are either pregnant or have given birth within six months, and people who are ill, disabled, elderly, or who have experienced violence or torture.

Between 2017 and 2018, Italian government adopted normative security measures which narrowed the field of the right to protection and brought about a reorganization of the procedures for examination of asylum requests. Asylum seekers, following examination of their request by the Territorial Commissions,[11] may either obtain a form of international protection – refugee status or subsidiary protection – or fail in their request. In the latter case an applicant may challenge the decision by appealing to the court of first instance, although not to the court of appeal, as a result of the adoption of the "Minniti decree" in 2017,[12] which also established that the court of first instance could decide on a request for international protection without listening to the applicant, basing a decision exclusively on a video recording of the hearing before the Territorial Commission.

According to the Geneva Convention and the "Qualification Directive", the term "refugee" shall apply to any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country", or to a stateless person in the same conditions with regard to the country of former habitual residence.[13] Subsidiary protection can be recognized to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or, in the case of a stateless person, to his or her country of former habitual residence,

[10] Legislative Decree, Coordinated Text 25 July 1998, No. 286.

[11] Administrative bodies currently formed of specialized personnel, hired through competitive exams, as well as a member of UNHCR.

[12] Decree-law 17 February 2017, No. 13, converted into Law 13 April 2017, No. 46.

[13] Art. 1, Geneva Convention on Refugees; art. 2, d), of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

would face a real risk of suffering serious harm as defined in Article 15 of the Qualification Directive. Serious harm consists of: the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; a serious and individual threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict.

It is worth noting that Italian legislators have wanted to align the content of subsidiary protection with refugee status, including analogous rights, such as the issue of a five-year residence permit, with all resulting implications concerning the fulfillment of the requirements for the issue of an EC residence permit for long-term residents,[14] and thus stability and integration, as well as the exercise of free movement in the Schengen zone. Beneficiaries of international protection are also granted the same right to healthcare as that enjoyed by Italian citizens, along with the right to family reunification, without needing to demonstrate income and housing requirements as in the case of other migrants.

Italian Courts intervened to specify the field of application of international protection, developing a highly advanced case law for some sectors, in compliance with obligations deriving from other International Treaties to which Italy adheres. Although this is not the place for a detailed reconstruction of the jurisprudential approaches that have emerged in the last few years, they are worth mentioning.

We will first highlight the judgements handed down by the Court of Cassation in May[15] and November 2017,[16] which recognized the right of international protection for asylum seekers who were victims of gender violence, on the basis of the Istanbul Convention of the Council of Europe,[17] implemented by Italy in 2013. The cases dealt with by the Supreme Court involved two women asylum seekers, the first, of Moroccan citizenship, domestically abused by her husband, and the other, of Nigerian citizenship, abused by her husband's family after his death. In both cases the Supreme Court held that gender-based violence should be counted as persecution, and thus qualifying

[14] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[15] Corte di Cassazione, order of 17 May 2017, No. 12333.

[16] Corte di Cassazione, judgement of 24 November 2017, No. 28152.

[17] Istanbul Convention Action against violence against women and domestic violence, 7 April 2011, implemented in Italy with Law 27 June 2013, No. 77.

for refugee status, as stipulated in Article 60 of the Convention of Istanbul and in the UNHCR guidelines.[18]

In spite of such significant judgements, in the GREVIO latest report on Italy,[19] it is highlighted that practices vary widely depending on the geographical area and on the Territorial Commission sexamining the application, and that asylum seekers who are victims of gender-based violence tend not to receive international protection in Italy.

The case-law on the recognition of international protection for victims of trafficking in human beings, and in particular for women asylum seekers from Nigeria exploited in the prostitution market, is particularly notable [20] too. However, in spite of progress made following the adoption of the Warsaw Convention,[21] GRETA has underlined that the number of people identified and assisted in Italy as victims of human trafficking remains small, and a large number of unaccompanied minors continue to disappear.[22]

Another sector worthy of note is the international protection of asylum seekers fleeing persecution because of their sexual orientation, with regard to which Italy, in comparison to the EU other European

[18] Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002.

[19] Group of Experts on Action against Violence against Women and Domestic Violence, *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), ITALY*, 15 November 2019.

[20] On this topic, see, among others: D. Belluccio, "Status di rifugiato e vittima di tratta: note a margine del decreto del Tribunale di Bari del 10 novembre 2018", and L. Minniti, "La tutela delle vittime di tratta davanti? al giudice della protezione internazionale. Le peculiarità, le possibilità, le necessità, gli obblighi", both published on <https://www.asgi.it/> (07/20), 27 February 2019. See also M. Massari, *Il corpo degli altri. Migrazioni, memorie, identità*, Orthotes, Napoli-Salerno, 2017; B. Pinelli, *Migranti e rifugiate*, Raffaello Cortina Editore, Milano, 2019; E. Rigo, "Donne attraverso il Mediterraneo. Una prospettiva di genere sulla protezione internazionale", *Notizie Di Politeia*, XXXII(124), 2016, pp. 82-94; E. Santoro, "Asilo e tratta: il tango delle protezioni", *Questione Giustizia*, 2018.

[21] Council of Europe Convention on Action against Trafficking in Human Beings, 1 February 2008, implemented in Italy with law 29 November 2010, No. 108.

[22] Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, 25 January 2019.

Countries systems, has assumed the position of pioneer.[23] The Court of Cassation,[24] established the principle, confirmed by subsequent case law, that any law criminalizing homosexuality constitutes a justifiable reason for granting international protection to an asylum seeker, without the necessity of demonstrating that the rule in question is applied, as established, however, by the EU Court of Justice in the *X.Y. and Z. case* of 2013. Indeed, criminal sanction for homosexual relations "constitutes on its own a general condition of deprivation of the fundamental right to lead one's own sexual and emotional life freely", and "has automatic repercussions on the individual condition of homosexual people, placing them in a situation of objective persecution that justifies granting protection".

The Court of Cassation, due to the fundamental nature of the right of sexual orientation, also rejected discretionary tests, and more recently sustained that for recognition of refugee status it is not necessary that the asylum seeker's country of origin criminalize relations between people of the same sex. The Territorial Commission or the judge of first instance must evaluate the possible risk that a person may face in respect of his or her mental and physical wellbeing,[25] risks that, as the UNHCR guidelines[26] state, may derive from a climate in the country of origin that is particularly discriminatory and oppressive for homosexuals, even in the absence of criminalization.

Mention should also be made of the third hypothesis of serious harm envisaged by the Qualification Directive. As is well known, migrants who reach Italy come predominantly from the African continent, and in particular from sub-Saharan countries. As such, they are often classified as "economic migrants" based on nothing more

[23] On this subject, see C. Danisi, "Crossing borders between International Refugee Law and International Human Rights Law in the European context: Can human rights enhance protection against persecution based on sexual orientation (and beyond)?", *Netherlands Quarterly of Human Rights*, 2019. See also: <https://www.sogica.org> (07/20).

[24] Corte di Cassazione, order of 29 May 2012, No. 15981, *T.T. vs. Interior Ministry*.

[25] Corte di Cassazione, judgement of 23 April 2019, No. 11176.

[26] Guidelines On International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012.

than an evaluation of their nationalities,[27] making it difficult for them to have access to fair and efficient asylum procedures, especially in the *hotspots* established in implementation of the European Agenda on immigration. [28] However, in many cases Italian judges granted subsidiary protection to Malian citizens fleeing from a situation of general violence linked to war, initially only to people from the north of the country, but more recently to applicants from other zones as well, since, given the intensification and spread of the conflict, "social tensions and terrorist threats, while less intense than in the north of the country, have alarming features that, insofar as they are growing and uncontainable, lead us to define the conflict as one of high intensity."[29]

The approach has become even more restrictive with the adoption of an Italian list of safe countries of origin, identified as Albania, Algeria, Bosnia-Herzegovina, Cape Verde, Ghana, Kosovo, Northern Macedonia, Morocco, Montenegro, Senegal, Serbia, Tunisia, and Ukraine, and the instruction that any request for international protection from citizens of these countries be evaluated in light of information regarding the countries of origin.[30] The asylum request evaluation scheme is therefore inverted; the assumption is that any applicant from one of the countries on the list runs no risk of persecution or serious harm in the event of return, and it is the applicant's responsibility to prove otherwise.[31]

2.1 Humanitarian protection before the 2018 security decree

Prior to the reform introduced by the 2018 security decree, in addition to the two forms of international protection, a third form of

[27] On the distinction between economic and humanitarian migrants see G. Cataldi, "La distinzione tra rifugiato e migrante economico: una dicotomia da superare?", in Giuseppe Nesi (ed.), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?,* Editoriale Scientifica, Napoli, 2018, p. 585 ff.

[28] European Commission, *A European Agenda On Migration*, COM(2015) 240 final, 13 May 2015.

[29] Court of Perugia, order of 24 April 2020, <https://www.meltingpot.org> (07/20).

[30] <https://www.asgi.it/wp-content/uploads/2019/11/decreto_paesi_sicuri.pdf> (07/20).

[31] <https://www.asgi.it/asilo-e-protezione-internazionale/richiedenti-asilo-elenco-paesi-sicuri> (07/20).

protection was envisaged – humanitarian protection – which in practice found wide application, thanks also to the clarification of the Italian Courts.

Article 32, para. 3, of Legislative Decree No. 25/2008 stated that "in cases where the Territorial Commission does not admit the application for international protection and believes that there may be serious humanitarian grounds, it will forward the application to the *Questore* [the Chief of the Police] for the granting of a residence permit pursuant to Article 5, para. 6" of the Law on immigration.

The aforementioned provision linked the issue of the residence permit for humanitarian reasons to serious grounds, in particular of a humanitarian nature or resulting from the Constitutional or International obligations Italy's. The Italian Court of Cassation specified that "the legal situation of foreigners who apply for the issue of a permit for humanitarian reasons has a consistency of subjective right, to be counted among fundamental human rights",[32] and that the competent body to decide on the release should be the Territorial Commission, not the *Questore*.[33]

Furthermore, the Supreme Court clarified that this was a form of residual and temporary protection, to be taken into consideration only if the conditions for granting refugee status or subsidiary protection did not exist,[34] and that it constituted an open catalogue to be used in varied hypotheses.[35]

These hipotheses were systematized by the National Commission for the recognition of international protection. They included: exposure to torture or inhuman and degrading treatment in case of the expulsion of the applicant, in accordance with the case law of the Court of Strasbourg on the basis of Article 3 ECHR regarding the expulsion of foreigners; serious psycho-physical conditions or serious pathologies that cannot be adequately treated in the country of origin; the temporary impossibility of return due to the insecurity of the country or area of origin; serious natural disasters or other serious local factors impeding repatriation with dignity and in safety; and the family situation of the asylum seeker, which must be assessed in

[32] Corte di Cassazione, order No. 19393/2009 and judgment No. 4455/2018.
[33] Corte di Cassazione, order No. 19393/2009.
[34] Corte di Cassazione, judgment of 21 April 2009, No. 11535.
[35] Corte di Cassazione, order 13 January 2009, No. 19393.

accordance with the provisions of Article 8 of the ECHR concerning the right to respect private and family life.[36]

In practice, humanitarian protection was used to regularize, *inter alia*, the legal situation of asylum seekers in the following situations: victims of torture, violence and rape when they were in Libya or during the migration process; single women with children; people whose application for international protection was pending and who had completed a process of integration; ill people; and even people who, upon return to their country of origin, would have found themselves in conditions of extreme poverty.

The residence permit for humanitarian reasons lasted two years and involved the recognition of many of the rights associated with international protection, as well as the convertibility to residence permits for work reasons and family reunification.[37]

The normative framework preceding the adoption of decree-law No. 113/2018 was completed with permits "for special protection" for victims of trafficking in human beings (Article 18 of the Law on immigration), "for victims of domestic violence" (Article 18 bis of the Law on immigration) and for victims "of particular labour exploitation" (Article 22, para. 12 quarter, of the Law on immigration), not abolished by the aforementioned decree-law.

Decree-law No. 113/2018, in force since October 5, 2018, later converted into Law No. 132/2018, abrogates the residence permit for humanitarian reasons, provides for new types of residence permits, and renames others that previously contained the words "humanitarian reasons". In the case of "special" residence permits, the issuing authority is the *Questore*, rather than the Territorial Commission for the examination of the application for international protection. It should be noted that these are short-term residence

[36] Ministerial Circular No. 00003716 of 30 July 2015, available at: <http://briguglio.asgi.it/> (07/20).

[37] On the residence permit for humanitarian protection see M. Acierno, "La protezione umanitaria nel sistema dei diritti umani", *Questione giustizia*, 2, 2018; M. Benvenuti, "Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini", *Diritto immigrazione e cittadinanza*, 1, 2019; G. Cataldi, "La distinzione tra rifugiato e migrante economico", cit; L. Neri, "Il principio di umanità", cit.; C. Favilli, "La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di cassazione n. 445/2018", *Questione giustizia*, 1, 2018; N. Zorzella, "La protezione umanitaria nel sistema giuridico italiano", *Diritto immigrazione e cittadinanza*, 1, 2018.

permits (six months to one year), which are not always renewable due to expiry and not always convertible into work reasons, unlike the residence permit for humanitarian reasons, which, as we have seen, had a duration of two years and guaranteed beneficiaries the possibility of its being converted into a work permit upon expiry.

The need to intervene on humanitarian protection was justified, according to the Explanatory Report of decree law No. 113/2018, with reference to the instrumental use of it by Territorial Commissions and by the judges. The residence permit for humanitarian reasons became in practice "the most widely recognized form of protection in the national system", according to the Executive, because of a legal definition with uncertain contours and an "excessively extensive" interpretation that could be demonstrated by the "anomalous disproportion" between the rates of recognition of international protection and recognition of humanitarian protection. The Executive therefore seemed to find the cause of the aforementioned disproportion in what, in truth, was actually the consequence of following: an extremely restrictive visa policy; the absence of legal entry channels; the malfunctioning of the old Territorial Commissions prior to the reform, which had been composed of unskilled personnel disinclined to recognise international protection even where the requisites established by law existed; and the rigidity of the conditions attached to refugee status and subsidiary protection.

We want to highlight that the Territorial Commissions often adopt unreasonably restrictive approaches, denying protection or recognizing the least guaranteed form of protection (before the reform put in place by the security decree of 2018, a residence permit for humanitarian reasons). This approach causes a large number of judicial appeals, and thus an overloading of the judicial system and further delays to asylum procedures, with detrimental consequences for applicants, and onerous additional costs to the State.

2.2 The new residence permits

The first new residence permit introduced by decree law No. 113/2018, converted into Law No. 132/2018, is the permit "for special protection", with an annual duration, which is renewable but not convertible into other types of residence permits. The Territorial Commission transmits the documents to the *Questore* for the issuance

of this type of residence permit when it has not accepted the application for international protection but there is a risk of persecution pursuant to Article 19, para. 1, or the risk of torture pursuant to Article 19, para. 1.1, of Legislative Decree No. 286/98, in the case of expulsion of asylum seekers.

Law No. 132/2018 then provides for a residence permit "for medical treatment", issued by the *Questore* to the foreigner who is in a "particularly serious" health condition, assessed by suitable documentation from a hospital or a doctor affiliated with the national health system (*Sistema sanitario nazionale*, S.S.N). This is a different case from that provided for by Article 36 of the Law on immigration, which allows entry into Italian territory of a third country citizen who needs medical treatment. The residence permit "for medical treatment" has a duration equivalent to the time attested by the health certification, but not exceeding one year, and is renewable. The law does not specify whether it allows work or whether it is convertible.

In addition to the residence permit for medical treatment, the new security decree introduces a residence permit "for disasters", issued, again, by the *Questore*, to foreigners who would return to a country in which there is a situation of exceptional calamity – not defined by law – which makes return in safe conditions impossible.[38]

Finally, we must mention the permit "for acts of particular civic value", to be issued, upon authorization of the Minister of the Interior, as proposed by the Prefetto, to foreigners who have exposed themselves to a real risk to save people in imminent and serious danger, to prevent or diminish the damage of a serious public or private disaster, to restore public order, to participate in the arrest of criminals, to contribute to the progress of science or generally towards the good of humanity, or to honor the name and prestige of Italy.

A critical note regarding the new residence permits concerns the precariousness of the legal status which comes from their issue, both with regard to the duration of the residence permit issued (six months for the permit for disasters, one year extendable in other cases), and with regard to the non-convertibility of some of these permits to other

[38] See E. Fornalé, "Floating rights in times of environmental challenges", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds.), *Migrations and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 183 ff., <http://www.jmcemigrants.eu/jmce/wp-content/uploads/2019/06/CATALDI-CORLETO-PACE_Collected-File.pdf> (07/20).

types, in particular to residence permits for work reasons. The shorter duration also affects the exercise of other rights, such as access, on equal terms with citizens, to social assistance benefits (when the residence permit lasts less than one year) and to public housing (in the case of a residence permit with a duration of less than 2 years). Furthermore, the security decree limits the right of the beneficiaries of the new types of residence permits to healthcare (this also having Constitutional recognition in Article 32), as it does not provide for automatic enrolment in the national health service, but only for access to urgent and essential medical care.[39]

It is clear, therefore, that the new provisions limit the exercise of rights that are guaranteed by the Constitution, determining a different treatment for similar situations previously protected under the umbrella of humanitarian protection. Moreover, the competent body to issue the authorization to stay is no longer the Territorial Commission, with the decision left instead to the discretion of the *Questore* and the *Prefetto*.

3. Reception of asylum seekers

Decree law No. 113/2018 also affected the reception system, establishing that applicants for international protection are not allowed to receive accommodation within the SPRAR (System of Protection for Asylum Seekers and Refugees), renamed "System for holders of international protection and unaccompanied minors" (SIPROIMI), which is reserved only for beneficiaries of international protection, unaccompanied minors (even if they are not asylum seekers), and beneficiaries of residence permits for special cases (for reasons of health, domestic violence, violence and severe exploitation, labour exploitation, natural disaster, civic value) if they do not already receive accommodation in the protection systems dedicated to them.

The applicants for international protection, on the other hand, can find accommodation exclusively in the Centres of First Reception (CPA) and in Extraordinary Reception Centres (CAS), a system with serious failures in terms: of the quality of the services offered, the

[39] ASGI, *Manifeste illegittimità costituzionali delle nuove norme concernenti permessi di soggiorno per esigenze umanitarie, protezione internazionale, immigrazione e cittadinanza previste dal decreto-legge 4 ottobre 2018, n. 113*, 15 October 2018.

training of staff, the adequacy of the facilities (which are in most cases overcrowded, located in remote areas and distant from transportation), and support for asylum procedures. Moreover, there have been many episodes of speculation by private companies – and in some cases by criminal organizations – which do not have profiles compatible with the social activities implemented in the centres.

The SPRAR, then SIPROIMI, is a system characterized by the provision of an "integrated reception", that goes well beyond the mere provision of accommodation, but includes orientation measures, access to Italian languages courses, legal and social assistance as well as the development of personalised programmes for the social-economic integration of individuals. The involvement of the local authorities, which entrusted the implementation of the services to third sector entities with consolidated and proven experience in the asylum sector, guaranteed high quality standards of reception and transparency in the management of the public funds. These features made SPRAR an exemplary practice, studied and taken as a model by other European countries.

The dismantling process had already begun with Law No. 142/2015,[40] which institutionalized the reception of asylum seekers in extraordinary centres (CASs), most often hotels, opened during the so-called "North Africa Emergency" of 2011, following the Tunisian "Jasmine Revolution". However, the law at issue specified at least that the accommodation of asylum seekers in the CASs was to be temporary and exceptional. Despite the law, over time this type of accommodation became the norm, as demonstrated by the data from the Ministry of the Interior, according to which 80% of those who are currently hosted in Italy are accommodated in the extraordinary reception system. Law No. 132/2018, restricting the possibility of accommodation in the ordinary system, goes so far as to deny a dignified reception to applicants for international protection, in this manner denying them *de facto* any possibility of social inclusion. The reception standards guaranteed within the extraordinary system appear to be far below those, already minimal, established by Directive 2013/33/EU,[41] especially when dealing with persons falling

[40] Legislative decree 18 August 2015, No. 142.

[41] Directive 2013/33/EU of the European Parliament and Council, of 26 June 2013, laying down standards for the reception of applicants for international protection.

within the so-called "vulnerable" groups (minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, people suffering from serious illness or mental disorders, or those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence), in favour of whom the European Directive provides for specific support services (for example, psychological assistance).

Even the decisionof the Government to reserve social inclusion projects (for example, access to training projects) exclusively for beneficiaries of international protection and special permits for unaccompanied minors interferes with the social inclusion of asylum seekers. As no social inclusion measures are provided for them, they will find themselves in a situation of social marginality, with the consequence of being more exposed to exploitation by employers and to episodes of racism and violence, such as have often been recorded in the last years in Italy.

The latest data confirm that at the moment there are about 60,000 people accommodated in the CPSA and CAS, and only about 20,000 in SIPROIMI. This distribution, however, has resulted in severe consequences during the emergency period caused by the COVID-19 pandemic, since in CASs it has been more difficult to guarantee physical distancing and the isolation of people who have tested positive for the disease, or who are suspected of being positive, and to provide healthcare, given the lack of government guidelines. The response has been improvised and there have been many difficulties in managing the situation. This is yet another demonstration of a system that does not work.

4. Detention of asylum seekers

Italian law provides for the detention of both irregular migrants pending expulsion and asylum seekers. Over time there has been an increasing use of administrative detention, which, it seems appropriate to recall, is not connected to the commission of a crime, but rather performs a deterrent function. There has been a growth in the number of cases of deprivation of the freedom of asylum seekers and an expansion of places and detention facilities for migrants pending

expulsion, even though detention should constitute a measure of *extrema ratio*.

An asylum seeker shall be detained in pre-removal detention centres (CPR), on the basis of a case by case evaluation, when he or she:

(a) falls under the exclusion clauses laid down in Article 1F of the 1951 Geneva Convention;

(b) is issued an expulsion order because he or she constitutes a danger to public order or state security, or is suspected of being affiliated with a mafia-related organisation, has conducted or financed terrorist activities, has cooperated in selling or smuggling weapons, or habitually conducts any form of criminal activity, including with the intention of committing acts of terrorism;

(c) may represent a danger for public order and security;

(d) presents a risk of absconding.[42]

Law No. 132/2018 provided a new option for the detention of asylum seekers: they may be detained in hotspots or first reception centres for the purpose of establishment of their identity or nationality. If the determination or verification of identity or nationality is not possible on those premises, they can be transferred to a CPR. The duration of detention is up to 210 days (an initial 30 in CPAs or hotspots, 110 plus 180 in CPR if identification is not possible).

The hotspots were established in Italy and Greece pursuant to the 2015 European Agenda on Migration. They are "structures of reception and first reception", aimed at "ensuring prompt identification, registration and acquisition of migrants' fingerprints ('crisis points')", with the support of the following EU agencies: EASO, FRONTEX, and EUROPOL. It will thus be possible "to distinguish between those who are in need of international protection and those who are not"[43] immediately after disembarkation, using standardized procedures, guiding the former group into procedures for relocation to other EU member states, one of the tools of European solidarity aimed at alleviating the pressure of migrants on Italy and Greece. The "hotspots" thus constitute "a device for the

[42] AIDA, *Country Report: Italy*, 2019 update.

[43] European Council meeting (25 and 26 June 2015) – Conclusions, EUCO 22/15, 26 June 2015.

determination of differentiated juridical status",[44] which pose a series of problems regarding the effective exercise of asylum rights and fundamental human rights. The process of "sifting" asylum seekers from economic migrants, often based on little more than nationality, is problematic in itself, since, according to the international system of refugee protection, and to the EU law, only through prior and meticulous examination of the individual situation of each person it is possible to determine whether someone is at risk of persecution, of serious harm, or of violation of human rights in the event of repatriation, and thus whether someone may obtain a form of international or national protection. What is relevant is not simply nationality, but also a person's general situation, and the fear he or she expresses.

To these issues can be added the fact that neither the "Minniti decree"[45] nor the 2018 security decree have provided hotspots with a precise legal basis within Italian law, which stipulates that asylum seekers may be held for up to thirty days in order to verify identity and citizenship, although it does not prescribe the procedure, and thus leaves room for discretional practices by the police without recognition of the procedural guarantees envisaged by Article 13 of the Constitution, for instance validation by a judge.

In light of what has been stated above, it is not clear whether the hotspots constitute closed or open centres, from which people may leave freely, and therefore whether these are intended as centres for reception or detention. Practices vary widely, as has been reported by the National Guarantor for the Rights of Persons Detained.[46] The Chief of police himself admitted that the Lampedusa hotspot, for example, is not a detention centre, but a reception centre, which also functions as a detention centre.[47]

[44] ASGI, podcast "I Centri di permanenza per il rimpatrio", <https://inlimine.asgi.it/ombre-in-frontiera-il-secondo-audio-documentario-racconta-i-centri-di-permanenza-per-il-rimpatrio/> (07/20).

[45] Article 14 Law on immigration.

[46] National Guarantor for the Rights of Persons Detained, *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, 2017.

[47] CIE was the current CPR. A. Pansa, in AP Camera, XVII legislatura, *Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei Centri di accoglienza, nei Centri di accoglienza per richiedenti asilo e nei Centri di identificazione ed espulsione*, 20 January 2016, p. 17.

The lack of legal regulation for hotspots is undoubtedly a point of concern, since, pursuant to Article 13 of the Constitution, the deprivation of liberty, a fundamental right, may only be ordered with a warrant from the judge and only in cases and according to the conditions provided by law. In the case of the hotspots, therefore, these terms are respected. People find themselves in legal *limbo*, often in a condition of *de facto* detention, in precarious hygienic conditions,[48] in facilities that have not been planned as detention centres, and in which asylum seekers haven't access to legal assistance.[49]

Moreover, although the detention of asylum seekers is expressly permitted by Article 8 of Directive 2013/33/EU and by Article 5 of ECHR, both the Court of Justice of the European Union[50] and the European Court of Human Rights[51] established stringent conditions for the deprivation of liberty of asylum seekers; people, it should be pointed out, who have not committed any crime and with regard to whom the use of the detention instrument seems debatable at the very least. Furthermore, it should be noted that a lack of identity and travel documents is a typical and fairly general condition for those seeking international protection, since it is possible that the person is persecuted by the authorities of his own state of citizenship and has not been able to obtain the documents, or that he has lost them during the journey. In this regard, it is imperative to reiterate that one of the fundamental principles enshrined in the 1951 Geneva Convention is Article 31, which states that an asylum seeker cannot be penalized for having entered a State's territory illegally.

[48] The Ministry of the Interior ordered the temporary closure of the Lampedusa hotspot in March 2018 following an inspection. See: <https://www.asgi.it/asilo-e-protezione-internazionale/hotspot-lampedusa-diritti-minori/> (07/20). Then, in December 2019, following several urgent appeals put forward by the ASGI, the European Court of Human Rights asked Italy to supply adequate information on the living conditions within the Lampedusa hotspot, particularly with regard to minors. See <https://www.asgi.it/asilo-e-protezione-internazionale/lampedusa-migranti-cedu/> (07/20).

[49] ASGI, podcast "I centri hotspot", 2020, available at: <https://inlimine.asgi.it/wp-content/uploads/2020/04/Audio-documentario-3-I-centri-Hotspot.mp3> (07/20).

[50] Among others, EU Court of Justice, case C -601/15, *J. N. c. Staatssecretaris van Veiligheid en Justitie*, judgment of 15 February 2016.

[51] AIDA, *The detention of asylum seekers in Europe Constructed on shaky ground?*, 2017; FRA, *Guidance on detention of asylum seekers and migrants*, 2017.

As stated previously, migrants pending expulsion may also be deprived of their freedom. The 2018 security decree has introduced somewhat problematic possibilities, having envisaged that a detention may not only take place in the CPR, which have been set up expressly for this purpose, but also in other places, such as hotspots and facilities at the border. The conditions of the centres vary considerably, access to legal assistance is not always guaranteed, and more generally police authority is characterized by a certain arbitrariness, which is also due to the lack of legislation regulating the detention of migrants.[52]

The Law on immigration specifies that detention is excluded in the cases of unaccompanied minors and vulnerable people, including those with health problems. Nevertheless, there are cases in which unaccompanied minors, victims of torture and trafficking, and other vulnerable asylum seekers have been deprived of their liberty.

5. Cooperation with Libya

Another problematic chapter in Italian policies regarding immigration and asylum is the cooperation with third countries, and in particular with Libya.[53] The European Court's judgement in the case *Hirsi Jamaa and Others vs. Italy*,[54] which condemned Italy for returning migrants to Libya by sea, and the killing of Qadhafi and the accompanying civil war, had led to the suspension of relations between the two countries. These relations entered a new phase in 2016 with the establishment of the Fund for Africa, which provides for a budget of €200 million for measures "aimed at relaunching dialogue and cooperation with the African countries of priority importance for migration routes", funds which are added to the €338 million of the Union Emergency Trust Fund for Africa (EUTF), launched by the European Union in 2014.[55] The Italian Fund finances a joint

[52] ASGI, podcast 'I Centri di permanenza', cit.

[53] On this theme, see also: M. Veglio, "Amiche, nemiche, complici. L'Italia, la Libia e un secolo di caccia agli stranieri", in Mariacristina Molfetta, Chiara Marchetti (eds.), *Il diritto asilo. Report 2019*, cit., p. 77 ff.

[54] European Court of Human Rights [GC], *Hirsi and others v. Italy*, application No. 27765/09, judgement of 23 February 2012.

[55] M. Veglio, "Amiche, nemiche, complici", cit., p. 95.

management system for borders and immigration, including the southern border of Libya.

On 2 February 2017 the centre-left Italian government, following an initiative proposed by the Minister for the Interior, Marco Minniti, concluded with the President of the Council of the Libyan Government of National Accord, Fayez Mustafa Serraj, a Memorandum of Agreement [56] aimed at collaborating on the management of "illegal immigration". In line with the new European Commission's Migration partnerships framework with third countries launched in 2016, the goal of this agreement was "to guarantee the reduction of illegal migratory flows", in other words to prevent departures towards Europe. One of the solutions identified in this document for the "issue of illegal migrants crossing Libya to reach Europe by sea" is the creation of temporary reception camps in Libya, locations under the exclusive control of the Libyan Ministry of the Interior, in which the *de facto* detention of "illegal migrants" is envisaged until repatriation to their countries of origin. In addition to this, the Italian government commits to supply technical and technological support to Libya, and in particular to the Libyan Coastguard, in order for the latter to collaborate in the fight against "illegal" immigration.

On the basis of the Memorandum, Italy trained the Libyan Coastguard and provided resources to use in the fight against migration, and, in the absence of a Libyan Maritime Rescue Coordination Centre (MRCC), offered the coordination of the Italian operational centre, which ceded its place to the Libyan equivalent when the North African country informed the IMO of the establishment of its own SAR (search and rescue) zone, identifying its own coordination centre as well.

According to the Italian Admiral Enrico Credendino, the Memorandum has enabled the creation of "a Libyan system capable of stopping migrants before they reach international waters, [and] as a result it will no longer be considered a push-back because it will be the

[56] Italian text available at <http://www.governo.it/sites/governo.it/files/Libia.pdf> (07/20); unofficial translation in English at <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> (07/20). On this subject, see also: A. Liguori, *Migration Law and the Externalization of Border Controls*, Routledge, London-New York, 2019, p. 9 ff.

Libyans who will be rescuing the migrants and doing whatever they consider appropriate with the migrants".[57]

What is questionable at this point is the fact that the Italian government, in a sector with significant repercussions for the rights of the people involved, has attempted to re-launch cooperation with a country whose adherence to International Law has been placed in doubt by the civil war underway between various armed militias, and its disastrous humanitarian consequences. Furthermore, the United Nations[58] and Prosecutor of the International Criminal Court[59] have denounced the violence, torture, rape, abuse, and exploitation that migrants suffer both in detention centres controlled by the government and those controlled by armed militias, as well as the return of migrants on boats directed from Libya to Europe, which are stopped by the Libyan Coastguard and carried out to detention centres. The Prosecutor of the ICC, in turn, has initiated an enquiry into the Libyan Coastguard, which includes members of the militias, among them people involved in human trafficking, and the violence perpetrated by the organization against migrants. Along with the UN and Council of Europe[60], both the UNHCR and IMO have asked Italy and Europe to suspend cooperation with Libya in matters of immigration until the country has reached institutional stability[61].

Libya is not party to the 1951 Convention Relating to the Status of Refugees and its Protocol, there is no asylum legislation. Libyan laws criminalize irregular entry, stay, or exit of all migrants, asylum-seekers and refugees, victims of trafficking. Violations are penalized with an undefined prison sentence with "hard labour". UNHCR estimates that 2,500 foreign nationals are held in the detention centres.

[57] The video is available at https://www.internazionale.it/video/2017/05/04/ong-libiamigranti (07/20). The quotation starts at 3.51.

[58] United Nations Support Mission in Libya, *Report of the Secretary-General, S/2020/41*, 15 January 2020.

[59] Prosecutor of the International Criminal Court, *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 2017; *Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 8 May 2019.

[60] CoE Commissioner for Human Rights, *Letter to Italy*, 13 February 2020, <https://rm.coe.int/letter-to-mr-luigi-di-maio-minister-of-foreign-affairs-and-internation/16809c8262> (07/20).

[61] <https://www.unhcr.it/news/dichiarazione-congiunta-unhcr-oim-necessario-cambiare-lapproccio-internazionale-nei-confronti-rifugiati-migranti-libia.html> (07/20).

Currently there are various cases pending before the European Court of Human Rights regarding the cooperation between Italy and Libya, and there is no lack of initiatives from civil society aimed at convincing Italy and the EU to suspend this cooperation.

From a theoretical perspective, there is debate as to whether it is possible to hold Italy responsible for violating migrant rights in its collaboration with Libya, in accordance with Article 16 of the International Law Commission (ILC) Draft Articles on the Responsibility of States, which provides that a State that aids or assists another State in the commission of an internationally wrongful act the latter is internationally responsible for doing so if that State does so with knowledge of the circumstances of the internationally wrongful act; and the act would be internationally wrongful if committed by that State. In the case in question, there is no doubt that Italy was aware of the situation that migrants would encounter in Libyan detention centres, of the violence carried out by the Libyan Coastguard, and of the situation in Libya in general, since International Organizations, NGOs and various Agencies had documented it thoroughly.[62]

There is also cause for concern regarding the procedures followed for the adoption of the Memorandum, which, despite its political nature and the onerous finances involved, was not ratified by the Italian Parliament, as is required by Article 80 of the Constitution.[63]

In spite of these various issues, the agreement between Italy and Libya was renewed automatically on 2 February 2020,[64] without any of the modifications. New funds for the Libyan coastguard were also allocated.

6. The criminalization of NGOs and Italian case law

Another aspect of Italian asylum policies that should be pointed out is the relationship between Italian authorities and the NGOs that

[62] On the responsibility of Italy for collaboration with Libya, see A. Liguori, *Migration Law and the Externalization,* cit., p. 18 ff.

[63] See F. De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", *Diritti umani e diritto internazionale*, 1, 2018, p. 5 ff., pp. 9–10.

[64] As stipulated in Article 8 of the agreement itself.

have organized search and rescue operations in the Mediterranean[65] over the last few years to compensate for the lack of activity on the part of the coastal States.

As is well known, and without wishing to expand too much on the subject,[66] the last maritime operation in the Mediterranean aimed at protecting human life at sea was *Mare Nostrum*, initiated by the Italian government following the dramatic shipwreck on 3 October 2013, a few miles off Lampedusa, which cost the lives of 368 people. After the conclusion of the *Mare Nostrum* operation in October 2014, the European Union launched various maritime operations in the Mediterranean Sea, coordinated by Frontex, the European Border and Coast Guard Agency, some of which are still underway at the time of writing; however, these were maritime operations aimed primarily at border control, and only marginally at search and rescue. [67] Furthermore, the coastal States gradually withdrew from the obligations placed on them by International Maritime Law, and no longer helped vessels in difficulty in the Mediterranean, delegating the Libyan Coastguard to intervene in cases of boats in distress, and denying any ports of disembarkation on their own territories.

The trajectory described above concerned the Italian government as well; the centre-left government, after having re-launched cooperation with Libya in 2017,[68] supplying the country with patrol craft and training personnel, gradually withdrew from any sort of search and rescue activity in the Mediterranean. The centre-right government then endorsed a "closed ports" policy, accompanied by recognition of the competence of the Libyan Coastguard, to which the

[65] On this theme, see: G. Bevilacqua, "Italy versus NGOs: The controversial Interpretation and Implementation of Search and Rescue Obligations in the context of Migration at Sea", *Italian Yearbook of International Law*, 2018, p. 11 ss.; P. Cuttitta, "Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean", *GEOPOLITICS*, 3, 2018, pp. 632-660; C. Heller, L. Pezzani, *Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean. A Report by Forensic Oceanography*, affiliated with the Forensic Architecture Agency, Goldsmiths, University of London, 7 May 2018; V. Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm", *Journal of Common Market Studies,* 56, 2018, pp. 119-140.

[66] For more on this topic, see the article by G. Cataldi in this collection.

[67] <https://www.consilium.europa.eu/en/policies/migratory-pressures/sea-criminal-networks/> (07/20).

[68] See also A. Liguori, *Migration Law and the Externalization,* cit., p. 9 ff.

MMRC in Rome delegated the responsibility of identifying disembarkation ports in the event of rescues carried out by NGOs in the Libyan SAR zone. The centre-right government also initiated a process of criminalizing NGOs, accusing them of participating in human trafficking and violating immigration laws, and assisting the illegal entry of migrants to Italian territory.[69]

Therefore, the centre-left government had tried to reduce NGOs' margin of action by proposing adherence to a code of conduct (the so-called *Codice Minniti*), the subsequent centre-right government initiated a media campaign aimed at discrediting the NGOs that undertook rescue operations for migrants at sea.

On 14 June 2018 the Italian centre-right government adopted a second security decree,[70] which gave the Ministry of the Interior, along with the Ministry for Infrastructure and the Justice Ministry, powers "to limit or deny the access, transit, or stopover of ships in territorial waters" for reasons related to public order and security, or rather when it is presumed that there has been a violation of the law on immigration, and in particular that a crime has been committed "that furthers illegal immigration". The second security decree also includes financial penalties imposed on the shipmaster in the event of non-compliance with the ban on entry to Italian territorial waters. It is quite evident that the measures in question, which follow the model of emergency security laws that have been a constant in Italian policies regarding immigration since law No. 189/2002 (the "Bossi-Fini" law), were adopted with the aim of targeting NGOs involved in search and rescue operations in the Mediterranean. It is no coincidence that the first punitive action, taken the day after adoption of the decree, was against the *Sea Watch 3*, a humanitarian ship flying under a Dutch flag,

[69] The "war" against NGOs involved in assisting migrants is not a prerogative of the Italian government; as has been documented by the European Agency for Fundamental Rights (FRA), investigations and administrative or criminal proceedings against private entities involved in SAR operations have been opened in Germany, Greece, Malta, the Netherlands, and Spain. FRA, *2019 update – NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, 19 June 2019, available at: <https://fra.europa.eu/en/publication/2019/2019-update-ngo-ships-involved-search-and-rescue-mediterranean-and-criminal> (07/20).

[70] Decree law 14 June 2019, No. 53, converted into Law 8 August 2019, No. 77. On this theme, see: G. Cataldi, "L'impossibile "interpretazione conforme" del decreto "sicurezza bis" alle norme internazionali sul soccorso in mare", *Questione Giustizia*, 2020.

which assisted a vessel in distress in the SAR zone off Libya, refused to disembark the survivors in Libya, since the country could not be considered safe, and sent a request to the MMRC in Rome for a disembarkation port in Italian territory, which was then refused. The shipmaster, Carola Rackete, took rescued migrants to an Italian port, in spite of the order forbidding entry to Italian territorial waters issued by the Ministry of the Interior in implementation of the second security decree. Moreover, following this episode, while the decree was being converted into law, the penalties for ships in violation of the measures were strengthened, with the stipulation of a fine between €150,000 and one million euros for any failure to observe the new rules, along with the confiscation of the vessel, and compulsory arrest of shipmaster, Carola Rackete, caught resisting or committing violence against Italian military ships.

It should nonetheless be noted that, in spite of the process of criminalization being conducted by Italian institutions, Italian judges, rather than confirming the accusations directed at NGOs, in fact underlines the merits of these organizations, insofar as they are currently the only entities fulfilling the obligation of rescue at sea. A rescue can only be considered complete once the survivors have disembarked in a place of safety, which is hardly the case of Libya, given its civil war and reports of abuse of migrants. The rescuing vessel on which shipwreck survivors are taken on-board cannot be considered a place of safety either, given the temporary nature of its facilities. Indeed, a place of safety is a place where people's basic needs may be met, but also where their safety may be guaranteed in a way that respects human rights, and in particular the principle of *non-refoulement*. This view was shared by the Italian Supreme Court, which reiterated these principles in the judgment[71] with which it rejected the appeal of the Public Ministry of Agrigento requesting the annulment of the order that the judge of preliminary investigations (GIP)[72] had adopted to avoid validating the arrest of Carola Rackete, shipmaster of the aforementioned humanitarian ship *Sea Watch 3*.

It should also be noted that the emergency health situation has prompted the Italian government to declare that Italy cannot provide a place of safety, at least not "for instances of rescues carried out by naval vessels under foreign flag outside the Italian SAR zone", because

[71] Corte di Cassazione, judgement of 6 January 2020, No. 6626.
[72] Court of Agrigento, Gip, order of 2 July 2019.

it has to preserve the "performance of national health, logistics and security structures dedicated to the containment of the spread of contagion and the assistance of patients with COVID-19". This is, once again, a measure whose only targets are the NGOs involved in rescue operations in the Mediterranean. It should be specified that the restriction of individual rights must comply with the limits provided for by the Italian Constitution, which, moreover, not only does not envisage a situation of extraordinary emergency, apart from a state of war, but in admitting a balance of rights – in this instance the right to health on one hand, and the right to life and right to asylum on the other – also makes clear that any restriction must happen with due regard for principles of legality and proportionality. What we are witnessing is instead a measure that impinges on fundamental and constitutionally protected rights, which are being restricted through an administrative action that is seriously flawed insofar as it lacks a legal basis, thus violating the principle of legal certainty. [73]

Afterwards, it was established that migrants rescued at sea and brought to Italian shores would have to spend a period of fourteen days in quarantine on board purpose-equipped ships, and not on land.[74] In practice, this plan has been put into action, and raises doubts from the perspective of respect of fundamental rights of the individual, above all the right to personal freedom, since it may be construed as *de facto* detention, without the procedural guarantees provided by the Italian constitution.

7. Conclusions

This analysis has tried to give an overview of the Italian system of asylum, examining the relevant laws, case law, and praxis, highlighting the most noticeable aspects of the system, as well as those that are most problematic. As the preceding pages have shown, since the 1990s policies concerning asylum – and immigration in general – have been characterized by security measures that have restricted the right to asylum, making the exercise of this right more difficult as such they

[73] Ministerial Decree R.0000150 of 7 April 2020. For commentary, see: A. Algostino, "Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati", *Questione giustizia*, 2020.

[74] Decree of the Head of Department, No. 1287, 12 April 2020.

have progressively limited the right to have one's case examined on individual merits and limited access to judges. The cooperation with Libya and the "war" with NGOs carrying out search and rescue operations at sea have made it more difficult to enter Italian territory, an essential condition for one to be able to exercise the right to asylum. Finally, the measures adopted to confront the public health emergency have markedly impacted the subjective legal positions of asylum seekers.

As we approach the date of publication of this book, the Italian government has adopted changes to the security decrees, which has not been abolished, as we hoped. Some changes are remarkable, including those relating to humanitarian protection, renamed "special protection", which is extended to other cases in addition to those already envisaged by the security decree. The residence permit will be recognized by Territorial Commission, not by Police, and will last two years; upon expiry it will be converted into a residence permit for work reasons.

Another positive element is the restoration of the former reception system (renamed "Reception and Integration System") to be managed by the municipalities as the priority system for the accommodation not only of the most vulnerable persons, minors and beneficiaries of international protection, but also of asylum seekers.

Moreover, the prohibition of registration of asylum seekers in the municipal registers, declared to be unconstitutional by Italian Constitutional Court in July 2020, is cancelled and the issue of an identity document valid for three years is provided.

However, the provisions relating to NGOs carrying out search and rescue activities at sea remain problematic. The Minister of the Interior can still prohibit non-military vessels from entering the territorial waters unless the navy carrying out the rescue complied with international conventions and reported the operations to the competent authorities and to the flag State. Otherwise, NGOs can be criminally sanctioned by the judge with fines ranging from 10 thousand to 50 thousand euros.

It is necessary to wait for the implementing regulations to understand the consequences of these changes on the Italian asylum system.

Anyway, while the situation has some welcome elements, as we have shown, it is hoped that Italian policies in this field change

trajectory, and that any changes are rooted in the values protected by the Constitution and International human rights law. We have to be aware that refusing to asylum seekers rescue at sea and a safe port of disembarkation, sanctioning the shipmasters of the humanitarian ships who carry out the search and rescues operations in the Mediterranean Sea constitute violations of international and national law. Italy, other Member States and European Union are responsible of these violations.

As scholars we call for a more appreciable coherence between the values that Italy and European Union affirm to be the basis of our society and the political and normative choices, which have severe consequences on human beings.

THE PROTECTION OF UNACCOMPANIED FOREIGN MINORS THROUGH THE LENS OF ITALIAN ASYLUM PROCEDURES

MICHELE CORLETO*

1. Introductory remarks: the connections between the economy, the labour market and migration policies

The current pandemic crisis shows us that we must not add the virus of selfishness to the coronavirus. It is time to remove inequalities and heal social injustice, the plague of humanity. Inequality affects the most vulnerable people who are often immigrants.

Some familiarity with statistical data allows us to understand the complexity of the migratory phenomenon of minors in Europe, considered not only in relation to the total number of migrants arriving in the EU, but above all in light of the extremely vulnerable condition of migrant minors. The United Nations Children's Emergency Fund (UNICEF) estimates that 535 million children[1] - 1 out of 4 in the world - live in countries affected by conflicts or natural disasters and who are often forced to flee their homes to seek shelter elsewhere. Data from the European Migration Network (EMN) reveals that in 2020 almost 40% of immigrants who arrived in Europe were minors, that's 30% of all immigration victims[2]. On 22 June, the Italian Directorate General for Immigration and Integration Policies published the data updated to 31 May 2020 of Unaccompanied Foreign Minors (hereinafter, UAM): 5,202 unaccompanied minors were registered: 4,966 male and 236 female[3]. These numbers tell us that EU child migration is an

* Università telematica Pegaso.

[1] UNICEF, *Humanitarian action for children,* 2017 overview.

[2] See the EMN Bulletin which provides policymakers and other practitioners with updates on recent migration and international protection policy developments at EU and national level. The 31st edition provides information from April to June 2020, including the (latest) relevant published statistics: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/00_31st_emn_bulletin_updated_en.pdf>.

[3] Direzione Generale dell'Immigrazione e delle Politiche di integrazione, divisione II, *Report mensile sui minori stranieri non accompagnati in Italia, May 2020;* Caritas,

important component of the migratory phenomenon, a complex challenge for national and European legal systems[4].

The flow of migrants along dangerous roads and stormy seas brings with it not only statistical numbers, but moving stories of real life. Their journey does not begin by "taking that first step" toward a destination, but by focusing on a goal to be reached whether by sea or by land. Europe, with its large cities, is the ultimate goal and the only obstacle is the Mediterranean.

An aspect that is indirectly linked to the migratory phenomenon, as a consequence of economic globalization, is the transformation of production processes, characterized by a progressive regress of protection, stability, salary and security levels. The flexibility of market organization and of the production of goods and services offers more and more options for productive arbitrage. In Italy, in particular, the policy decision-makers and *Confindustria* (the industries' confederation), by conforming to the dictates of supranational organizations, such as the International Monetary Fund and the World Bank, exert continuous pressure in favour of "flexibility" and "precariousness" that reduced the job security of abour relations[5].

In this context the workers who are most susceptible to threats yet are also the most harassed, are inevitably the immigrants. Commercial needs have therefore impacted the migration policies that have been disseminated since the nineteen-nineties, as well as internal legislation in EU Member States. The reform of Italian legislation on migrants, carried out through Law no. 40 of March 6, 1998[6] is attributable to this phase.

In recent decades the legislator has operated on two levels: on the one hand, the progressive dismantling of constitutional guarantees,

Minori migranti, maggiori rischi, Pericoli e problematiche dei minori non accompagnati che migrano verso l'Ue, Dossier no.42, December 2018.

[4] European Union Agency for Fundamental Rights, *Migration to EU: five persistent challenges*, February 2018: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-february-migration-report-focus-five-challenges_en.pdf>.

[5] See C. Amirante, *Dalla forma Stato alla forma mercato*, Giappichelli, Torino, 2008.

[6] The so-called "Turco-Napolitano" Law, whose discipline flows into Legislative Decree 25 July 1998, n. 286, the so called "*Consolidated*" Act on Immigration - T.U.I., whose original structure is subject to constant redefinition by subsequent legislative interventions.

through the so-called reforms of labour law, which have imposed flexibility and led to an increase in short term work contracts; and on the other, the cyclical re-proposal of emergency criminal legislation, as a form of normalization of the conflict resulting from the denial of needs.

These two legislative trends have controlled and neutralized the rights of migrants for two decades, through their differentiation of migrants into "regular" and "irregular": "low cost" labour, offered by the former, and "undeclared work", to which the latter are forced[7].

The Italian policies mentioned above resulted in a contained migratory phenomena: the progressive denial to foreigners of the status of regular – and, consequently, of the international protection system.

The "Minniti-Orlando"[8] decree and the "Salvini"[9] decrees redefine, among other measures, the discipline of international protection, restricting its procedures and the criteria to access such protection.

Deferring any reflection on the innovations introduced in the field of political asylum by the above mentioned "security decrees", in the following pages we will focus on the subject of UAM, defined by Italian law as a person with a "high vulnerability", whose protection is the specific object of this work.

2. The protection of UAM under the Italian constitution and International obligations

The protection of UAM, provided for by the Italian legal system as we will see, is, first of all, facilitated by the extension of certain principles sanctioned at constitutional level. The degree of protection of a foreign child without a parent, – a status which the 2017 legislation

[7] See M. Pascali, *La "decolorazione" del lavoro nero nel processo di decostruzione del diritto penale del lavoro. Normalizzazione, migrazione ed eclissi del diritto*, Editoriale Scientifica, Napoli, 2007; A. Caputo, "Diseguali, illegali, criminali", *Ques. giust.*, 2009, p. 83 ff.

[8] Decree-Law no. 13 of 17 February 2017, converted, with amendments, into Law no. 46 of 13 April 2017.

[9] Decree-Law no. 113 of 4 October 2018, converted, with amendments, into Law no. 132 of 1 December 2018 and Decree Law of 14 June, no. 53, converted, with amendments, into Law no. 77 of 8 August 2019.

has not hesitated to define as one of "extreme vulnerability"[10] – is also the result of the set of guarantee levels offered by both national and international sources.

The Constitution refers to the norms in which – although there is no explicit reference to the status of migrants, to his or her minor age and to his or her entry into the territory of the Italian State without the presence of an adult – priority is given to the respect of human rights. Along with generic provisions focused on the protection of human dignity, equal consideration is given to the protection of minors.

The consolidated exegesis, in literature as well as in jurisprudence, of Art. 2 of the Constitution, where "fundamental human rights" are recognized and guaranteed, and of Art. 3, where the statement of formal equality must be interpreted in a broad sense[11], would seem to lead to an expansion of the number of recipients of such guarantees, including persons in need of special protection.

The reference, contained in Art. 10.2 of the Constitution, to the generally recognized rules of international law which regulate the legal condition of the foreigner, can also be extended to the minor migrant, against whom there would be much lower margins of "reasonable derogation" than that proposed for adults[12].

The non-derogation of equal treatment between "citizens" and "non-citizens" meets with limitations, in light of constitutional jurisprudence, where there is a shift from a mere statement of abstract principles, found under Art. 2 of the Constitution, to "positions compared" in practice, "in relation to the specific cases covered by the disputed legislation". This takes place in consideration of the affirmation of the criterion of equality as a prohibition of unequal treatment, referred to in Art. 3 of the Constitution.

[10] The status of "extreme vulnerability" of unaccompanied minors has been repeatedly recognised by the European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006, para. 55; *Popov v. France*, Applications No. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 91; see also European Court of Justice, Case C-648/11, *MA, BT and DA v. Secretary of State of the Home Department*, 6 June 2013, para. 55.

[11] Going beyond the concept of citizenship *tout court* as originally intended by the Constitutions of 1948.

[12] See A. Patroni Griffi, "Lineamenti della tutela costituzionale dei minori stranier", in R. Bonito Oliva (ed.), *Identità in dialogo. La liberté des mers,* Mimesis. Quaderni di Bioetica, Milano - Udine, 2012, pp. 187 ff.

The *Corte Costituzionale* decision no. 62/1994[13] offers an eloquent example of the abstractness of the egalitarian statement stated in Art. 3 of the Constitution. The questions that were referred to the judges concerned the heterogeneity of the positions of the citizen and the foreigner, especially if non-EU, in respect of the complex regime of prison treatment and criminal sanction, and at the same time characterized by different issues related to public security, public order and state policies on immigration. In this context, preventive measures applicable exclusively to the status of migrant, such as expulsion from the territory of the State, take on importance, as regards the inevitable discrimination generated by migration legislation. Considering the mandatory nature of the constitutional principle of equality in general between the position of the citizen and the foreigner, the Court however only recognized to the former the right to reside in the territory of the State without time limits and not to be expelled for any reason, since the foreigner lacks "an ontological link with the national community". For these reasons, the courts of law did not consider the legislator's option to allow the suspension of the custodial regime or the execution of the sentence, at the same time as the definitive removal of the migrant from the territory of the State, to be either arbitrary or unreasonable.

On the basis of the criteria set forth in the *Corte Costituzionale* decision, "the position of the foreigner proves to be quite peculiar and not comparable, for the aspect considered, with that of the citizen, since expulsion is a measure referable only" to the former and in no case extendable to the latter.

The principle of reasonableness, according to which the legislator can legitimately distinguish the actual enjoyment of abstractly recognized fundamental rights, should, however, have a peremptory limit regarding the protection of underage migrants and, in particular, those without assistance and representation by parents or other adults legally responsible for them.

The current hermeneutical pathways – oriented toward the extension of constitutional guarantees to foreigners, especially if minors and unaccompanied – presuppose, in any case, an "open" reading of the provisions of the 1948 Charter, such as to allow for the transposition of fundamental rights of the person in continuous evolution. An exegesis of the Constitution according to a dynamic vision, in conjunction

[13] Judgment of the Constitutional Court No. 62, filed February 24, 1994.

with social changes, would guarantee the affirmation of cultural pluralism, to whose institutionalization, however, is subject to inevitable limits linked to the impossibility of accepting all claims to identity. Otherwise there would be a situation of conflict, which is expressed in real "clashes between civilizations[14]".

Instead of inserting foreigners in a broader category of *civitas,* which can be described as "social citizenship", we are witnessing the definition of a more restricted category of "economic citizenship[15]". The new concept of citizen, in fact, takes into account immigrants as expression of highly qualified foreign labour (skilled migrations) or, however, inserted into the legal production cycle.

The extension of the full enjoyment of fundamental rights - denied to "non-citizens", especially if non-EU, - should however be guaranteed at least to minors without citizenship and not assisted by the presence of an adult legally responsible for them.

An *ad hoc* discipline has therefore been defined over the years in Italy through the evolution of national and international legislation. With reference to the constitutional protection of the delicate position of unaccompanied foreign minors, further sources are to be found in Articles 30 et seq. of the Constitution. Par. 1, Art. 30 of the Constitution guarantees the education and upbringing of children, entrusting this task first as a duty, then a right to parents, configuring them as a true "private *munus*". The "paradigm of the promotion of the child", declined through "a dialectical educational relationship", appears in doctrinal exegesis as the only factor suitable to provide concrete application of the "emancipatory charge of the constitutional project"[16].

An even greater protection for migrant children is offered by the second para. of Art. 30 of the Constitution: "In cases of incapacity of parents the law ensures that their duties are fulfilled". For this reason, further obstacles to the guarantees set forth in par. 1 above are removed. As a complement to the protection provided by art. 30, the following art. 31 of the Italian Constitution states that the Italian Republic is invested with the task of promoting, through "economic

[14] See E. Grosso, "Multiculturalismo e diritti fondamentali nella Costituzione italiana", in A. Bernardi (ed.) *Multiculturalismo, diritti umani, pena. Atti del convegno in occasione del conferimento della laurea h. c. a Mireille Delmas-Marty* (Ferrara, 5-6 November 2004), Giuffrè, Milano, 2006, p. 109 ff.

[15] See C. Amirante, *Dalla forma stato alla forma mercato*, cit., p. 21.

[16] See E. Bilotti, "Diritti e interessi del minore", *L–JUS*, 2019.

measures and other provisions", the "formation of the family and the fulfilment of related tasks ...". Thus, articles 34 and 37 of the Italian Constitution sanction the rights, respectively, to primary education for the child, and to working conditions for the "working woman", equal to those of men, allowing for "the fulfilment of her essential family function" and ensure "to the mother and the child a special adequate protection".

As for the levels of guarantee offered to unaccompanied foreign minors by the extension of principles affirmed in international sources, the defence of the juvenile universe is based primarily on three treaties adopted over the last thirty years[17].

The priority of protecting of the child, whose interests must be "pre-eminent"[18], has been sanctioned, first of all, through the "UN Convention on the Rights of the Child", approved by the General Assembly of the United Nations on November 20, 1989 and ratified by Italy with Law no. 176 of May 27, 1991. The Convention lists several principles that the adhering States undertake to observe, pertaining to different types of human rights, civil, cultural, economic, political and social. Fundamental rights include the right to non-discrimination, the best interests of the child and to listen to the child's opinions in relation to any decision, legislative action or legal measure, together with protection against abuse and exploitation, assistance, development, family unity and respect for cultural identity[19].

The right of custody and access in international situations is guaranteed by the "European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children" (Luxembourg), opened for signa-

[17] A. Del Vecchio, "La protezione dei minori nell'evoluzione delle convenzioni internazionali in materia", *Rivista Internazionale dei diritti dell'uomo*, 2000; C. Focarelli, "La Convenzione di New York sui diritti del fanciullo e il concetto di «best interest of the child»", *Rivista di diritto internazionale,* 2010, p.981 ff.; H. Gornik, "At the Croassroad of Power Relations: the Convention of the Rights of the Child and Unaccompained Migrant Minors", in M. Sedmak, B. Sauer, B. Gornik (eds.), *Unaccompained Children in European Migration and Asylum Practicers: in Whose Best Interest,* Routledge, 2017, p. 10 ff.

[18] See F. Morrone, "L'interesse superiore del minore straniero non accompagnato nella prassi internazionale", in A. Annoni, P. Mori (eds.), *I diritti delle famiglie migranti fra interazione e tutela della diversità,* Giappichelli, Torino, 2015, p. 103 ff.

[19] See M. Corleto, "A trent'anni dalla Convenzione sui diritti dell'infanzia e dell'adolescenza. Libertà religiosa, educazione e superiore interesse del minore", *Diritto e Religione,* XIV - n. 2, 2019, p. 206 ff.

ture by the Member States and accession by non-EU Member States on 20 May 1980 and ratified in Italy by Law No. 64 of 15 January 1994.

Finally, we have the "European Convention on the exercise of children's rights" (Strasbourg), open for signature by Member States and non-members of the EU on January 25, 1996 and ratified in Italy by Law no. 77 of March 20, 2003, providing for certain procedural measures, through which children can assert their claims. Family procedures encompass custody, residence, right of access, affirmation or contestation of paternity, legitimation, adoption, protection, administration of the assets of minors, loss or limitation of parental authority, protection of the persons concerned against cruel or degrading treatment and medical treatment.

Following the preliminary overview on constitutional statements and o international sources, the basis for the protection of the unaccompanied minor migrant, it is now necessary to verify whether, in practice, the mere declaratory intentions are echoed by the actual formulation of regulatory instruments aimed at the effective protection of minors, especially in the transition to adulthood[20].

3. General remarks on the discipline concerning the protection of foreign unaccompanied minors as redefined by Law no.47 of 7 April 2017 (also called "Zampa Act")

The end point of the course followed to strengthen the protection of UAM in compliance with agreements in force for Italy is Law 47 of

[20] On the protection of migrant minors, see: F. Lenzerini, "La protezione dei minori stranieri non accompagnati nel diritto internazionale", in R. Pisillo Mazzeschi, P. Pustorino, A. Viviani (eds.), *Diritti umani degli immigrati. Tutela della famiglia e dei minori,* Editoriale Scientifica, Napoli, 2010, p. 271 ff. ; F. Mosconi, "La protezione dei minori", in Salerno (eds.), *Convenzioni internazionali e la legge di riforma del diritto internazionale privato,* Cedam, Padova, 1997, p. 59 ff.; J.M. Pobjoy, *The Child in International Refugee Law,* Cambridge University Press, 2017, p. 22 ff.; A. Saccucci, "Riflessioni sulla tutela internazionale dei diritti del minore"*, Giurisprudenza italiana,* 2000, p. 224 ff.; A. L. Sciacovelli, "Minori stranieri non accompagnati: criticità e nuovi sviluppi giurisprudenziali", *Studi sull'integrazione europea*, 2018, p. 502 ff.; R. Virzo, "Coastal States and the Protection of Migrant Children at Sea"*,* in F. Ippolito, G. Biagioni (eds.), *Migrant Children: Challenges for Public and Private International Law,* Naples, 2016.

April 7, 2017 [21], which has as its main objective a complete redefinition of the matter. The legislator's declared intention is to protect people whose particular conditions of age and origin make them easy targets of trafficking by criminal organizations. The reasons for the regulatory intervention are explained in Art. 1 of the Law, where such minors are entitled to the same treatment as provided to Italians or EU minors.

Borrowing the definition of UAM from the previous legislative interventions on the subject, UAM are defined as minors who are not Italian or European citizens but who, for whatever reason, are in the Italian territory without the assistance or representation of parents or other adults responsible for them according to Italian legislation.

The notion evolved in the light of subsequent legislative interventions. Unaccompanied minors means "citizens" of countries outside the European Union or stateless persons under the age of eighteen years who enter the national territory without being accompanied by an adult, or who have been abandoned, unless and until a person with authority to assume parental responsibility for them takes custody of them once they enter the national territory[22]".

More concise and generic is the definition that emerges from Art. 2, para. 1, letter e), Legislative Decree no. 142/2015[23], where the legislator defines "unaccompanied minor" "a foreigner under the age of eighteen years, who is, for any reason, in the national territory, without legal assistance and representation". The measure introduces important novelties for minors seeking international protection or for minors who are children of applicants for international protection. It

[21] Law No. 47 of 7 April 2017 (GU no. 93 of 21 April 2017) on "Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati" was proposed by Save the Children in July and submitted to the Chamber of Deputies on 4 October 2013. The proposal was approved by the Senate with amendments on 1 March 2017 and by the Chamber of Deputies on 29 March 2017. The Law passed almost unanimously with 375 votes in favour and 13 against. It entered into force on 6 April 2017. See C. Cipolletti, "Law No. 47 of 7 April 2017 (GU No. 93 of 21 April 2017) New Protective Measures for Unaccompanied Foreign Minors", *Italian Yearbook of International Law*, Vol. XXVII, 2017 p. 513 ff.

[22] According to Art. 2, para.1, letter f), D. Lgs. n. 85/2003, Implementation of Directive 2001/55/EC on the granting of temporary protection in the event of a mass influx of displaced persons and cooperation within the Community.

[23] Implementation of Directive 2013/33/EU laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures for granting and withdrawing international protection status.

provides, in fact, for compulsory schooling and access to courses and initiatives for learning the Italian language.

In the wake of the above mentioned regulatory evolution the definition contained in Art. 2 of Law no. 47/2017 further explains: "unaccompanied foreign minor present in the territory of the State means a minor not having Italian or European Union citizenship who is for any reason in the territory of the State or who is otherwise subject to Italian jurisdiction, without assistance and representation by parents or other adults legally responsible for him/her according to the laws in force in the Italian legal system".

This last formulation is very similar to the one provided under art. 1, para. 2, D.P.C.M.(Ministerial Decree) of 9 December 1999, n. 535. Both definitions also include the minor who enters Italy with the migratory flows accompanied by relatives who are not their legal guardians. In this way protection is offered to those minors who, although not in a state of abandonment, have entered the national territory without legal parental representation.

Further margins of protection are offered by the 2017 legislator, including, in addition to those who are within the borders of the State, also those who are otherwise subject to Italian jurisdiction.

The 2017 legislator prefers family custody of unaccompanied foreign minors to their confinement in a reception structure. Local authorities are invested in promoting awareness raising and training of foster caregivers[24].

Where reunification with their family members in the country of origin or in a third country corresponds to their superior interest, the measure of assisted and voluntary repatriation of unaccompanied foreign minors is adopted[25].

When ordering the prohibition of rejection or expulsion, the *Questore* (Police Commissioner) will issue a residence permit for minors, valid until the age of majority, or for family reasons[26].

A fundamental aspect of the 2017 reform is represented by Art. 12, which provides a system of protection for asylum seekers, refugees and unaccompanied minors, introducing changes to art. 19 of Legislative Decree no. 142 of August 18, 2015. According to the new para. 2, unaccompanied minors are accepted within the "Protection system for

[24] Art. 7 of Law n. 47/2017.
[25] *Ibidem*, Art. 8.
[26] *Ibidem*, Art. 10.

asylum seekers, refugees and unaccompanied foreign minors" and, in particular, in projects specifically designed for this category of vulnerable persons. The capacity of the System is commensurate with the actual presence of unaccompanied minors in the national territory and according to the limits of the resources of the National Fund for Asylum Policies and Services.

In order to deal with each individual's needs, para. 2 *bis* has been inserted after Art. 19, para. 2: "In choosing the place, among those available, in which to place the minor, you must take into account the needs and characteristics of same, such as those resulting from the interview carried out, in relation to the type of services offered by the reception structure". The interview with the minor migrant must be carried out by the qualified personnel of the first reception structure, with the help, where possible, of organizations, bodies or associations with proven experience in the protection of the juvenile universe, when the person concerned comes into contact or is reported to the police or judicial authorities, social services or other representatives of the local authority. The Reception Centres for foreign UAM must satisfy legal requirements as per Art. 117 para. 2 letter m) of the Constitution, the minimum standards of services of assistance provided by the residential facilities for minors, and must be authorised and accredited in accordance to national legislation. Failure to conform with the declarations made in terms of the accreditation leads to the elimination of the Reception Centre from the system.

From the moment the minor is admitted to the reception facilities in view of the new provisions[27], the educational institutions of any level and the educational institutions accredited by the autonomous regions and provinces of Trento and Bolzano shall activate measures to promote the fulfilment of compulsory education and training of UAM, also by means of specific projects that include, where possible, the use of or coordination with cultural mediators, as well as agreements aimed at promoting specific training programmes.

In addition to the right to education, art. 14 also provides for the right to health. In this regard, it is provided that, in the case of unaccompanied minors, registration with the National Health Service is required by those who exercise, even temporarily, parental responsibility or by the person in charge of the first reception facility.

The right to be heard in proceedings and the right to legal assis-

[27] *Ibidem*, Art. 14.

tance are also guaranteed through the following articles: 15[28] and 16, respectively. According to the reformulated discipline, unaccompanied foreign minors have the right to participate through their legal representative in all judicial and administrative proceedings concerning them and to be heard on the merits. To this end, the presence of a cultural mediator is required. The amendments made to the discipline by the following Art. 16 of Law No. 47/2017 give the unaccompanied foreign minor, involved in any capacity in judicial proceedings, the right to be informed of the desirability of appointing a legal representative, including through the appointed guardian or parental responsibility officer.

Particular protection must be guaranteed, in accordance with Art. 17 of Law no. 47/2017, to UAM who are victims of trafficking, through the provision of a specific assistance programme that ensures adequate reception conditions and psycho-social, health and legal assistance, providing long-term solutions, even beyond the age of majority.

The transition to adulthood represents one of the most painful moments and the most deficient aspects of the discipline on the subject. Not even the 2017 legislation has provided adequate answers to a complex problem, that of coming of age, which involves the definitive loss of fundamental guarantees.

Art. 13, par. 2 of Law no. 47/2017 merely states that "when an unaccompanied foreign minor, on reaching the age of majority, despite having embarked on a path of social integration, requires prolonged support aimed at the successful outcome of this path aimed at autonomy, the Juvenile Court may order, also at the request of the social services, by means of a reasoned decree, custody to the social services, in any case no later than the age of 21".

This custody is meant as a benefit to the person but relates to the field of criminal enforcement, and so can be characterized by punishment. This example captures only one aspect of a complex range of guarantees reserved to subjects with "high vulnerability". There is no mention of broader protection, especially in relation to education and international protection of the no longer minor subject, in the 2017 legislative intervention.

In conclusion, law n. 47/2017 constitutes the first general legal

[28] Art. 15 of Law no. 47/2017 amended Art. 18 of Legislative Decree no. 142/2015.

intervention in Europe in the field of the protection of UAM, and as such has been welcomed by different organizations [29] for the protection of minority rights, as well as by scholars on the subject.

UNICEF considered the Law not only a "historic law to boost support and protection for the record number of foreign unaccompanied and separated children who arrived in Italy" but also as "a model for how other European countries could put in place a legislative framework that supports protection[30]".

Moving in the right direction as suggested by the Commission, this law, in fact, incorporates the fundamental principles of international law and the common European asylum system into Italian law and protects the obligation of *non-refoulement* and the centrality of the best interest of the child. In fact, it prohibits the return of unaccompanied minors at the border; provides that the "assisted and voluntary return" of unaccompanied minors can be decided by a Juvenile Court, when family reunification in the country of origin or in a third country is in the child's best interests, after having listened to the child and guardian's opinion and taking into consideration the results of social assessment of the family situation in the country of origin or third country and the situation of the minor in Italy.

In 2014, the United Nations High Commissioner for Refugees, while noting the compliance of the Italian legal system to international and European law[31], made some remarks concerning the lack of procedural guarantees during the age assessment phase and the fragmentation of the regulatory framework for the protection of minors. Although the new Law introduces additional procedural

[29] The Italian association for immigration studies (ASGI) hailed the new Italian age assessment procedure as a model for Europe (although under the condition of its practical implementation): see E. Rozzi, "The new Italian law on unaccompanied minors: a model for the EU?", *EU Immigration and Asylum Law and Policy*, 13 November 2017, available at: <http://eumigrationlawblog.eu> (07/20). For a comparative approach to the regulation of unaccompanied minor status in other States see R. Rosskopf (ed.), *Unaccompanied Minors in International, European and National Law*, Berlin, 2016; Save the Children noted that this new Law "encompasses all the basic elements for a good integration", available at: http://legale.savethechildren.it/enUS/News/Details/3ad3b3bb82184a27a6f6a6f5b827f666?container=generica-news (10/2020).

[30] Available at: <https://www.unicef.org/media/media_95485.html> (07/20).

[31] European Commission, Communication from the Commission to the European Parliament and the Council, The protection of Children in Migration, 14 April 2017, COM (2017) 211.

guarantees for minors, such as the establishment of a list of "voluntary guardians" for unaccompanied minors, selected and trained by the Regional Ombudsperson for minors, to be established by the Juvenile Courts, some concerns remain regarding the implementation of these guarantees without allocating additional costs to public finances. There is the risk that the assistance granted in theory to unaccompanied minors may lack any real possibility of practical implementation. Other critical aspects concern the division of competences among the judicial authorities involved in the protection of unaccompanied minors, as well as the ability of this law to fill the gap in the Italian legal system and to harmonize the various rules applicable to the matter.

Ultimately, progress has been made with this new law for the protection and identification of unaccompanied minors arriving in Italy, but there is still a long way to go.

To complicate the permanence of the right of asylum of the young adult, there is the specific drastic general reduction of humanitarian protection following the recent "Minniti-Orlando" and "Salvini" decrees.

4. The amendments on the subject of international protection in view to the "Minniti-Orlando" and "Salvini" decrees

The disappearance of certain forms of protection in the transition from minor to adult, especially with regard to the right of asylum, leads us to dwell, albeit briefly, on the restrictions that the emergency immigration legislation has brought, in the period between 2017 and 2019, to the regulation of international protection.

The implementation of the right to asylum, which is recognised by the Constitution by virtue of Art. 10, para. 3, in the absence of consolidated legislation, has, in the course of the years given rise to classification by EU Directives. Consequently, the subject has been defined through agreements and is subsequently destined to be redefined constantly with the evolution of supranational sources. These include the Qualification Directive 2011/95/EU of 13 December 2011 (laying down rules on the qualification of third country nationals or stateless persons as beneficiaries of international protection, on a uniform status for refugees or persons eligible for subsidiary protection, and on

the content of the protection granted); the Procedures Directive 2013/32/EU of 26 June 2013 (laying down common procedures for granting and withdrawing international protection status).

The Italian legislation on the matter was first amended - as part of the reform implemented between 2017 and 2019 - by Decree Law no. 13 of 17 February 2017, converted into Law no. 46 of 13 April 2017 (the so-called "Minniti-Orlando Decree"[32]).

The merely declaratory intent of the legislator in 2017 to render effective requests for international protection, echoes the more pragmatic objective of ensuring the speed of the relative procedures to the detriment of the pondered examination of the necessary requisites. The abolishment of appeal as a possibility to counter the denial of asylum status and the introduction of summary judicial proceedings without oral hearings represent, notwithstanding the unconvincing reprimand of the EU regulations in force, two weak points of the 2017 reform. A balanced interpretation of the criteria which emerge from EU provisions, subsisting on a sincere will to conform the national legislation with EU obligations, would have conversely lead to contrasting solutions. The introduction of Directive 2013/32/EU on the right of effective appeal, on the one hand, and the extensive interpretation of applicability of the principle of correct procedure, sanctioned by the Convention for the Protection of Human Rights and Fundamental Freedoms intended in favour of immigrants and asylum seekers, on the other, seem, in fact to contradict the choice made by the Italian legislator in 2017[33].

One of the most questionable aspects of the amendments made to the matter by Law Decree no. 113 of 4 October 2018, converted, with

[32] For a more detailed comment on the "Minniti-Orlando" decree of 2017, see M. C. Contini, "La riforma Orlando- Minniti a un anno dall'entrata in vigore. I molti dubbi e le poche certezze nelle prassi delle sezioni specializzate", *Diritto, Immigrazione e Cittadinanza*, n. 3, 2018; P. De Sena, F. De Vittor, "La "minaccia" italiana di "bloccare" gli sbarchi di migranti e il diritto internazionale", *SIDIBlog*, 1.7.2017; A. Del Guercio, "Dal decreto Minniti-Orlando al decreto Salvini: decretazione d'urgenza, securitizzazione della politica d'asilo e compressione dei diritti fondamentali. Quando la legge genera vulnerabilità", in A. d'Angiò, M. Visconti (eds), *Persone fragili. La vita psichica dei migranti forzati tra cura ed esclusione*, Guida Editori, 2018.

[33] See C. Favilli, "Scompare l'appello contro il diniego di protezione", *Guida al diritto,* 12, 2017, pp. 53 ff.

amendments, into Law no. 132 of 1 December 2018 ("Salvini decree") is the abolition of the residence permit for humanitarian reasons[34].

Recognition of refugee status and the granting of subsidiary protection remain, now, the only prerequisites for a full reception, one goes beyond mere assistance and goes as far as integration[35]. Both requirements represent, following the abolition of the humanitarian residence permit, the only conditions for access to the the Protection System for Asylum Seekers and Refugees (SPRAR, Italian acronym of *Sistema di Protezione per Richiedenti Asilo e Rifugiati*). The Protection System for Asylum Seekers and Refugees can, following the 2018 reform, accommodate only the two categories of "asylum seekers" mentioned above. On the other hand, all other migrant persons will be granted first reception facilities of an exclusively welfare nature, in support of which, since the conditions for international protection are not met, there will no longer be any further humanitarian reasons to justify the granting of a residence permit.

The refusal or revocation of this permit - adopted, in light of Art. 5, para. 6, Legislative Decree no. 286 of 25 July 1998 (Consolidated Law on Immigration), on the basis of international conventions or

[34] For a more accurate survey of the "Salvini" decrees of 2018 and 2019, see S. Fattorini, "Decree Law No. 113 of 4 October - converted, with amendments, into Law No. 132 of 1 December 2018 (GU No. 281 of 3 December 2018) Reform of the Italian Regulatory Framework on Migration", *Italian Yearbook of International Law*, Vol. XXVIII, 2018; M. Benvenuti, "Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini", *Diritto, Immigrazione e Cittadinanza*, 1, 2019; M. Acierno, "La protezione umanitaria nel sistema dei diritti umani", *Questione giustizia*, 2018, fasc. II, p. 100 ff.; S. Curreri, "Prime considerazioni sui profili d'incostituzionalità del decreto legge n. 113/2018", *Federalismi.it*, 2018, fasc. XXII, pp. 2-3; M. Ruotolo, "Brevi note sui possibili vizi formali e sostanziali del d.l. n. 113 del 2018", *Osservatorio costituzionale*, 2018, fasc. III, p. 1 ff.; ASGI, "Il D.L. n. 53/2019, convertito, con modificazioni, nella L. n. 77 /2019. Analisi critica del c.d. "Decreto sicurezza bis" relativamente alle disposizioni inerenti il diritto dell'immigrazione", September, 2019, <https://www.asgi.it/wp-content/uploads/2019/09/2019_Commento-decreto-sicurezza-bis_13_9_.pdf>(07/20).

[35] See E. Codini, "Immigrazione, non sempre il rigore porta a più legalità", *Guida al diritto*, n. 4, 2019, pp. 23 ff..; C. Favilli, "La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di cassazione n 445/2018", *Questione giustizia*, 1/2018; N. Zorzella, "La protezione umanitaria nel sistema giuridico italiano", *Diritto immigrazione e cittadinanza*, 1, 2018; T. Scovazzi, "Il mare dei diritti umani. Gli aspetti peggiori della politica italiana in tema di migrazione irregolare via mare, Atti del Convegno di Milano - 4 ottobre 2019", *Giustizia Insieme*.

agreements, made enforceable in Italy, when the foreigner does not meet the conditions applicable in one of the Contracting States - was subject to the particular reasons indicated in the second part of the same article. Under the terms of current legislation, if the conditions for a residence permit are no longer met, humanitarian reasons could lead the *Questore* to issue it in the manner foreseen in the implementing regulation. The repeal of this form of protection is achieved through certain modifications made by the 2018 legislator to the text of Legislative Decree no. 286/1998, which concern, first of all, the replacement of para. 6 of Art. 5, which will eliminate the reference to other particular reasons legitimising the right to asylum.

Humanitarian protection was not contemplated by any EU or supranational source, unlike the international one, expressed through a double hypothesis, that of refugee status, defined according to Art. 1 of the Geneva Convention of 28 July 1951 (ratified by Italy with Law no. 722 of 24 July 1954), and subsidiary protection, sanctioned at European level, in order to deal with the risks of serious harm, torture, death penalty and, in general, inhuman treatment that the repatriation of the foreigner would have entailed. Both forms of protection, however, provide a minimum percentage of asylum seekers, the majority of whom are now deprived of an important tool, with the opportunity to emerge from the condition of irregularity.

The reference to "serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian State", contained in the above mentioned Art. 5, para. 6, appears, in the eyes of the 2018 legislator, to be an excessively general defining formula and is, therefore, deleted. In order to suppress the further hypothesis of asylum, originally provided under the Consolidated Act on Immigration, Art. 1 of Law no. 132/2018 also intervenes on all the other articles of Legislative Decree no. 286/1998 containing a reference to the definition of protection subsequently repealed. Of the various modifications made, the phrase "for humanitarian reasons" has been replaced by reference to medical care in Art. 5, para. 2 *ter* of L.D. no. 286/1998, as well as to residency permits for reasons of social protection, for victims of domestic violence, for disasters, for fixed-term and permanent employment (in the case of serious labour exploitation), for acts of particular civic merit, and for special protection.

These are exceptional protection hypotheses which, as such, appear to be largely limited, both because of the short duration of their

provision and because of the rigour of the conditions required for their granting, which make them residual. On the other hand, the lack of use of forms of protection already foreseen, before the 2018 reform, by the relevant regulations, confirms these considerations. The introduction, in the Consolidated Law on Immigration, of Art. 20 bis, according to which a temporary residency permit can be issued by the *Questore*, in the event that the country of destination of the foreigner is in a situation of contingent and exceptional calamity, which does not allow for him to return and remain in conditions of safety, is added, for example, to the pre-existing Art. 20, containing "extraordinary reception measures for exceptional events". The constant consolidation, in the last two decades, of migration policies based on the logic of exclusion, beyond the succession of progressive or conservative governments, has led, however, to the failure to apply the above mentioned rule, despite the increase in humanitarian crises that the spread of conflicts produces in areas of geopolitical interest, such as Africa or the Middle East.

As for the residency permit issued in the event of serious labour exploitation - according to Art. 22, para. 12 *quater*, D.Lgs. no. 286/1998 - by the *Questore*, upon proposal and with the favourable opinion of the Public Prosecutor, to a foreigner who has filed a complaint and cooperates in the criminal proceedings against the employer, it is very unlikely that a migrant would be able to obtain a regular work contract, especially if it is pre-existing when he/she enters the national territory. Similar considerations apply to the protection defined as "special", granted in cases where international protection is refused and there are expulsion and rejection prohibitions against vulnerable categories, on the basis of documents sent by the Territorial Commission to the police headquarters. The residency permit - referred to in this para. 3, Art. 32 of Legislative Decree no. 25/2008 - is renewable and, while it allows for work activities, it cannot, however, be converted into a work permit.

5. Humanitarian protection in the light of jurisprudence: the notion of "vulnerability" and "social integration"

It is appropriate to focus on humanitarian protection because it is a status that in Italian practice has prevailed over the others, although

it consists, as is evident, in a residual form of protection[36].

As mentioned in the previous paragraph, one of the most controversial aspects of the amendments made by the "Salvini Decree" is the abrogation of the residence permit for humanitarian reasons. Previously, in case of serious reasons of a humanitarian nature or resulting from international or constitutional obligations of the Italian State, our system, as is the case in at least 20 of the 28 countries of the Union, had provided for the possibility of granting the status of "humanitarian protection". The broad interpretative faculty can also be found with respect to "serious reasons", both subjective (vulnerability for health reasons, age) and objective (in particular in relation to the country of origin).

Before the entry into force of the "Salvini" decree, the Territorial Commissions, not finding the elements for recognition of international protection, but unwilling to expel the person for humanitarian reasons, submitted the documents to the *Questore* so that he could issue the residence permit for humanitarian reasons[37], with a duration fixed at two years.

Reasons of a humanitarian nature seem to be based on the general clause of Art. 2 of the Constitution; we could define it as a protection clause intended to provide protection in situations that did not fall under any of the *statuses* that are ordinarily provided.

It should be remembered that there are categories with statuses that are not well defined, but that nevertheless are in need of international protection: among which are UAM, a category that cannot be expelled in application of the principle of *non-refoulement* and that can aspire to an autonomous form of international protection but for

[36] According to official data published by the Ministry of Interior, as a result of the administrative procedure related to applications for international protection submitted in 2016, about 60% of the applications have been refused, only 5% of cases has been granted refugee status, 14% of cases has been granted subsidiary protection and 21% of cases humanitarian protection. These data to some extent raise doubts that the institution in question may also have been used to provide protection to the individual while maintaining a restrictive interpretation of refugee status and subsidiary protection.

[37] Art. 5, par. 6, of Legislative Decree no. 6. 286/98: "The refusal or revocation of the residence permit may also be adopted on the basis of international conventions or agreements made enforceable in Italy, when the foreigner does not meet the conditions of residence applicable in one of the Contracting States, unless there are serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian State".

which, despite the existence of *ad hoc* international standards, the institute of humanitarian protection has so far been used in our system.

It should also be remembered that, in general, the judiciary in many cases has provided a different reading of the situations to be assessed, transforming many denials of status into the attribution of humanitarian protection. The Italian judiciary has used the institution in question to give concrete implementation to the constitutional provision of Art. 10, which opens the door to the recognition of fundamental rights to foreigners in a very broad way, both by requiring only proof of failure to "effectively exercise the democratic freedoms guaranteed by the Constitution" in their country, and not necessarily persecution (para. three), and, in para. two, by providing that the legal condition is regulated by law in accordance with international rules and treaties. In the absence of an organic law on the right of asylum, humanitarian protection has therefore played an essential role in the concrete implementation of fundamental norms of our system.

Italian jurisprudence, therefore, has rightly, and in accordance with international practice, emphasized the criteria of "vulnerability" and "integration" of the person as crucial elements for the granting of a status that would legitimize the person to remain in the territory of the State[38]. Reference is made to a decisions made by the Court of Bologna, on November 18, 2014, which defines humanitarian protection as a safeguard clause of the system, thus allowing for granting an authorization to stay in situations that do not fall within the cases provided (refugee status, subsidiary protection), but which nevertheless meet the needs of protection of human rights provided by constitutional or international provisions. In the case in question, it was a person who had fled from the terrible flooding that occurred in the previous months in Pakistan. Very significant for our purposes is the order of the Court of Milan of 31 March 2016. The judge reminds us that our Constitution protects the right to a dignified existence, and that the right to health and food are constitutional principles. Faced with a serious situation of vulnerability arising from the socio-economic con-

[38] For an example, see the Court of Appeal of Trieste judgment no. 186 of 23 March 2017. In reforming the decision made by the judge of first instance, this Court granted humanitarian protection to a citizen of Côte d'Ivoire because of his overall personal situation of extreme fragility, as an orphan, very young, and with a career already started. In the same sense, the Court of Rome, with an order dated May 4, 2017 with reference to a young man from Gambia.

ditions of the State of origin (in this case Gambia), according to this decision, humanitarian protection cannot be denied, bearing in mind art. 32 of the Constitution, art. 25 of the Universal Declaration of Human Rights and art. 11 of the United Nations Covenant on Economic and Social Rights of 1966. The possibility that this interpretation could potentially open the doors of humanitarian protection to a considerable and indeterminate number of persons cannot condition the judge since "the recognition of a fundamental right cannot depend on the number of persons to whom that right is recognized. By its nature, a universal right cannot be a restricted number".

All these decisions, in our opinion, have developed what has already been stated in general terms by the Court of Cassation, Civil Section VI, in judgment no. 26566 of 27 November 2013. With this decision, in fact, the Supreme Court was able to reject the restrictive interpretation of the institution of humanitarian protection, an interpretation according to which the status in question could be recognized only when the circumstances of the case abstractly integrate the conditions required for typical measures (refugee status, subsidiary protection). On the contrary, the Court affirms that humanitarian protection has an "atypical and residual" character. This means that it is used precisely when the conditions for the application of the other measures are not met, not even hypothetically, and that, precisely because of this characteristic, the conditions for granting it must be ascertained on a case-by-case basis.

The Court also states, and it is an important concept, that these conditions are encountered "in so-called vulnerable situations that may have the most varied etiology and do not necessarily descend as a *minus* from the requirements of the typical measures of refuge and subsidiary protection". So the idea of the crucial importance of the condition of vulnerability, and of constituting such a condition is "an open catalog not necessarily based on *fumus persecutionis* or on the danger of serious harm to life or psycho-physical safety".

Finally, with sentence no. 4455 of February 23, 2018, the Supreme Court, first civil section, elevated social integration as a relevant reason for the determination of individual vulnerability and recognition of humanitarian protection. Autonomous reason, but not independent from the applicant's condition of origin, which implies the verification of the fact that in his country he runs the risk of seeing his fundamental rights sacrificed even for reasons other than those for which inter-

national protection with refugee status and subsidiary protection operate. But it is up to the judge to verify whether this risk of prejudice is current. And this onerous function can and must benefit from the obligation of investigative cooperation and the benefit of doubt.

The notion of vulnerability and persons with special needs finds, as mentioned above, a significant correspondence in norms and decisions of international law. We refer first of all to Chapter IV of Directive No. 2013/33/EU of 26 June 2013 of the European Parliament and the Council of the European Union, entitled "provisions in favor of vulnerable persons". Art. 21 ("General principle") states that "in national measures implementing this Directive, Member States shall take into account the specific situation of vulnerable persons". Below is a list (minors, disabled, elderly, etc.), which should not be considered exhaustive, also because it ends with the general mention of "other persons who have suffered torture, rape, or other serious forms of psychological, physical or sexual violence". In this regard, it is worth mentioning that according to the 2016 report of the International Organization of Migrants (IOM), 75% of people in transit undergo "practices similar to those of trafficking".

Jurisprudence of the European Court of Human Rights has also used and emphasized the category of "vulnerability". We refer in particular to the important and well-known ruling of the Grand Chamber of 21 January 2011 in the case M.S.S. v. Belgium and Greece. In this judgment the Court attributes considerable importance to the vulnerability of the applicant, a situation leading, as a consequence, to a reduced probative obligation for the purposes of demonstrating the risk incurred.

The New York Declaration for Refugees and Migrants adopted by the General Assembly of the United Nations on September 11, 2016 has the same provisions. In its three final points, it specifies its intent *"*To develop guidelines on the treatment of Migrants in vulnerable situations. These guidelines will be particularly important for the increasing number of unaccompanied children on the move*"*.

Also the implementation of the humanitarian corridors from Lebanon, arranged by some Italian religious bodies (Mediterranean Hope), is based on a selection of people on the basis of the sole criterion of vulnerability, also confirming the transversality inherent in the notion.

Finally, in the judgment of the International Court of Justice in the

case of the application of the International Convention on the Elimination of All Forms of Racial Discrimination, the concept of vulnerability (Vulnerability Test) recurs in many points of the judgment[39].

In the light of what has been stated so far, it is of great concern that the institution in question has been suppressed without being replaced by another valid instrument of equal significance and effectiveness.

What are the consequences? First of all, our State will find itself in violation of international commitments it has assumed. It should be remembered that there are numerous legal norms interpreted by international courts (in particular the European Court of Human Rights) that provide for the non-expulsion of persons who do not strictly meet the criteria for the granting of refugee status or subsidiary protection. From an international perspective, therefore, the institute of humanitarian protection serves to give a status and regularization to these persons who would otherwise live in legal limbo, with immediate or inevitable violation of a number of human rights, such as the right to decent living conditions, etc. This applies to adults but also to particular situations such as the condition of minors.

Humanitarian protection provides legal coverage to all those situations of particular vulnerability that international norms at various levels indicate as necessary in general and particular conventions (not only ECHR but also conventions on trafficking, against violence to women etc.).

In conclusion, the effect of the repeal of Art. 5, par. 6, Legislative Decree 286/98 has aspects of manifest unconstitutionality, as it appears to be in contrast to Articles 2, 10 and 117 of the Constitution, since a rule, such as the one that currently regulates humanitarian protection, is intended to enforce a fundamental right of the person such as the right of asylum, which is much broader than the two notions of international protection[40].

[39] This is developed with extensive arguments in the dissenting opinion of Judge Cançado Trindade (par. 145 - 166) in which he highlights how the Court should have gone beyond an evaluation *stricto sensu* of the issue, and therefore a traditional vision of international law, to the benefit of a more modern interpretation - and therefore application - of international law, nowadays "not at all insensitive to the fate of the population".

[40] See ASGI opinion 15-10-2018 entitled "Manifeste illegittimità costituzionali delle norme del Decreto Legge 4.10.2018, No. 113 concernenti permessi di soggiorno per motivi umanitari, protezione internazionale e cittadinanza".

The abrogation of the residence permit for humanitarian reasons, an entitlement deriving from constitutional and international obligations, combined with the introduction of new residence permits that on the whole do not completely replace the ones that are abrogated, violates Constitutional and international obligations, because the system no longer provides for forms of protection appropriate to ensure compliance with such obligations. It will re-open opportunities for successful legal actions to ascertain the right of asylum guaranteed directly by Art. 10, para. 3 of the Constitution, no longer fully implemented by the legislation.

6. Final remarks: the objective of maintaining protection for minors in the transition to adulthood

We have pointed out that there are categories with an undefined status, but that are undoubtedly in need of international protection, including unaccompanied minors, a category that cannot be expelled in application of the principle of *non-refoulement* and that can aim at an autonomous form of international protection but for which, despite the existence of ad hoc international standards, the institution of humanitarian protection has so far been used in our system. One of the most controversial changes made by the "Salvini Decree" is the abrogation of the residence permit for humanitarian reasons.

The regulation of UAM must therefore be contextualized in this normative framework, especially where the transition to adulthood deprives them of certain fundamental protections offered by the juxtaposition of national and international sources examined so far. After their transition to adulthood, even though the situation of "high vulnerability" remains, forms of protection such as the right to education, reception and employment begin to disappear. At the age of twenty-one they are no longer reflected in legislative sources, specifically in Law no. 47/2017.

Although it is true that there are close relations between the economy, the labor market and migration policies, it becomes unreasonably uneconomic to have invested in reception and protection of rights, primarily for the training and integration of minors and then to deny them stability and asylum as young adults.

It can be reasonably concluded that the drafting of regulatory in-

struments aimed at safeguarding a subject of "high vulnerability[41]" is not accompanied by Italian and EU policies on migration flows, intended to promote respect for human rights.

The objective of protecting "individuals still vulnerable" cannot be separated from legislative policies that provide for their effective and stable social inclusion. A desirable starting point would be a radical reform of the discipline of the right of asylum, which, through a broader range of possibilities of access, can accommodate all those who are escaping from countries at war or from conditions of poverty, and also young adults, i.e. those who are "no longer minors", who cannot suddenly see their psychophysical identity suddenly interrupted by the cessation of a training guaranteed to them until the age of 18.

With the denial even of registration in the registry office (bravely maintained by some mayors), they are transformed into "ghosts" and, what is worse, they are condemned to crime. Thus the State fails in promoting the respect and protection of the dignity of the individual, even if it had met such a challenge during the period of protection of minors.

[41] See F. Ippolito, "(De)Constructing Children's Vulnerability in European Law", in F. Ippolito, S. Iglesias Sanchez (eds.), *Protection of Vulnerable Group. The European Human Rights Framework,* Hart Publishing, 2015, London-Dublin, p. 23 ff.

ASYLUM AND MIGRATION LAW IN AUSTRIA[1]

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1. Introduction

The asylum and migration in Austria is not regulated in one specific law or one coherent system of laws and regulations. It is rather a branch of law with uncertain contours, composed of a larger number of provisions that touch upon this subject. They are, at the same time, often not exclusively, or not even directly, aimed at regulating this field.

A drawback of this situation lies in the fact that thereby the whole legal situation becomes highly blurry and intransparent. The applicable rules are often contradictory, while in other cases they leave lacunae.

One might ask what the reasons for this situation are. They are manifold. First of all, historically, Austria's position towards immigration has changed several times. And the same is true for the general attitude of the broader population towards the related questions.

Austria has long been a country of immigration, both after WW I and after WW II, when German speaking minorities from Central and Eastern European countries fled to Austria. After WWII, more than 3 million *Sudetendeutsche* where banned from Czechoslovakia, a country where this group had been living since the Middle Ages.[2] They passed

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[1] This essay constitutes a preliminary study on the Austrian asylum and migration law. Work on this subject will continue and further, more detailed publications in this area are planned.

[2] On the lot ot the "Sudetendeutschen" see G. Gilbert, "Völkerrecht und Völkermord. Definition – Nachweis – Konsequenzen am Beispiel der Sudetendeutschen", in Schriftenreihe Geschichte, *Gegenwart und Zukunft der altösterreichischen deutschen Minderheiten in den Ländern der ehemaligen Donaumonarchie*, Vienna, 2002, p. 92 ff. On the endeavours to protect this group in the interwar-period see P. Hilpold, "The League of Nations and the Protection of

through Austria and some of them remained there. During the Cold War, Austria has often been the first country of refuge for dissidents from the East. And again, many passed through to other countries, for example Germany, and some remained in Austria. Through this process Austria gained often highly qualified workers. At the same time, lesser qualified migrants where welcomed and needed in Austria during the long period of recovery and economic expansion after 1945. They all contributed, in a decisive way, to wealth creation and to the high living standard that Austria has now been enjoying for decades.[3]

It goes without saying, however, that there were also periods when the economy slowed down and further immigration was no longer needed. Similar to what happened in Germany, in Austria, for a long time, politics addressed immigration as a tool to regulate the need of manpower by a stop-and-go-policy, while in the long term this vision revealed to be utopian.

Especially in the 1970s, the economic crisis following the oil boycott provoked increasing intolerance against migrants that diminished again when recovery set in anew.

For the Austrian legislator, to take into regard all these different events, goals, sentiments and aspirations, was tantamount to squaring the circle. Notwithstanding the need of migrant workers, the fact that broad parts of the economy called for a facilitation of immigration and the further fact that these immigrants made remarkable contributions to the growth of the Austrian economy, the official position of the various governments over these periods was that Austria needed no or next to no immigration.[4]

At the same time, international obligations set more limits to a strict prohibition of immigration. In this context, first of all, more

Minorities – Rediscovering a Great Experiment", *Max Planck Yearbook of United Nations Law*, 17, 2013, pp. 87-124.

[3] On this period see P. Hilpold, "Österreichs Rolle in der Europäischen Union zwischen West und Ost", in Gilbert Gornig, Peter Hilpold (Hrsg.), *Europas Grundwerte und ihre Umsetzung. insbesondere in den Ländern Mittel- und Ostmitteleuropas (im Erscheinen)*.

[4] See B.C. Funk, J. Stern, "Die österreichische Einwanderungs- und Asylpolitik: völkerrechtliche, europarechtliche und verfassungsrechtliche Aspekt"e, in Peter Hilpold, Christoph Perathoner (eds.), *Immigration und Integration: Völkerrechtliche und europarechtliche Antworten auf eine zentrale Herausforderung der Zeit*, Peter Lang AG, Frankfurt am Main, 2010, p. 237.

extensive human rights obligations had to be considered. The ratification of the Refugee Convention 1951 by the Austrian government had as a consequence the need for internal executive measures. To this end, a law on the right of residence for refugees according to the Refugee Convention 1951 was adopted.[5]

This law was in all its essence ambivalent as it showed, on the one hand, openness towards refugees in need of protection, while at the same time trying to restrict, as far as possible, the influx of asylum-seekers.[6]

This law remained widely unchanged until the breakdown of the "Iron Curtain" that led to endeavours for the introduction of further restrictions.[7] Further, far-reaching restrictions were introduced in the following years, especially in the year 2005[8] and as a consequence of the refugee crisis starting in 2015.

Austria's accession to the European Union (EU) had, to a considerable extent, modified the law applicable in the field of asylum and migration. In part, this development was already anticipated by Austria's membership of the European Economic Area (EEA), and had started one year before. The free circulation of persons (workers but also of EU citizens in general) was further promoted by the consolidation and further extension of Union citizenship.[9] With regard to asylum law and the protection of refugees, the development of a Common European Asylum System[10] had considerable influence on the law applicable in this field in Austria.

The overall intention – at least at the EU level – is now not merely

[5] Federal Law BGBl. 55/195 and BGBl. 1968/126, Bundesgesetz über die Aufentaltsberechtigung von Flüchtlingen im Sinne der Konvention über die Rechtsstellung der Flüchtlinge.

[6] See F. Merli, "Das Asylrecht als Experimentierfeld: Einführung", in Franz Merli, Magdalena Pöschl (eds.), *Das Asylrecht als Experimentierfeld: Eine Analyse seiner Besonderheiten aus vergleichender Sicht*, MANZ, Vienna, 2017, p. 1.

[7] Ibid, p. 2, referring to the Federal Law 1990/190, Bundesgesetz BGBl. 1990/190 mit Änderungen des Passgesetzes, des Grenzkontrollgesetzes und des Bundesgesetzes über die Aufenthaltsberechtigung von Flüchtlingen.

[8] See the Asylum Law 2005 as part of the "Foreigners Law Package" (AslyG 2005 als Teil des Fremdenrechtspaketes 2005, BGBl I 2005/100).

[9] See on this subject P. Hilpold, "Nichtdiskriminierung und Unionsbürgerschaft", in Matthias Niedobitek (ed.), *Europarecht*, 2. Edition, de Gruyter, Berlin, 2020, pp. 805-886.

[10] See now Articles 78 ff. TFEU.

to restrict migration but to manage it.[11] At the same time, these management activities have to accommodate humanitarian concerns, i.e. to fully respect the obligations resulting from the Geneva Refugee Convention 1951 as well as from those from CEAS.[12]

The resulting system is highly complex. Even at the highest level of EU politics it is often not clear which of the conflicting goals should be given preference. All the more, there are enormous hurdles and difficulties to explain this multi-layered management system at the national level. The refugee crisis of the years 2015 -2016 which has provoked considerable strain for Austria due to its geographical position at the end of the so-called "Balkan route" has stirred up protest and anti-immigration sentiments in this country. Eventually, this changed the national political landscape and the new government had a strong mandate by the electorate to engage in a more restrictive policy also at the EU level. This new approach fit well with other similar tendencies in the European Union so that, as a whole, the EU became more cautious and more restrictive in their migration and asylum policy.[13]

This historical and international circumstances had direct repercussions on the legislative situation in Austria. It is not always clear how the diverse bodies of norms should be qualified and there is political and academic uncertainty as to the main aims of pivotal norms in this field. Often, the terminology chosen in normative acts carries a specific political message, be it that the terms attempt to sweeten the appearances of otherwise drastic measures, be it that they communicate in codified manner what is the ultimate aim of a measure, apparently neutral in nature.[14]

The very assignment of asylum law to a legal area gives rise to

[11] See D. Chalmers et al., *European Union Law*, CUP, Cambridge, 2014, p. 526.

[12] Ibid.

[13] See P. Hilpold, "Unilateralism in Refugee law – Austria's Quota Approach Under Scrutiny", *Human Rights Review*, 18, 2017, pp. 305-319. For the overall situation in Europe see P. Hilpold, "Quotas as an Instrument of Burden-Sharing in International Refugee Law – The Many Facets of an Instrument Still in the Making", *International Journal of Constitutional Law*, 14, 2017, 4, 2017, pp. 1188-1205.

[14] This is, for example, the case with the term *Ausreisezentren* (Repatriation center) created by the former Interior Minister Herbert Kickl in order to rename the *Erstaufnahmestellen* (first registration point). While the latter signals the hope for an asylum procedure with positive result the term "repatriation center" should apparently convey the message that there is (next to) no hope.

discussions as to whether this body of norms makes part of the law of aliens or constitutes an independent legal area. Gerhard Muzak is probably right when he qualifies asylum law as part of the law of aliens and defines it rather comprehensively.[15] However, asylum law shares common grounds and overlaps with other areas of law. For this reason, any inquiry into Austrian asylum and migration law is more complex than one might think at first sight. In the following paper, the relevant legal sources and their relation to asylum and migration law will be presented in more detail. As far as possible, it will be tried to evidence the complex and often contradicting aims of these norms. This article will conclude with a short summary and an outlook. Pre-eminent attention will be paid here to asylum law. General migration law is mostly regulated by EU law and should more appropriately be treated in the context of the free circulation of persons.

2. Legal sources

(a) Asylum Act (*Asylgesetz* 2005)

The reformed Asylum Act of 2005 deals with the issue of granting asylum and subsidiary protection as well as the rights and obligations of the asylum seeker, the asylum procedure itself, the relevant cards and residence permits. The Act of 2005 represents the fourth major reform of the Asylum Act, which was accompanied by numerous amendments. Amendments usually happen as a result of external influences, such as changes at EU level or developments at the international level. As already exposed, even the first Asylum Act of 1968 was the direct consequence of an external impulse: the need to implement the 1951 Geneva Convention on Refugees.[16] In the meantime, this act has become a highly sophisticated instrument for the granting of asylum and subsidiary protection according to international guidelines. At the same time, however, procedural provision evidence a series of Austrian particularities.

Status

Asylum seeker: § 3 para. 1 AsylG 2005 refers to the categories of

[15] See G. Muzak, "Das Asylrecht und seine Wechselwirkungen mit dem Aufenthalts-, Fremdenpolizei – und Grenzkontrollrecht", in Franz Merli, Magdalena Pöschl (eds.), cit., p. 29.

[16] See F. Merli, "Das Asylrecht als Experimentierfeld: Einführung", cit., p. 1.

persons listed in Article 1 Section A Z 2 of the Convention under the scope of protection of the Refugee Convention and thus ensures their unrestricted right of application. If the conditions are given and recognized, a right of asylum has to be granted. This implies in Austria the permanent right of entry and residence for the respective foreigners.[17] There are five elements characterizing the concept of refugee:[18]

- well-founded fear of
- persecution
- for one or more of the following reasons: race, religion, nationality, membership of a particular social group and/or political opinion,
- being outside the country of nationality or habitual residence of the person concerned,[19] and
- being unable or, owing to such fear, being unwilling to return to take recourse to the protection in the State of that country.

Exclusion: However, there is the possibility to exclude the granting of status for certain reasons according to Art 1 Section F GFK, which are implemented in § 6 AsylG 2005.[20] Reasons for exclusion exist regarding persons who already enjoy protection or assistance by the United Nations or who are excluded from refugee protection due to war crimes, criminal offences or other serious acts.[21] If one of these reasons apply, the application can be rejected without further examination. Furthermore, § 6 also specifies national reasons according to which an exclusion is possible on the grounds of danger to the security of the Republic and against persons who have been convicted by a domestic court of law for a particularly serious crime.[22] A distinction must be made between exclusion and termination of asylum, the latter meaning the revocation of the asylum status formerly given.

[17] See J. Putzer, "Asylrecht und Schutz bei Abschiebung und Ausweisung", in Gregor Heißl (ed.), *Handbuch Menschenrechte: allgemeine Grundlagen – Grundrechte in Österreich – Entwicklungen – Rechtsschutz*, Facultas.WUV, Vienna, 2009, p. 446.

[18] Ibid., pp. 448 - 451.

[19] § 2 para 1 Z 12 AsylG 2005; Art 10 StatusRL.

[20] See J. Putzer, "Asylrecht und Schutz bei Abschiebung und Ausweisung", cit., p. 451.

[21] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA*, Verlag Österreich, Vienna, 2017.

[22] See J. Putzer, "Asylrecht und Schutz bei Abschiebung und Ausweisung", cit., p. 452.

Subsidiary protection: If no status for international protection can be granted, it must be examined whether a case of subsidiary protection under Section 8 of the Asylum Act 2005 exists, also known as the refoulement ban. This is the case if the person concerned faces a real risk of a serious violation of some fundamental rights, [23] in particular if a rejection, removal or deportation of the foreigner to his country of origin would pose a real risk of a violation of Art. 2 ECHR, Art. 3 ECHR or Protocols 6 or 13 to the Convention or pose a serious threat to him as to his life or integrity as a result of arbitrary violence in the context of an international or domestic conflict.

When examining whether subsidiary protection is to be granted, an individual case examination must be carried out.[24]

If an application for international protection or subsidiary protection is rejected or dismissed, (for example if the applicant represents a security threat), a deportation must be carried out according to § 10 AsylG 2005. This must be distinguished from measures terminating the stay under the Foreign Police Act. Deportation under the asylum law means carrying back of the applicant to the country of origin and is inadmissible if this would cause a violation of Article 8 ECHR.[25] Neither can it be carried out even if the foreigner has a right of residence outside the Asylum Act.[26]

According to § 34 AsylG 2005, residence titles can also be obtained on the basis of family relations, or according to § 62 AsylG 2005 by displaced persons fleeing from civil wars and similar circumstances, by persons who have been granted asylum according to § 55f AsylG 2005 in order to protect their private and family life or in special cases worthy of consideration on humanitarian grounds[27] or for reasons of protection under Article 8 ECHR.[28] These residence titles

[23] Ibid., p. 453.

[24] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

[25] See J. Putzer, "Asylrecht und Schutz bei Abschiebung und Ausweisung", cit., p. 458.

[26] See R. Feik, "Fremdenrecht", in Susanne Bachmann et al. (eds.), *Besondere Verwaltungsrecht*, 12. Edition, Verlag Österreich, Vienna, 2018, p. 201.

[27] See D. Kolonovits, "Neuer Asylgerichtshof in Österreich – Verfassungsrechtliche und verfassungspolitische Aspekte der Neuregelung des Rechtsschutzes in Asylsachen", in P. Hilpold, C. Perathoner (eds.), cit., pp. 261-292.

[28] See G. Muzak, "Das Asylrecht und seine Wechselwirkungen mit dem Aufenthalts-, Fremdenpolizei- und Grenzkontrollrecht", cit., p. 34.

usually follow a negative asylum procedure and they do not fall under the purview of he Asylum Act in the stricter sense. However, in order to avoid additional procedures according to the Settlement and Residence Act, these titles are also granted on the basis of this law.

Asylum procedure

In Austria, a distinction is made between the application, which can be made in any way, and the submission of the application, with which all deadlines begin to run. The submission of the application triggers the de facto protection against deportation according to § 12 AsylG and is initially entitled to stay. (Here a procedure card is issued to confirm this).[29] In the case of an application or admission procedure, an initial interview and identification procedures must be carried out.

Approval: The approval procedure is conducted by the Federal Office for Foreigners and Asylum to deal with the question of whether Austria is competent at all[30]. In no other procedure does the question of competence play such an important role[31]. There are many situation in which Austrian authorities lack competence for the procedure. The following situations can be distinguished:

i) a "Dublin case" may be given;
ii) the application may come from a safe third country,
iii) the application may follow a decided case;
iv) a material examination of the case following the procedural admission of the application.

In the first situation, the Dublin case, one of the other Member States is responsible on the basis of the Dublin III Regulation.

In case the application is made by a person coming from a country in which the Dublin III Regulation does not apply, Austria can reject it if the state is a so – called safe third country – the second possibility.

The decided cases are applications which have already been rejected or dismissed once with legal effect and no new grounds have

[29] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

[30] See R. Feik, "Fremdenrecht", cit., p. 199.

[31] See F. Merli, M. Pöschl, "Das Asylrecht als Experimentierfeld: Schlussfolgerung", in Franz Merli, Magdalena Pöschl (eds.), cit., p. 206.

been added to the new applications[32]. The Asylum Act 2005 follows in principle the Dublin III-rules according to which Austria has to examine the substance of the case only if someone enters Austria directly from the country of persecution. At first sight, one might think that on this basis Austria, due to the geographical location of this country, will never be responsible for an asylum procedure. In practice, however, this leads to the escape routes being concealed[33].

Material examination of the application: If the application is not likely to be rejected, it must be admitted. If a person is admitted to the procedure, he or she will receive a right of residence together with a residence entitlement card[34]. As mentioned above, a material examination is carried out in the second stage of the procedure[35]. The asylum procedure is a procedure in which the decision can only be made on the basis of external information. In order to do justice to this, country information is available from the Federal Office's country information sheet. In practice, however, sufficient and up-to-date country information as a basis for decision-making is a difficult problem to solve[36]. The procedure is terminated by granting asylum, rejection or dismissal, discontinuation or filing as irrelevant. There are other procedures with special regulations as the airport procedure, when the applicant arrives via an airport, and the family procedure, which enables all family members to conduct the procedure together[37].

Legal consequences: Initially, a three-year residence permit is granted, which becomes permanent if there are no grounds for withdrawal[38]. A further consequence is the right to basic care during the procedure or other financial support after a decision has been taken, the right of residence, identification and integration measures[39].

[32] See N. Kittenberger, *Asylrecht kompakt*, LexisNexis, Vienna, 2016.

[33] See S. Schuhmacher et al., *Fremdenrecht: Asyl, Ausländerbeschäftigung, Einbürgerung, Einwanderung, Verwaltungsverfahren*, 4. Edition, ÖGB Verlag, Vienna, 2012.

[34] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

[35] See R. Feik, "Fremdenrecht", cit., p. 199.

[36] See N. Bracher, "Kritische Bemerkungen zum österreichischen Asylsystem am Beispiel des (Herkunftsstaats) Irak", in Christian Filzwieser and Isabella Taucher (eds.), *Asyl- und Fremdenrecht: Jahrbuch 2019*, NWV, Vienna & Graz, 2019, p. 174.

[37] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

[38] See R. Feik, "Fremdenrecht", cit., p. 194.

[39] For details, see the relevant laws.

In parallel to acquiring numerous rights, the asylum seeker must also fulfil duties in the form of obligations to cooperate and report[40].

(b) Asylum Act Implementing Regulation 2005 (*Asylgesetz-Durchführungsverordnung* 2005)

This is the ordinance for the implementation of the Asylum Act 2005. It provides how cards are to be issued and how they have to look.

(c) Federal Office for Foreigners and Asylum – Procedure Act (*Bundesamt für Fremdenwesen und Asyl-Verfahrensgesetz*; BFA-VG)

The BFA-VG contains the general provisions on the procedure before the Federal Office for Foreigners and Asylum, BFA[41], for granting international protection, granting residence titles for reasons worthy of consideration, deportation, toleration and the issuance of measures terminating residence, as well as for issuing Austrian documents to foreigners. Generally, the BFA is responsible for the implementation of the Asylum Act[42].

Legal protection: Legal protection is provided by the revision procedure before the Federal Administrative Court (*Bundesverwaltungsgericht*; BVwG), into which the Asylum Court was incorporated in 2013[43]. Special features of this appeal procedure are the lack of suspensive effect and the prevailing prohibition of innovation; verbal proceedings may also be omitted. [44] As a consequence, innovation is prohibited under the terms of § 20 para. 1 BFA-VG. This means that innovation is only permitted in case of a decisive change of the facts, if the proceedings before the BFA were deficient, if the new facts and the new evidence were not accessible to the foreigner until the decision was made, or if the foreigner was not able to present them.[45]

In case, an application is decided negatively, a suspension of the

[40] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

[41] BFA is the Austrian short form for the Federal Office for Foreigners and Asylum.

[42] See R. Feik, "Fremdenrecht", cit., p. 163.

[43] Ibid., p. 206.

[44] Ibid.

[45] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

effects of such a decision is nevertheless to be granted according to § 17 BFA-VG if a rejection, removal or deportation of the foreigner to his country of origin would pose a real risk of a violation of Art. 2 ECHR, Art. 3 ECHR or Protocols 6 or 13 to the Convention or pose a serious threat to him as a civilian Life or integrity as a result of arbitrary violence in the context of an international or domestic conflict.[46] If a suspensive effect is denied, this is associated with essential legal consequences:

- there is no time limit for voluntary departure,
- the imposition of a residence requirement in a certain quarter of the Federal Republic is possible
- the loss of the previous right of residence as an asylum seeker
- entitlement to basic care ends.

A review of this decision by the Austrian Administrative Court (*Verwaltungsgerichtshof*; VwGH) has become possible again; it had been ruled out during the jurisdiction of the Asylum Court[47].

A Fast-track procedure is possible under certain conditions provided for in § 18 para. 1 BFA-VG:

(i) if the asylum seeker comes from a safe country of origin,
(ii) if he poses a threat to public order and security,
(iii) if the asylum seeker deceives about his true identity, nationality or the authenticity of his documents,
(iv) if there are no grounds for persecution,
(v) if the allegations do not correspond to the facts,
(vi) in case of an enforceable return decision,
(vii) in case an enforceable expulsion order or an enforceable residence ban has already been issued prior to the application,
(viii) in case the asylum seeker refuses to give fingerprints.[48]

(d) Foreign Police Act (*Fremdenpolizeigesetz*; FPG)

The Foreign Police Act is the main body of foreigners' law. Foreigners' law in general regulates the police supervision of the arrival and the residence of foreigners. More in particular, it deals with the exercise of the foreign police force, the granting of entry permits,

[46] See D. Urban, "Die aufschiebende Wirkung im Asylverfahren", in Christian Filzwieser and Isabella Taucher (eds.), cit., pp. 129-146.

[47] See F. Merli, "Das Asylrecht als Experimentierfeld: Einführung", cit., p. 5.

[48] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

their rejection, the adoption of measures terminating residence, deportation, toleration and enforcement of repatriation decisions and the issuing of Austrian documents. The FPG regulates the powers and measures of the foreign police, whereas the NAG controls immigration and migration. As defined in the Act, foreigners are persons who are not Austrian citizens. In this case a further distinction as to whether this person is a third-country citizen or a citizen of the European Union has to be made. A third-country citizen only becomes an asylum seeker once he or she has submitted an asylum application, whereas a refugee only becomes a refugee once his or her status has been recognised as asylum seeker or as a person entitled to subsidiary protection.[49]

The Foreign Police Act and the Asylum Act 2005 show overlaps and interactions. They are also linked by the BFA joint authority and its Special Procedures Act. Nevertheless both pursue different objectives. The Asylum Act is concerned with the acquisition of a right of residence, whereas the FPG is intended to ward off dangers. Again, it could be stated that these differences evidence again many reciprocal links.[50]

Deportation: As in the Asylum Act, the FPG also offers the possibility to take measures to end the stay. There are return decisions under the FPG for different groups of persons, those with unlawful residence (this is the case with rejected applications for international protection) under § 52 para. 3 FPG and for persons with lawful residence (for reasons of the Settlement and Residence Act). In the cases of § 46b para. 1 FPG, this also corresponds to an enforceable return decision, otherwise this becomes enforceable upon the entry into force of the law. In this case again it has to be examined, whether this does not contradict the prohibition of refoulement resulting from the human rights obligations cited above. With the return decision, it must be determined at the same time whether a deportation is permissible.[51]

Refoulement ban: Care must be taken, that the ECHR is neither be infringed in the case of foreign police measures. This would happen in

[49] See R. Feik, "Fremdenrecht", cit., pp. 147-206.

[50] See, comprehensively, G. Muzak, "Das Asylrecht und seine Wechselwirkungen mit dem Aufenthalts-, Fremdenpolizei- und Grenzkontrollrecht", cit., p. 28.

[51] See I. Gachowetz et al., *Asyl- und Fremdenrecht im Rahmen der Zuständigkeit des BFA,* cit.

case of a violation of the prohibition of torture and degrading treatment, which is particularly relevant in the deportation procedure, the protection of private and family life in the granting of entry and residence permits and the protection of personal freedom in detention pending deportation procedures[52], All of these cases find expression in the refoulement ban. A return decision can also be made regarding asylum seekers according to § 52 para. 2 and 3 FPG.[53] In these cases, the "Boultif criteria" have to observed: seriousness of the violation of law, duration of stay, behaviour after violation of law, nationality of the persons involved, family situation, knowledge of the partner of the violation of law at the beginning of the relationship, age of the children, obstacles to resettlement in the home country. The decision is implemented by measures of deportation.[54]

Detention pending deportation: A special form of arrest and detention of strangers is detention pending deportation according to § 76 FPG. This is a procedural detention and is only to be used if no less severe means are to be applied.[55] Such a deportation can be imposed to secure the effectiveness of a return decision, of an order for removal from the country, of a measure expulsion or a ban of residence pursuant to § 76 para. 1 FPG, or also, under certain conditions

[52] See R. Feik, "Fremdenrecht", cit., p. 176.

[53] *(2) Gegen einen Drittstaatsangehörigen hat das Bundesamt unter einem (§ 10 AsylG 2005) mit Bescheid eine Rückkehrentscheidung zu erlassen, wenn:*

1.dessen Antrag auf internationalen Schutz wegen Drittstaatsicherheit zurückgewiesen wird,

2. dessen Antrag auf internationalen Schutz sowohl bezüglich der Zuerkennung des Status des Asylberechtigten als auch der Zuerkennung des Status des subsidiär Schutzberechtigten abgewiesen wird,

3.ihm der Status des Asylberechtigten aberkannt wird, ohne dass es zur Zuerkennung des Status des subsidiär Schutzberechtigten kommt oder

4. ihm der Status des subsidiär Schutzberechtigten aberkannt wird und ihm kein Aufenthaltsrecht nach anderen Bundesgesetzen zukommt. Dies gilt nicht für begünstigte Drittstaatsangehörige.

"(3) Gegen einen Drittstaatsangehörigen hat das Bundesamt unter einem mit Bescheid eine Rückkehrentscheidung zu erlassen, wenn dessen Antrag auf Erteilung eines Aufenthaltstitels gemäß §§ 55, 56 oder 57 AsylG 2005 zurück- oder abgewiesen wird."

[54] Ibid., p. 171.

[55] See D. Kolonovits, "Neuer Asylgerichtshof in Österreich – Verfassungsrechtliche und verfassungspolitische Aspekte der Neuregelung des Rechtsschutzes in Asylsachen", cit., pp. 261-292.

regulated in asylum law, § 76 para. 2 and 2a FPG[56], if there is a risk of escape pursuant to § 76 para. 2 no. 1 FPG. This is the case if certain facts justify the assumption that the foreigner will evade either the proceedings or the deportation, or that the foreigner will make deportation considerably more difficult. If a deportation or return decision is not admissible, the stay must be tolerated and further actions must be taken in accordance with the Asylum Act.

(e) Basic Service Agreement due to article 15a Austrian Constitution (*Grundversorgungsvereinbarung* Art. 15a B-VG (*Bund – Länder*))

These agreements are concluded between the Federal Government and states pursuant to Article 15a of the Federal Constitution on joint measures for the temporary provision of basic care for foreigners in need of assistance and protection (asylum seekers, persons entitled to asylum, displaced persons and other persons who cannot be deported for legal or factual reasons) in Austria.

During the procedure, asylum seekers are provided with the most basic necessities, including accommodation in decent housing, adequate food or board and health insurance. In addition, there are special benefits in kind and in cash to obtain necessary clothing (max. 150€/year/person), to cover costs incurred by school attendance (max. 200€), reimbursement of travel expenses for cargo and a small pocket money of 40€/person/month. In Austria, this right exists from the point of submission and not from the moment the application is made, although in most cases these moments coincide. The agreement regulates the division of competence between the Federal Government and the states. The Federal Government is responsible as long as the admission procedure is ongoing. Only subsequently, i.e. after admission, the responsibility falls to the states. The agreement therefore regulates who is in charge of the mentioned services and costs.[57]

(f) Basic Services Act - Federal Government 2005 (*Grundversorgungsgesetz – Bund* 2005)

The Basic Service Act regulates the provision of basic services for asylum seekers in the admission procedure and for certain other

[56] See R. Feik, "Fremdenrecht", cit., p. 176.

[57] See N. Kittenberger, *Asylrecht kompakt*, 2. Edition, LexisNexis, Vienna, 2017.

foreigners. Care during the admission procedure is provided in a federal care facility. After admission, the responsibility falls to the states which provide with their own laws and regulations.[58]

Basic care and social benefits after a positive outcome of the procedure differ between the states. Basically, all persons entitled to asylum are under the protection of the minimum benefit system. Nevertheless, further limits may apply and only in Vienna, Salzburg and Carinthia applicants receive the full amount.[59] With the new amendments of the last couple of years the minimum protection for persons receiving subsidiary protection is no longer applicable. It was lowered step-by-step for those entitled to asylum.[60]

(g) Integration Act (*Integrationsgesetz*; IntG)

This Act contains provisions on the integration of persons legally residing in Austria without Austrian citizenship. Nonetheless privileged asylum seekers, those with a particularly high chance of receiving protection, will have the opportunity to take advantage of integration measures or to participate in the integration year since 1 January 2018. In this case, the requirements are higher and consist of a package of measures by the AMS (Public Employment Service Austria). Non-participation in such courses may result in a reduction of social benefits.[61]

The IntG provides German language courses, as well as value- and orientation courses for persons entitled to asylum and subsidiary protection. Legally settled third-country nationals must enter into an integration agreement beforehand.[62]

(h) Integration Agreement Regulation (*Integrationsvereinbarungs-Verordnung*)

This regulation stipulates who can offer these courses and how the quality should be like, regarding the lecturing personnel, quality standards of the lectures and the examination.

[58] Ibid.

[59] Ibid.

[60] See *Mindestsicherung neu kostet mehr, nicht weniger*, <https://www.diepresse.com/5539366/mindestsicherung-neu-kostet-mehr-nicht-weniger> (02/20).

[61] See N. Kittenberger, *Asylrecht kompakt*, cit.

[62] See R. Feik, "Fremdenrecht", cit., p. 190.

(i) Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*; NAG)

The NAG regulates the granting, refusal and withdrawal of residence permits (> 6 months' stay), with the exception of foreigners who are privileged to stay under the Asylum Act.[63] These residence titles are limited in time, differently as provided for in the Asylum Act. In contrast to the two titles from the Asylum Act, here a larger number of different titles can be found.[64]

(j) Citizenship Act (*Staatsbürgerschaftsgesetz*)

The Citizenship Act is subject to changes with the current amendments.[65] With regard to the right of asylum, asylum seekers acquire citizenship after a stay of 10 years. Up to the current amendments, this was possible after only 6 years of residence and was therefore equal to the other EEA states.

3. Short summary of the acts presented so far

- The Asylum Act deals with the recognition of status in general and, in addition to this main task, also regulates the procedure; in special cases, deportation under asylum law can also occur.
- The Asylum Act Implementing Regulation is an extension of the Asylum Act.
- The BFA-VG contains procedural provisions of the Federal Office for Foreign Affairs and Asylum, which is responsible for asylum procedures. These are therefore the procedural provisions for the procedure specified in the Asylum Act. Legal protection goes hand in hand with procedural regulations and can also be found there.
- The FPG is in part closely related to asylum law, but nevertheless pursues other goal. One of its main aims is to avert danger and therefore deportations can take place for more extensive reasons than those recognised in asylum law. Nevertheless, the

[63] Ibid., p. 180.

[64] See G. Muzak, "Das Asylrecht und seine Wechselwirkungen mit dem Aufenthalts-, Fremdenpolizei- und Grenzkontrollrecht", cit., p. 33.

[65] See D. Kolonovits, "Neuer Asylgerichtshof in Österreich – Verfassungsrechtliche und verfassungspolitische Aspekte der Neuregelung des Rechtsschutzes in Asylsachen", cit., pp. 261-292.

prohibition of refoulement must be observed like in all areas of asylum law and can be found in the FPG. It also regulates the possibility of a detention pending deportation.

- The burden of care-taking for the applicants during the procedure has been divided between the federal and states governments as we can see in the Basic Provision Agreement Art. 15a B-VG and Basic Provision Act.
- For a better integration of those entitled to asylum, an Integration Act and an Integration Agreement Act have been adopted.
- If the Asylum Act does not apply, the NAG may become relevant. Normally this law is applicable for longer residence permits. There are, however, exceptions according to which even in the case of negative asylum procedures, a residence title might be granted according to the Asylum Act instead of the NAG.
- Finally, there is a possibility for persons entitled to asylum to become Austrian citizens, regulated in the Citizenship Act.

4. Migration

As already explained, the movement of persons due to reasons of (economic) migration and flight from persecution, while conceptually distinct, are often difficult to distinguish. Sometimes they even overlap and so it becomes very hard to adopt coherent policies in this field. Nonetheless, governments, and in particular also the Austrian one, are trying hard to achieve this goal.

As is well-known, the EU introduced in 2009 the so-called "Blue Card" scheme, according to which access to the EU labour market is opened up to non-EU nationals who hold higher education qualifications or at least five years of equivalent professional experience and have been offered a contract of employment of at least one year's length by an EU employer.[66]

Along these lines, Austria has introduced the "red-white-red"-card granting access to highly qualified non-EU nationals (for example "key professionals" or also "start-up founders") for 24 months. They must evidence to earn a certain minimum salary, to have a sickness

[66] See D. Chalmers et al., *European Union Law*, cit., p. 527, referring to Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (2009) OJ L 155/17.

insurance and to be granted housing according to the usual local conditions. At present, political talks are under way to extent the category of eligible candidates in order to comprehend also lesser payed workers in shortage occupations.[67]

5. Conclusion

Migration and asylum law provisions closely interact. There is, and it is needless to deny it, considerable resistance against further immigration in Austria but at the same time there is also the need for immigration for economic reasons. Immigration is both seen as a threat to the high living standards in this country and as a prerequisite to preserve this high standard. Foreigners are both welcome and unwelcome and in addition there is also a strong humanitarian sentiment in favour of the protection of those in need. And this sentiment is well-grounded in specific international obligations. These manifold ambitions, aims and sentiments are mirrored in the relevant legislation. The lack of coherence in this legislative mass is a direct consequence of the contradiction on the factual level. Nonetheless, more coherence can at least be reached for. And the same holds true for respect of international obligations in this field which at the same time, however, are also shaped by the Austrian government. And perhaps there are few fields of politics where the sentiments of the population are so strong as in that of asylum and migration.

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[67] See *Auch schlechter bezahle Ausländer sollen nach Österreich dürfen,* <https://www.derstandard.at/story/2000115051099/auch-schlechter-bezahlte-auslaender-sollen-nach-oesterreich-duerfen> (02/20).

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TFEU: Art 78ss

FRENCH ASYLUM POLICY SYSTEM: LEGAL ASPECTS

GAËLLE MARTI*

1. French Asylum Law System

In France, there are four sources of protection of the right of asylum.

1. The oldest derives from the Geneva Convention of July 28, 1951. It is the major source of the right of asylum and is generally qualified of conventional right of asylum.

2. Since 1998, the refugee status can also be recognized on the basis of the fourth paragraph of the Preamble to the 1946 Constitution (to which the Preamble of the 1958 Constitution directly refers), which states that "4. Anyone who is persecuted because of his or her action for freedom has the right to asylum in the territories of the Republic".

The hypothesis covered by the preamble is very narrow, so it has contributed to relativizing the interest of the constitutional asylum. In fact, no application has been made on behalf of the constitutional right to asylum since 2009.

3. Since 2003, a "subsidiary protection" (formerly known as territorial asylum) is granted to any persecuted person who does not meet the requirements for the refugee status, but faces a risk of being persecuted if he or she is returning in his or her country of origin.

4. Lastly, since the French law n ° 2003-1119 of November 26, 2003, a "temporary protection" is granted, "in case of a massive influx of displaced persons". This protection is not granted on the basis of an individual persecution but in the event of a collective persecution, established by a decision of the Council of the European Union. It has never been implemented.

Asylum Law was governed between 1952-2005 by a specific law adopted in application of the Geneva Convention. This specificity has come to an end. Since 2005, legislative and regulatory sources of

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asylum law have been fully integrated in the Code on the Entry and Residence of Foreigners and the Right of Asylum.

This codification is beneficial for its intelligibility and access to the law; but it maintains a confusion between an administrative policy applicable to all foreigners ("the right of entry and stay in France") and the individual right of asylum.

The French code specifies the grounds for protection by referring to the European Directive of December 13, 2011.

French law has for a long period refused to overcome the imprecision of the Geneva Convention and simply stated that refugee status must be granted to any person, "who meets the definitions of Article 1 of the Geneva Convention."

This situation came to an end recently. The Law of 29 July 2015[1] breaks with this logic by referring to the European Directive[2] for the assessment of acts of persecution and grounds for persecution.[3] It also specifies that "aspects related to sex, gender identity and sexual orientation are duly taken into consideration for the purpose of recognizing membership of a certain social group".[4]

2. French Asylum Procedure

The French migration procedure is different if the application is requested from abroad, at the border or if the person is already on the French territory.

1. From abroad

In theory, a foreign national can apply for asylum visas to the French authorities at his or her place of residence. For this, he or she must apply to the French Embassy or the nearest consulate. These visas for asylum are very rarely granted and the French State Council (Conseil d'Etat) stated that there was no right to asylum visas.[5]

[1] Law 2015-925 on the reform of the right of asylum.
[2] Directive 2011/95 of 13 December 2011.
[3] L711-2§1.
[4] art. L711-2 §2.
[5] CE, ord., 16 oct. 2017, n° 408374, *Khodadad*.

2. At the border

Foreigners who do not meet the conditions to enter the French territory are placed in a waiting zone (for a maximum period of 20 days). It is possible to apply for an authorization to enter the territory in order to apply for asylum.

The Ministry of the Interior has the authority to take the decision to admit or not the applicant to enter the territory, after consulting the Office for the Protection of Refugees and Stateless Persons (OFPRA). In case of admission the foreigner has 8 days to file his or her application for asylum.

If the foreigner is not admitted to the territory, he or she must return to his or her country of origin or provenance. This referral decision may be appealed in front of the administrative tribunal.

Many asylum seekers reach the French territory by taking flights with a stopover in France to other destinations. The French government took the decision to introduce airport transit visas, making it impossible to stop in France without a visa for the nationalities of very unstable countries from which the largest number of asylum seekers originate. This has had the effect of reducing or even eliminating asylum applications at the border for these nationalities as well as increasing the number of illegal immigrants from these countries.

3. On the French territory

If the person is already on the French territory, the application must be made within 90 days from arrival at the Prefecture (administrative structure which represents the government in French regions).

During the evaluation of this application, the foreigner has in principle a right of residence in the French territory. He or she is also entitled to the material reception conditions and financial assistance provided for in the "reception" Directive 2013/33 / EU of 26 June 2013.

The Prefecture decides whether the asylum seeker is placed under the Dublin procedure, or if the application will be processed under the accelerated or normal procedure.

a. Under the Dublin procedure, the authorities need to identify the State responsible for the examination of the application for international protection. The asylum seeker can be placed under house

arrest or put in administrative retention, especially in case of "significant risk of absconding".

b. Under the Priority procedure, a shorter response is requested. OFPRA has to take a decision within 15 days, but the examination of the situation is more superficial.

Moreover, the decision of the OFPRA can be challenged before the National Court of the right of Asylum (CNDA) but it is a single judge who rules on the appeal, which is suspensive.

The accelerated procedure occurs in different circumstances/hypotheses:

- If the application wasn't made within 90 days of arrival
- In case of fraudulent application or abuse of the asylum procedure
- If the asylum seeker is under an obligation to leave the territory
- If the applicant constitutes a serious threat to the public order
- If he requested a reconsideration of his application (2nd application)
- In case of a safe country of origin

NB: the OFPRA now establishes a list of allegedly "safe countries" which respect political rights and principles of freedom. The first list was enacted in July 2005. Since 2015 it now includes 15 countries.[6]

c. Under the normal procedure, the OFPRA is competent to decide if the asylum seeker has to be granted refugee status of subsidiary protection. The decision is taken after an individual interview in the presence of an interpreter and possibly a lawyer. The OFPRA has 3 months to rule on the application.

In case of rejection, an appeal before the CNDA within one month is possible.

In principle, this appeal is suspensive but there are exceptions, especially if the asylum seeker has lost the right to stay in the territory (and the law of September 10, 2018, added new cases of loss of the right to stay in the territory, see *infra*).

In case of rejection of the appeal, there is a possibility to refer to

[6] Albania, Armenia, Benin, Bosnia Herzegovina, Cabo Verde, Georgia, Ghana, India, Macedonia, Mauritius, Moldavia, Mongolia, Montenegro, Senegal, Serbia, Kosovo.

the State Council within 2 months (no examination on the merits of the application, only right / procedure, non-suspensive appeal).

It is also possible to submit a request for reconsideration in the event of a new fact.

If the CNDA rejects the request, the prefecture automatically takes an order to leave the territory (OQTF). It can be challenged within 15 days.

After a negative decision, the alien will have the obligation to leave the French territory with or without a period of voluntary departure. This measure can be completed by a ban on return to the French territory which means a deportation to the border. If the Prefet decides that the foreigner represent a threat to the public order, he or she will be expelled immediately.

3. French Asylum Reforms

1. The first one derives from the law n°2018-187 of March 20, 2018, enabling the appropriate application of the European asylum system.

This law was adopted to counter the effects of a jurisprudence of the Court of Cassation. The latter had in fact ruled, in a judgment of 27 September 2017[7] repeating the ECJ *Al Chodor* decision,[8] that the detention of "Dublin" persons was not possible, in the absence of a definition by law of the "risk of significant absconding/leakage" of the asylum seekers concerned.

The French Council of State followed this reasoning,[9] that's why the Parliament modified article L. 551-1 of the CESEDA in order to specify the cases in which a significant risk of leakage should be, except in special circumstances, regarded as established.

The law defines a presumed "risk of leakage", through twelve extremely broad situations, allowing people, including children, to be held in detention almost systematically. A red line is crossed: it allows for the first time to lock up people even before a decision of expulsion

[7] Pourvoi n° 17-15.160, arrêt n° 1130.

[8] CJUE, 15 mars 2017, 518/15.

[9] EC, 5 March 2018, *La Cimade*, n ° 405474, to the conclusions of Aurélie Bretonneau.

has been issued. It also reduced the time limit for challenging these decisions by fifteen to seven days.

The constitutional council declared this law was in conformity with the constitution.[10]

2. The second law, which also was highly controversial, is the law No. 2018-778 of September 10, 2018, for controlled immigration, effective right of asylum and successful integration.

One of the goals of this law was to reduce the average processing time for asylum applications from eleven to six months. To reach it, the text reduces various delays in the administrative procedure (for instance, as I said, the asylum seeker now has to file his application within 90 days – instead of 120 days – otherwise his application will be processed under the accelerated procedure).

Other measures concern the procedure. The language of exchange can be chosen by the administration and the notification of the decisions can be made on any support including by sms or by email. Moreover, the video-hearing becomes the principle without the possibility for the applicants to oppose it.

The law also provides for a distribution of asylum seekers in the regions. Asylum seekers are no longer free to set their homes or move without the permission of the Office of Immigration and Integration (OFII). In the event of failure to comply with this obligation, the material reception conditions are automatically interrupted and the investigation of the asylum application may be terminated.

The law also allows the administration to refuse refugee status or to terminate it in case of convictions for serious crimes in another EU country.

It also makes it possible to place under house arrest or to detain asylum seekers who pose a threat to the public order.

It reinforces the sanction for the refusal of fingerprinting and photography, already punishable by imprisonment and fine, by allowing the criminal judge to impose a prohibition of the territory up to three years.

The offense of solidarity remains with some adjustments to take into account the decision of the Constitutional Council of July 6, 2018, which elevates the fraternity to the rank of constitutional value. The exemption from prosecution was already provided for in cases of relationship or marital relationship. Nor was there any prosecution

[10] Décision n° 2018-762 DC du 15 mars 2018.

where the act of solidarity (legal advice, catering, accommodation or medical care) "did not give rise to any direct or indirect compensation." The new text extends the exemption to traffic aid (transportation of illegal aliens by volunteers and associations).

Some progress nevertheless exist in the new legislation. First, beneficiaries of subsidiary protection (a supplementary protection to refugee status which represents 42% of OFPRA and CNDA agreement decisions in 2017) and stateless persons are granted a four-year multi-year residence permit and no longer a title of one year renewable for periods of two years.

Second, unaccompanied minor children who had been granted protection could already apply for "family reunification" by bringing their parents. The law extends this possibility to brothers and sisters. In 2017, 381 unaccompanied minors were granted protection.

Finally, since 10 September 2018, minors living in France with parents who have obtained refugee status, will automatically be refugees when they reach the age of majority.

MIGRATION AND ASYLUM POLICY SYSTEM: THE CASE OF REPUBLIC OF NORTH MACEDONIA

OLGA KOSHEVALISKA*, ANA NIKODINOVSKA KRSTEVSKA**

1. Introduction

The EU integration process is a clear and unambiguous strategic interest and priority for North Macedonia. One of the basic requirements for the integration is the harmonization of the national legislation with the EU legislation. In 2015 and 2016 North Macedonia was witnessing the largest migrant crisis[1] which shook the already fragile legal and political system[2] and put the State on test for respecting the rule of law, human rights, international conventions, the principles of humanity and solidarity. At that time, North Macedonia's migration and asylum policy similarly to the EU's policy on migration and asylum, lacked solidarity and consistency to deal with the migration influx.[3] The legislation concerning asylum policy was amended consequently to the increase of the number of migrants. In fact, the solutions reached at that time seemed not to be so appropriate, however bearing in mind the urgency of the crisis situation that the country coped with, that legislative solution was thought to be the most suitable to solve the migration challenge at least temporarily. Following the crisis, the Law on asylum

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[1] Until September 2016, more than 800,000 transited through Macedonia, which is almost half of the country's population. Actually, the total population of the country according to the last census from 2001 amounts to 2.022.547 citizens (*State Statistical Office 2019*).

[2] See *RadioFreeEurope RadioLibrery,* <https://www.rferl.org/a/explainer-crisis-in-macedonia-leads-to-violent-protests/27675969.html> [08/2019].

[3] See *Asylum in Europe,* <http://www.asylumineurope.org/annual-report-20142015#sthash.ejTDhelJ.dpuf> (09/2019): Annual Asylum Information Database Report 2014/2015: Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis. The report covers research for 18 countries: Austria, Belgium, Bulgaria, Cyprus, Germany, France, Greece, Croatia, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Sweden, the United Kingdom, Switzerland and Turkey.

and temporary protection[4] was amended a couple of times. This was due to the many gaps that turned out to be a ground for opening numerous questions related to the right of asylum and proper protection. Since the Law was supposed to be in line with the European acquis in matter of migration and asylum, because of the country's European integration process, North Macedonia opted for passing a new Law for international and temporary protection that came in force in the first quarter of 2018[5], replacing the Law on asylum and temporary protection. In parallel a new Law for foreigners[6] came into effect in June 2018 and replaced the old one. Therefore, some of the aspects of this work are to evaluate the key features of the Macedonian asylum system and their conformity with international standards and to point out the ongoing changes in the country's asylum policy as well as to stress the drawbacks of the current system.

2. Start at the beginning

Migrant crisis is not news to North Macedonia. In the last 25 years, the country has coped five times with a refugee crisis. Hence, in 1991 when, following the events in the Republic of Albania,[7] 1,180 persons from the border regions towards the Republic of North Macedonia sought and received protection in the regions of Prespa-Oteshevo, Struga and Ohrid. During 1992, the country offered protection to 35,000 people fleeing from the war in Bosnia and Herzegovina whereby refugees were accommodated in seven collective centers throughout the country. These persons were under the protection of State until 1997.[8] In

[4] Amendments to the *Law on Asylum and Temporary Protection*, published in the *Official Gazette of the Republic of Macedonia* No. 49/2003, 66/2007, 142/2008, 146/2009, 166/2012, 101/2015, 152/2015, 55/2016 и 71/2016.

[5] *Law for International and temporary protection*, Official Gazette No.64/2018.

[6] *Law for Foreigners*, Official Gazette of the Republic of Macedonia no. 97/2018 and "Official Gazette of the Republic of North Macedonia" no. 108/2019.

7 See *New Protests in Albania; Crisis Mounts*, by <David Binder, Special To the New York Times>, (02/1991), Section A, Page 3, *New York Times* <https://www.nytimes.com/1991/02/22/world/new-protests-in-albania-crisis-mounts.html> (09/2019).

[8] See J. Kekenovski, "Republic of Macedonia and refugee crisis - between the hammer and the anvil", *Horizonti*, 2017, available at <https://www.uklo.edu.mk/filemanager/HORIZONTI%202017/H-orizonti%20serija%20A%-

the aftermath of the Kosovo crisis in the spring of 1999, 360,000 people – mainly ethnic Albanians – sought and received international protection in Macedonia. After the Government Act on Providing Temporary Humanitarian Protection, 126,000 persons were placed in eight collective centers,[9] built for that purpose on the territory of the Republic of Macedonia, and 234,000 persons were accommodated in family homes of citizens throughout the country.[10] During the escalation of the internal state crisis in North Macedonia during 2001, as a result of the armed violence, 86,954 internally displaced persons were registered, and according to the UNHCR data about 20,000 people left the Republic of North Macedonia and headed for Kosovo.[11]

Lastly, the country coped with un unprecedented migration crisis in 2015, over 850.000 as observed by local NGOs (Legis, 2005), most of them coming from Syria, Iraq and Afghanistan. Starting from June 19th, 2015 at 00:00 hours, the first day after the Law for asylum and temporary protection was amended)[12] until March 7th, 2016 at 24:00 hours, the day of closing the so called 'Balkan route", the total number of migrants that were registered on Macedonia's border according to the relevant domestic laws was 477.876,[13] which did not correspond to the observed number of migrants that have transited through the country's territory.[14] On one hand, this gap was generally due to the big number of daily entrances in the country that varied from 5.000 up to 15.000 entries per day, and on the other hand because of the poor capacity of the State in terms of technical and human resources, in order to answer the needs and carry out full registration. The registered migrants would

20volume%2019/1.%20Republic%20of%20Macedonia%20and%20refugee%20crisis%20%20between%20the%20hammer%20ans%20the%20anvil-%20Jove%20Kekenovski.pdf> (09.2019).

[9] With 91,476 persons accomodated, Stenkovec was the largest collective center. Temporary humanitarian protection for refugees from Kosovo lasted until September 22, 2003, although by the end of 2000 the number of refugees was reduced to 5,416.

[10] B. Markovski, *Evropksata begalska kriza – predizvik od globalni razmeri* [European refugee crisis – a challenge with global proportion], available at <http://respublica.edu.mk/blog/2016-02-25-10-02-17> (09/2019).

[11] Ibid.

[12] Amendments of the *LATP* see Official Gazette No. 152/2015.

[13] Parlamentaren Institut, Sobranie na Republika Makedonija, *Efektite od Migrantskata kriza vo zemjite od Jugoistocna Evropa – Studija* [The effects of the Migrant crisis in the countries of Southeast Europe – A Study], Skopje, July 2016, p. 24.

[14] *Parlamentaren Institut,* cit., p. 24.

have been in a much smaller number if it wasn't for the help offered by the local and international non-governmental organizations that they offered in the transit camps near the border.[15]

In this context, the table given bellow gives an illustration about the different migrant nationalities that were officially registered by the state authorities during the crisis.[16]

Table No.1:

Number of officially registered migrants that transited trough North Macedonia on the Balkan route (2015 and 2016) according to the state of origin

Year	**2015**	**2016**	**Total**
Syria	216,157	44,734	260,891
Afghanistan	95,691	26,546	122.237
Iraq	54.944	18,337	73,281
Iran	6,231	N/A	6,231
Pakistan	5,416		5,416
Palestine	2,158		2,158
Somalia	1,276		1,276
Bangladesh	1,253		1,253
Morocco	1,317		1,317
Congo	514		514
Alger	453		453
Laban	434		434
Nigeria	279		279
Other	2,110	6	2,116
Total	388,233	89,623	477,856

Source: Institute of the Assembly of the Republic of Macedonia [Parlamentaren Institut na Republika Makedonija], 2016

[15] Z. Drangovski, *Analytical report Lessons learned from the 2015-2016 migration situation in the Western Balkan region*, Prague Process: Dialogue, Analyses and Training in Action Initiative, International Center for Migration Policy Development, 2019, <https://www.pragueprocess.eu/en/migration-observatory/publications/document?id=180> (09/2019).

[16] *Parlamentaren Institut*, cit., p. 26.

North Macedonia was not a priority country for the asylum seekers,[17] neither it was the country of last resort. Studies have shown that if the asylum seekers were to stay in this region they would choose Serbia or Greece, because from Serbia they are closer to the EU, and being in Greece is better because they have access to European funds and possible relocation schemes.[18] This brings to the conclusion that the migrant influx was of a transitory character for Macedonia. This observation is also confirmed by the low number of asylum requests registered in the country (Amet, 2018:140). However, despite its transitory character the migration flow had repercussions upon the humanitarian, political, institutional and economic system of the country.[19]

3. Macedonian asylum policy and its shortcomings

3.1. Existing legislation in the time of the migrant crisis 2015 – 2018

According to Stojanoski, T.,[20] the migrant crisis can be divided into three periods in base of the intensity of the migrant influx and the type of entry.[21] The *first* period is the period of illegal entry until the

[17] S. Amet, *Help on the route, Annual report for 2018, The rights of refugees, migrants and asylum seekers in the Republic of Macedonia*, Helsinki Committee for Human Rights of the Republic of Macedonia, 2018, <https://mhc.org.mk/wp-content/uploads/2019/05/Help-On-Route-ANG-2018-final.pdf> (19/2019).

[18] See E. Brmbevska, *Help on the route" Yearly report 2017 – Right of migrants, refugees and asylum seekers in Macedonia*, Helsinki Committee, Skopje, 2017 available at <https://mhc.org.mk/wpcontent/uploads/2019/05/Help_On_Route_-_MK__3_.pdf> (09/2019)].

[19] B. Weber, *Time for a Plan B: The European Refugee Crisis, the Balkan Route and the EU – Turkey Deal*, A DPC Policy Paper, Berlin: Democratization Policy Council, 2016.

[20] T. Stojanovski, *Prava na begalcite, migrantite I baratelite na azil vo Republika Makedonija* [The rights of refugees, migrants and asylum seekers in Republic of Macedonia], Helsinki Committee for Human Rights of the Republic of Macedonia, 2016 available at <https://nkeu.mk/wp-content/uploads/2018/12/Izvestaj_Trpe-Stojanovski.pdf > (09/2019)]. (hereafter T. Stojanovski, *Prava na begalcite, migrantite I baratelite na azil vo Republika Makedonija*).

[21] Also B. Beznec, M.Speer, M. S. Mitrović, *Governing the Balkan route: Macedonia, Serbia and the European Border Regime,* Research Paper Series of Rosa Luxemburg, Stiftung Southeast Europe n. 5, 2016, <https://bordermonitoring.eu/wp-content/uploads/2017/01/5-Governing-the-Balkan-Route-web.pdf> (09/2019) (here-

amendments of the legislation in June 2015; the *second* period of legislative amendments and formalization of the corridor – introducing the 72 hours rule (from June 2015 until March 2016) and the period of closure of the Balkan route and the return to illegality (from March 2016 – ongoing).

The *first* period is the period when North Macedonia was in the center of the attention of the international public for the detained 1003 migrants at Gazi Baba 'Reception Centre for Foreigners' from January 1st, until June 15th, 2015.[22] These cases of arbitrary detention refer to those migrants and refugees that were 'detained' together with their smugglers in order to serve as witnesses in the subsequent criminal proceedings of their smugglers.[23] This practice was contrary to the Law on asylum and temporary protection (LATP) and the Criminal Procedure Code,[24] (hereafter CPC), because it resulted in deprivation of liberty of the migrants for the entire criminal process that could last three months or even longer. The UNHCR,[25] Human Rights Watch (HRW),[26] Amnesty

after B. Beznec et.al., *Governing the Balkan route: Macedonia, Serbia and the European Border Regime*).

[22] See C. Veigel, O. Koshevaliska, B. Tushevska, A. Nikodinovska Krstevska. "The 'Gazi Baba' Reception Center for Foreigners in Macedonia: migrants caught at the crossroad between hypocrisy and complying with the rule of law", *The International Journal of Human Rights*, 21, 2, 2016, p.103-119.

[23] *The former Yugoslav Republic of Macedonia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Refugees in the former Yugoslav Republic of Macedonia*, 2015. *The UNHCR – the UN Refugee Agency*, p. 10. <https://www.refworld.org/docid/55c9c70e4.html> (09/2019).

[24] *Criminal Procedure Code*, published in the Official gazette No. 150 on 18 November 2010, entered into force on 01.12.2013.

[25] *The former Yugoslav Republic of Macedonia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Refugees in the former Yugoslav Republic of Macedonia*, 2015. *The UNHCR – the UN Refugee Agency*, p. 3. < https://www.refworld.org/docid/55c9c70e4.html> (09/2019).

[26] Human Rights Watch, *As Though We Are Not Human Beings: Police Brutality against Migrants and Asylum Seekers in Macedonia*, September 2015, p. 47. Available from Human Rights Watch. The Macedonian Ministry of Interior has urged HRW to file a detailed report with the police so that the alleged reports of abuses could be investigated, raising questions as to whether the accusations would be treated as biased and unserious, see <http://english.republika.mk/interior-ministry-asks-human-rights-watch-for-help-in-dealing-with-allegations-raised-by-their-refugees-report/> (08/2018). Meanwhile, Macedonia's Sector on Internal Control and Professional Standards issued disciplinary sanctions against five police officers at Gazi Baba, including the discharge of one, and, despite statements by Macedonia's government to the contrary, there is evidence that Gazi Baba remains operational. Human Rights

International[27] and the Helsinki Committee for Human Rights of the Republic of North Macedonia have issued reports detailing the 'conditions of' and the 'reasons for' the detention at Gazi Baba. In general, the reports suggest that the refugees and migrants at Gazi Baba were arbitrarily detained and subjected to degrading treatment.

Despite these indictments, the Macedonian government claimed it was merely 'accommodating' the refugees and migrants in accordance with Macedonia's Law of Foreigners and the Reception Centre's *Rulebook for House Order* and that it had fully comply with its obligations under international and domestic law.[28] Concerning this it can be assumed that relevant Macedonian domestic laws were in compliance with international and regional human rights laws and obligations, however they were applied arbitrarily. According to the domestic legislation at that time anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful. Under very narrow circumstances witnesses can be deprived of their liberty under CPC.[29] As a part of its investigative power, the public prosecutor may summon persons who may provide evidence in connection with a criminal investigation.[30] It is important to note that imprisonment here refers to incarceration in a Macedonian prison, not "accommodation" in a "Reception Centre for Foreigners", and that victims who act as

Watch (2015), p. 66; *See* also the press statement of I. Kotevski, Public Relations for the Macedonian Ministry of Interior Affairs, <*http://alsat.mk/News/211854/disciplinski-vo-mvr-protiv-nasilstvoto-vrz-begalci last access on 13.11.2015*> (08/2019)*;* Interview with Mersiha Smailovic, Lawyer and General Secretary for LEGIS, on October, 2015. LEGIS is a non-governmental organization located in Skopje, Macedonia, <http://www.legis.mk/what-we-are/> (08/2019).

[27] *Europe's Borderlands Violations against Refugees and Migrants in Macedonia, Serbia and Hungary*, Amnesty International, July 2015, p. 6. Available from Amnesty International; Helsinki Committee for Human Rights of the Republic of Macedonia (MHC), Submission to United Nations Committee Against Torture, 54th session in Geneva, 20 April to 15 May 2015. Submitted: 6 April 2015.

[28] *Human Rights Watch* (2015), cit., p. 46.

[29] *Macedonia Code of Criminal Procedure*, Official Gazette No. 150/2010, unofficial translation. Available from <https://www.unodc.org/cld/document/mkd/1997/criminal_procedure_code_of_the_republic_of_macedonia_as_of_2010.html> (09/2019) (hereafter *CPC*).

[30] *CPC*, at Article 285 ph.1.

witnesses are subject to witness protection procedures, not incarceration or detention.[31] Under the CPC, witnesses are to be protected and treated with dignity and respect, not detention under the conditions found at Gazi Baba. Additionally, it is unlikely that the testimony of the witnesses could have been used at all given that their testimony was conditioned by force and threats.

The so called "immigration custody" continue to be a practice among the authorities in the next several years and to this very day,[32] even though there is no legal ground for deprivation of liberty to be a witness in a criminal procedure.[33]

With the amendments of the LATP on June the 16th 2015 starts the *second* period characterized by the legalization of transit through Macedonia, allowing migrants to register an intention to apply for asylum on the border points and to get a 72-hour travel permit for legal transit throughout the country.[34] Additionally, with this travel permit, migrants could legally use public or private transport and housing, and get free medical aid in state facilities.[35] With the amendment, the number of detainees in Gazi Baba decreased, probably because newcomers could legally travel through the country. Also, the Ministry

[31] *CPC*, at Articles 226-232; *See* also *Law for the Protection of Witnesses* (Official Gazette No. 38/2005 and 58/2005). See N. Matovski, G. Buzarovska-Lazetik, G. Kalajdziev, *Criminal procedure law,* Faculty of Law, Skopje, 2011, p.194-205, G. Buzarovska-Lazetik, G., Kaladziev, B. Misoski, D. Ilik, *Criminal procedure law*, Faculty of Law, Skopje, 2015, p. 144-146.

[32] See *Report on Immigration custody in North Macedonia for January to September 2019*, MYLA and UNHCR, and see Ombudsman of North Macedonia, *Special report on the conditions of the Shelter Centers for accommodation and detention on migrants and refugees*, available at <http://ombudsman.mk/upload/NPMdokumenti/Izvestai/Poseben%20izvestaj-januari-avgust%202019.pdf> (09/2019).

[33] See *Yearly Report on the efficiency of the protection on human rights in North Macedonia,* MYLA, 2016 available at <http://myla.org.mk/pub_categories/%d0%b1%d0%b8%d0%b1%d0%bb%d0%b8%d0%be%d-1%82%d0%b5%d0%ba%d0%b0/%d0%bf%d1%83%d0%b1%d0%bb%d0%b8%d0%ba%d0%b0%d1%86%d0%b8%d0%b8/%d0%b8%d0%b7%d0%b2%d0%b5%d1%88%d1%82%d0%b0%d0%b8/#> (09/2019).

[34] Article 16 of the Amended *LATP*, Official Gazette No.152/2015.

[35] Before legalizing the transit of migrants, humanitarian medical assistance was offered by local NGO's. However, it was hard to deliver due to the irregular and hidden nature of the transit through the country, in particular in the first half of 2015, Legis, *2015 Annual Report Legis*, Skopje, 2016.

of Interior and the Public Prosecution Office have also speeded their processing of refugees held in detention in order to serve as witnesses in criminal cases, as a result of which almost all asylum-seekers held in detention (some 350 individuals as of June 2015) have been referred to the open Vizbegovo RC.[36]

In accordance with the previous LATP, in force in that time, asylum-seekers could register an intention to apply for asylum at the border entry points, in which case the asylum-seeker is provided with a travel permit valid for 72 hours, for the purpose of travelling to a police station to formally register the asylum claim.[37] If already inside the country, the asylum-seeker must register his or her asylum application at the nearest police station. These amendments formalized in a way the transit through the country, allowing migrants to gain access to two transit centers situated on the south and north border of the country (Vinojug and Tabanovce). Here migrants were registered and they received different kind of assistance and medical help. In this period 477,876 migrants were registered at the border points or in transit centres. But still, the massive influx and the high number of daily arrivals that varied from 5000 to 10000 people,[38] brought the country to declare the state of emergency on 21 August 2015[39] and close temporarily its southern border. The closure of the border left stranded almost 4000 migrants on the Greek side that resulted in violent clashes between migrants and police. Three days later Macedonian authorities reconsidered opening the border again.[40]

With the state of emergency, the Army of the Republic took control over the management of the borders and the Center for Crisis Management (a special government body), was appointed to manage the

[36] See UNHCR Observations: *The former Yugoslav Republic of Macedonia as a Country of Asylum*, UNHCR, the Un Asylum Agency, August, 2015, p.16. UNHCR continues to advocate with the authorities for the Criminal Code to be amended in order to ensure that asylum-seekers are not detained if summoned to act as witnesses in court cases.

[37] Article 16 from the *Amendments to the Law on Asylum and Temporary Protection*, published in the Official Gazette of the Republic of Macedonia No. 101/15;

[38] Z. Drangovski, *Analytical report Lessons learned from the 2015-2016 migration situation in the Western Balkan region*, cit., p.5.

[39] S. Senada, S. Sabić, S. Borić, *At the Gate of Europe: A Report on Refugees on the Western Balkan Route*, Fridrich Ebert Stiftug, Zagreb, 2016, p. 6.

[40] B. Beznec, M. Speer, M. S. Mitrović, *Governing the Balkan route: Macedonia, Serbia and the European Border Regime,* cit*.,* p.19.

crisis. Not only that, but the country raised a wired fence along the border with Greece on which, the state authorities together with foreign police officers (mostly from the Visegràd countries but also other states), conduct border control activities in order to prevent smuggling of migrants.[41] In the meantime the Western Balkan states and the leaders of the EU in November 2015 held a meeting where they drafted a 17-point Action Plan, after which the country introduced restrictive admission policy for migrants. In base of that only Syrian, Iraqi and Afghan migrants were permitted to enter the border, whilst migrants coming from other countries were denied entrance. Soon these restrictive measures were extended also to migrants coming from Afghanistan.[42]

Finally, the *third* period was characterized with the closing of the Balkan route and return to illegality. The agreement between the EU and Turkey which foresaw a special arrangement for tackling the crisis, affected also North Macedonia, and consequently the country closed its borders on March 8, 2016. The same day of the closure of the border, the Government abolished the 72-hour rule for transiting the country and started to apply the previous provisions that did not allow free movement of migrants through the country at all, except in case of application for asylum. In addition, it introduced the new safe third country clause whereby all neighbouring countries were to be considered as safe countries.[43] In base of this clause and in base of the readmission agreements that the country has signed with neighbouring states, North Macedonia could legally proceed towards deportation of migrants to the country of their first entry.[44] Besides the regular deportation of migrants which was practiced by the authorities, non-governmental organizations have observed that also illegal push-backs were taking place.[45] However, in spite of these restrictions migrants continued to illegally cross the border, turning to smugglers and traffickers in order to follow their journey to the EU.

[41] T. Stojanovski, *Prava na begalcite, migrantite I baratelite na azil vo Republika Makedonija*, cit., p. 5-6.

[42] *Annual Report of Legis* 2016, cit., p. 6-8.

[43] This was introduced in article 10-1 that foresees that states coming from the EU, EFTA and NATO were to be considered as safe countries.

[44] B. Beznec, M.Speer, M. S. Mitrović, *Governing the Balkan route: Macedonia, Serbia and the European Border Regime,* cit., p. 24.

[45] *Annual Report of Legis* 2016, cit. p. 24-6; *Annual Report of Legis*, 2018, cit., p. 15-17.

3.2.The renewed legislation for asylum – 2018 and ongoing

The EU integration process is a clear and unambiguous strategic interest and priority for Macedonia. One of the basic requirements for the integration is the harmonization of the national legislation with the EU legislation. Since the national legislation concerning asylum reported to have many gaps for which it failed to meet the challenges from the migration crisis, the latter needed to be changed. Therefore, a new Law for International and Temporary protection was passed in April 2018 (hereafter LITP).[46] This Law is a successor of the Law for asylum and temporary protection. The first purpose of this law was to harmonize the Macedonian legislative with the relevant EU concerning asylum and temporary protection. This law is in full consistency with several Directives of the EU Parliament and the Council:

1. The Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted;
2. The Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection;
3. The Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection;
4. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

The LITP regulates the terms and the procedure for obtaining the right to international protection (right of asylum), as well as cessation, abolishment and annulment of the right of asylum of a foreign national or a stateless person (foreign national), as well as the rights and duties of asylum seekers and persons to whom the right of asylum has been recognized in the Republic of North Macedonia. This Law also regulates the conditions under which the country may give temporary

[46] *Law for International and temporary protection*, Official Gazette No. 64/2018.

protection, as well as the rights and duties of persons under temporary protection.

The LITP overcomes the concerns that have risen from its predecessor as a result of the disputed legal solutions concerning the right of family reunion and the access to efficient asylum procedure. For the first time, the law encompasses and recognizes "sexual orientation", as the basis for persecution and for seeking asylum in Macedonia. Namely, in Article 7, paragraph 5 of the new law,[47] for the first time, sexual orientation and gender identity have been indicated as characteristics of a particular social group that could face persecution and would have the possibility to seek international protection. In the same paragraph, it is noted that sexual orientation is not considered a punishable offense and that gender and gender identity will be taken into account when determining the belonging to a particular social group. Bearing in mind that very few laws in Macedonian legislation explicitly mention sexual orientation and gender identity as grounds for protection, the introduction of this change in the law can be considered a major step.

However, the NGO's,[48] the civil society and relevant institutions,[49] turn the red alert about one of the major changes introduced by the new law, and that is the possibility of restricting the freedom of movement of asylum seekers. According to the new measure, asylum seekers in the Republic of North Macedonia who are currently undergoing through the asylum procedure, in certain cases provided by law, may be restricted by a decision of the Ministry of Interior. Namely, Article 63 stipulates that, in exceptional cases, "the freedom of movement may be restricted in order to establish the identity and citizenship, to establish the facts and circumstances of the asylum application, especially if it is

[47] In accordance with the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095> (09/2019).

[48] See *Commentary of the Young Lawyer Association on the new Law for international and temporary protection, MYLA, 2019,* available at <www.myla.org.mk> (09/2019).

[49] See UNHCR, *Commentary on the LITP of North Macedonia*, available at: <https://www.refworld.org/cgibin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b066b354> (02/2019).

established that there is a flight risk, for protection of the public order and national security, or when a foreigner is detained in order to prepare for a return or removal procedure." The exceptional cases of restriction on freedom of movement defined in such a way may lead to arbitrary deprivation of liberty in several respects, particularly when considering the assessment of the flight risk as a condition for restricting freedom of movement. Considering the larger wave of refugees in the past three years, the use of the possibility of restricting the freedom of movement of asylum seekers can cause significant burdens on the state in terms of the capacities of the reception centers for asylum seekers and foreigners. This would lead to a greater and more serious violation of their fundamental human rights and freedoms, especially the absolute prohibition of torture, depriving and degrading treatment, which, as demonstrated by the experience, is not inevitable. Moreover, the Law provides for the initial possibility of limiting freedom for a maximum of three months, with the possibility of extension for another three months.[50] In addition, the procedure for detaining an asylum seeker is unspecific and problematic, especially considering that the decision is not passed by a competent court, but by the Ministry of Interior, thus challenging the constitutionality of this law.

Although this new legal possibility is in line with European law, especially the Directive 2013/33/EU, still there are no guarantees for the rights of asylum seekers in these cases as regards the duration and conditions of restriction of freedom of movement, especially in cases regarding children, families and women asylum seekers. The Helsinki Committee in North Macedonia also stresses that there are few terminological misunderstandings, probably due to bad translation, but these misunderstandings could generate future problems and leave space for arbitrary decisions.[51]

4. Conclusion

The conclusions that can be drawn from this paper is that Macedonia's asylum and migration policy system demonstrated that it

[50] Articles 64 and 65 of the LITP.

[51] See *Opinion of the Helsinki Committee on the Law for international and temporary protection*, available at <https://meta.mk/helsinshki-komitet-noviot-zakon-za-azil-ima-nedostatotsi-vo-primenata-na-eu-direktivite/> (09/2019).

has loopholes and shortcomings which have emerged throughout the various refugee crisis that have stroke the country over the years. The migration crisis from 2015/2016 revealed that the country was not in the position to cope with such an outnumbered migration influx and that it had to proceed towards adopting legislative changes. This has proven to be quite a difficult task. However, having in mind that the country is in the process of European integration, steadily the country had strengthened its asylum system and it harmonized the national legislation with the EU acquis but also with international standards in matter of asylum and migration. However, North Macedonia still has not proceeded towards ensuring that asylum-seekers have access to a fair and efficient asylum procedure. This is reflected, amongst others, by the fact that the North Macedonia has not yet put in place sensitive screening mechanisms at the border in order to identify those who may need protection and to refer the individuals concerned to appropriate procedures. But still, this shortcoming represents an issue that should be tackled on a European or on a global level.

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MIGRATION AND ASYLUM POLICY SYSTEMS FROM A MALTESE POINT OF VIEW

TONIO BORG*

Coming from the University of a country which is in the geometrical centre of the Mediterranean, the southernmost and smallest sovereign state of the European Union, the problem of migration, mostly irregular, has exhibited certain traits ever since it started constituting a problem for the Maltese Islands since 2002[1].

First of all, for Malta, but also for Italy, the problem of irregular migration equals Libya. A quick look at the map of the Mediterranean shows that the closest route to reach Lampedusa, Malta and Sicily is to depart from two Libyan ports one on each side of Tripoli: Zitana and Zouara; a veritable *suq* market of illegal migration exists; prices vary according to the weather, chance of success, availability of sea vessels, and other general circumstances. This is indeed an irregular business netting an average of $500 per person carried, a real business of human trafficking for migration purposes. The Libyan authorities pre- and post – revolution have always taken the stand that once a migrant leaves Libya's shores it is not Libya's responsibility any more – even because all migrants leaving Libyan shores are not Libyans but mostly nationals of sub-Saharan countries. For the Libyan authorities migrants leaving Libya are a problem less. The only time they really tried to control the problem – a proof therefore that this is possible – was when the Italian Government of Berlusconi signed the multi-billion euro treaty and deal with the Gaddafi Government in Benghazi. Immediately from thousands of arrivals, the numbers were reduced to a few hundreds. Proof that the problem can be controlled.

I am stating these facts from a vantage point; since I am an academician but also was Minister responsible for amongst other things Migration between 1998-2008. One of the utopian dreams which every now and then features in the conclusions of the European Council or European Institutions, is the call for he setting up of an asylum centre in Libya which would sift asylum applications and then

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the selected few will be granted access to Europe without the need of crossing the Central Mediterranean sea in unseaworthy vessels.

Sounds nice; but the proposal is a non-starter, and has been proven to be so. What interest can Libya have in creating an attractive catchment area within its own territory, constituting a veritable Gate to Europe! This would attract hundreds of thousands of migrants and refugees from its Southern borders. Libya has not signed or ratified the Geneva Convention on Refugees of 1951. Why should it? It would then become a country of first asylum and would have no reason or justification to expel or allow migrants to proceed North once they acquire a protected status in Libya. Besides, even if the utopian idea of a European Centre for Asylum in Libya were to be set up, there would be still nothing to stop rejected asylums seekers from seeking to reach European Shores. I would like to apologize for sounding so pessimistic this morning but it is a sheer waste of time to continue considering this proposal.

So what other alternatives are there? In recent times both Italy and Malta have refused to be the frontier guards of Europe absorbing migrants, shackled by a Dublin Convention which sends back migrants to the first country of asylum where they landed. For what incentive do the southern Mediterranean states have in controlling the migration problem when the latter is treated as an Italian or Maltese problem rather than a European one?

Burden-sharing for a long time was rejected by most EU member states. The reasons for so doing are interesting. One country stated that it has no experience of the migration problem. Others submitted that were a burden sharing agreement to be established, this would attract even more migrants to Europe. All pretexts to justify doing nothing. When the littoral states of the South could take it no longer and the problems started spreading throughout Europe particularly in the North, all of a sudden one discovered the utility of sharing the burden. But even the modest, attempts at distributing migrants landing in the South have either have met stiff resistance form Eastern European states, or else depend on *ad hoc* arrangements each time a rescue ship is not allowed to enter EU territorial waters .

The meeting which will take place in Malta led by Germany France and Italy may led to a more permanent structure of migrants' distribution.

I must state that I am against this hard-line approach. But I

understand it. The populist but convincing argument that while Dutch and German – registered ships save migrants at sea, then they shift responsibility to receive them to the littoral states, is not only populist. What purpose is there for the Southern EU states to participate in rescue missions to aggravate their own problem once there is no burden sharing arrangement beforehand?

The problem is further aggravated by the question of repatriation of rejected asylum seekers. The populist argument is: send them back! But how do you send back people arriving at sea in rickety unseaworthy sea vessels! Do you send them back at sea, risking their lives? Repatriation is rendered very difficult because of the blatant non-co operation of the countries of origin. Even repatriation to moderate states such as Morocco or Algeria sometimes presents difficulties. You can imagine the resistance when it comes to Sudan, Ethiopia or Eritrea. The problem is not the lack of provision of aircraft but the lack of travel documents to send back rejected asylum seekers, and non-co operation of states of origin. Coupled with the non-cooperation of Libya as a state of transit, the problem becomes serious and apparently insurmountable.

A solution could be that when the EU signs co-operation agreements regarding development (not humanitarian) it could attach a condition to the effect that the country receiving development aid, must accept back its own nationals on the basis of a travel document issued by the EU which will be accepted by such country. This principle is after all enshrined in the Cotonou Agreement signed in 2000 between EU and ACP amongst others which states in article 13(5) that:

> The Parties agree that: each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities.
>
> The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes

Pacta sunt servanda. If they receive money for development purposes, there is a price to pay. As to *humanitarian* aid, this should not have any conditions attached to it.

I pass on now to examine the situation of asylum policy today in

the EU as described in the 2018 EASO report. By the way the Asylum Support Office was established in Valletta in 2009 and amongst its functions there is that of assisting member states in managing asylum polices.

On 4 May 2016, the Commission presented a first package of reform proposals, including: a reform of the Dublin System to better allocate asylum applications among EU+ countries; steps toward reinforcing the *Eurodac* regulation, including to increase the efficiency of the EU fingerprint database for asylum seekers; and the strengthening of the mandate of the European Asylum Support Office toward a fully-fledged agency for asylum.

This was followed, on 13 July 2016, by a second package of proposals to reform the Common European Asylum System CEAS, which included: replacing the Asylum Procedures Directive with a regulation, directly applicable in the national asylum systems, to harmonize asylum procedures across EU+ countries and achieve convergence in recognition rates; replacing the Qualification Directive with a regulation, directly applicable in the national asylum systems to harmonize protection standards and rights for asylum seekers; and reforming the Reception Conditions Directive to ensure that applicants for international protection benefit from harmonized and dignified reception standards and prevent secondary movements and abuse.

Finally, as part of this ongoing round of proposals toward reforming the CEAS, the *Commission put forth a proposal for the establishment of a permanent EU resettlement framework* to replace existing *ad hoc* resettlement schemes. The Union Resettlement Framework Regulation will provide for legal and safe pathways to the E.U., complementing ongoing resettlement and humanitarian admission initiatives in the E.U. framework and contributing to international resettlement initiatives. It will also assist in relieving pressure for countries hosting large numbers of people in need of international protection, while reducing the risk of irregular arrivals.

These proposals have not been concluded owing to the controversy relating to changing the amendment of the Dublin Regulation. This lack of progress is granting governments the pretext of adopting populist attitudes and measures, such as closing territorial waters and ports, thus preventing even genuine asylum claims from being made on EU territory.

In March 2016, EU Heads of State or Government and Turkey

agreed on the EU–Turkey Statement with a three-fold aim: a) to end irregular migration flows from Turkey to the EU; b) to enhance reception conditions for refugees in Turkey; and c) to offer safe and legal paths for Syrian refugees from Turkey to the EU. To achieve these ends, the Statement included, *inter alia,* an agreement that all new irregular migrants crossing from Turkey into the Greek islands, as from 20 March 2016, would be returned to Turkey, and a resettlement scheme would be implemented. According to this scheme for every Syrian returned to Turkey from the Greek islands another Syrian would be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.

A similar Statement should be adopted in relation to the Central Mediterranean with agreements with the North Africa littoral states, at least with those which have stable governments and where there is no danger of *refoulement*. Of course, these States do not form a homogenous entity. But gradually starting from Libya one could begin to negotiate. There is no other alternative for EU countries affected by the central Mediterranean flows, however difficult it is to negotiate with a Government in Libya which does not have complete control over its entire national territory. Progress in this direction can perhaps be more easily achieved with Tunisia which, although not free from internal trouble, is in a better position to strike a deal with.

The 2018 European Asylum Support Office EASO Report states that:

> The disembarkation of migrants and refugees rescued at sea in the Mediterranean became an issue of debate in 2018, underlining the need for the development of a more systematic and coordinated EU approach on disembarkation. In January 2019, the need to find a solution in the rescue of the vessel Sea Watch 3 instigated a first practical effort of coordination between the European Commission, a number of Member States, and relevant agencies. This practical experience stood as a testament to a willingness to work toward a more effective, systematic EU framework for cooperation in the areas of disembarkation, first reception, registration and relocation. This may take the form of temporary arrangements, which could serve as a bridge solution until the new Dublin Regulation becomes applicable. Temporary arrangements could be developed in a transparent step-by-step work plan, based on a mutual understanding of shared interests, which would ensure the delivery of operational and effective

assistance from the Commission, EU agencies, and other Member States to the Member State concerned.

The core elements of these temporary arrangements could include:

(a) a request by a Member State, which has found itself under pressure or in need of immediate assistance regarding disembarkation after a search and rescue operation.

(b) identification of specific solidarity measures by other Member States, in response to the request. Solidarity measures provided by other Member States need to be balanced by responsibility measures taken by the Member State receiving the support indicating that it has taken the appropriate steps for the management of arrivals.

(c) putting in place a coordination mechanism for following up on such requests, involving key stakeholders, such as the Commission and relevant EU agencies.

(d) EU agencies are prepared and well equipped to provide their assistance in the process.

(e) financial support will be made available from the EU budget for Member States volunteering to relocate migrants, for return operations, and for the Member State under pressure".

The pressure and burdens brought about by recent migration trends in Italy, Malta and Greece, as well as Cyprus, are significant. In 2017, 176,452 irregular migrants had arrived in Europe by land and sea, almost all of them travelling along the Central route[2]. Irregular arrivals to Greece by land and sea surpassed 900,000 in 2015, eleven times higher than in 2014.

IOM, the UN Migration Agency, reports that 67,122 migrants and refugees entered Europe by sea in 2018 through 26 August, with 27,994 to Spain, the leading destination that year.

[2] For the most up to date figures, see https://migration.iom.int/europe?type=arrivals (10/20).

The following figures cover two weeks: last week of July 2019 and the first week of August 2019.

Country	Arrivals Previous week 25 Jul - 31 Jul	Current week 01 Aug - 07 Aug	Percentage Change
Cyprus	122	129	5%
Greece	1,210	849	-29%
Italy	328	175	-46%
Malta	140	40	-71%
Spain	1,143	650	-43%
Total first arrival countries*	**2,943**	**1,843**	**-37%**
Registered Migrants in Other countries*			

A conservative estimate is that in 2017 over 3000 migrants died in the Mediterranean trying to cross over. Of course, these figures are not technically complete since it is difficult to keep record of such facts.

Conclusion

To expect the littoral states to carry the burden alone is an illusion. In fact owing to the Schengen system, it is not that difficult for irregular migrants to move within the Schengen area especially where there are only land and not sea borders.

So unless there is a proper system of solidarity in emergencies- which now we have started rather belatedly and perhaps haphazardly to adopt – the burden sharing will be forced on EU states in a disorganized manner.

This should not be allowed to happen. Asylum policies of course are aimed at protection of the rights of protected persons; but they should take into account the pressures, in material terms of migratory flows and the pressure of public opinion exerted on the littoral Mediterranean States. Living in a utopia of rights without recognizing

the duties of all EU members states to contribute to a solution, will only lead to an increase in vote-catching popular and populist moves and measures by the countries affected.

PART II

Migration and Asylum Policies Systems:
challenges and perspectives
under European law and jurisprudence

FUNDAMENTAL RIGHTS OF REFUGEES/MIGRANTS DURING MIGRATION INFLUX

MILICA ŠUTOVA*, ALEKSANDAR DIMOVSKI**

1. Introduction

To be prepared for what may come is to be aware what the world undergoes changes and challenges. These days one of the biggest challenges in the world is migration. People have been migrating since the beginning of history and the issues, causes and reasons vary according to what is happening in the world, in the past as in the present. Migration itself is a natural part of human existence; it is neither a crime nor a problem. [1] We are witnessing today an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born. Migrants are present in all countries in the world. In 2015, their number surpassed 244 million, growing at a rate faster than the world's population. However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.[2] On 19 September 2016 the UN General Assembly in its New York Declaration for Refugees and Migrants summed up the global phenomenon of migration, stating that

Since earliest times, humanity has been on the move. Some people move

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[1] Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on agenda for facilitating human mobility*, Thirty-fifth session, 6- 2035, 23 June 2017, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

[2] Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility,* Thirty-fifth session, 23 June 2017, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many migrants move, indeed, for a combination of these reasons.

The latter category was forced to move as a result of persecution, conflict, violence or human rights violations.[3]

According to the United Nations Department of Economic and Social Affairs/Population Division, in 2017 the migrant population worldwide peaked at 257.7 million. Asia and Europe combined hosted over 60 per cent of all international migrants worldwide in 2017, with nearly 80 million international migrants living in Asia and 78 million in Europe.[4]

The Organisation for Security and Cooperation in Europe stated that migration itself is caused by:

Widespread unemployment and a lack of viable economic opportunities leave countless numbers of people without jobs or sustainable livelihoods. At the same time, a growing demand for cheap labour, combined with often pervasive corrupt practices, have led to an increasing tolerance towards the exploitation of economically vulnerable people in dangerous and degrading work in the OSCE region. This demand, against the backdrop of the evolving crises, contributes to migration flows, thereby heightening the vulnerability of the affected populations, providing new, lucrative opportunities for criminal networks and ensuring an unbroken cycle of exploitation.[5]

If we consider the numbers and put the accent on the statistics referring to the period when the world witnessed the biggest mixed migration flow in recent history we can say that:

In 2015, the number of people applying for asylum in the EU peaked at

[3] UNHCR, *Global Trends: Forced Displacement in 2015*, 2016.

[4] United Nations Department of Economic and Social Affairs/Population Division, *International Migration Report 2017*, pp. 2-3.

[5] Organization for Security and Cooperation in Europe, *From Reception to Recognition: Identifying and Protecting Human Trafficking Victims in Mixed Migration Flows: A Focus on First Identification and Reception Facilities for Refugees and Migrants in the OSCE Region*, p.15.

1.26 million, while in total in 2015 and 2016 alone, more than 2.5 million people applied for asylum in the EU. Authorities in the member states issued 593,000 first instance asylum decisions in 2015 - over half of them positive. Most people who applied for protection at the height of the refugee crisis in 2015 had to wait until 2016 to receive their ruling. That year 1.1 million asylum decisions were made. 61% of those were positive with one third of applicants granted refugee status, the highest level of international protection.[6]

In 2016, 388,000 people were denied entry at the EU's external borders. According to the Frontex data in 2015 and 2016, more than 2.3 million irregular crossings of the EU's external borders were registered by national authorities.[7]

In such circumstances, it is also crucial to recognise that while human smuggling and trafficking in human beings are distinct concepts, they overlap significantly in practice. When refugees and migrants are forced to use smugglers to take irregular, covert and more expensive routes to reach their destinations, they are simultaneously exposed to higher risks of exploitation, which can result in situations of trafficking.[8]

Along the Central Mediterranean route alone, considered to be the deadliest known route according to the IOM, between January 2014-July 2017 more than 14,500 deaths were recorded. During 2017, 1 in 36 migrants attempting to cross the Central Mediterranean route perished. This is a significant increase compared to 2016 when 1 in 88 was reported missing or dead.[9] UNHCR estimates that there are over half a million stateless persons in Europe, including a large group are migrants originating from both European and non-European

[6] European Parliament, *EU migrant crisis: facts and figures,* 30 June 2017, available at <http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures>(06/20).

[7] Ibid.

[8] Mixed Migration Platform, *Trafficking in mixed migration flows. Exploitation of refugees and other migrants in the Middle East and Europe*, briefing paper no. 4., 2017, p.1.

[9] IOM Missing Persons Project, data available at <https://missingmigrants.iom.int/sites/default/files/c-med-fatalities-briefing-july-2017.pdf> (06/20).

countries. From their collected data and evidence, we can conclude that amongst the incoming flow of migrants and refugees, some of them are stateless. As such, they should be identified and protected, and most of the migrants/refugees registered, the majority originating from countries with known stateless populations (Syria, Iraq, Kuwait, Eritrea, Afghanistan, etc.). In addition, the influx includes Palestinians, who are recorded as stateless in some EU Member States.

Migration can be both a cause and a consequence of statelessness. Migration involves a risk of statelessness when migrants break their bond with their countries of origin. These persons can lose their records or proof of nationality or their country of origin may withdraw their nationality because they went abroad. Because these persons are deprived of their fundamental rights and are marginalised in their own countries, they may begin a search for a new life, new opportunities and their movement becomes a reason for migration. According to the European Commission, the number of children migrating to the European Union, many of whom are unaccompanied, has also increased dramatically over the past few years. In 2015 and 2016, around thirty per cent of asylum applicants in the European Union were children, and there has been a six-fold increase in the total number of child asylum applicants in the past six years.[10] Based on the data of UNHCR, UNICEF and IOM, over a fifth of the nearly 800,000 children who applied for asylum in Europe in 2015 and 2016 were considered unaccompanied.[11]

Whatever the reasons may be for an individual, a family or group of people to migrate, they all share to a lesser or greater extent the same experience of embarking on an unfamiliar and at times dangerous journey. Both adults and children, men and women, may be asylum seekers, victims of trafficking, or undocumented migrants or they may even fall under all these categories at the same time. The immigration status for people on the move may also differ at various stages on their journey through the various countries. Those migrants

[10] European Commission, Communication from the Commission to the European parliament and the Council, *The protection of children in migration*, Brussels, 12.4.2017, COM (2017) 211 final).

[11] UNICEF, IOM, UNHCR, *Refugee and Migrant Children in Europe, Accompanied, Unaccompanied and Separated*, Quarterly Overview of Trends, January-March 2017.

may encounter many different situations of vulnerability.[12] In addition, as a result of gender norms, roles and relations, men and women are exposed to different types of risk and vulnerability during the forced migration. Due to their status in society and their sex, women and girls are particularly vulnerable to discrimination and sexual and gender-based violence – which may in itself be grounds for flight – and have other specific protection risks.[13] Undocumented migrants have limited access to their rights and are vulnerable to abuse and slavery, and are always on the move for fear of detection. In many cases, people are reluctant to be sent back because they have such a fear of persecution or risk of harm in returning to their place of origin that they will risk their lives and undergo severe adversity, rather than return to their country of origin.

States, on the other hand, have a vested interest in controlling migration, but people's motivations can change as migratory routes are advancing, and refugees/migrants can assume different categories of illegality/legality as they move from their country of origin to the destination country, even if they decide to return to their own country.

As fundamental rights are closely connected with migration and migration is mostly handled by border guard authorities in every state, we can say that fundamental rights are the most important in terms of border control, not just because border guards are the first to establish contact with refugees/migrants in mixed migration flows, but because they are the first ones to either respect or violate fundamental rights. Taking into consideration that border control has several stages/procedures, we can divide them into first line and second line stages/procedures. If we are talking about border crossing points, passport control/profiling is a first line procedure and every border guard action performed after the passport control is a second line procedure. But when we are talking in the context of today's migration border guard actions mainly begin at the "green line" of the border and as a first line control we can consider detection and interception

[12] For example, see the Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on agenda for facilitating human mobility,* Thirty-fifth session, 6- 2035, 23 June 2017, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

[13] European Parliament, *Gender aspects of migration and asylum in the EU: An overview*, briefing, the European Parliamentary Research Service, 2016, p.3.

as border guard activities. The second line border activities are screening (nationality assumption), reception, registration, debriefing and return. Depending on the situation in the area of mixed migration (land border, sea border) some of the border guard activities can be carried out together (screening and reception, reception and registration, etc.). All these border activities are closely connected to respect of fundamental rights, but there are also situations where some of the fundamental rights can be breached. At this time, we will focus on the registration procedure, what it is, what is required to register persons in full compliance with fundamental rights and which rights in EU Charter of Fundamental Rights apply to the procedure for registering refugees/migrants.

2. Registration

Every country has a special unit or organization that is part of the national authority responsible for registering any undocumented person (refugee/migrant) intercepted in an illegal border crossing or staying illegally in the territory of the country, as well as all persons applying for international protection. During the process of registration, it is a generally accepted rule for all countries to take the fingerprints of all fingers of the above mentioned category of refugees/migrants who are at least 14 years of age. These prints are then stored in the EURODAC database for EU Member States and in national data bases for the other countries, to allow for computerized exchange of fingerprints solely in order to identify applicants already registered in other EU Member State and to see whether the individual person may fall under the scope of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

The Dublin III Regulation, which is mostly used in EU member states, contains sound procedures for the protection of asylum applicants and improves the system's efficiency through:

- an early warning, preparedness and crisis management mechanism, geared to addressing the dysfunctional causes of national

asylum systems or problems stemming from particular pressures;

- a series of provisions on the protection of applicants, such as compulsory personal interview, guarantees for minors (including a detailed description of the factors that should lay at the basis of assessing a child's best interests) and extended possibilities of reunifying them with relatives;
- the possibility for appeals to suspend the execution of the transfer for the period when the appeal is judged, together with the guarantee of the right for a person to remain on the territory pending the decision of a court on the suspension of the transfer pending the appeal;
- an obligation to ensure legal assistance free of charge upon request;
- a single ground for detention in case of risk of absconding; a strict limitation of the duration of detention.
- the possibility for asylum seekers that could in some cases be considered irregular migrants and returned under the Return Directive, to be treated under the Dublin procedure - thus giving these persons more protection than the Return Directive;
- an obligation to guarantee the right to appeal against transfer decision;
- more legal clarity of procedures between the Member States - e.g. exhaustive and clearer deadlines. The entire Dublin procedure cannot last longer than 11 months to take charge of a person, or 9 months to take him/her back (except for absconding or where the person is imprisoned).[14]

Eurodac Regulations indicate specially designated authorities of EU Member States responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences, who have access to the Eurodac database. However, they also state that the database cannot be used by the national authorities to support persecution. The most important aspect is that in the process of registration and fingerprinting the border control authorities should respect and safeguard EU and international legislation on human rights, e.g. ECHR and the EU Charter of Fundamental Rights. The European Union is aware that, in order to have better control on the

[14] Country responsible for asylum application (Dublin), available at <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en>. (06/20).

migration routes, it must cooperate with the third countries along the migration routes, for example the Balkan route, so it could best manage and control the movement of refugees/migrants during their transit to destination counties. The EU has been signing agreements with third countries for the purpose of developing reasonable solutions so that these countries could have access to the EURODAC system or at least share the data base of applicants for international protection and/or persons who have committed serious offences in the third countries that are part of the migration route.

In order to ensure a registration process complies fully with fundamental rights and is conducted without breach or violation of the rights of migrants or refugees, all border control authorities should prepare the process of registration (including fingerprinting) in full respect of the fundamental rights of the persons undergoing this process. The registration process in every country must be conducted promptly upon interception or arrival of the refugees/migrants and in full compliance with the EURODAC Regulation (EU member states) or national law (third countries). However, if such is not possible due to the lack of trained staff or proper equipment, the initial registration should, at the very least, be performed by the border guards.

All countries should have appropriate facilities where this process of registration can be accomplished in compliance with human rights requirements. The facilities where the process takes place must ensure that waiting and registration areas can accommodate the necessary equipment, border guards and refugees/migrants to be registered. Whenever a disabled persons or vulnerable group come along, their special needs should be taken into consideration. Depending on the numbers and categories of person registered, proper registration and fingerprinting equipment, which can ensure efficient registration, should be present. All border guards tasked with performing the registration must to know how to use that registration and fingerprinting equipment in respect of the fundamental rights of the persons registered.

Concerning the respect of fundamental rights of refugees/migrants according to the Charter of Fundamental Rights of the European Union, which is the legal cornerstone for respect and protection of fundamental rights within the EU, we will now examine the various rights of migrants/refugees that are most likely to be breached during the process of registration.

2.1. *Right to human dignity*

The process of registration consists in fingerprinting and collecting personal data from the refugees/migrants. During registration border guards need to take into consideration the sensitivity of migrants as regards age, gender and cultures, and they should also always respect the dignity of all persons being registered.

Article 1 of the EU Charter of Fundamental Rights states that "Human dignity is inviolable.[15] It must be respected and protected". Informing refugees/migrants on the registration process and the different procedures, but also on their rights, obligations and consequences in case they do not comply, represents an outcome of respecting human dignity at any stage of the registration process.

During the registration process the border guards should have a cultural awareness of the persons with whom they are dealing and awareness of the condition of persons who may be suffering a possible trauma, or fear of the authorities. It is highly desirable to have cultural mediators/interpreters present who can ease possible cultural and language barriers. Because of different religious and cultural backgrounds, it is recommended to always have a female border guard present constantly on every shift in order to avoid possible biases. Also, if there are no interpreters or members of non-police services who generally help to explain the fingerprinting procedure, then there should be leaflets written in their language in order for the migrants/refugees to become acquainted with the procedure. If they still refuse to cooperate, then border guards should apply legitimate coercive measures, with full respect of the integrity and dignity of the person. But, in the case of a vulnerable person, the border guards should apply the coercive measures only in exceptional cases. According to the FRA focus paper "Fundamental rights implications of the obligation to provide fingerprints for Eurodac"[16] before using coercive measures as a last resort, persons need to be provided with an effective opportunity to comply voluntarily with the fingerprinting requirements, including by asking them to appear for fingerprinting a second time. All persons who are properly informed and continue not

[15] <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> (06/20).

[16] The EU Fundamental Rights Agency focus paper, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac,* October 2014.

to cooperate and refuse to give their fingerprints, should be counselled with a view to addressing their fears and expectations. If there is a possibility to temporally postpone the fingerprinting, then it is advisable to explain once again the reasons for fingerprinting, relying on specialized agency personnel who are trained to give assistance to vulnerable persons.

2.2. *Prohibition of torture and inhuman or degrading treatment or punishment*

No one shall be subjected to torture or to inhuman or degrading treatment or punishment. [17] In the process of registration of refugees/migrants, in cases where the legal coercive measures as a last resort are applied because of non-cooperation of the person, none of the measures taken should expose the refugee/migrant to torture or other inhuman treatment.

As mentioned in the FRA publication "Fundamental rights implications of the obligation to provide fingerprints for Eurodac", the use of force that does not inflict inhuman or degrading treatment or punishment. However, it still raises some fundamental rights concerns, particularly as regards to Article 3 of EU Charter of Fundamental Rights, relative to the right of everyone to respect his or her physical and mental integrity. When force is used to compel a person to do something, the circumstances of each individual case must be assessed to determine whether the use of force was necessary and proportionate, and would thus constitute lawful interference in light of the standards set forth in Article 52 (1) of the EU Charter of Fundamental Rights.

In the above-mentioned FRA publication, it is recommended that before resorting to coercive measures, a person must always be provided with an opportunity to agree voluntarily with the fingerprinting requirements. That is why giving proper information about the procedure and its consequences is an important step of this process and having and using interpreters or other non-police personnel to explain the necessity of fingerprinting to the refugees/migrants is highly recommended.

[17] Article 4 of the of the Charter of the fundamental rights of the European Union.

2.3. *Principle of non-discrimination*

Any discrimination based on any grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.[18]

Mixed migration flows can be a big challenge with regard to the principle of non-discrimination. Tensions between different ethnic or religious groups among refugees/migrants occur, as witnessed by border guards since the very beginning of the registration process. In these cases, it is crucial not to abet or take sides with a specific group, but rather to be impartial and implement equal treatment for everyone. All measures taken in this process should follow the principle of non-discrimination in a way that no person or group of persons is subject to discrimination. When we speak of non-discrimination, prioritising vulnerable groups of refugees/migrants is not considered to be discriminatory because of their sensitivity profile.

2.4. *Right to personal data protection*

Everyone has the right to the protection of personal data. Such data must be processed fairly for specified purposes and based on the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.[19]

As mentioned earlier, the registration process consists of two main parts, and the second part is collection of personal data. All personal data collected and stored must be used in full compliance with the EURODAC or national rules. We should always bear in mind that all personal data must be protected from unauthorized access, even in cases when they are stored only in national databases.

[18] Article 21 of the of the Charter of the fundamental rights of the European Union.

[19] Ibid.., Article 8.

It should be noted that Article 35 relating to "Prohibition of transfers of data to third countries, international organisations or private entities" stipulates detailed rules regarding data transfer to third countries:

- personal data obtained by a Member State or Europol pursuant to this Regulation from the Central System shall not be transferred or made available to any third country, international organisation or private entity established in or outside the Union. This prohibition shall also apply if those data are further processed at the national level or between Member States within the meaning of Article 2(b) of Framework Decision 2008/977/JHA. Since 6 May 2018 EU Member States should apply new legislation, which transposed the provision of the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA], and rendered invalid the previous legislation, which was based on the above-mentioned Framework Decision.
- Personal data which originated in an EU Member State and are exchanged between Member States following a hit in the EURODAC system, obtained for the purposes laid down in Article 1(2) of the EURODAC regulation, shall not be transferred to third countries if there is a serious risk that as a result of such transfer the data subject may be subjected to torture, inhuman and degrading treatment or punishment or any other violation of his or her fundamental rights.
- The above-mentioned prohibition to transfer shall be without prejudice to the right of EU Member States to transfer such data to third countries to which Regulation (EU) No 604/2013 [Dublin III Regulation] applies.

Collective registration of refugees/migrants should be avoided, because it is unreliable and impractical. This kind of collection compromises confidence in the process, and if a member of a family wishes to be registered individually, his wishes should be respected. If it is intended to protect personal data from unauthorised access, the process should be organised in a way that one person, or one family, is

registered at one time at one registration point. The border control authorities in every country should ensure that all collected personal data is stored for no longer than allowed by the EU and/or relevant national legislation.

2.4.1 Rights of vulnerable groups

We must differentiate between vulnerable groups of persons mentioned in the il Cambridge Dictionary lo da "above-mentioned" ECER articles and persons who are in vulnerable situations usually found in the interception phase (during search and rescue operations or based on a call for help regarding persons in danger). When we discussed the principle of non-discrimination we said that the border control authorities should ensure that priority is given to vulnerable categories of migrants, especially unaccompanied minors, families with small children, pregnant women, disabled persons or other vulnerable groups so that their waiting time is reduced to a minimum, and all members of vulnerable groups should be dealt with special care, involving services and agencies specialised in dealing with that category of persons to prevent their traumatization. As we said before reception facilities, should be easily accessible (e.g. for elderly, or disabled persons), ensure privacy and prioritisation of the vulnerable persons in the procedures, and if possible, should provide a special area where such persons can be registered. During the registration process if there are doubts about the declared age of any refugee/migrant, the principle of presumption of minority should prevail, and the situation should be immediately notified to the responsible authorities which can activate the procedure for age determination.

Properly trained staff and instruction should be provided to the border guards in order to recognize vulnerable persons, even if the person is not asking for protection. Following registration, such persons should be directed to the border guard units and specialised agencies which will provide them with further assistance.

2.4.2 Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31

January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties").[20]

All persons have a right to asylum or international protection but in practice and from experience most of them do not have the knowledge to understand how he/she can use this right. In this manner the proactive approach of border guards, combined with proper delivery of information in a language understandable to the refugee/migrant or stateless person is essential. Border guards should be aware that refugees/migrants are mostly coming from countries where legal provisions do not exist or are not functional, or the person is not aware of his stateless status or the possibility to be protected. For this reason, providing information regarding the right to asylum is mandatory and essential during the registration process. The barrier between the border guard and the refugee/migrant which could rise as a result of cultural or language reasons can be an even bigger obstacle in this sense. The border guards should be aware that a refugee/migrant or stateless person has the right to access international protection at any time and in any manner, as well as during the registration process. Furthermore, the border guard should be able to identify a person in need of international protection even when the person does not ask for it. The border guard is obliged to inform a person of his/her rights.

2.4.3 Right to privacy and family life

We have stated several times that collection of personal data is a primary objective of the registration process, therefore a minimal privacy condition shall be provided for the refugees/migrants in the facilities where this process is ongoing. The conditions in these facilities should ensure a private conversation between the border guard and the refugee/migrant, which cannot be heard by others in consideration of confidentiality and privacy. With reference to this matter we can say that the use of interpreters does not violate the right to privacy, but they should be present only if there is a need. The registration premises should be spacious, in case of family registrations at one booth, however if migrants/refugees want to be registered individually they should be informed that they are entitled to demand

[20] Ibid., Article 18.

to be registered individually.

2.4.4 Right to liberty and security

"Everyone has the right to liberty and security of person."[21] All of the actions taken by the border guards from the moment of initial reception are done to ensure this right. In some specific cases this right can be restricted or limited but this does not mean that border guards should postpone the respect of this right. All persons undergoing the registration process should be granted security by the border authorities at all times and in all areas where refugees/migrants are waiting to be registered or are being registered. In cases where there is a large number of refugees/migrants waiting to be registered, security measures must be taken by border guards in the waiting areas in order to preserve order during the registration process. In such case separating conflicting parties, different groups of refuges/migrants but in full respect of the principle of non-discrimination can help alleviate the tense atmosphere in the waiting area during this process. The primary objective of such measures is to ensure full security of all persons in all stages of registration, with special consideration for vulnerable persons.

2.5. Other fundamental rights connected to registration

Principle of non-refoulement

During the process of registration, all refugees/migrants should be registered in accordance with the EURODAC or national regulation. If someone is not registered, because of his undefined legal status, in some cases such person may later be returned to his/her country of origin, where he/she was previously persecuted. This kind of situation will lead to violation of the non-refoulement principle. According to EURODAC Regulation registration and/or subsequent search and data processing is related to the following categories of persons:

- applicants for international protection, who are third-country nationals or stateless persons and who are at least 14 years old;
- third-country nationals or stateless persons of at least 14 years of age who are apprehended by the competent control authorities in connection with the irregular crossing of the border of that Member

[21] Article 6 of the Charter of the fundamental rights of the European Union.

State by land, sea or air, having come from a third country and who are not turned back or who remain physically on the territory of the Member States and who are not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back;

- third-country nationals or stateless persons - beneficiaries of international protection;

Third-country nationals or stateless persons of at least 14 years of age, found residing irregularly in the EU Member State and, as a rule:

- this third-country national or stateless person declares that he or she has lodged an application for international protection but without indicating the Member State in which he or she lodged the application for asylum;
- he or she does not request international protection but objects to being returned to his or her country of origin by claiming that he or she would be in danger, or,
- this third-country national or stateless person otherwise who seeks to prevent his or her removal by refusing to cooperate in establishing his or her identity, by showing no document or false identity papers.

2.5.1 Right to healthcare

"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."[22] This right shall be respected in every phase of the processes and should be respected even if the refugee/migrant is not yet registered.

2.5.2 Right to property

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation

[22]Article 35 of the Charter of the fundamental rights of the European Union.

being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.[23]

The right to property of a refugee/migrant shall be respected and at any point of the registration process all refugee/migrant lawfully acquired possessions may not be confiscated by the authorities. In cases where a refugee/migrant possesses an object which is not legally allowed to be detained in the country where he/she is registered, such possessions can be confiscated through a legally determined procedure followed by a written confirmation issued to the refugee/migrant.

2.5.3 Prohibition of slavery and forced labour

"1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labor.
3. Trafficking in human beings is prohibited."[24]

Border guards should be well trained staff, not only in the acknowledgment of fundamental rights but also in recognizing the indicators of victims of trafficking in human beings and all others forms of cross border crime present in the migration influx. If such persons are recognized during the registration process, border guards shall refer them to institutions specialized in those kinds of cases in order to provide further assistance and referral.

3. Conclusion

Registration of undocumented persons (refugees, migrants or asylum-seekers) remains the responsibility of each country. In most emergency migration situations international organizations such as UNHCR/IOM provide operational assistance for registration only if needed. In such cases, this assistance should be assumed jointly with the authorities of the host country, and/or the host country should be trained in order to enable it to assume this responsibility at a later stage.

[23] Article 17 of the Charter of the fundamental rights of the European Union.
[24] Ibid., Article 5.

In simple words the process of registration consists in recording, verifying and updating information on persons of concern with the aim of protecting and documenting them and to implementing sustainable solutions. While this document uses only the term "refugees" on some occasions, all undocumented persons/persons of concern are covered by the standards and procedures detailed in the document, unless indicated otherwise. This includes asylum seekers, returning refugees, returnees, resettled refugees, migrants, stateless and internally displaced persons.

Registration is a fundamental component of international protection and it is the right of the persons who may be of concern to be registered. Registration recognizes that an individual is someone of concern, or potentially of concern, and that he/she needs continued protection. Registration helps protect against refoulement, arbitrary arrest and detention by making people known to UNHCR and the host government as persons of concern. It helps individuals, families and other groups of refugees/migrants to get basic access to the rights, services, and assistance they need. Accurately registering children helps to prevent military recruitment and to ensure family unity, and, in the case of separated children, to reunite families. Registration also helps to ensure that decisions regarding sustainable solutions are voluntary by recording an individual's agreement to a solution. Accurate registration is also essential in identifying cases for which resettlement and local integration are the most appropriate solutions. Registration can foster freedom of movement and minimize dependence. Registration should not mean that persons are confined to the place in which they registered. Nomads, for example, should not be forced to stay where they are registered, or they will lose their livelihoods.

Registration is crucial in identifying those who are at risk and those who have special needs. These people are often the least likely to come forward and make their needs known. Information on where people come from helps to prepare voluntary repatriation programmes and in assessing whether an area can absorb large numbers of returnees. Registration in countries of asylum can help to rebuild national civil registries in the event of return when the data can be made available to local and central authorities in the country of origin.

Registration of refugees/migrants is also crucial for security purposes and in determining the pattern of migration which can

ensure a slightly more real and correct number of persons on the move, but we will elaborate this issue in another scientific report.

De-registration of all these persons ensures that registers are updated with information about progress towards the achievement of solutions, as well as the current status of a refugee/migrant who was previously registered.

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TWO COURTS BUT A SIMILAR OUTCOME – NO HUMANITARIAN VISAS

ANNA LIGUORI*

1. Introduction

Recently both the European Court of Justice and the European Court of Human Rights have been called upon to decide, respectively, in cases *X and X v. Belgium*[1] and *M.N. and others v. Belgium*[2], whether an obligation to issue humanitarian visas at embassies could be derived from the prohibition of torture and inhuman treatments under particular circumstances.

The topic of humanitarian visas, as legal and safe entry channels for people in need of international protection, is very complex and has been long debated in literature over the past years[3]. Also, the New York Declaration[4] and the Global Compact on Refugees[5] refer to humanitarian visas within the topic "Legal pathways".

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[1] CJEU, judgment of 7 March 2017, *X and X* [GC], case C-638/16 PPU.

[2] ECtHR, decision of 5 May 2020 [GC], *M.N. and others v. Belgium,* App. No. 3599/18.

[3] See, *ex multis*, G. Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law?", *International Journal of Refugee Law,* 2005, p. 542 ff; V. Moreno-Lax, "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees?", *European Journal of Migration and* Law, 2008, p. 315 ff.; T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge University Press, Cambridge, 2011, in particular p. 135 ff.; U.I. Jensen, *Humanitarian visas: option or obligation?*, European Parliament, September 2014, <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf>(07/20); M-C. Foblets, L. Leboeuf (eds), *Humanitarian Admission to Europe The Law Between Promises and Constraints,* Hart Publishing, Oxford, 2020.

[4] New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1.

[5] Global Compact on Refugees, UN Doc. A/73/12.

As pointed out[6], "visa rules in general, and humanitarian visas in particular, lie at the core of a paradox: under international migration law, the human right to leave any country, including one's own, is not accompanied by the corollary right of entering any other country".

The practice is indeed based on different national frameworks, characterized by discretionary powers which often result in arbitrariness and lack of transparence. What is worse is that in most cases domestic procedures and judicial controls are completely absent or inefficient.

This is why it could be particularly useful – even in the presence of a domestic legislation providing for the possibility of humanitarian visa – to recur to supranational courts. And this is why great expectations had been placed first on the Court of Justice of the European Union (hereinafter CJEU), thanks also to an admirable Opinion of Advocate General Mengozzi[7]; and later on the European Court of Human Rights (hereinafter ECtHR), thanks also to the position adopted by Judge Pinto de Albuquerque in a previous case[8].

Indeed, claims before the two European Courts concerned in both cases a family coming from Syria with minor children: because of the situation in their country of origin, if the applicants had managed to reach the European Union, they would have certainly benefited from international protection under the EU qualification directive. In addition, the request for visas had been addressed to a country - Belgium - that in those same days was carrying out *opérations de sauvetage*[9] in favour of Syrian people of Christian religion from Aleppo, delivering visas to allow their entry to Belgium in order to apply for asylum. The operations, even if conducted in a secret and discretionary manner, might have encouraged people - in situations

[6] See J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", *Cahiers de l'EDEM*, June 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/european-court-of-human-rights-gc-decision-on-admissibility-of-5-may-2020-m-n-and-others-v-belgium-appl-no-3599-18.html>(07/20).

[7] Opinion of Advocate General Mengozzi delivered on 7 February 2017, case C-638/16 PPU *X and X*.

[8] *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012 [GC], Applic. No. 27765/09, Concurring Opinion of Judge Pinto de Alburquerque, p. 70.

[9] See *Focus: Visas humanitaires*, <https://www.myria.be/files/FOCUS_visa_humanitaire.pdf > (07/20).

similar to those that fell within the above-mentioned program - to file a request for a visa at Belgium embassies. Nevertheless, in spite of the existing practice and the fulfilment of eligibility conditions (not only for international protection in Belgium but also for the above mentioned governmental program, since all the applicants were Syrian and Christian), the Syrian families' requests had been rejected by the Administrative authorities in both cases.

Unfortunately, both the CJEU and the ECtHR dismissed the claims, despite the fact that there were possible alternative solutions, as demonstrated by Advocate General Mengozzi with respect to the European Union and suggested by Judge Pinto de Albuquerque with respect to the ECHR system.

2. The *X and X v. Belgium* Judgment of the European Court of Justice of 7 March 2017

The first of the two European Courts called upon to decide on the issue of humanitarian visas was the Court of Justice, which delivered its ruling on 7 March 2017[10].

[10] This part of the paper is based on a previous paragraph already published in A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, Routledge, London and New York, 2019, p. 80 ff. On the *X and X v. Belgium* judgment see also E. Brouwer, "The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?", *CEPS Commentary*, 16 March 2017, <https://www.ceps.eu/system/files/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf >(07/20); H. De Vylder, "X and X v. Belgium: a missed opportunity for the CJEU to rule on the state's obligations to issue humanitarian visa for those in need of protection", *Strasbourg Observer*, 14 April 2017, <https://strasbourgobservers.com/2017/04/14/x-and-x-v-belgium-a-missed-opportunity-for-the-cjeu-to-rule-on-the-states-obligations-to-issue-humanitarian-visa-for-those-in-need-of-protection/ >(07/20); G. Raimondo, "Visti umanitari: il caso X e X contro Belgio, C-638/16 PPU", *Sidiblog*, 1 May 2017, <http://www.sidiblog.org/2017/05/01/visti-umanitari-il-caso-x-e-x-contro-belgio-c%E2%80%9163816-ppu/>(07/20); A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", *European Papers*, Vol. 2, 2017, p. 271 ff., <http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-giustizia-sul-rilascio-del-visto-umanitario>(07/20); C. Favilli, "Visti umanitari e protezione internazionale: così vicini così lontani", *Diritti umani e Diritto internazionale*, 2/2017, p. 553 ff., <http://www.sidi-isil.org/wp-

The case concerned a Syrian family who had come to Beirut (Lebanon) to apply at the Belgian Embassy for a territorially limited Schengen visa (LTV visa) on account of humanitarian considerations, in order to reach Belgium and request international protection there. Judgment was delivered on the issue of preliminary ruling from the Conseil du Contentieux des Étrangers (Belgium) concerning the interpretation of Article 25(1)(a) of 'the Visa Code' and of Articles 4 and 18 of the Charter of Fundamental Rights of the European Union, asking in substance whether, under the Visa Code Member, States have the duty to issue a territorially limited Schengen visa, where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons to torture or inhuman or degrading treatment.

In its judgment the Court, although it acknowledged that the applicants in the main proceedings were facing a real risk of being subjected to inhuman and degrading treatment[11], does not pronounce on the merits, but states that the application falls outside the scope of the Visa Code. This because, in the Court's view, even if formally grounded on Article 25 of the Visa Code (concerning visas for intended stays of no more than three months), the application in reality was submitted "with a view to applying for asylum in Belgium immediately upon their arrival in that Member State and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days"[12].

As a consequence, the Court inferred that the provisions of the Charter, in particular Articles 4 and 18 thereof, referred to in the questions of the Belgian court, do not apply[13], thus concluding that:

> an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is

content/uploads/2017/04/Osservatorio-Favilli-per-SIDI.pdf>(07/20); G. Cellamare, "Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie", *Studi sull'integrazione europea*, N. 3/2017, p. 527 ff.; F. Calzavara, "La sentenza della Corte di giustizia in tema di visti umanitari: quando la stretta interpretazione rischia di svilire la dignità umana", *Ordine internazionale e diritti umani,* 2017, p. 546 ff., <http://www.rivistaoidu.net/sites/default/files/5_Calzavara_0.pdf >(07/20).

[11] Para. 33.

[12] Para. 42.

[13] Para. 45.

within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, *solely within that of national law*[14].

One of principal shortfalls of the decision is that it puts the applicants outside the scope of EU law on the basis of the real intention of their application, which was to reach Belgium in order to apply for asylum. However, as convincingly argued by the Advocate General Mengozzi[15] in its Opinion of 7 February 2017:

The intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium cannot alter the nature or purpose of their applications ... [S]uch an intention could at the very most constitute a ground for refusal of the applications of the applicants in the main proceedings, pursuant to the rules of that code, but certainly not a ground for not applying that code[16].

The Opinion of the Advocate General, a long and rich exposition – if we compare it with the brief reasoning of the Court – deserves attention under a number of aspects, and seems worthwhile to review it, even if synthetically. It is true that the possibility of applying for humanitarian visa has not been codified yet at European level, despite

[14] Italics added.

[15] Opinion of Advocate General Mengozzi delivered on 7 February 2017, case C-638/16 PPU *X and X*.

[16] On this point see also V. Moreno-Lax, "Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge" (Part. I-II), *EU Immigration and Asylum Law and Policy*, 16 and 21 February 2017, <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/> (07/20): "This would be tantamount to accepting, for instance, that failed asylum seekers were *ab initio* excluded from the remit of the Qualification Directive and the Asylum Procedures Directive because ex post, upon determination of their claims, it has been concluded that they did not qualify for refugee status or subsidiary protection. The fact that an application for either a visa or for international protection under EU law is dismissed on the merits (or even at the admissibility stage) cannot be confounded with the determination of whether the rules of the relevant instruments (i.e. the CCV or the QD+APD) apply to and govern the examination of the claim".

proposals in this direction[17]. However, the Opinion of the Advocate General shows that another interpretation, one that might have allowed a solution more in conformity with human rights[18], was possible. Indeed, after having illustrated that the intention of the applicants was irrelevant, the Advocate General adds that:

> by issuing or refusing to issue a visa with limited territorial validity on the basis of Article 25 of the Visa Code, the authorities of the Member States adopt a decision concerning a document authorising the crossing of the external borders of the Member States, which is subject to a *harmonised set of rules* and act, therefore, *in the framework of and pursuant to EU law*[19].

He goes on to say that such a conclusion cannot be called in question by the circumstance that the Member State enjoyed discretion in applying Article 25(1)(a) of the Visa Code, because the Court of Justice has stated in a number of cases that acts adopted in the exercise of discretion fall within the scope of EU law[20]. He then concludes that by adopting a decision under Article 25 of the Visa Code, Member States implemented EU law and therefore were required to respect the rights guaranteed by the Charter. He then goes on to analyse the merits of whether the discretion of the Member State had been exercised in conformity with the Charter. To this end, first of all he recalls that in the judgment of 21 December 2011, *N. S. and Others*[21], concerning the determination of the Member State responsible for processing an application for asylum, the Court stated that a mere option for a Member State may turn into an actual obligation on that Member State in order to ensure compliance with Article 4 of the

[17] The recent recast of the Visa Code [Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)] does not introduce rules concerning the issue of humanitarian visas. On the position of the European Parliament see *ultra* in the Conclusions.

[18] In literature the possibility to recognize a legal access route under article 25 of the Visa Code has been extensively discussed: see U. I. Jensen, cit; S. Peers, "Do Potential Asylum-Seekers Have the Right to a Schengen Visa?", *EU Law Analysis*, 20 January 2014, <http://eulawanalysis.blogspot.com/2014/01/do-potential-asylum-seekers-have-right.html >(07/20); Moreno-Lax, "Asylum Visas", cit.

[19] Para. 80. Italics is in the Opinion.

[20] See CJEU, *N. S. and Others*, 21 December 2011, C-411-10 and C-493-10, para. 68 and 69.

[21] Opinion of Advocate General Mengozzi., para. 94-98.

Charter[22]. He also stresses that this right corresponds to the right guaranteed by Article 3 of the ECHR, and affirms that

By analogy with the case-law of the European Court of Human Rights on Article 3 of the ECHR, Article 4 of the Charter imposes on the Member States, when implementing EU law, not only a negative obligation with respect to individuals, that is to say that it prohibits the Member States from using torture and inhuman or degrading treatment, but also a *positive obligation*, that is to say that it requires them to take measures designed to ensure that those individuals are not subjected to torture and inhuman or degrading treatment, in particular in the case of vulnerable individuals, including where such ill-treatment is administered by private individuals[23]... In examining whether a State has failed to fulfil its positive obligation to adopt reasonable steps to avoid exposing a person to a genuine risk of treatment prohibited by Article 4 of the Charter, it is necessary, in my view, to ascertain, by analogy with the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, what the foreseeable consequences of that omission or that refusal to act with regard to the person concerned are[24].

Since the risks for the Syrian family were known or should have been known to the Belgian authorities, in light of the numerous reports attesting to the situation in Syria[25], the Advocate General concludes that Article 25(1)(a) of the Visa Code must be interpreted as meaning that the Member State shall issue a LTV visa on humanitarian grounds if there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing that national to treatment prohibited by Article 4 of the Charter[26].

[22] Ibidem, para. 137.

[23] Ibidem, para. 139. Italics is in the text. To this end the advocate General reminds that "in its judgments of 21 December 2011, *N. S. and Others* ... (para. 106 and 113), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, ... para. 90 and 94), the Court already held that, like Article 3 of the ECHR, Article 4 of the Charter imposes a positive obligation on the Member States under certain circumstances".

[24] Ibidem, para. 140.

[25] Ibidem, para. 142-147.

[26] Ibidem, para. 163. The Opinion of the Advocate General is remarkable also with respect to the explicit statement that "the fundamental rights recognized by the Charter, which any authority of the Member States must respect when acting within

Finally, it is worthwhile to compare the statement of the Luxembourg Court, affirming that "to conclude otherwise ... would undermine the general structure of the system established by Regulation No 604/2013[27]" (the Dublin regulation), and the premise enounced by the Advocate General at the beginning of his opinion, i.e. that "It is ... crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law"[28]. In the first case, the Court is concerned with the consequences that would result from a different interpretation of article 25 of the Visa Code, because this might entail legal access irrespective of the rules established under the Dublin system; on the other hand, the Advocate General explicitly affirms that

> It is, on the contrary, the refusal to recognize a legal access route to the right to international protection on the territory of the Member States – which unfortunately often forces nationals of third countries seeking such protection to join, risking their lives in doing so, the current flow of illegal immigrants to EU's borders – which seems to me to be particularly worrying,

the framework of EU law, are guaranteed to the addressees of the acts adopted by such an authority *irrespective of any territorial criterion*" (para. 89). This position is very important because it denotes a broader scope of application of the EU Charter in comparison to the ECHR. While the dominant case law of the Strasbourg Court sets "effective control" as a threshold for triggering jurisdiction under the ECHR (although, as we will analyse in the next paragraph, there are cases which point to a different approach), according to such interpretation, both EU institutions and the Member States, whenever they act within the scope of EU law, even outside the EU's borders, are bound by the Charter. In other words, as already convincingly upheld in literature, the European Union has the duty to respect the rights guaranteed by the Charter "whenever it exercises its competences, both internally and externally, either directly or through the intermediation of the Member States 'implementing EU law": see V. Moreno-Lax, C. Costello, Cathryn, "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, 2014, p. 1682. See also J. Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory", *European Papers*, 2017, p. 79,
<http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2017_2_7_Article_Jorrit_J_Rijpma.pdf > (07/20).

[27] Judgement of 7 March 2017, cit., para. 48.

[28] Opinion of Advocate General Mengozzi, cit., para. 4.

in the light, inter alia, of the humanitarian values and respect for human rights on which European construction is founded[29].

From this comparison it is clear that the Court probably made a self-restraint because of the concern – expressed by the fourteen intervening Member States – regarding an excessive augmentation of requests for visas at MS embassies in third countries[30]. The best answer to such fear, however, lies once again in Advocate Mengozzi's words:

Admittedly, the circle of persons concerned may prove to be wider than that which is currently the case in the practice of the Member States. That argument is however irrelevant in the light of the obligation to respect, in all circumstances, fundamental rights of an absolute nature, including the right enshrined in Article 4 of the Charter[31].

3. The *M.N. and others v. Belgium* decision of the European Court of Human Rights of 5 May 2020.

Recently, on 5 May 2020, the Grand Chamber of the European Court of Human Rights dismissed an almost identical claim in the *M.N. and others v. Belgium* case[32]. The decision, characterised by a

[29] Ibidem, para. 6.

[30] See A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", cit., p. 285.

[31] Ibidem, para. 171.

[32] On this decision see M. Baumgärtel, "Reaching the dead-end: M.N. and others and the question of humanitarian visas", *Strasbourg Observers*, 7 May 2020, https://strasbourgobservers.com/2020/05/07/reaching-the-dead-end-m-n-and-others-and-the-question-of-humanitarian-visas/; J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit; F. Camplone, "La decisione *M.N. e al. c. Belgio* alla luce della sentenza *X e X*: la conferma della prudenza delle Corti o un impulso allo sviluppo di canali di ingresso legali europei?", *Diritto, immigrazione e cittadinanza*, forthcoming; C. Danisi, "A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", *Sidiblog*, 27 May 2020, <http://www.sidiblog.org/2020/05/27/a-formalistic-approach-to-jurisdiction-in-the-european-court-of-human-rights-decision-on-humanitarian-visas-was-another-interpretation-possible/>(07/20); T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the

"prudent and yet conservative approach towards the conditions to trigger extraterritorial jurisdiction"[33], is very deceiving, because "cette affaire représentait l'un des derniers remparts contre la politique de non-entrée menée par l'Union européenne à l'égard des personnes en besoin de protection international"[34].

After a short analysis of the reasoning of the Court, with specific reference to the claim similar to the one brought before the Court of Justice of the European Union, concerning the risk of torture or inhuman treatment in case of refusal of a humanitarian visa[35], the

limits of extraterritorial refoulement", *EU Immigration and Asylum Law and Policy*, 26 May 2020, <http://eumigrationlawblog.eu/adjudicating-old-questions-in-refugee-law-mn-and-others-v-belgium-and-the-limits-of-extraterritorial-refoulement/>(07/20); E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", *La Revue des droits de l'homme*, 2020, n. 17, <https://journals.openedition.org/revdh/9913>(07/20), p. 1 ff; A. Reyhani, "Expelled from Humanity – Reflections on M.N and Other v. Belgium", *Verfassungsblog*, 6 May 2020, https://verfassungsblog.de/expelled-from-humanity/; V. Stoyanova, "M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas", *European Journal of International Law: Talk!*, 12 May 2020, <https://www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas/. For comments on the *MN* case before the ECtHR decision see D.Schmalz, "Will the ECtHR Shake up the European Asylum System?", *Verfassungsblog*, 30 November 2018, <https://verfassungsblog.de/will-the-ecthr-shake-up-the-european-asylum-system/>(07/20); E. Delval, "La CEDH appelée à trancher la question des "visas asile" laissée en suspens par la CJUE: Lueur d'espoir ou nouvelle déception?", *EU Immigration and Asylum Law and Policy*, 12 February 2019, <https://eumigrationlawblog.eu/la-cedh-appelee-a-trancher-la-question-des-visas-asile-laissee-en-suspens-par-la-cjue-lueur-despoir-ou-nouvelle-deception/>(07/20); F.L. Gatta, "La 'saga' dei visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione europea e le prassi degli Stati membri", *Dirittifondamentali.it*, 1/2019, <https://dirittifondamentali.it/2019/06/12/la-saga-dei-visti-umanitari-tra-le-corti-di-lussemburgo-e-strasburgo-passando-per-il-legislatore-dellunione-europea-e-le-prassi-degli-stati-membri/> (07/20), p. 35 ff.

[33] J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit.

[34] E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 6.

[35] The applicants also lodged a complaint under art. 6 ECHR, which will not be the object of our analysis. On this point see TJ.-Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?"; F. Camplone, "La sentenza *M.N. e al. c. Belgio* alla luce della sentenza *X e X*", cit.

present paper intends also in this case to propose a possible different interpretation that the Strasbourg Court might have followed.

The facts upon which the Strasbourg decision and the Luxembourg judgment are based are very similar: a married couple with minor children from Syria had come to Beirut (Lebanon) to apply at the Belgian Embassy for a territorially limited Schengen visa (LTV visa) grounded on humanitarian considerations, in order to reach Belgium and there to request international protection.

The national proceedings in the *MN* case began in August 2016 and were particularly complex. At the end of "Kafkian proceedings"[36], the Belgium Alien Office categorically refused to grant a visa despite judiciary decisions to the contrary. In the view of the Aliens Office, the LTV visas were only for persons wishing to reach a Schengen State for a short period for reasons such as the illness or death of a relative, whereas granting a visa on humanitarian grounds to people who intended to apply for asylum would "create a precedent which would derogate dangerously from the exceptional nature of the procedure for short-stay visas"[37]. It is important to add, however, that the Aliens Office invited the applicants to apply for another type of visa, for more than 90 days, based on Belgian legislation, but that this application was rejected by the Belgian authorities too.

The applicants lodged a claim before the Strasbourg Court on 10 January 2018, alleging that the Belgian authorities' refusal to issue a humanitarian visa had exposed them to a situation incompatible with Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment) with no possibility of an effective remedy, as required by Article 13 ECHR.

In addition, with respect to the internal proceedings, they complained that the impossibility of having the favourable judicial decision executed was in breach of article 6 ECHR (right to a fair trial)[38].

[36] E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 2.

[37] Para. 12.

[38] The Court stated that the case fell outside the scope of art. 6 ECHR, referring to its settled case-law (see judgment of 5 October 2000, *Maaouia v. France* [GC], no. 39652/98, § 40). For criticisms to such an approach in this case see J.-Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", and more in general A. Liguori, *Le garanzie*

This paper will deal exclusively with the first complaint, which corresponds in substance to the object of the preliminary ruling before the EU Court of Justice. As we have seen, the CJEU avoided issuing a ruling on the merits through a formalistic reasoning, although a different interpretation was possible - as shown by Advocate General Mengozzi in his meritorious opinion. Similarly, the ECHR Court also decided not to examine the case on the merits, declaring the complaint inadmissible by reason of jurisdiction. In this case too, however, another conclusion was possible, had the Court chosen to apply a different notion of jurisdiction, based on some of its own precedents.

In the present decision the Court first of all reiterates that Article 1 ECHR limits its scope to persons within the "jurisdiction" of the States Parties to the Convention, stating that "jurisdiction is a condition *sine qua non* in order for that State to be held responsible for acts or omissions attributable to it" (para. 97).

The problem however is the particularly restrictive interpretation of jurisdiction delivered in this case, compared to previous case-law.

Traditionally a State's jurisdiction, for purposes of its human rights obligations, was assumed to be limited primarily, if not exclusively, to its territory. As international human rights law has evolved, it is now accepted that a State's jurisdiction for human rights purposes can extend to persons outside its territorial limits, whenever the State exercises "effective control" over them, or over the territory in which they are located.

With respect to the European Court of Human Rights case-law[39],

procedurali avverso l'espulsione, Editoriale Scientifica, Napoli, 2008, p. 12 ff. and literature quoted therein.

[39] See, *ex multis*, G. Gaja, "Art. 1", in Sergio Bartole, Benedetto Conforti, Guido Raimondi (eds.), *Commentario alla Convenzione europea per la salvaguardia dei diritti dell'uomo*, CEDAM, Padova, 2001, p. 28; P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giappichelli editore, Torino, 2002; M. O'Boyle, "The European Convention on Human Rights and extraterritorial jurisdiction: a comment on 'life after Bankovic'", in Fons Coomans, Menno T. Kamminga, *Extraterritorial Application of human rights treaties*, Intersentia, Antwerpen, 2004; E. Lagrange, "L'application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national", *Revue générale de droit international public*, 2008, p. 521 ff.; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011; R. Sapienza, "Art. 1", in Sergio Bartole, Pasquale De Sena, Vladimiro Zagrebelsky (eds.), *Commentario breve alla Convenzione europea* (eds), Cedam, Padova, 2012, p. 13 ff.; S. Besson, "The Extraterritoriality of the European Convention on Human Rights: Why

it is worthwhile to recall an extremely relevant statement in *Issa v. Turkey*[40]*:* "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory". A consistent implementation of this principle could have led to a functional approach to extraterritorial jurisdiction.

However, the ECtHR jurisprudence on jurisdiction is quite puzzling. In *Banković v. Belgium* [41] the Court held that the text of "Article 1 does not accommodate" an approach to a "cause-and-effect" notion of jurisdiction (vigorously denying a functional approach); at the same time in *Al-Skeini v. the United Kingdom*[42], after reiterating that "A State's jurisdictional competence under Article 1 is primarily territorial", affirmed nonetheless the existence of jurisdiction "whenever the State, through its agents, exercises control and authority over an individual" (personal model) and "when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory" (spatial model). In the *Hirsi* case the Court recalls both judgments, and also the *Medvedyev* case, which considered that *de facto* control over a ship suffices to establish the State party's jurisdiction (even if the people on board were not transported on the French warship)[43].

A more 'functional test' has been applied so far in only a few

Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", *Leiden Journal of International Law*, 2012, p. 857 ff.; S. Vezzani "Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani", *Rivista di Diritto Internazionale,* 2018, p. 1086 ff.. See also, with specific reference to migration cases, V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model" in this volume.

[40] ECtHR, *Issa and others v. Turkey*, judgment of 16 November 2004, Applic. No. 31821/96, para. 71. See in similar terms the UN Human Rights Committee in the case *Lopes Burgos v. Uruguay*, Par. 12.3 (UN Doc. CCPR/C/13/D/52/1979, 29 July 1981).

[41] ECtHR, *Banković and others v. Belgium*, decision of 12 December 2001 [GC], Applic. No. 52207/99.

[42] ECtHR, *Al-Skeini and others v. the United Kingdom*, judgment of 7 July 2011 [GC], Applic. No.55721/07.

[43] For more details see A. Liguori, "Some observations on the legal responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims", *The Italian Yearbook of International Law*, Volume 25, 2016, in particular p. 155-157 and literature quoted therein.

cases, i.e. *Xhavara v. Albania and Italy*[44]. In this decision the Court seems to have adopted a "cause-and-effect" approach since, with reference to a collision which took place on the high seas, it admitted implicitly the existence of Italian jurisdiction (and excluded that of Albania) apparently because an Italian warship *caused* the sinking of a vessel carrying Albanian migrants: "La Cour note d'emblée que le naufrage du Kater I Rades a été directement provoqué par le navire de guerre italien Sibilla. Par conséquent, toute doléance sur ce point doit être considérée comme étant dirigée exclusivement contre l'Italie". The same approach emerges in *PAD v. Turkey*[45], concerning the killing of Iranian citizens by a Turkish helicopter, where the Court affirmed that "it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters *had caused the killing* of the applicants' relatives" (italics added). Likewise, in the decision of 3 June 2008, *Andreou v. Turkey*[46], concerning Turkish authorities positioned behind the border killing a demonstrator inside the UN-controlled area, the Court stated that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey".

More recently, in *Jaloud v. The Netherlands*[47], the Court declared that the applicant fell within the jurisdiction of the Netherlands because he passed through a checkpoint "manned by personnel under the command and direct supervision of a Netherlands Royal Army officer". However, this last case confirms that the Court is probably not yet ready for a notion of "cause and effect" jurisdiction; otherwise, as pointed out[48], "[a]ll the talk [in Jaloud] about occupation, exercise

[44] ECtHR, *Xhavara and others v. Albania and Italy*, decision of 11 January 2001, applic. No. 39473/98.

[45] ECtHR, *PAD and others v. Turkey*, decision of 28 June 2007, applic. No. 60167/00.

[46] ECtHR, *Andreou v. Turkey*, judgment of 27 October 2009, applic. No.45653/99.

[47] ECtHR, *Jaloud v. The Netherlands*, judgment of 20 November 2014, applic. No. 47708/08.

[48] See the response of A. Sari to J. Lehmann's post "The Use of Force against People Smugglers: Conflicts with Refugee Law and Human Rights Law", *European Journal of International Law: Talk!*, 22 June 2015, http://www.ejiltalk.org/the-use-of-

of public authority and manning checkpoints would have been quite unnecessary".

In the present case, however, none of the decisions opening a window to a functional approach were referred to. On the contrary, the Court emphasized the necessity of *exceptional circumstances* as grounds for extraterritorial jurisdiction, rejecting all the arguments of the applicants and of the intervening NGOs in favour of the existence of such circumstances in the *MN* case and adhering completely to the position of the respondent Government, supported by numerous Member States[49].

The applicants, after recalling that the Court's case-law clearly indicated that the responsibility of the States could be engaged when acts by their authorities produced effects outside the national territory, stressed that in the present case "the Belgian State bodies were exercising a State function of border control"[50], adding that "this was necessarily a manifestation of its jurisdiction, which entered into play regardless of where it was exercised, regardless of which authorities, territorial or consular, implemented them, and regardless of whether or not the authorities involved exercised de facto or physical control over the individuals concerned"[51]. In addition, the applicants referred to the case-law on expulsion, established since the ruling in the *Soering* case, which had found that a State Party to the Convention could be held responsible for the extraterritorial consequences of decisions taken by it in the event of a risk of torture or ill-treatment, or of failures, attributable to it, to take measures with a view to avoiding or preventing exposure to such risks[52].

It is also worth mentioning the written submissions in support of the applicants, from third Parties interveners (from now on TPI), of the AIRE Centre, the Dutch Council for Refugees, ECRE and the International Commission of Jurists. In their observations, the TPI emphasized that in *Bankovic* the Court had clearly recognised that other instances of extraterritorial exercise of jurisdiction by a State

force-against-people-smugglers-conflicts-with-refugee-law-and-human-rights-law/>(07/20);

[49] In this case eleven States intervened in support of the Belgian government: the Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway, Slovakia and the United Kingdom.

[50] *MN* decision, para. 83.

[51] Ibidem.

[52] *MN* decision, para. 84.

could exist in cases concerning acts or omissions by diplomatic or consular agents when exercising a governmental function. In their view, since issuing visas corresponds to a prerogative of government power in the field of immigration control, it falls within the jurisdiction of the sending State and has to be exercised, in the case of States Parties to the Convention, in accordance with the rights and freedoms recognised by it, as emerges from the extensive case-law of the former Commission (*X. v Federal Republic Germany*, App no 1611/62, Commission decision of 25 September 1965); *X v. the United Kingdom*, App. no. 7547/76, Commission decision of 15 December 1977; *M. v Denmark*.; App. no. 17392/90, Commission decision of 14 October 1992), consistent with recent case-law of the United Nations Human Rights Committee[53] and of the Inter-American Court of Human Rights[54].

In addition, the interveners – basing their arguments on the *Soering* case and more extensively on the theory of positive obligations as applied in previous ECHR case-law - submitted that "State responsibility may be engaged when refusing treatment of a visa application, in circumstances where the State is or ought to be aware that applicant if returned faces a real risk of serious Convention human rights violations, in the absence of available alternatives that would prevent such outcome"[55].

A similar approach, in favour of a positive obligation of member States to issue humanitarian visas derived from article 3 ECHR if no other escape is possible, had already been envisaged by a former judge of the European Court of Human Rights, Pinto de Albuquerque. Indeed, in his separate opinion in the landmark Hirsi case, after stressing that "States cannot turn a blind eye to an evident need for protection", he used as example precisely the hypothesis of a person in an embassy of a State party to the ECHR in danger of being tortured

[53] See C. Danisi, "A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", cit.

[54] See A. De Leo, J.Ruiz Ramos, "Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR", *EU Immigration and Asylum Law and Policy*, 13 May 2020, <http://eumigrationlawblog.eu/comparing-the-inter-american-court-opinion-on-diplomatic-asylum-applications-with-m-n-and-others-v-belgium-before-the-ecthr/>(07/20);

[55] TPI written submissions, para. 19.

in his or her country, concluding that "a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State. This will not be a merely humanitarian response, deriving from the good will and discretion of the State. A positive duty to protect will then arise under Article 3"[56].

In the *MN* case, however, the Strasbourg Court completely ignored this approach, conversely entirely aligning itself with the Member State's line on jurisdiction.

In fact the Court, despite acknowledging that the Belgian authorities exercised a public power in ruling on the applicants' visa applications, states that "[T]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is … not such as to establish the jurisdiction of the State concerned over those persons outside its territory"[57], stressing that it is necessary to assess *exceptional circumstances* in order to come to the conclusion that Belgium was exercising extraterritorial jurisdiction in respect of the applicants.

After pointing out that "this is primarily a question of fact, which requires it to explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter effectively exercised authority or control over them"[58], the Court comes to the conclusion that none of the former Commission case-law precedents cited above (involving the actions and omissions of diplomatic agents) are comparable, because the connecting links which characterised these previous cases are not present in this case: the applicants are not nationals seeking to benefit from the protection of their embassy and at no time did the diplomatic agents exercise *de facto* control over the Syrian family, since the applicants "freely chose to present themselves at the Belgian Embassy in Beirut, and to submit their visa applications there"[59] and "had then been free to leave the premises of the Belgian Embassy without any hindrance"[60].

[56] *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09, Concurring Opinion of Judge Pinto de Alburquerque, p. 70.

[57] Para. 112, referring to Banković, at para. 75.

[58] Para. 113.

[59] *MN* decision, para. 118.

[60] In *M.N.* the Court took a much more restrictive approach than the one adopted in its precedents: as pointed out by Stoyanova ("M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas", cit.), in the present case the

The Court further rejects the additional argument that the applicants placed themselves within Belgian jurisdiction by suing courts at domestic level with a view to securing their entry to Belgium, affirming that the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him[61] and because "to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction"[62].

This last statement unveils the real *ratio* at the basis of the decision, masked under a formalistic approach which has selectively picked only some of ECHR previous case-law, and surprisingly neglected other relevant ones (the deafening silence on a landmark decision such as the *Hirsi* case is indeed meaningful[63]).

Court introduced "a distinction between 'State's nationals or their property', on the one hand, and 'certain persons' over whom a State exercises *physical* power and control, on the other", which was not present either in Al-Skeini (see para. 134), nor in the highly criticized Bankovic decision, clearly going against "other, more optimistic assessments of the public powers doctrine to situations of migration control" (see T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", cit., referring in particular to T. Gammeltoft-Hansen, J.C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence"*, Columbia Journal of Transnational Law,*, 2015, pp. 266 ff.).

[61] To this end the Court refers to its own decision of 28 January 2014 in the case *Abdul Wahab Khan v. the United Kingdom*, App. no. 11987/11, para. 28.

[62] The Court adds that such an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens. At this point of the judgments the Strasbourg Court recalls the ruling of the CJEU in *X. and X v. Belgium*, examined above, i.e. that the issuing of long-stay visas falls solely within the scope of the Member States' national law (para. 124).

[63] As pointed out (E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 8), mentioning this judgment would have confirmed that the scope of the principle of non-refoulement is not restricted to removal from the territory of the defendant

With respect to jurisdiction, the Strasbourg Court has undeniably adopted a self-restraint position, because, as suggested by scholars, other approaches to jurisdiction are indeed possible[64].

In this paper we will focus in particular on one of these alternative approaches, concerning the notion of jurisdiction in relation to positive obligations, widely developed by the third interveners in their written submissions before the Court.

In fact, in their submissions the TPI pointed out that State responsibility under Article 3 is engaged when state authorities "fail to take preventive measures to protect the individual from inhuman and degrading treatment. This includes, amongst others, all the steps that the State can reasonably be expected to take to protect individuals, in the case of a particular threat to an individual or a group, from harm to their physical integrity of which it knew or ought to have known"[65]. To this end they explicitly quote the case *Mahmut Kaya v. Turkey*[66] ("State responsibility may therefore be engaged where the framework of law fails to provide adequate protection […] or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known") and *E v. United Kingdom*[67] ("a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State"), coming to the conclusion that – under the specific circumstances of the case –, the refusal to grant a humanitarian visa would be a violation of positive obligations inherent in article 3 ECHR. Indeed, if "[c]onduct of non-admittance of an individual in need of international protection without an effective opportunity given to apply for protection may thus constitute constructive refoulement[68] under

state or non-admission at the borders but is extended to anyone within the jurisdiction of the States Parties, no matter where he is.

[64] See literature quoted at note n.39 and most recently Moreno- Lax in this volume.

[65] Para 11.

[66] *Mahmut Kaya v. Turkey*, App. No. 22535/93 (ECtHR, 28 March 2000), para 115.

[67] *E. and Others v. United Kingdom,* Appl no 33218/96 (ECtHR, 26 November 2012), para 99.

[68] On the notion of "constructive refoulement" see P. Mathew, in S. Juss (ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, Cheltenham-Northampton, 2019, p. 207 ff.

international law"[69], this is particularly true in the present case because the applicants represent the paradigmatic family entitled to international protection and because denying visas in this specific circumstance surely exposed them to inhuman treatment as Lebanon was not able to offer appropriate reception conditions to them and the family's only alternative was to return to Syria (or face a dangerous journey through the Mediterranean Sea).

If the Court had decided to consider the approach based on the theory of positive obligations, it might have referred to some interesting precedent case-law which could have paved the way for establishing jurisdiction in the present case.

Indeed, as pointed out, "while it is counter-intuitive to assume that the requirement to find jurisdiction may be easier with respect to positive obligations than the traditional, 'negative dimension' of human rights, some paradoxical elements of the jurisprudence of the ECtHR may indeed point in this direction"[70] .

In fact, according to the circumstances of the case, the theory of positive obligations could be a useful tool for holding outsourcing States responsible, because in some cases the Strasbourg Court has been ready to accept a lower threshold for jurisdiction, disentangled from "effective control", in claims related to positive obligations[71]. Among the judgments in which the ECtHR adopted such a notion of jurisdiction with respect to positive obligations, the most relevant are *Ilaşcu and Others v. Moldova and Russia*[72], *Manoilescu and Dubrescu v. Romania and Russia*[73] and *Treska v. Albania and Italy*[74], where the Court affirmed in general terms that: "*Even in the absence of effective control of a territory outside its borders*[75], the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and

[69] Para. 18 of the TPI.

[70] H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, Cambridge, 2011, p. 404.

[71] Ibidem; see also M. den Heijer, *Europe and Extraterritorial Asylum,* Hart Publishing, Oxford, 2012, p. 48 and A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, cit., p. 38 ff.

[72] *Ilaşcu and Others v. Moldova and Russia* [GC], judgment of 8 July 2004, applic. No. 48787/99.

[73] Decision of 3 March 2005, applic. No. 60861/00

[74] Decision of 29 June 2006, applic. No. 26937/04.

[75] See *Treska v. Albania and Italy,* cit. Italics added.

are in accordance with international law to secure to the applicants the rights guaranteed by the Convention" . As pointed out, the formula used in these cases supports the conclusion that "the duty to take preventive or other positive action in respect of human rights interferences taking place in a foreign territory derives primarily from the influence a State wields over a particular situation, therewith the 'power', or capability, it has to prevent the occurrence of human rights violations" [76], and that "the ECtHR is at the least receptive for claims relating to positive obligations in an extraterritorial setting"[77]. In other words, in these decisions the Court explicitly disregarded "the test of effective control as a precondition for the establishment of jurisdiction"[78].

4. Conclusions

In conclusion, the two Courts have come to the same outcome by different reasoning: no possibility for the Syrian family to reach Belgium, notwithstanding the well-known fact that the family was in danger of incurring inhuman treatment in the event of refusal of a humanitarian visa at the embassy.

[76] See M. den Heijer, *Europe and Extraterritorial Asylum*, cit., p. 81, adding that "The establishment of the scope of this duty requires an inquiry, on the one hand, of the substantive international obligations of the state and the duties of due diligence inherent in them; and, on the other hand, an examination of the legal and factual capabilities of the state to change the course of events". See also *Ilascu and Other*s, para. 392-393.

[77] See M. den Heijer, R. Lawson, "Extraterritorial Human Rights and the Concept of 'Jurisdiction'", in Martin Scheinin, Malcolm Langford, Willem van Genugten, Wouter Vandenhole (eds.), *Global justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, Cambridge, 2013, p. 188.

[78] See C. Rozakis, "The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights", in *The Status of International Treaties on Human Rights*, Strasbourg, 2005, pp. 70-72; see also V. Tzevelekos, P. Proukaki, "Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?", *Nordic Journal of Int. Law*, 2017, p. 427 ff. *Contra* K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge University Press, Cambridge, 2012, pp. 220-224; see also S. Besson, "Due Diligence and Extraterritorial Human Rights Obligations", *ESIL-Reflection*, 28 April 2020, <https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/>(07/20).

The impression is that both courts made the fear of the intervening States their own, despite the special vulnerability of the applicants: in both proceedings as the case concerned a family from Syria with minor children[79], each option at the applicants' disposal in case of refusal – widespread violence in the event of a return to Syria, harsh living conditions in Lebanon or high risks of inhuman treatment and even death in the case of an irregular crossing to Europe through the Mediterranean sea – exposed them to a treatment in breach of art. 3 ECHR (and of art. 4 of the ECFR). Had the two European Courts reached a different conclusion in the cases under review, member States would have abided by their obligation to issue a humanitarian visa in the future only in extreme circumstances[80], since not everyone applying for visas from embassies would be in a similar situation.

Unfortunately, both Courts recurred to a formalistic approach which led the Strasbourg Court to deny its jurisdiction, on the one hand (although the endorsement for a different position from a former judge – Pinto de Albuquerke, and interesting precedents supporting a different approach to jurisdiction when positive obligations are at stake, both in its case law and in other regional and universal human rights bodies[81]); and the Luxembourg Court, on the other, to adopt a self-restraint decision, stating that the granting of humanitarian visas

[79] As pointed out (C. Danisi, A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", cit.), the principle of the best interests of the child is totally absent in the *MN* decision despite the involvement of children.

[80] See D. Schmalz, "Will the ECtHR Shake up the European Asylum System?", cit., referring to Mengozzi's opinion.

[81] On recent developments with respect to the interpretation of "jurisdiction" (mostly concerning positive human rights duties) in other regional and universal human rights bodies see also D. Desierto, "The ICESCR as a Legal Constraint on State Regulation of Business, Trade and Investment: Notes from CESCR General Comment No. 24 (August 2017)", *European Journal of International Law: Talk!*, 13 September 2017 <https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>(07/20); A. Berkes, "A New Extraterritorial Jurisdictional Link Recognised by the IACtHR", *European Journal of International Law: Talk!,* 28 March 2018 <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/>(07/20); D. Møgster, "Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR", *European Journal of International Law: Talk!,* 27 November 2018 <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/>(07/20).

does not fall within the scope of EU law but solely of national law (notwithstanding the fact that Advocate General Mengozzi had convincingly suggested a different possible interpretation).

The outcome reveals the incoherence of European policies: although the rhetoric discourse, especially in official EU documents, is in favour of "safe passages" for those in need of international protection, the possibility of a practical legal path – such as the one at stake in the present decisions (applying for humanitarian visas at embassies) is in the end left to the discretion of the single member States. Unfortunately, the attempt of the European Parliament to reform the Visa Code "for the benefit of greater legislative coherence by combining the subject of humanitarian visas (access) with that of asylum procedures (*after* access)"[82] met the strong opposition of the Council and the reluctance of the Commission; as a result the recent recast of the Visa Code does not introduce rules concerning the issue of humanitarian visas[83] and the later Parliament's legislative impulse[84] has been left without a concrete follow-up[85].

In this context the self-restraint of both European Courts, passing the buck to the States, and refusing to intervene at least in such paradigmatic cases as the ones at stake in the abovementioned proceedings, in order to avoid the violation of a fundamental (and absolute) rights, such as the prohibition of torture and inhuman

[82] See J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit.

[83] Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code). See N. Vavoula, "Of Carrots and Sticks: A Punitive Shift in the Reform of the Visa Code", *EU Immigration and Asylum Law and Policy*, 5 September 2018, available at <http://eumigrationlawblog.eu/of-carrots-and-sticksa-punitive-shift-in-the-reform-of-the-visa-code >(07/20).

[84] See *European Parliament Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas* (2018/2271(INL), <https://www.europarl.europa.eu/doceo/document/A-8-2018-0423_EN.html>(07/20).

85 The Commission has declared that its Proposal on resettlement meets the Parliament's recommendations for the creation of protected entry channels, adding that "it is politically not feasible to create a subjective right to request admission and to be admitted": see *Follow up to the European Parliament non-legislative resolution with recommendations to the Commission on Humanitarian Visas,* (SP(2019)149), Bruxelles, 1.4.2019, <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2271(INL)>(07/20).

treatment – creates a dangerous vacuum of protection not only for people seeking humanitarian visas at embassies, but also for all those situations that are the foreseeable consequences of the increasingly frequent strategies of externalization of border controls at European level (implemented both by the European Union and by single European States)[86].

[86] See A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, cit. and literature quoted therein. So far, the outcome of another important case concerning the consequences of externalization, the pending case *S.S. and Others v. Italy* (see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model" in this volume), is indeed at risk, also in light of the latest developments in the Strasbourg case-law. As pointed out, the recent trio (*Ilias and Ahmed v. Hungary* , *N.D. and N.T. v. Spain* and *M.N. and others v. Belgium*) "point to a new and more cautious direction of the Court in regard to migration-related rights under the ECHR" (T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", cit.).

THE ARCHITECTURE OF FUNCTIONAL JURISDICTION: UNPACKING CONTACTLESS CONTROL – ON PUBLIC POWERS, *S.S. AND OTHERS V. ITALY,* AND THE "OPERATIONAL MODEL"

VIOLETA MORENO-LAX*

1. Introduction

Debates on the extraterritorial reach of human rights are often channeled through debates on jurisdiction. In substance, it is the exercise of jurisdiction that determines whether a state can be held accountable for human rights violations in a specific situation, hence the importance of defining the term and identifying the factors through which it can be ascertained. This is particularly true in the context of the European Convention on Human Rights (ECHR),[1] where the notion is construed as a "threshold" criterion that determines its applicability in concrete cases,[2] but it is a common feature across the field of international human rights instruments.[3]

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[1] European Convention on Human Rights and Fundamental Freedoms, Nov. 4 1950, C.E.T.S. 5 [hereinafter ECHR].

[2] *Al-Skeini and Others v. United Kingdom* [GC] 53 E.H.R.R. 18, para. 130, 2011. See also *Al-Jedda v. United Kingdom*, App. No. 27021/08, para. 74 (7 July 2011), <http://hudoc.echr.coe.int/eng?i=001-105612> (06/20). Speaking of a "necessary condition" instead, see *N.D. and N.T. v. Spain* [GC], Apps. 8675/15 and 8697/15, para. 102 (13 February 2020), <http://hudoc.echr.coe.int/eng?i=001-201353> (06/20).

[3] For a thorough discussion and further references, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, Oxford University Press, Oxford, 2011. See also R. Wilde, "The Extraterritorial Application of International Human Rights Law on Civil and Political Rights", in N. Rodley, S. Sheeran (eds.), *Routledge Handbook of International Human Rights Law,* 2013, p. 635; M. Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, 2013; M. Gibney, S. Skogly (eds.), *Universal*

Ultimately, what these discussions reveal is a tension between competing conceptions of the mission and rationale of human rights, whether seen as essentially underpinned by an universalist vocation or as fundamentally constrained by national borders as key delineators of state powers and state obligations.

Adjudicators, particularly at the European Court of Human Rights, have reflected this dialectic in their judgments, expanding the scope of human rights provisions to situations outside national territory, but over which states exhibit high levels of "effective control," adapting the territorial model to extraterritorial settings. Their findings, however, do not follow a straightforward, fundamental tenet, and have generated confusion as for what constitutes "control" that can be deemed "effective" and thus tantamount to an exercise of jurisdiction in the individual circumstances. Rather than "apprais[ing] the facts against [a set of] immutable principles," the Court has been criticized for "fashioning doctrines which somehow seem to accommodate the facts," but reach conclusions in a piecemeal way.[4]

To overcome this limitation, several authors have suggested alternative approaches. Lawson, for instance, has done so by reference to relative control and the cause-and-effect relationship between state action and foreign territory or persons abroad, proposing that states be considered responsible for the consequences of their conduct wherever performed[5]—somewhat equating the ability to violate rights with the duty not to violate them, without expounding how to avoid the conflation between capability and obligation. Others, like Milanovic, rely on the nature and content of obligations and whether they entail positive or negative duties, presuming that the latter are easier to comply with offshore and should therefore be ubiquitously respected—as if the distinction between positive and negative duties

Human Rights and Extraterritorial Obligations, University of Pennsylvania Press, Philadelphia, 2010; M. Gondek, *The Reach of Human Rights in a Globalising World. Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2009.

[4] *Al-Skeini*, 53 E.H.R.R. 18, Concurring Opinion of Judge Bonello at para. 8.

[5] R. Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights", in F. Coomans, T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, p. 83, 20. See also Applicants in *Bankovic and Others v. Belgium and Others*, 11 B.H.R.C. 435, 2001.

was warranted, as a matter of principle, or easy to operate, as a matter of practice.[6]

These propositions, as plausible as they may be, leave a significant amount of unpredictability, which may lead to unsatisfactory outcomes. They fail to provide a coherent construction of jurisdiction that is applicable across the board, within and beyond borders, and that is principled and non-contingent on levels of physical control or the legal characterization of the nature of obligations (as positive or negative). So, contributing to this discussion, but offering an alternative reading, this article proposes a new conceptualization, taking extraterritorial maritime migration multi-actor interventions as a case in point.

Starting from pronouncements of international human rights courts and treaty bodies, the goal is to distil a principled and workable concept of jurisdiction that reconciles the universal ethos of human rights with the existence of national borders in an inter-dependent, globalized world. With this in mind, the objective is to unpack the normative premise unifying the generally accepted models of extraterritorial jurisdiction (that is, "control over an area," or territorial, and "State agent authority," or personal) and, on that foundation, propose a paradigm that resolves the current difficulties with the appraisal of extraterritorial action.

This model, which I call "functional"—in a sense somewhat different from the one implied by other authors, as discussed in Part D—aspires to provide a more intelligible approach to the establishment of extraterritorial jurisdiction, highlighting the importance of the normative foundation of sovereign authority overall, whether exercised territorially or abroad. It is predicated on the exercise of *public* powers, such as those ordinarily assumed by a territorial sovereign,[7] taking the form of policy delivery and/or operational action translating into "situational control."

Against this background, I will assert that instances of "contactless" control by an ECHR party,[8] exercised through remote

[6] See M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, cit., p. 210 ff.

[7] *Al-Skeini*, 53 E.H.R.R. 18, para. 149.

[8] The argument will elaborate upon V. Moreno-Lax, M. Giuffré, "The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows", in S.S. Juss (ed.), *Research Handbook on International Refugee*

management techniques and/or in cooperation with a local administration acting as a proxy,[9] may nonetheless amount to "effective" control and engage Convention obligations—whether it be exercised over persons, territory, or specific situations abroad. The role of knowledge and the extent of due diligence owed to avoid prospective harm will be considered as well, in view of conduct occurred "during the course of, or contiguous to, security [or equivalent] operations" performed under state direction.[10] Such "operations," *qua* complex mechanisms of governance that implement broader policies, with a planning, rollout and post-implementation phase—rather than random, one-off, haphazard encounters between a state and its potential subjects[11]—are key to the conceptualization of functional jurisdiction posited herein.

The pending case of *S.S. and Others v. Italy*, lodged by the Global Legal Action Network (GLAN), in collaboration with the Italian Association of Immigration Lawyers (ASGI), where I act as lead counsel, will illustrate the argumentation.[12] I will claim that the constellation of events of November 6, 2017, recounted in Part B and contextualized in Part C, falls within Italy's "jurisdiction" under Article 1 ECHR, in a way comparable to the *Hirsi* case.[13] While in *Hirsi* a "push-back" operation was conducted directly by Italian forces, here the same underlying policy was carried out by proxy.[14] As

Law, Edward Elgar Publishing, 2019, p. 81. For a similar argument on military occupation but without "boots on the ground", see O. Ben-Naftali, Y. Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories", *Israel L.Rev*., 2003–2004, p.37; O. Ben-Naftal et al. (eds.), "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, 2005, p. 551.

[9] *Catan and Others v. Moldova and Russia*, Apps. 43370/04, 8252/05, and 18454/06, para. 106 (19 October 2012), <http://hudoc.echr.coe.int/eng?i=001-114082> (06/20).

[10] *Al-Skeini*, 53 E.H.R.R. 18 at para. 150.

[11] This has been discarded in *Bankovic*, *supra* note 5, para. 75. Further on these "encounters," *see* I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law,* Cambridge University Press*,* Cambridge, 2016.

[12] *S.S. and Others v. Italy*, App. No. 21660/18, communicated on 26 June 2019 <http://hudoc.echr.coe.int/eng?i=001-194748> (06/20).

[13] *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (23 February 2012), <http://hudoc.echr.coe.int/eng?i=001-109231> (06/20).

[14] On "pull-backs", see further N. Markard*,* "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries", *European Journal of Int. Law*, 2016, p. 591.

Part E will expound in detail, Italy exercised—though remotely[15]—a sufficient degree of "effective control" over the applicants' fate,[16] reaching the jurisdictional threshold of the Convention.

This will serve to clarify the limits of multi-actor cooperation that contributes, or leads, to human rights violations through capacity building, financial transfers, and/or intervention in the command and control structure of a partner State. It will demonstrate that human rights responsibility can be engaged through consensual measures of pre-emption and containment of unwanted migration,[17] challenging systems of "contactless control" of irregular flows, like the one built by Italy with Libya, which impedes access to protection by refugees and others in need. Under the functional approach, the elimination of direct physical contact with the individuals concerned no longer amounts to the severance of a possible jurisdictional link that may trigger human rights obligations. On the contrary, the functional understanding maintains that operational power projected and actioned abroad, like other methods of territorial and/or personal control, amounts to an exercise of jurisdiction.

The wider ramifications of this model for armed conflict, peace building programs, development policies, or democratization efforts, beyond the immediate migration by sea terrain, should be duly considered and problematized in further research. It is anticipated that this new understanding of jurisdiction—which I deem implicit in the existing extraterritorial bases already recognized in international human rights law—can have revolutionary implications and serve to close important accountability gaps,[18] but it will also give rise to new questions around consolidating practices of collaboration in the management of cross-regional challenges, including disaster relief or the consequences of the climate crisis, with an impact throughout the

[15] Further on techniques of "remote control", see D.S. FitzGerald, "Remote Control of Migration: Theorising Territoriality, Shared Coercion and Deterrence", *Journal of Ethnic and Migration Studies* (advance access), 2019, <https://doi.org/10.1080/1369183X.2020.1680115> (06/20).

[16] *Ilaşcu v. Moldova and Russia*, App. No. 48787/99, para. 392 (8 July 2004), <http://hudoc.echr.coe.int/eng?i=001-61886> (06/20).

[17] See*, e.g.*, T. Gammeltoft-Hansen, J.C. Hathaway, "Non-refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, 2015, 53, p. 235.

[18] See I. Mann, "Maritime Legal Black Holes: Migration and Rightlessness in International Law", *European Journal of Int. Law*, 2018, p. 347.

legal sectors implicated in states' international relations. The limits and possible objections to this model will therefore be addressed in Part F.

2. The Events of November 6, 2017

The facts of *S.S.* have been reconstructed in detail by the research hub *Forensic Oceanography*,[19] through evidence collected by the Search and Rescue Observatory for the Mediterranean (SAROBMED),[20] on the basis of materials provided by the search and rescue (SAR) NGO *Sea Watch*. The evidence includes video footage and audio recordings of the event, survivors' testimonies, interviews with key actors, and complementary documentation gathered from a variety of official sources. There is, however, no commonly agreed account of how the situation unfolded, since the Italian Government is yet to respond to the applicants' allegations and the Court is still to render a decision on the case. The description below, therefore, presents the facts as they were communicated to Italy.[21]

The case concerns the LYCG's interception/rescue of a migrant dinghy on the high seas, carrying around 150 persons, including the applicants, which had departed the Tripoli area around midnight on November 5, 2017, and began to capsize soon after. The Italian Maritime Rescue Coordination Centre (MRCC) located in Rome was

[19] See C. Heller, L. Pezzani, *Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean*, Forensic Oceanography, 4 May 2018, <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf> (06/20) [hereinafter *Mare Clausum* Report]; for the visual minute-by-minute reconstruction of events, *see* C. Heller, L. Pezzani, *Mare Clausum: The Sea Watch v. Libyan Coast Guard Case,* Forensic Architecture, (May 4 2018), <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard> (06/20) [hereinafter *Mare Clausum* Video].

[20] The Search and Rescue Observatory for the Mediterranean (SAROBMED) is an international, multi-disciplinary consortium of researchers, civil society groups, and other organisations working in the field of cross-border maritime migration, either on the ground, or through advocacy, research and/or strategic litigation that records and documents human rights violations occurring at sea as a result, or in the course, of rescue/interdiction operations and of which the current author is the coordinator, <https://sarobmed.org/> (06/20).

[21] See (only in French) Requête no 21660/18 *S.S. et autres contre l'Italie* introduite le 3 mai 2018, Communiquée le 26 juin 2019, Exposé des faits, <http://hudoc.echr.coe.int/eng?i=001-194748> (06/20).

first to receive its distress signal, which it communicated to "all ships transiting in the area," including the *Sea Watch 3* (SW3) and the *Ras Al Jadar* of the LYCG, requesting that the dinghy be assisted.[22] MRCC Rome provided exact coordinates about an hour later.[23] Meanwhile, the dinghy had started sinking.

Survivors recall a Portuguese military aircraft—belonging to the EUNAVFOR MED Operation Sophia[24]—overflying and circling them several times, throwing down lifejackets. A French warship, *Premier Maître l'Her*, also under EUNAVFOR MED command, and an Italian navy helicopter, within the Italian Operation *Mare Sicuro*,[25] were in close proximity. It was only about another hour later that the SW3 and the LYCG arrived on site. Apparently, the LYCG made it first, but did not assist immediately. By contrast, the SW3 crew started rescue procedures right away, assuming on-scene command (OSC), a role to which the LYCG objected – although the LYCG vessel was initially unresponsive to radio communication and lacked the necessary equipment, including rigid-hulled inflatable boats (RHIBs).[26]

The survivors recall the *Ras Al Jadar* did not help them. Instead,

[22] See copy of Inmarsat distress signal received by the SW3, in *Mare Clausum* Report, *supra* note 19, p.89.

[23] See copy of Hydrolant message received by the SW3, in *Mare Clausum* Report, *supra* note 19, p.90.

[24] This is the EU maritime security mission tasked with the fight against human trafficking and migrant smuggling from Libya, launched in 2015. Council Decision 2015/778/CFSP of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), 2015, O.J. (L 122/31). The unpublished EUNAVFOR MED documents cited hereinafter have been leaked to the press and are available via Z. Campbell, *Europe's Deadly Migration Strategy: Officials Knew EU Military Operation Made Mediterranean Crossing More Dangerous*, Politico (28 February 2019), <https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/> (06/20).

[25] This is the Italian maritime security operation launched in March 2015, in replacement of the mixed rescue-security mission *Mare Nostrum*. *See* Ministero della Difesa, *Operazione Mare Sicuro,* 19 June 2015, <http://www.difesa.it/OperazioniMilitari/NazionaliInCorso/MareSicuro/Pagine/default.aspx> (06/20).

[26] It was latter claimed by a LYCG spokesman that the LYCG RHIBs are dysfunctional. *See* S. Scherer, A. Lewis, *Exclusive: Italy Plans Big Handover of Sea Rescues to Libyan Coastguard*, Reuters, 15 December 2017, <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG> (06/20).

the crew "took pictures and cursed."[27] Its entry into the rescue theatre "created a big wave, which made people sink and others drift away,"[28] including the child of one of the applicants. The LYCG crew then "beat people with ropes who were in the water."[29] They also established contact with the SW3, "inviting her to stay away,"[30] and stating that "[w]e are now responsible for this rescue."[31] The SW3 rejected the proposition, informing the LYCG that "[w]e have orders from MRCC [to assist the dinghy in distress]."[32]

It is unclear what the orders were. It appears that MRCC Rome had communicated by phone with the LYCG Joint Operation Room (JOR) in Tripoli.[33] From the transcript of the conversation, it transpires that MRCC Rome had directly asked the official in charge to assume OSC and that he "confirmed 'yes' the LYCG will conduct the operation and assume OSC."[34] Generally, as per the official's account, the LYCG "are in contact 24/7 with MRCC Rome." It is MRCC Rome who "provide[s] all information about SAR', including "all distress signals" – which, as the next section expounds, the LYCG has no infrastructure to systematically register and further disseminate.[35]

[27] Testimonies of survivors (on file). Confirming: U.N. Office of the High Comm'r for Human Rights, *Situation of Human Rights in Libya, and the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya – Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/37/46, para. 46 (21 February 2018).

[28] Testimonies of survivors (on file).

[29] *Id.* For similar practices in other incidents, *see, e.g.*, B. Trew, T. Kington, *Video Shows Libyan Coastguard Whipping Rescued Migrants*, The Times, 14 February 2017, <https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6> (06/20).

[30] EUNAVFOR MED, *Monitoring Mechanism Libyan Coast Guard and Navy, Monitoring Report October 2017 – January 2018* [hereinafter LYCG Monitoring Report], Annex C, p. 3 (on file).

[31] Audio recording of the SW3's bridge communications (November 6 2017) (on file).

[32] *Id.*

[33] LYCG Monitoring Report, *supra* note 30, Annex C, p.3.

[34] Transcript of interview with Brigadier M. Abdel Samad (10 November 2017) (on file), also cited in *Mare Clausum* Report, *supra* note 19, p.94.

[35] *Id.* The information has been corroborated in a second interview, undertaken on Mar. 23, 2018 (on file). Confirming, *see also* EUNAVFOR MED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, p.8 (on file), reporting how "MRCC [Rome] . . . requested the Libyan Coastguard to assume responsibility for the

While the LYCG vessel approached the dinghy, the SW3 had lowered two of its RHIBs to reach out to migrants scattered around at risk of being lost. The LYCG vessel deployed a rope instead, only after several persons had already passed away, causing the dinghy to tip and others to fall into the water.[36] Amidst the chaos, some climbed on board the *Ras Al Jadar* unaided, including several of the applicants. Others, fearing for themselves, swam towards the SW3 RHIBs. Video footage shows how the LYCG shouted and threw objects at them, endangering rescue procedures. This caused the SW3 RHIBs to retreat, and several other persons to drift and drown.[37] Regarding those on board the *Ras Al Jadar*, including some of the applicants, LYCG crewmembers used a rope to tie them up and beat them, pointing firearms in their direction.[38] Unable to establish order, the LYCG patrol speeded up abruptly to leave the scene, leaving one person hanging on the flank of the ship, who was only recovered after repeated calls by the Italian military helicopter.[39]

In the interim, six of the applicants managed to jump overboard and regain the SW3, which, in total, rescued 59 of all survivors and took them to Italy. The body of the child of one of the applicants was

coordination of the search and rescue operation" of May 10, 2017. *See also* U.N. Support Mission in Libya & U.N. Office of the High Comm'r for Human Rights, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, at p.17 (20 December 2018), reporting an interview where a LYCG spokesperson confirmed that coordination of SAR operations takes place "with the support of the MCCR [i.e., Rome MRCC]" and that the distress calls they receive and respond to are "coming through Italy," <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> (06/20).

[36] *See* C. Heller et al. *"It's an Act of Murder": How Europe Outsources Suffering as Migrants Drown*, New York Times, (26 December 2018), <https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html> (06/20).

[37] *See* Sea Watch, *Update: Beweismaterial für unverantwortliches Verhalten der Libyschen Küstenwache*, undated, <https://sea-watch.org/update-beweise-libysche-kuestenwache/> (06/20).

[38] U.N. S.C., *Report of the Secretary-General on the United Nations Support Mission in Libya*, U.N. Doc. S/2018/140, para. 49, (12 February 2018), <http://www.securitycouncilreport.org/un-documents/document/s2018140.php> (06/20).

[39] Sea Watch, *EXKLUSIVE [sic]: Full incident of 06 November 2017 with the Libyan Coast Guard* (13 November 2017), <https://www.youtube.com/watch?v=_phI-f_yFXQ> (06/20).

retrieved too, making it the second infant known to have been lost in the commotion. The remaining two applicants staying on the *Ras Al Jadar* were taken to the Tajura camp in Libya,[40] where they were abused for over a month.[41] From there, they were returned to Nigeria after agreeing to "voluntary repatriation," as the only alternative to indefinite detention they were offered.[42] Two witnesses, who had been pulled back as well, were still in Libya at the time of filing of the complaint.[43]

3. The Bigger Picture of Italy–Libya Relations

The involvement of the LYCG in *S.S.* is not an isolated event and must be appraised against its wider context. It is part of a broader plan, in which Italian (and EU) authorities have invested vastly, to establish a Libyan SAR and interdiction capacity so they can assume responsibility for rescue (and disembarkation) and stymie irregular

[40] U.N. High Comm'r for Refugees, *Libya, Detention Centres* (15 January 2017), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=58874a004&skip=0&query=Tajura&coi=LBY> (06/20).

[41] On the treatment of detainees, *see* among many others U.N. Office of the High Comm'r for Human Rights, *Detained and Dehumanised – Report on Human Rights Abuses Against Migrants in Libya* (13 December 2016), <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> (06/20); Council of Europe Commissioner for Human Rights (CoE CommHR), *EU Agreements with Third Countries Must uphold Human Rights* (2 February 2017), <https://www.coe.int/en/web/commissioner/-/eu-agreements-with-third-countries-must-uphold-human-rights> (06/20); U.N. Secretary General, *Report of the Secretary-General pursuant to Security Council Resolution 2312*, 2016, U.N. Doc. S/2017/761 (7 September 2017); U.N. Office of the High Comm'r for Human Rights & U.N. Support Mission in Libya, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya* (April 2018), <http://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf> (06/20).

[42] I. Leghtas, *"Death Would Have Been Better": Europe Continues to Fail Refugees and Migrants in Libya*, Refugees International Field Report, at pp.14–19 (April 2018), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5ad3ceae03ce641bc8ac6eb5/1523830448784/2018+Libya+Report+PDF.pdf> (06/20).

[43] These two persons filed a separate application, once GLAN was able to collect their powers of attorney in Libya. Their case reference is C.O. and A.J. v. Italy, Appl. 40396/18 (not yet communicated).

migration across the Central Mediterranean. Efforts date back to the early 2000s,[44] with the 2008 Treaty of Friendship of the Berlusconi-Gaddafi period marking a particularly significant inflection point.[45] But they have continued in the post-Gaddafi era, with Italy providing key logistic, financial, political, and operative support.

3.1. *The Legal and Political Framework*

The 2008 Treaty of Friendship, as developed in the Memorandum of Understanding (MoU) of February 2017,[46] is the pivotal agreement, providing legal coverage to the Italian-Libyan cooperation in the field of irregular migration. It specifically buttresses the re-establishment of a Libyan Navy and Coast Guard (LN/LCG), with Italy assuming "a leading role."[47]

The Treaty contains a provision, in Article 19, calling on both parties to intensify their collaboration in the establishment of an integrated system of frontier surveillance in Libya, for the Italian actors with the requisite technological competence to administer, committing Italy to pay half of the cost, with the EU bearing the other half.[48] The provision also explicitly commits the parties to jointly define actions to "stem irregular migration flows"[49] – with no mention

[44] Listing the different documents and reconstructing the history of migration management cooperation during this period, *see* E. Paoletti, "A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU", *Ramses Working Paper* 12/09, European Studies Centre, Oxford (April 2009). For the book-length elaboration, *see* E. Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya*, Palgrave Macmillan, London, 2010.

[45] *Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista* (30 August 2008), <https://www.gazzettaufficiale.it/eli/id/2009/02/18/009G0015/sg> (06/20) [hereinafter Treaty of Friendship].

[46] *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontier tra lo Stato della Libia e la Repubblica Italiana* (2 February 2017), <http://www.statewatch.org/news/2017/feb/it-libya-memo-immigration-border-security-2-2-17.pdf > (06/20) [hereinafter MoU].

[47] Ministero degli affari esteri, *La Strategia Italiana Nel Mediterraneo*, p. 21 (December 2017), <https://www.esteri.it/mae/resource/doc/2017/12/med-maeci-ita.pdf> (06/20) [hereinafter MAE Report].

[48] Treaty of Friendship art. 19.

[49] *Id.* art. 19(3).

of human rights obligations. While the implementation of the Treaty led to the joint push-back campaign conducted in 2009, and for which Italy was condemned in *Hirsi*,[50] cooperation was halted during the civil war period.

The 2017 MoU has revived the Treaty of Friendship by expanding on its Article 19.[51] It sets up, on that basis, specific structures of collaboration, including a "Joint [Italy-Libya] Commission" charged with the definition of priorities, funding needs, implementation strategies, and monitoring actions.[52] The ultimate goal remains to "stem irregular migrant flows"[53]- again, with no reference to human rights. To that end, the division of labor foresees that Italy provide the financial, technical, technological and other means, specifically to the LYCG.[54] The financing of detention centers, the training of its personnel, and overall support to return and readmission from Libya is also part of the agreement.[55]And Article 4 reiterates that it is for Italy, including via EU funding, to cover the expense.[56]

Regarding political support, Italy has not been alone in sustaining the LYCG and the plan for comprehensive containment of unwanted flows departing from Libya. The EU, besides providing significant financial and logistic assistance, has also celebrated the Italian-Libyan cooperation at the highest political level. Already in January 2017, the EU Commission and the EU High Representative for Foreign Affairs called for the enhancement of support to Libya and the LYCG.[57] And, far from condemning the MoU, the *Malta Declaration*, adopted by all EU Heads of State and Government, "welcomes and … support[s]

[50] This was the direct result of an (unpublished) Additional Protocol of February 4, 2009, cited in *Hirsi*, *supra* note 13, para. 19.

[51] MoU, *supra* note 46.

[52] *Id.* art. 3.

[53] *Id.* art. 1a.

[54] *Id.* arts. 1b and 1c.

[55] *Id.* art. 2.

[56] *Id.* art. 2. EUNAVFOR MED has also delivered training to the LYCG upon extension of its mandate via Council Decision (CFSP) 2016/993 of 20 June 2016 Amending Decision (CFSP) 2015/778 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), 2016 O.J. (L 162/18).

[57] *Joint Communication on Migration on the Central Mediterranean Route: Managing Flows, Saving Lives*, JOIN, 2017 4 final (25 January 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=en> (06/20).

Italy in its implementation," pledging funds and capacity building, with the explicit aim of "preventing departures and managing returns."[58] Despite the wealth of sources denouncing it, the situation facing migrants in Liby – known to former Italian Minister of Interior, Minniti[59] and his fellow ministers of the other Member States[60] – has been no impediment to the EU's backing of this cooperation.

3.2. Funding and Equipment

Capacity-building initiatives within the framework of the Treaty of Friendship and the MoU intensified in the summer of 2017, with Italy creating a dedicated "Africa Fund" and allocating €2.5 million for the maintenance of Libyan boats and the training of their crews.[61] In parallel, Italy also secured EU funding in excess of €160 million for Libya. An EU project was awarded to the Italian Coast Guard, through which €46.3 million have been channeled to border management and migration control in Libya.[62] The project specifically aims at "[s]trengthening the operational capacities of the Libyan coastguards", via "training, equipment … repair and maintenance of the existing fleet," so as to "strengthen the authorities' capacities in

[58] European Council, *Malta Declaration*, para. 6(j) (3 February 2017), <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> (06/20).

[59] *Migranti, Minniti: "Condizioni di chi è riportato in Libia sono mio assillo",* Repubblica TV (15 August 2017), <https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328> (06/20).

[60] Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, pp. 56–59 (11 December 2017), <https://www.amnesty.org/en/documents/mde19/7561/2017/en/> (06/20), counting over 20 reports from reliable monitors, including UN and EU sources. *See* further list of nearly 50 reports by Amnesty International (AI) and Human Rights Watch (HRW) spanning the period 2013 to 2019 appended to their joint Third-Party Intervention in *S.S.*, *Human Rights Watch and Amnesty International Submissions to the European Court of Human Rights*, Annex, 12 November 2019, <https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf> (06/20).

[61] Ministry of Foreign Affairs, Director General for Italians abroad and migration policies, Decree 4110/47 of 28 August 2017.

[62] EU Commission, *EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya* (28 July 2017), <http://europa.eu/rapid/press-release_IP-17-2187_en.htm> (06/20).

maritime surveillance and rescuing at sea."[63] The final goal is "to provide the Libyan coast guards with *initial capacity* [absent hitherto] to better organise their control operations" and "coordinate maritime interventions."[64] This, the EU Commission has noted, "will involve the full design of an Interagency National Coordination Centre … and a Maritime Rescue Coordination Centre,"[65] which does not yet exist – its completion being "estimated in 2020"[66] – as well as "assistance to the authorities in defining and declaring a Libyan Search and Rescue Region [SRR]"[67] – which was only recognized by the International Maritime Organization (IMO) in June 2018.[68]

In terms of equipment, Italy has donated ten fast patrol boats to the LN/LCG,[69] which seem to be "the most effective and reliable ships [in the LYCG inventory]." The best appears to be precisely the *Ras Al Jadar*, which performed "approximately half of all sorties" between October 2017 and January 2018,[70] including the one of

[63] *Id.*

[64] *Id.* (emphasis added).

[65] *Id.*

[66] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, EEAS, 2017, 1612, p.14 (on file).

[67] EU Commission, Press Release, July 28, 2017, *supra* note 62.

[68] The coordinates were uploaded on June 26, 2018, on IMO's Gisis database, <https://gisis.imo.org/Public/COMSAR/NationalAuthority.aspx> (06/20). *See* the former Ambassador of Italy to Libya, Giuseppe Perrone, congratulating the Libyan authorities via Twitter for completing the procedure on June 28, 2018, <https://twitter.com/Assafir_Perrone/status/1012235279141359616> (06/20). For an elaboration on the declaration process, *see Mare Clausum* Report, *supra* note 19, pp.50–52. For the controversies surrounding the process, *see also* Statement by Mr Leggeri, Frontex Executive Director to the European Parliament, LIBE Committee Meeting (27 March, 2018): "Je ne considère pas comme acquise la zone SAR de la Lybie," <http://web.ep.streamovations.be/index.php/event/stream/20180327-0900-committee-libe> (06/20). *Cf.* Parliamentary Questions – Answer given by Mr Avramopoulos on behalf of the European Commission, P-003665/2018(ASW), 4 September 2018, <https://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html> (06/20)

[69] Italian Ministry of Interior, *Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica* (21 April 2017), <http://www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica> (06/20); *Minniti in Libia: fronte comune control il traffico di migranti* (16 May 2017), <https://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti> (06/20).

[70] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, at 19, 5, raising the number to "75% of [all] LCG&N missions." This continues to be the case. *See*

November 6, 2017. The vessels were gifted disregarding the widely publicized malpractices of the LYCG – also witnessed in the *S.S.* events – and the series of violent incidents occurred just a few days before the ceremony of award.[71] In one such incident the LYCG had interrupted a rescue, intercepted migrants at gunpoint, and pulled them back to Libya using perilous tactics.[72] Several actors, including the UN Secretary-General, have denounced similarly violent behavior by the LYCG[73] – of which the Italian Coastguard was aware[74] – including the firing of live shots,[75] the intimidation of NGO rescue boats,[76] and the use of force against migrants.[77]

3.3. *Operational Involvement*

For many years, and especially since the Arab Spring, "the only

EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, EEAS(2019) 18, Part A, p.13 (on file).

[71] EUNAVFOR MED has noted how migrants "rescued" by the LYCG, immediately "mak[e] attempts to escape LCG&N vessels." *See* EUNAVFOR MED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, EEAS, 2018, 710, p.6 (on file).

[72] Sea Watch, *official Facebook account*, (10 May 2017), <https://www.facebook.com/seawatchprojekt/videos/1865822903635782/> (06/20).

[73] UNSC, Report S/2018/140, *supra* note 38, para. 49. *See also Mare Clausum* Report, *supra* note 19, at pp.57–62; *Dark Web of Collusion*, *supra* note 60, pp. 35–37.

[74] *See, e.g.*, A. Rettman, *Italy Backs Libya as NGOs Chased Out of Mediterranean*, EU OBSERVER, 14 August 2017, <https://euobserver.com/migration/138736> (06/20), reporting how MSF had been "warned" by MRCC Rome "about security risks associated with threats publicly issued by the Libyan Coast Guard against humanitarian … vessels operating in international waters."

[75] *Migranti. Guardia costiera libica spara contro motovedetta italiana*, Avvenire (26 May 2017), <https://www.avvenire.it/attualita/pagine/guardia-costiera-libica-spara-contro-vedetta-italiana> (06/20).

[76] S. Scherer, *Rescue Ship Says Libyan Coast Guard Shot at and Boarded It, Seeking Migrants*, Reuters (September 26 2017), <https://uk.reuters.com/article/uk-europe-migrants-libya-ngo/rescue-ship-says-libyan-coast-guard-shot-at-and-boarded-it-seeking-migrants-idUKKCN1C12LJ> (06/20).

[77] *See, e.g.*, B. Trew, T. Kington, *Video Shows Libyan Coastguard Whipping Rescued Migrants*, The Times (14 February 2017), <https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6> (06/20). And this is routine practice. A LYCG commander told HRW that the use of force against migrants during rescues was "necessary to control the situation as you cannot communicate with them." *See* HRW, *EU: Shifting Rescue to Libya Risks Lives, Italy Should Direct Safe Rescues* (June 2017), <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives> (06/20).

country that provide[d] SAR to the area sitting next to the territorial waters of Libya [was] Italy."[78] After the termination of the *Mare Nostrum* operation in 2014, the Italian Government carried on "coordinat[ing] virtually all rescue operations" in that area[79] – a fact corroborated by EUNAVFOR MED, confirming that the "Italian MRCC … *continued* to coordinate rescue operations" throughout 2016 and 2017.[80] In fact, LYCG coordination capabilities peaked at a mere "54% of [all] SOLAS events" only in the second semester of 2018[81] – long after the *S.S.* events.

This situation of *de facto* Italian-led Libyan interventions was consolidated in 2017, on the basis of the MoU. Within that framework, not only the establishment of a capable coast guard, but also of a reliable Libyan MRCC became top priorities. The aforementioned EU project awarded to the Italian Coast Guard supported implementation.[82] Completion was planned in consecutive phases, including activities such as "organiz[ing] [LYCG] SAR units" and "develop[ing] SAR SOPs."[83] But the actual creation of the Libyan MRCC only began in December 2018, when the project entered its

[78] Italian Coalition for Civil Liberties and Rights (CILD), *Guidance on Rescue Operations in the Mediterranean*, p.8 (July 2017), <https://cild.eu/wp-content/uploads/2017/07/KYR-Protection-and-Maritime-Safety_EN.pdf> (06/20).

[79] *Shifting Rescue to Libya, supra* note 77. *See also* Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean* (September 2014), <https://www.amnesty.org/download/Documents/8000/eur050062014en.pdf> (06/20).

[80] EUNAVFOR MED, *Six-Monthly Report 1 January – 31 October 2016* (on file), p. 11; and EUNAVFOR MED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, p. 8.

[81] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part B, p. 2. "SOLAS" refers to the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 278 [hereinafter SOLAS Convention].

[82] EU Commission, *Support to Integrated Border and Migration Management in Libya – First Phase* (T05-EUTF-NOA-LY-04) (27 July 2017), <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-04_fin.pdf> (06/20).

[83] Italian Coastguard, *LMRCC [Libyan MRCC] Project briefing, Shade Med Presentation, 23–24 November 2017* (on file), mentioned in EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 22, and reproduced in *Mare Clausum* Report, *supra* note 19, p.11. "SOPs" stands for "standard operating procedures."

second phase, with the "development of the MRCC Communication network along the coast."[84]

Meanwhile, an incipient LYCG – still "far from being fully operational" by EUNAVFOR MED's own admission[85] – started operating with the support of a Joint Operation Room (JOR), consisting of some "basic operational rooms in a joint building in Tripoli" set up in the first phase of the project,[86] but "with limited [space] and communication capabilities [and] relatively equipped to communicate with naval assets at sea."[87] The JOR, involved in the November 6, 2017, events, was and still remains "in a critical infrastructural situation … [that] is further adversely conditioned by a limited presence of personnel with insufficient language (English) skills and limited software tools … knowledge."[88] In fact, the JOR is incapable of operating at a "self-sustaining level,"[89] and its capacities "do[] not allow properly carrying out the institutional tasks as MRCC,"[90] so that, as per the EUNAVFOR MED's assessment, they "still need further sustainment … *also in operational terms.*".[91]

Especially, the "lack of effective and reliable communication systems hampers Libyan capacity for the minimum level of execution of command and control [C2], including that necessary to coordinate SAR/SOLAS events," [92] hence Italy has secured the necessary functions. To this effect, in August 2017, it launched Operation *Nauras*, an extension into Libyan territorial and internal waters of the

[84] EU Commission, *Support to Integrated Border and Migration Management in Libya – Second Phase* (T05-EUTF-NOA-LY-07), pp. 9–12 (27 December 2018), <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf> (06/20).

[85] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 3.

[86] T05-EUTF-NOA-LY-04, *supra* note 82, p. 2.

[87] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 8.

[88] *Id*. p. 22.

[89] EUNAVFOR MED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, p. 17. This level has not yet been reached. *See* EUNAVFOR MED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, p. 10; and EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, p. 13.

[90] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, Annex C, p. 4.

[91] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part C, p. 12 (emphasis added).

[92] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 26.

military mission *Mare Sicuro*,[93] including "a factory vessel" sent to Tripoli with the task "to restore the efficiency of other Libyan naval units, and *coordinate patrol and sea rescue operations.*"[94]

Operation *Nauras* consists of four ships, four helicopters, and 600 servicemen, of which 70 per cent are deployed at sea, with the remaining 30 per cent staying in Tripoli harbour. Their key mission is, specifically, to "establish [the] operational condition[s] for LN/LNCG assets and develop C2 capabilities."[95] In the interim, their "naval asset in Tripoli Harbour [is] acting as LNCC [i.e., Libyan Navy Communication Centre] and logistic assistance/support hub."[96] This vessel is permanently "in contact with SAR assets and ITCG [i.e. Italian Coast Guard] and MRCC Centres,"[97] thus playing the role of a floating MRCC for Libya. Its function—also at the time of the *S.S.* events[98] – was explicitly "the cooperation and coordination of the joint activities of the Libyan Coast Guard and Navy, with a view to *carrying out their Command and Control (C2) tasks* and maintaining an adequate Maritime Situational Awareness to fight illegal migration."[99]

It is, therefore, via the Italian authorities, within the MRCC Rome and aboard the *Nauras* warship in Tripoli, that the LYCG received distress calls. And, because, on receipt, it lacked the means to further communicate with, let alone coordinate, assets at sea, the LYCG

[93] Italian Chamber of Deputies, *Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia alla missione internazionale in supporto alla guardia costiera Libica*, Doc. CCL n. 2 (28 July 2017), <www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf> (06/20).

[94] MAE Report, *supra* note 47, p. 24 (emphasis added).

[95] Marina Militare Italiana, *Mare Sicuro Briefing, Shade Med Presentation, 23–24 November 2017* (on file), mentioned in EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 22, reproduced in *Mare Clausum* Report, *supra* note 19, p.10.

[96] *Id.*

[97] *Id. See also* T05-EUTF-NOA-LY-04, *supra* note 82, p. 10.

[98] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 26.

[99] Italian Chamber of Deputies, *Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione*, Doc. CCL-bis n. 1, p. 101 (December 28 2017), <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf> (06/20) (emphasis added).

systematically relied on Italian (and EUNAVFOR MED[100]) infrastructure to liaise with the relevant actors. A case of 2019, documented by the SAR NGO *Mediterranea*, discloses how, oftentimes, communication is even entirely done by Italian officials supposedly "on behalf of" their absent LYCG counterparts, creating the impression of autonomous Libyan action.[101] A usual mode of engagement – confirmed by the EU Commission – involves the early detection via "sightings" performed by Italian or EUNAVFOR MED aerial assets, transmission of the information to the LYCG through the *Nauras* warship in Tripoli acting "as a "communication relay,"[102] and then further action coordinated by Italy "on behalf of" the LYCG.[103]

This pattern consolidated through sustained practice since August 2017,[104] and has been reinforced with Italy (and the EUNAVFOR MED) introducing a post-operation evaluation of the LYCG's conduct, precisely as a consequence of the November 6, 2017, incident. The lack of "professional behaviour" of LYCG personnel was raised through this channel on this occasion and a "basic 'lessons learnt' process" introduced, with disciplinary measures taken "in one specific case."[105] Apparently, the monitoring system in place entails an

[100] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, p. 4.

[101] C. Cappelletti, *La Libia abbandonò un barcone in mezzo al mare: ecco gli audio dell'ultimo salvataggio della Mare Jonio*, Open (18 April 2019), <https://www.open.online/2019/04/18/la-libia-abbandono-un-barcone-in-mezzo-al-mare-ecco-gli-audio-dell-ultimo-salvataggio-della-mare-jonio/> (06/20). *See also* M. Mensurati, F. Tonacci, *Migranti, le carte false sui soccorsi: "I fax dei libici scritti dagli italiani"*, Repubblica (17 April 2019), <https://rep.repubblica.it/pwa/generale/2019/04/17/news/migranti_le_carte_false_sui_soccorsi_i_fax_dei_libici_scritti_dagli_italiani_-224317594/> (06/20).

[102] *See Letter of Ms Paraskevi Michou, Director-General for Migration and Home Affairs, to Mr Fabrice Leggeri, FRONTEX Executive Director, of 18 March 2019*, Ref. Ares(2019)1755075, <http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf> (06/20).

[103] For the reconstruction of this sequence and evidentiary material, *see* C. Heller, *The Nivin Case: Migrants' Resistance to Italy's Strategy of Privatized Push-back*, Forensic Oceanography, especially p. 64 (December 2019), <https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf>. Confirming: EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part A, p. 4.

[104] *Mare Clausum* Report, *supra* note 19, pp. 57–87.

[105] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, Annex C, p. 4.

"*advising role* in order to strengthen accountability and follow up,"[106] including "feedback and recommendations" to which the LYCG has been "receptive" so far.[107]

Accordingly, what the next sections will substantiate is that, from the launch of *Nauras*, it has been Italy, both remotely through its MRCC and via direct military presence in Libya, which has assumed the overall coordination of the LYCG operational response in the Central Mediterranean in a way that amounts to an exercise of extraterritorial jurisdiction. Italy's pervasive political, financial, and operative involvement equates "effective control."

4. Defining (Extraterritorial) Jurisdiction

Before entering into a discussion on what constitutes "effective control" with a view to ascertaining extraterritorial jurisdiction—as I claim Italy exercised in the *S.S.* case—it is worth pausing to reflect on what jurisdiction itself amounts to in the context of human rights. A main contribution this article attempts to make is precisely in regards to the identification of a common thread that runs through territorial and extraterritorial configurations of the term, leading to principled inferences and predictable outcomes.

4.1. *Jurisdiction as Sovereign-authority Nexus*

The definition of the concept and its specific role in international human rights law has long attracted doctrinal attention. But there is disagreement as to its utility and its centrality for the establishment of

[106] EUNAVFOR MED, *Six-monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, p.18 (emphasis added). EUNAVFOR MED monitoring competence is the result of Annex F, added to the bilateral MoU signed with the LYCG on 21 August 2017 alongside Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), [2017] OJ L 194/61. *See* EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 3.

[107] EUNAVFOR MED, *Six-monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 4, 14. *Cf.* EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part B, p. 8, claiming that the monitoring function "does not entail any form of aid or assistance" nor "any form of direction or control of the LCG&N."

responsibility for human rights violations. Some authors, like Scheinin, argue that "jurisdiction" does not add anything to the key aspects of admissibility within the state responsibility framework and should, therefore, be considered an empty notion for the purposes of substantiating legal accountability. For him, there is apparently no distinction between the attribution of wrongful conduct to the state concerned and the determination of an exercise of its jurisdiction. The two are one and the same. Adding an extra step that functions as a threshold and precludes the establishment of responsibility is, therefore, seen as unhelpful.[108] Another strand of the literature questions the appropriateness of attempting a general synthesis of the concept, in light of the variety of human rights duties and their different manifestations, which would require a more tailored and nuanced approach. Only so can the complexities of (especially positive "facilitation" and "fulfillment") obligations, entailed in particular by economic, social and cultural rights, be adequately reflected.[109]

By contrast, other writers, such as Besson, consider jurisdiction to be fundamental to the proper understanding of the relationship that unites human rights holders and duty bearers.[110] For her, without jurisdiction, the universality of human rights would imply that any state would owe human rights duties to any human rights holder, regardless of any specific political-legal nexus between them. This is why jurisdiction, in this relational sense,[111] has an essential role to play in arbitrating between duty, capability, and desirability of compliance by any specific state vis-à-vis any specific human rights holder. And this is also why jurisdiction should be understood as an "all-or-nothing" condition for the activation of human rights obligations,

[108] M. Scheinin, "Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights", in M. Langford et al., cit. *supra* note 3, p. 212.

[109] For a critique of the use of the notion of "jurisdiction" in the Maastricht Principles, see N. van der Have, *The Maastricht Principles on Extraterritorial Obligations in the area of ESC rights – Comments to a Commentary*, 25 February, 2013, <http://www.sharesproject.nl/the-maastricht-principles-on-extraterritorial-obligations-in-the-area-of-esc-rights-comments-to-a-commentary/> (06/25).

[110] S. Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", *Leiden Journal of Int. Law*, 2012, p. 857.

[111] Highlighting this relational nature of jurisdiction, *see* U.N. Human Rights Comm., *Lopez Burgos v. Uruguay*, U.N. Doc. A/36/40 176, para. 12.1 (29 July 1981); *Celiberti de Casariego v. Uruguay*, U.N. Doc. A/36/40 185, para. 10.3. (29 July 1981).

rather than as gradual or incremental.[112] Either there is a jurisdictional link between the state and the person concerned or there isn't. What may, then, be "divided and tailored" in the specific case, and be proportionate to the level of control applied, are the ensuing obligations, but not jurisdiction *per se*.[113]

From this perspective, the term should best be understood as the "*de facto* political and legal authority" of the sovereign, amounting to more than mere coercion,[114] including a normative dimension that demands compliance. It is not "facticity [that] creates normativity."[115] Normativity must precede and underpin the account of a factual basis *qua* jurisdiction. It is the normative aspect of an exercise of state power that makes its interaction with a particular individual human-rights relevant. In Besson's view—which I espouse—jurisdiction refers to "some kind of normative power" that the sovereign exercises vis-à-vis an individual "with a claim to legitimacy," and that serves to establish the human-rights relevant link between them. Whether the state concerned may have acted *ultra vires* in the specific situation constitutes a separate question. *A priori*, to be an expression of jurisdiction, state actions/omissions do not have to be lawful, but only stem from a "lawfully organized institutional and constitutional order."[116] What matters to characterize state conduct as jurisdiction in the human rights sense is the underlying sovereign-authority nexus that connects the state to those within its might and the control it thereby purports to exercise, whether *de jure* or *de facto*, rather than the legality of its conduct. In this sense – which seems to be the one tacitly embraced by the Strasbourg Court – jurisdiction works as a trigger of human rights obligations.[117]

Without a (pre-existing) jurisdictional link between a State party and a certain individual, no human rights duties can be owed in

[112] Cf. Argumentation by the applicants in *Bankovic*, *supra* note 5, para. 75. See also M. den Heijer and R. Lawson, "Extraterritorial Human Rights and the Concept of "Jurisdiction"", in M. Langford et al., cit. *supra* note 3, p. 153.

[113] *Al-Skeini*, *supra* note 2, para. 137.

[114] *Cf.* M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, cit., p. 53, reducing jurisdiction to "a question of fact."

[115] *Cf.* M. Scheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights", in F. Coomans, T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties,* cit. *supra* note 5, p. 73.

[116] S. Besson, cit., pp. 864–865.

[117] *Catan*, cit., para. 103.

specific circumstances. Potential or hypothetical connections are hence irrelevant. Also *claimed* connections, which are not effectuated in the real world, are immaterial.[118] Jurisdiction requires an "*external* manifestation of the power of the State"[119] – whether having a legal or factual dimension, or being constituted by a combination of both. So, for instance, simply having the capacity to counter famine in a remote land to which there is no prior public-power relation does not suffice to entail responsibility. Unless there is an underpinning basis of prescriptive, executive and/or adjudicative authority – with or without legal title – through which *actual* state activity has taken place, the jurisdictional link will not be established. If, on the contrary, there is a piece of legislation enacted, a policy plan implemented, and/or a Court decision enforcing the legislation or the policy plan in relation to said famine in said remote land, there should be no obstacle to consider such action as one demonstrative of state jurisdiction. Once the sovereign authority-nexus has been ascertained, there seems to be no principled reason justifying a distinction on the basis of the *locus* of such activity in deeming it a manifestation of jurisdiction, whether territorially or extraterritorially exercised. It would be "unconscionable" to create a double standard on that ground alone and, in consequence, "permit a State … to perpetrate violations … on the territory of another State, which violations it could not perpetrate on its own territory."[120]

To my mind, the role that territoriality plays within this understanding of the concept – in line with the basic tenets of public international law[121] – is to generate a (rebuttable) presumption of the

[118] S. Besson, cit., p. 872.

[119] M. Gavouneli, *Functional Jurisdiction in the Law of the Sea*, Martinus Nijhoff Publishers, Leida, 2007 (emphasis added).

[120] *Lopez Burgos v. Uruguay*, *supra* note 111; *Celiberti de Casariego v. Uruguay*, *supra* note 111. See also *Issa and Others v. Turkey*, App. No. 31821/96 (16 November 2004), para. 71: "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".

[121] S. Allen et al. (eds.), *The Oxford Handbook of Jurisdiction in International Law*, Oxford University Press, Oxford, 2019; C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, Oxford, 2008; V. Lowe, "Jurisdiction", in M. Evans (ed.), *International Law*, Oxford University Press, Oxford, 2006, p. 335; I. Brownlie, *Principles of Public International Law,* Oxford University Press, Oxford, 6th ed., 2003, p 106 ff.; R. Higgins, "The Legal Bases of Jurisdiction", in Cecil J. Olmstead (ed.), *Extra-territorial Application of Laws and Responses Thereto*, Oxford: International Law

existence of such a link within the national domain, applying "throughout the State's territory". [122] What distinguishes extraterritorial settings is the absence of such a presumption, given the principles of territorial integrity and non-interference in domestic affairs. But that does not alter the fundamental premise on which the concept of jurisdiction rests. As soon as a concrete public-power relation has been established, a jurisdictional connection is activated, triggering the application of human rights obligations. This, however, does not mean that *all* human rights will be owed in *all* situations. For instance, a military surveillance mission over non-national territory will be irrelevant to the right to education of those concerned, but it may engage responsibility from the perspective of the right to privacy, if it entails the collection of personal data.[123]

This approach, therefore, unifies the premise underpinning all forms of jurisdiction *qua* normative power with a claim to legitimacy by a state that, if and when acted upon, establishes a sovereign-authority link with those concerned. It also "normalizes" the possibility of extraterritorial manifestation—just like the Strasbourg organs did before *Bankovic*.[124] Indeed, the now-disappeared European Commission on Human Rights consistently held that the "High Contracting Parties are bound to secure the … rights and freedoms [in the Convention] to all persons under their *actual authority and responsibility*, not only when the authority is exercised within their

Association in association with ESC Publishing Limited, 1984; P. Weil, "Towards Relative Normativity in International Law*?*", *American Journal of International Law*, 1983, p. 413; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, Recueil Des Cours, Hague Academy of International Law, Leiden, 1964.

[122] *N.D. and N.T.*, *supra* note 2, para. 103. This presumption normally "precludes territorial exclusions". See *N.D. and N.T.*, *supra* note 2, para. 106. But can, however, be rebutted "in exceptional circumstances … where a State is prevented from exercising its authority in part of its territory". *See N.D. and N.T.*, *supra* note 2, para. 103. For an example of such exceptional circumstances, *see, e.g.*, *Longa v. The Netherlands*, App. No. 33917/12, 9 October 2012, <http://hudoc.echr.coe.int/eng?i=001-114056> (06/20), regarding the detention of a defence witness in a trial before the ICC, within the ICC premises in The Hague, para. 73: "The fact that the applicant is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the 'jurisdiction' of the Netherlands."

[123] *Al-Skeini*, *supra* note 2, para. 137, on the possibility of "divid[ing] and tailor[ing]" ensuing obligations.

[124] *Bankovic,* 11 B.H.R.C. 435.

own territory, but also when it is exercised abroad." [125] The Convention was supposed to govern the actions and omissions of Contracting Parties *wherever* they exercised jurisdiction. And jurisdiction, under Article 1 ECHR, was not deemed "equivalent … to or limited to the national territory of the High Contracting Party concerned." This was "clear from the language … and the object of this Article, and from the purpose of the Convention as a whole …".[126] It has been in *Bankovic* that the Court "exceptionalized" extraterritorial jurisdiction and conceptually decoupled it from its territorial counterpart.

4.2. *The "Exceptionalization" of Extraterritorial Jurisdiction*

In *Bankovic* the Court likened the term "jurisdiction" to the concept of legal title under international law, thus affirming that "the jurisdictional *competence* of a State is primarily territorial."[127] In fact, "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State".[128] There must, otherwise, be a legal basis allowing the state to exercise its power extraterritorially, whether "nationality, flag, diplomatic and consular relations, effect, protection, passive personality [or] universality."[129] This understanding, however, conflates jurisdiction under Article 1 ECHR with the existence of a right or prerogative of the state to act, which *a contrario* leads to the absurdity that states operating unlawfully abroad, without legal title conferred by international law, can additionally be human rights exempt.

Even in *Bankovic* did the Court avoid this conclusion and decided, instead, that the implication of "the 'ordinary meaning' of the relevant term in Article 1 of the Convention" was that jurisdiction should be understood as "primarily territorial,"[130] other bases "being exceptional and requiring special justification in the particular circumstances of

[125] *See*, among others, *W v. Ireland*, App. No. 9360/81, 5 E.H.R.R. 504, para. 14, 1983 (emphasis added).

[126] *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75, 2 Eur. Comm'n H.R. Dec& Rep. 72, p. 136, 1975.

[127] *Bankovic,* 11 B.H.R.C. 435, para. 59 (emphasis added).

[128] *Id*. at para. 60.

[129] *Id*. at para. 59.

[130] *Id*.

each case."[131] While it delivered other controversial findings regarding the effect of the so-called "colonial clause" in Article 56 ECHR and the "*espace juridique européen*," [132] these have been subsequently overturned in *Al-Skeini*.[133]

What *Al-Skeini* has retained is the notion that extraterritorial jurisdiction is exceptional and, as such, must be demonstrated in the specific instance[134] – an assertion I only partly share: While I accept that jurisdiction should be "presumed to be exercised normally throughout the State's territory,"[135] over which the state is sovereign, that alone does not render extraterritorial jurisdiction exceptional in the material sense, it only requires that proof of an actual sovereign-authority link be produced in the individual situation. The presumption allocates the burden of that proof, but should have no bearing on the substantive finding of whether jurisdiction has indeed been exercised. It is also unclear what "exceptional" refers to in the eyes of the Court: Does it concern frequency or justifiability? The elimination of the presumption does not make the occurrence of extraterritorial exercises of jurisdiction any less frequent, or any less legitimate, *per se*. Questions on the lawfulness of jurisdictional action are separate from whether such jurisdictional action obtains in a particular case.

In any event, this "exceptionalization" has led to a narrow understanding of the material circumstances that can count as an exercise of extraterritorial jurisdiction. Only two models have been accepted: The "State agent authority" or personal model and the "control over an area" or territorial model.[136] In both cases the accent is put on the *factual* dimension of jurisdiction, understood as equivalent to "effective control," but without defining the term or clarifying what "effective" means in this framework.

The territorial model refers to situations in which jurisdiction arises as a consequence of state military action outside national territory, whether lawfully or unlawfully engaged.[137] The obligation to

[131] *Id*. at para. 61.

[132] *Id*. at para. 80. Appearing to endorse a revival of these concepts, *see* Concurrent Opinion of Judge Pejchal in *N.D. and N.T.*, *supra* note 2.

[133] *Al-Skeini*, 53 E.H.R.R. 18, paras. 140–142.

[134] *Id*. at para. 131.

[135] *Id*.

[136] *Id*. at paras. 133 et seq. and 138 et seq., respectively.

[137] *Id*. at para. 138.

secure Convention rights derives from "the fact of such control," whether exercised directly, by the state's own army, or through a subordinate local administration.[138] In the latter case, if the existence of "overall control" can be established, then it becomes unnecessary to demonstrate that the state exercises *detailed* control over each and every of the policies and actions of the subordinate local administration.[139] And, again, determining whether effective control exists in such a situation is deemed a "question of fact," which, according to the Court, must be resolved by reference to the strength of the military deployment in the area or the degree to which military, economic, and political support to the local administration is "decisive" to influence its behavior.[140]

"Overall control" is considered to involve a measure of constant dominium over the foreign area at hand, to a point comparable to state sovereignty. In this sense, "overall control" is the *de facto* counterpart of the *de jure* title entailed by state sovereignty, thus justifying the (re-)emergence of the presumption of jurisdictional authority throughout the area concerned and its transposition to the extraterritorial context. "Overall control" liability becomes equivalent to that of the *de jure* sovereign. Therefore, within the area under its overall control, the controlling state has the responsibility to secure "the entire range of substantive rights set out in the Convention."[141] Otherwise, discrete forms of geographical control give rise to a duty to ensure only the rights that are relevant in the circumstances.[142]

This is also what happens under the personal model, where effective control over an individual also entails a duty to secure only the relevant protections – presumably on consideration that, unlike in situations of overall territorial control, there has not been a replacement of the territorial sovereign. Under this model, the Court

[138] *Id.* citing *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A.), para. 62, 1995; *Loizidou v. Turkey* (Merits), 23 Eur. Ct. H.R. 513, para. 52, 1996; Cyprus v. Turkey, 35 Eur. Ct. H.R. 967, para. 76, 2001.

[139] *Loizidou (Merits)*, 23 Eur. Ct. H.R. 513 at para. 56; *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 at para. 77.

[140] *Al-Skeini*, 53 E.H.R.R. 18 at para. 139, citing *Ilaşcu*, App. No. 48787/99 at paras. 387–394. *See also Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 103 et seq.

[141] *Al-Skeini*, 53 E.H.R.R. 18 at para. 138, referring to *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 at para. 76–77.

[142] *Al-Skeini*, 53 E.H.R.R. 18 at para. 137.

operates under the general rule that jurisdiction may extend to acts of state authorities "which produce effects outside its own territory"[143] and distinguishes three cases.

First, the acts of diplomatic and consular agents, "present on foreign territory in accordance with provisions of international law," may count as an exercise of jurisdiction whenever they "exert authority and control over others."[144] Second, state acts that amount to an exercise of "public powers normally to be exercised by [a national] Government" may also reach the threshold, if underpinned by "the consent, invitation or acquiescence" of the territorial sovereign. If such is the case, responsibility may be incurred by the ECHR party "as long as the acts in question are attributable to it rather than to the territorial State."[145]

These first two categories thus appear to attach importance to elements of *de jure* jurisdiction, but the Court has failed to provide a detailed elaboration. In *Hirsi*, it did suggest that legal bases under customary international law, and in particular "the relevant provisions of the law of the sea," are significant, so that "acts carried out on board vessels flying a State's flag" shall be considered "cases of extraterritorial exercise of … jurisdiction."[146] But it did not dwell on whether on that ground alone – without additional elements of *de facto* control – Article 1 ECHR could have been engaged.[147]

[143] *Id.* at para. 133, referring, among others, to *Drozd & Janousek v. France and Spain*, App. No. 12747/87, para. 91 (26 June 1992), <http://hudoc.echr.coe.int/eng?i=001-57774> (06/20); *Loizidou (Preliminary Objections)*, *supra* note 138, para. 62; *Loizidou (Merits)*, *supra* note 138, para. 52.

[144] *Al-Skeini*, 53 E.H.R.R. 18 at para. 134, citing embassy decisions by the EComHR; *X v. Federal Republic of Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 8 (Eur. Comm'n on H.R.); *X v. United Kingdom*, App. No. 7547/76, 15 December 1977; *W.M. v. Denmark*, App. No. 17392/90, 14 October 1993.

[145] *Al-Skeini*, 53 E.H.R.R. 18 at para.135, citing, *Gentilhomme v. France*, App. Nos. 48205/99, 48207/99 and 48209/99, 14 May 2002, <http://hudoc.echr.coe.int/eng?i=001-60454> (06/20); *X and Y v. Switzerland*, App. Nos. 7289/75 and 7349/76, 14 July 1977.

[146] *Hirsi*, App. No. 27765/09 at para. 77.

[147] The Court concluded that "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive [both] *de jure* and *de facto* control of the Italian authorities." *Hirsi*, *supra* note 13, para. 81. For additional discussion, *see* V. Moreno-Lax, *Accessing Asylum in Europe*, Oxford University Press, Oxford, 2017, pp. 280–281 and 320–333.

The Court's attention has rather focused on the third tier of the personal model, concerning the use of force, under which it has concluded that what tends to be "decisive" in this context is "the exercise of physical power" over persons abroad.[148] The circumstances that have been considered to reach the threshold, and that the Court invokes to illustrate its findings, are instances of arrest, detention, abduction, and extradition,[149] thus highlighting forms of *de facto* control. And the same is true on the high seas, where in most cases the Court has ascertained the existence of jurisdiction on account of the "full and exclusive control" exercised "in a continuous and uninterrupted manner" over a foreign vessel or persons apprehended aboard.[150] This was the test applied in *Hirsi*, in the context of the push-back operation of migrants to Libya carried out by Italy, where the Court concluded that, "in the period between boarding the ships of the Italian armed forces" after rescue "and being handed over to the Libyan authorities," the applicants had been subjected to "the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."[151]

However, the Court has also made clear that *direct* physical contact is not always necessary as long as the control thereby exerted is indeed effective. So, in a case involving the maritime blockade of a Dutch vessel by the Portuguese authorities impeding access to Portugal's territorial waters, the jurisdictional link was not contested.[152] In parallel, the rerouting of a foreign ship in *Medvedyev*, imposing a specific course, but without boarding it, was also deemed to meet the jurisdictional test. Jurisdiction was exercised "from the stopping" of the boat, throughout the period of enforced navigation.[153] This, as the next Part elaborates, opens up a range of possible

[148] *Al-Skeini*, 53 E.H.R.R. 18 at para. 136.

[149] *Öcalan v. Turkey*, App. No. 46221/99 (12 May 2005), <http://hudoc.echr.coe.int/eng?i=001-69022> (06/20) (abduction from Kenya); *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, 2 March 2010 (surrender to Iraqi authorities in Iraq); *Medvedyev v. France*, App. No. 3394/03, 29 March 2010, <http://hudoc.echr.coe.int/eng?i=001-97979> (06/20) (arrest on the high seas and forcible rerouting to France).

[150] *Medvedyev*, App. No. 3394/03 at para. 67.

[151] *Hirsi*, App. No. 27765/09 at para. 81.

[152] *Women on Waves v. Portugal*, App. No. 31276/05, 3 February 2009, <http://hudoc.echr.coe.int/eng?i=001-91113> (06/20).

[153] *Medvedyev*, App. No. 3394/03, paras. 62—67.

configurations in which instances of "contactless control" may be seen as an expression of jurisdiction—particularly when exercised against a background of existing legal competence in the relevant domain, lending a *de jure* basis for action.[154]

5. The Functional Approach

What ensues from the discussion so far is that the Court retains an "exceptionalist" approach to extraterritorial jurisdiction; that it does not define what jurisdiction *tout court* entails; and that the prevalent notion of "effective control" is one that attaches importance to physical force, leaving the role of *de jure* factors uncertain. Perhaps, aware of these limitations, the Court can be seen to delineate an alternative approach, which is of particular importance to the *S.S.* events and tallies with the streamlined notion of jurisdiction that I endorse.

In *Al-Skeini*, relying on the second tier of the personal model of extraterritorial jurisdiction, the Court concluded that the UK had exercised "authority and control" over individuals killed during a security operation carried out by British soldiers in Basra. Even the death of the third applicant's spouse, killed during an exchange of fire with a gang, was considered to fall within Article 1 ECHR. The fact that "it [was] not known which side fired the fatal bullet" did not alter this conclusion. Instead, the Court affirmed that, because the death occurred "*in the course of a United Kingdom security operation* … there was a jurisdictional link between the United Kingdom and this deceased also."[155] What mattered was the "functional" connection established between the deceased and the British forces through the medium of the security operation's implementation. Also of relevance was the fact that the operation itself entailed an assumption of "public powers," "normally … exercised by

[154] On the importance of the existence of legal competence to extradite under the European Arrest Warrant scheme as sufficient to establish a jurisdictional link between the child of an E.T.A. victim, present in Spain, and Belgium, where the presumptive murderer had taken refuge, in light of Belgium's duty to cooperate in an art. 2 ECHR investigation, *see Romeo Castaño v. Belgium*, App. No. 8351/17, 9 July 2019, paras. 36–43, <http://hudoc.echr.coe.int/eng?i=001-194618> (06/20).

[155] *Al-Skeini*, 53 E.H.R.R. 18 at para.150 (emphasis added).

a sovereign government,"[156] which, in this case, had been sanctioned by UN Security Council Resolutions and regulations of the Coalition Provisional Authority in Iraq. It was arguably on that *de jure* basis that the UK was expected to carry out executive (jurisdictional) "functions" on the territory of Iraq in line with human rights, thus retaining ECHR responsibility for "as long as the acts [and omissions] in question [were] attributable to it rather than to the territorial State".[157]

For some commentators, this creates a "sub-heading" under the state agent authority exception, which allows for inclusion of a wider array of factual profiles on account of *de jure* elements.[158] For others, it is a distinct third model – or a "halfway house"[159] – based on a mix of the territorial and personal paradigms, which may have a positive impact in the establishment of extraterritorial jurisdiction. [160] Conversely, another group of scholars thinks this approach can restrict the scope of Article 1 ECHR, if the *de facto* and *de jure* factors are taken to both be jointly necessary for jurisdiction to exist.[161] Still others question the necessity of a legal basis in all cases for "public powers" to be ascertained – for example, in anti-terrorism and drone-strike operations undertaken without the territorial state's authorization.[162]

All these readings are plausible – and denote the strategic ambiguity with which the Court formulates certain doctrines, allowing for adaptation to different scenarios over time. Taken together, what

[156] *Id.* at para. 149.

[157] *Id.* at para. 135.

[158] C. Mallory, "The European Court of Human Rights Al-Skeini Judgment", *International & Comparative Law Quarterly,* 2012, p. 301, p. 311.

[159] A. Cowan, "A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini", *Cambridge Journal of International and Comparative Law*, 2012, pp. 213, 224.

[160] C. Costello, *The Human Rights of Migrants and Refugees in European Law,* Oxford University Press, Oxford, 2015, p. 241. See also C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, 2012, p. 287.

[161] S. P. Bondini, "Fighting Maritime Piracy under the European Convention on Human Rights", *European Journal of International Law*, 2011, pp. 829, 847.

[162] *See, e.g.*, L. Halewood, "Avoiding the Legal Black Hole: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy", *Goettingen Journal of International Law,* 2019, p. 301. *Cf.* F. Rosen, "Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility", *Journal of Conflict and Security Law,* 2014, p.113.

they jointly come to display is the emergence of an incipient functional conception of jurisdiction that can bridge the gap between territorial and extraterritorial conceptualizations. The importance it attaches to the exercise of "public power" for the establishment of a jurisdictional link follows the line of argument advanced above, defining jurisdiction *qua* an exercise of normative power by a state, with a claim to legitimacy, that establishes a sovereign-authority nexus with those concerned through factual or legal means, or a combination of both.

But my understanding of jurisdiction as "functional" differs from interpretations offered by other authors using the same term. For instance, Besson, examining the specific role of Article 1 ECHR within the scheme of the Convention, uses the term to refer to the threshold function that it plays. She infers that what Article 1 ECHR does is to "situate[] human rights within a relationship of jurisdiction and make[] them dependent on it." From this perspective, the criterion within the ECHR "is not territorial . . . but functional," in the sense that "it pertains to the function of jurisdiction."[163] Shany, in turn, employs the term in its capacious meaning, to designate the faculty or "potential" to assume responsibility, requiring states to protect human rights in situations where they can and may reasonably be expected to do so, whenever they have the means to prevent harm. What renders such an expectation reasonable, in his view, is the specific context and "the intensity of power relations" or "special legal connections" that put the state in a unique position to afford protection.[164] Finally, the ESCR Committee mentions "functional" in contradistinction to "geographical . . . or personal" versions, as a third variation of jurisdiction.[165]

My reading is closer to Gavouneli's, who, in her discussion of the law of the sea, describes it as a function of state sovereignty.[166] In connection with this, I use "functional" to literally denote the

[163] S. Besson, *supra* note 110, p. 863.

[164] Y. Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law", *Law and Ethics of Human Rights* p.47, 63, 65 et seq, 2013. *See also* Bonello, *supra* note 4.

[165] U.N. Comm. on Economic, Social and Cultural Rights, Concluding Observations on Israel, U.N. Doc. E/C.12/1/Add.27, 4 December 1998, para. 6.

[166] M. Gavouneli, cit. *See also* E. Papastavridis, "Rescuing Migrants at Sea and the Law of International Responsibility", *in* T. Gammeltoft-Hansen, J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation*, Routledge, London and New York, 2016, p. 161.

governmental "functions" through which the power of the state finds concrete expression in a given case.[167] This agglutinates the tasks normally conducted by its officials, including those they are legally obliged to undertake. Jurisdiction, from this perspective, is therefore *always* functional and expressed through legislative, executive, and/or adjudicative activity, by which the state exercises its powers, combining personal and geographical aspects. Jurisdiction through this prism is multifactorial and composite.

The implication is that not only effective control over persons or territory matters for the activation of ECHR obligations. Control over (general) policy areas or (individual) tactical operations, performed or producing effects abroad,[168] matters as well. These are the vehicles of the exercise of "public powers" that amounts to jurisdiction. It is through policy measures and operational procedures that states exert personal or spatial control – carried out as claiming legitimacy and expecting compliance by those concerned.[169] In these situations, the jurisdictional nexus between the state and the individual exists prior to any potentially ensuing violations – through the planning and execution of policy and/or operational conduct over which the state exerts effective (if not exclusive) control. Policy implementation and operational action are no accidental events. They manifest a degree of state deliberation and volition that, when actuated, constitute a fundamental expression of its powers as sovereign.

In *Bankovic* – leaving the question aside of whether the designation of a non-military objective respected international humanitarian law standards – if the Court had considered the operational context within which the bombardment took place, rather than examining the attack in isolation, the conclusion could not have been the same.[170] Of importance would have been the practical situation on the ground, in terms of the operational powers which the defendant States were actually purporting to exercise, and not the legality or legal basis of their operations. The air strike of the radio-television of Belgrade was the last point in an operational chain of action, undertaken by a military aircraft within a NATO-led mission.

[167] *Al-Skeini*, *supra* note 2, para. 135.
[168] *Id.* at para. 131; *Bankovic*, 11 B.H.R.C. 435 at para. 67.
[169] S. Besson, cit., pp. 864–865.
[170] *Bankovic*, 11 B.H.R.C. 435.

It was not a one-off, "instantaneous" actuation of state authority,[171] the immediate consequences of which were unpredictable or irrelevant. It was part and parcel of a pre-planned operation, similar to the one in *Al-Skeini* or in any of the other extraterritorial cases in which the Strasbourg Court has recognised there to be a jurisdictional link.[172] In virtually all cases, including *Loizidou*, *Öcalan*, *Hirsi*, or *Jaloud*, the action considered jurisdictionally relevant was integrated within a wider military, security, or rescue operation through which the state exercised "effective control."[173] So, the conclusion must be that it is the "situational," rather than the personal or spatial, control thereby exerted, executed through operational or policy-implementing action, what triggers the application of the Convention.

"Effective control," in the context of the functional approach to jurisdiction, does not readily amount to direct physical constraint. Control, in this framework, should be deemed effective, not on the basis of the intensity or directness of the physical force it may imply, but when it is determinative of the material course of events unlocked by the exercise of jurisdiction, even when the relevant activity takes place from a distance.[174] In *Bankovic*, the control the military mission exercised through the striking aircraft over its pre-determined operational target was effective, in that it was brought within firing range and subjected to the destructive outcome programmed in the operational plan of which the bombing was part. It is not the act of bombing alone that brought the applicants within the "effective control" of the state concerned, but the wider spectrum of operational action within which the bombing was inscribed – and which should not have omitted to take account of the very predictable consequences the bombing of a civilian target would entail. The effectiveness of control should be judged against its influence on the resulting situation and the position in which those affected by an exercise of

[171] Using this vocabulary, see *Hirsi*, App. No. 27765/09 at para. 73.

[172] *Al-Skeini*, 53 E.H.R.R. 18.

[173] *Loizidou (Merits)*, 23 Eur. Ct. H.R. 513; *Öcalan*, App. No. 46221/99; *Hirsi*, App. No. 27765/09; *Jaloud v. The Netherlands*, App. No. 47708/08, 20 November 2014, <http://hudoc.echr.coe.int/eng?i=001-148367> (06/20). In the latter case the manning of a checkpoint in Iraq, on the basis of S.C. Res. 1483, U.N. Doc. S/RES/1483 (22 May 2003), was equated to an exercise of "elements of governmental authority" by the Netherlands, whereby its art.1 ECHR jurisdiction was considered to be engaged.

[174] *Cf. Hirsi*, App. No. 27765/09 at para. 180.

public powers find themselves upon execution of the measure concerned. This means that not only *de facto* elements of effective control, but also *de jure* factors (that may coalesce with them) should be taken into account in the establishment of functional jurisdiction.[175]

The *Norstar* decision illustrates this proposition.[176] The International Tribunal on the Law of the Sea (ITLOS) considered in this case that the issuance of a decree of seizure vis-à-vis a foreign vessel on the high seas was sufficient to reach the jurisdictional threshold, arguably not because it produced physical control on its own, but because it generated the conditions for its actual enforcement.[177] Admittedly, it was the combination of the issuance of the decree by Italy *and* the accompanying request for its enforcement addressed to Spain, which did subsequently enforce it, that generated the jurisdictional link between the foreign vessel and the Italian State.[178] While the decree alone could be understood as an instance of merely "claimed" jurisdiction, if taken in isolation – particularly on consideration that it was secret and could have remained unknown to those concerned[179] – no enforcement action would have taken place without the related request for its execution, in turn based on the decree itself. The decree is, therefore, the *sine qua non* condition in the sequence of (*de jure* and *de facto*) events that established effective control; it is the "but for" element in the absence of which the jurisdictional chain could not be ascertained. A functional reading, rather than splitting the chain, takes account of both: the prescriptive and enforcement aspects of jurisdiction that, in combination, constitute the expression of the constabulary functions of the Italian State in the particular case – exercised in part directly, by its own authorities, and in part through recourse to Spain.

[175] *See, e.g. Jaloud*, App. No. 47708/08 at para. 141: "For the purposes of establishing jurisdiction … the Court takes account of the particular factual context and relevant rules of international law."

[176] *M/V Norstar (Panama v. Italy)*, Case No. 25, Judgment of Apr. 10, 2019, paras. 222–226, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf> (06/20).

[177] *Cf.* E. Papastavridis, "The European Convention of Human Rights and Migration at Sea: Reading the "jurisdictional threshold" of the Convention under the Law of the Sea Paradigm", *German Law Journal*, 2020.

[178] *Norstar*, cit., para. 226, last sentence.

[179] *Id.* at para. 206.

There seems to be, *a priori*, no good reason to disaggregate or distinguish between the different facets of jurisdiction. They constitute the often inseparable, composite ways in which "public powers" may be expressed.[180] In fact, from the international perspective, the adoption of domestic laws "express[es] the will and constitute[s] the activities of States, in the same manner as do legal decisions or administrative measures."[181] So, instances of legislative, executive, and/or judicial activity should be deemed equally relevant towards the establishment of (functional) jurisdiction. Their occurrence in the specific case, whether jointly or in isolation, must be taken in consideration. If this is true, functional jurisdiction as equivalent to an exercise of "public powers" can be manifested through different factors of policy-related and/or operational control, not all of which may always be required in the aggregate, but which, as the next section will argue, are present in the *S.S.* case, so that they cumulatively give rise to an Article 1 ECHR claim.

6. A Functional Approach to *S.S.*

S.S. offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction designed above. It entails a series of elements characteristic of public powers that are exercised by the Italian State – both territorially and extraterritorially; both directly and through the intermediation of the LYCG – that taken together generate overall effective control. The so-called "impact" element, the "decisive influence" element, and the "operative involvement" element considered below have already been recognized by international courts and Treaty bodies, including the Strasbourg Court, to be generative of a jurisdictional link that triggers the applicability of human rights obligations. They can each separately and independently amount to an exercise of (functional) jurisdiction, lending combined force to the activation of Article 1 ECHR in the *S.S.* case, where they occur in conjunction.

[180] *The Case of the S.S. "Lotus" (Fran. v. Turk.)*, 1927 P.C.I.J. (ser. A), No. 10, p. 25 (7 September).

[181] *Certain German Interests in Polish Upper Silesia (Germ. v. Pol.)*, Judgment, 1926 P.C.I.J. (ser. A) No. 7, p. 19 (25 May).

6.1. *The Impact Element*

Very much in the line of the *Norstar* case,[182] the impact element refers to the "sufficiently proximate repercussions" of state action "on rights guaranteed by the Convention", that the Strasbourg Court has deemed pertinent to the establishment of jurisdiction, "even if those repercussions occur outside" national territory.[183] What is of relevance is their origin in an exercise of public powers by the authorities of the state concerned. Sovereign activity – arguably of whatever nature: legislative, executive, or judicial[184] – with direct and predictable consequences beyond territorial boundaries can thus engage Article 1 ECHR. So, for instance, in *Andreou*, the opening of fire from within state territory on a crowd from close range was deemed to amount to jurisdiction, "even though the applicant sustained her injuries in territory over which Turkey exercised no control," since the shooting by state officials was "the direct and immediate cause of those injuries."[185]

The Inter-American Commission, in a very similar case, concluded the same. In *Brothers to the Rescue*, Cuba was considered to have exerted sufficient control through the shooting down of two aircrafts outside its aerial space, because "the victims died as a consequence of direct actions of agents of the Cuban State" operating within Cuban territory.[186] The Inter-American Court has followed suit and declared that "a person is under the jurisdiction of the State … if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory."[187] So, the mere fact that the impacted individuals are situated outside national territory does not preclude the engagement of extraterritorial responsibilities. The jurisdictional link is established

[182] *Norstar*, *supra* note 176.

[183] *Ilaşcu*, App. No. 48787/99 at para. 317.

[184] *Drozd & Janousek*, App. No. 12747/87 at para. 91.

[185] *Andreou v. Turkey*, App. No. 45653/99, Admissibility Decision (3 June 2008), <http://hudoc.echr.coe.int/eng?i=001-95295> (06/20).

[186] *Alejandre v. Cuba*, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II. 106, doc. 3 rev., 1999, paras. 24–25 [hereinafter *Brothers to the Rescue*].

[187] Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am.Ct.H.R. (ser. A) No. 23, para. 74 (15 November 2017).

through the effects of state conduct that is initiated within territorial domain.

However, the significance of the presence of the state authorities exercising jurisdiction within national territory has, subsequently, been downplayed. The Human Rights Committee has inferred that the extraterritorial "impact," which is the "direct and reasonably foreseeable" result of state action, is relevant also vis-à-vis "individuals who find themselves in a situation of distress at sea."[188] Actually, the Committee had already previously held that a State party could be considered responsible for extraterritorial violations of the ICCPR,[189] where there was a "link in the causal chain" that would make possible violations on the territory of another state – wherever the location of state organs.[190] In such situations, the risk of an extraterritorial violation must be a "necessary and foreseeable consequence," judged on the knowledge the state had at the time of events.[191] So, knowledge of the probable result becomes a factor in the jurisdictional analysis, whereas the *locus* of the action is immaterial. In *Munaf*, for instance, the Committee evaluated the conduct of diplomatic staff in the Romanian Embassy in Baghdad applying this paradigm, and implying that only remote and unforeseeable consequences fail the jurisdictional test.[192]

The Strasbourg Court has also endorsed this understanding. In *Loizidou*, it declared that "the responsibility of Contracting Parties can be involved because of acts of their authorities, *whether performed within or outside national boundaries*, which produce effects outside their own territory."[193] And more recently, in *Al-Saadoon*, it applied

[188] U.N. Human Rights Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the Right to Life, U.N. Doc. CCPR/C/GC/36, para. 63 (3 September 2019) (emphasis added).

[189] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[190] U.N. Human Rights Comm., Mohammad Munaf v. Romania, U.N. Doc. CCPR/C/96/D1539/2006, para. 14.2 (30 July 2009).

[191] *See, e.g.*, U.N. Human Rights Comm., A.R.J. v. Australia, U.N. Doc. CCPR/C/60/D/692/1996 (11 August 1997); Judge v. Canada, U.N. Doc. CCPR/C/78/D/829/1998 (13 August 2003); Lichtensztejn v. Uruguay, U.N. Doc. CCPR/C/OP/2/1990 (31 March 1983); Alzery v. Sweden, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006).

[192] *Munaf*, *supra* note 190, para. 14.2.

[193] *Loizidou v. Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. (ser. A.) at para. 62.

the so-called *Soering* reasoning to an extraterritorial extradition by UK agents of a terrorist suspect in Iraq.[194] Therefore, while pure causation is insufficient to establish jurisdiction in relation to utterly accidental and unpredictable outcomes,[195] the proximate and predictable results must be taken into account when planning and executing state action, whatever the location of its agents and of the action itself.

In the *S.S.* case, the coordination of the rescue/interdiction operation was undertaken by MRCC Rome through a combination of prescriptive and executive action – with knowledge of the likely outcome. The Italian Coast Guard acted territorially, within its Headquarters, taking the decisions of launching the SAR response and delivering instructions to all assets in the SAR theatre on the high seas. This alone, amounting to the "institution of … proceedings" extraterritorially by the authorities of an ECHR party, has, in comparable cases, been considered to be "sufficient to establish a jurisdictional link" by the Strasbourg Court.[196] Here, such action "produced effects outside its own territory" with very significant consequences for those concerned,[197] which Italy could and should have taken into account when planning and deploying its intervention. The fact that Italy's conduct "facilitated the whole process" that led to the involvement of the LYCG and "created the conditions" for the several violations complained of to materialize,[198] is a further

[194] *Al-Saadoon*, App. No. 61498/08. For commentary, *see, e.g.*, C. Janik, T. Kleinlein, "When Soering went to Iraq . . .: Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the European Court of Human Rights' Al-Saadoon Case", *Goettingen Journal of International Law*, 2009, p. 459. In *Soering*, an extradition case, the Court first deduced a *non-refoulement* obligation from the prohibition of inhuman and degrading treatment in Article 3 ECHR; Soering v. U.K., 11 E.H.R.R. 439, 1989.

[195] *Cf. Bankovic*, 11 B.H.R.C. 435 at para. 75.

[196] *Güzelyurtlu and Others v. Cyprus and Turkey*, App. No. 36925/07, para. 188 (29 January 2019), <http://hudoc.echr.coe.int/eng?i=001-189781> (06/20).

[197] *Drozd & Janousek*, App. No. 12747/87 at para. 91; *Al-Skeini*, 53 E.H.R.R. 18 at para. 133.

[198] *Al-Nashiri v. Poland*, App. No. 28761/11, para. 517 (24 July 2014), <http://hudoc.echr.coe.int/eng?i=001-146044> (06/20). *See* similar extraordinary rendition cases, where the ECtHR has concluded to the existence of state jurisdiction on account of the facilitating role played by the ECHR party in question, e.g., *El-Masri v. FYROM*, App. No. 39630/09, para. 239 (13 December 2012), <http://hudoc.echr.coe.int/eng?i=001-115621> (06/20); *Husayn (Abu Zubaydah) v.*

indication of the existence of jurisdiction under Article 1 ECHR.[199]

This factual dimension of the jurisdictional constellation present in the *S.S.* case is complemented by a *de jure* basis in international law. Indeed, the coordinating role assumed by MRCC Rome could not have been ignored or avoided. It was legally predetermined by the maritime conventions, which, rather than creating any new sovereign entitlements in favor of coastal states, instead produce "area[s] of responsibility" to be overseen (in good faith) in order to preserve the safety of human life at sea.[200] These conventions stipulate that upon receipt of a distress call, the first MRCC contacted becomes and remains responsible for the coordination of rescue procedures until the MRCC in charge of the SAR region (SRR) within which the incident occurs assumes responsibility.[201] Like Papastavridis argues in this Special Issue, it is the knowledge of the situation of distress that triggers the obligation under the law of the sea, in line with the object and purpose of the maritime conventions. Their objective is to ensure cooperation in completing the rescue and disembarking survivors[202] – a duty that would normally fall on to the MRCC in whose SRR the incident takes place.[203]

However, in the absence of an officially declared SRR and a fully functioning Libyan MRCC, that responsibility could not be validly transferred to the LYCG, and the first MRCC receiving the distress call – and thus with knowledge of the event – remained bound to

Poland, App. No. 7511/13, para. 512 (24 July 2014), <http://hudoc.echr.coe.int/eng?i=001-146047> (06/20).

[199] This is the conclusion reached by the Tribunale di Trapani, resolving a similar SAR case, in its Judgment of June 3, 2019, at 27, <https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf> (06/20).

[200] U.N. Convention on the Law of the Sea, art. 98, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; SOLAS Convention, Annex, Ch V, Reg 7(1); International Convention on Maritime Search and Rescue, Preamble, Recitals 1 and 3, and Annex, para. 2.1.1, Apr. 27, 1979, 1405 U.N.T.S. 119 [hereinafter SAR Convention]

[201] IMO, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea* [hereinafter IMO Guidelines], 2004, MSC.167(78), MSC 78/26/Add.2 (Annex 34), para. 6.7. IMO Guidelines are not strictly binding, but must "be taken into account" by SAR and SOLAS Convention parties accepting of the 2004 amendments, as is Italy's case. *See* SAR Convention, Annex, para. 3.1.9. *See also* the U.N. General Assembly urging members to implement them in their domestic procedures in Res. 61/222, U.N. Doc. A/RES/61/222, para. 70 (20 December 2006).

[202] SAR Convention, Annex, para. 3.1.9.

[203] *Id.* Annex, para. 2.1 and 2.3; SOLAS Convention, Annex, Ch V, Reg 7(1).

proceed with the effective coordination of the operation. This responsibility includes making sure that the rescue is conducted safely and in compliance with the relevant rules, bringing survivors to landfall in a place of safety[204] – which Libya is not.[205]

Any information, instructions, and guidance delivered by MRCC Rome must take into account their likely repercussions – bearing in mind that reliance on law of the sea norms does not release from parallel human rights obligations concurrently applying in situations of distress.[206] In particular, an MRCC that coordinates a SAR operation outside its own SRR "should refrain from giving directions or advice which it knows or ought reasonably to know would have negative human rights implications for those requiring assistance."[207] This arguably includes the requisitioning of vessels from actors, like the LYCG, which are known for their unsafe, threatening, and abusive conduct towards survivors, invariably leading to their *refoulement*.[208] While "the search and rescue service concerned … has the *right* to requisition ships [so that they] render assistance,"[209] it has also the

[204] SAR Convention, Annex, para. 3.1.9 and IMO Guidelines, paras. 6.12, 6.17, defining "place of safety" as "a location where rescue operations are considered to terminate … *where the survivors' safety of life is no longer threatened* and *where their basic human needs (such as food, shelter and medical needs) can be met*," stressing "[t]he need to *avoid disembarkation in territories where the lives and freedoms* of those alleging a well-founded fear of persecution *would be threatened*" (emphases added).

[205] This has been the explicit finding of the Tribunale di Trapani, *supra* note 199, p. 32 and 46 et seq.

[206] Confirming: *Hirsi*, *supra* note 13. For commentary, *see* V. Moreno-Lax, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", *International Journal of Refugee Law*, 2011, p. 174.

[207] U.N. High Comm'r for Refugees, *General Legal Considerations: Search and Rescue Operations Involving Refugees and Migrants at Sea*, para. 20 (November 2017), <https://www.refworld.org/docid/5a2e9efd4.html> (06/20). *See also* CoE CommHR, *Lives Saved, Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean*, p. 30, recommendation 9 (June 2019), <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87> (06/20).

[208] CoE CommHR, Third Party Intervention in Application No. 21660/18, S.S. and Others v. Italy, CommDH, 2019, p. 29, para. 30 (15 November 2019), <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098dd4d> (06/20).

[209] SOLAS Convention, Annex, Ch V, Reg 33(2) (emphasis added). *See also* SAR Convention, Annex, para. 5.3.3.5.

duty to exercise this power in line with "other rules of international law."[210] Arguably, this includes the prerogative to release masters of ships that could potentially be requisitioned from their obligation to render assistance, when they are unsuitable.[211] A shipmaster should only be asked to proceed to the rescue "in so far as such action may be reasonably be expected of him."[212]

The Italian authorities knew or ought to have known that the LYCG was inadequate. They knew or ought to have known that calling upon it to intervene would mean for the survivors to be taken back to Libya,[213] to face "dismal circumstances" amounting to "crimes against humanity," as described in EUNAVFOR MED documentation.[214] And this foreseeability of the likely result of their actions was relevant to the establishment of a jurisdictional link with the *S.S.* applicants.

Acting in the knowledge that the life and integrity of the persons in distress will be threatened when delivered to the authorities of an unsafe country[215] amounts to an exercise of jurisdiction under the impact model, which thus suffices to activate the positive, due diligence obligations attaching to the rights of the persons directly affected by the action concerned.[216] In the *S.S.* case, SAR duties intersect with human rights responsibilities, which constrain state

[210] UNCLOS arts. 2(3) and 87(1).

[211] SOLAS Convention, Annex, Ch V, Reg 33(3)–(4).

[212] UNCLOS art. 98(1).

[213] EUNAVFOR MED has noted that "migrants doesn't [sic] want to be rescued by the Libyan Coast Guard because they *obviously* don't want to go back in Libya." *See* EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, Annex C, p. 3 (emphasis added).

[214] EUNAVFOR MED, *Six-Monthly Report 1 November 2016 – 31 May 2017*, *supra* note 35, pp. 2, 5–6.

[215] That Libya was unsafe for returns has been well known for a long time. Since the 2011 upraising and civil war, UNHCR's views on the disembarkation of refugees and migrants in Libya have been unequivocal. *See* U.N. High Comm'r for Refugees, *UNHCR Position on Returns to Libya* (12 November 2014), <https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Libya_position_on_returns_12_November_2014.pdf> (06/20), updated in October 2015 (Update I), <https://www.refworld.org/docid/561cd8804.html> (06/20) and in September 2018 (Update II), <https://www.refworld.org/docid/5b8d02314.html> (06/20).

[216] *M.S.S. v. Belgium and Greece* [GC], 53 E.H.R.R. 2, paras. 258–259, 263, 358–359, and 366–367, 2011; and *Hirsi*, App. No. 27765/09 at paras. 118, 123, 125–126, 156–157.

discretion and limit the options left for choice of action.[217] Italy could, therefore, not legitimately indicate a transfer of responsibility for the survivors to the LYCG, whether directly or indirectly, including through the provisions regulating OSC, without thereby engaging its (functional) jurisdiction and violating its international obligations.[218] MRCC Rome should, instead, have avoided the intervention of the LYCG, by not calling on the *Ras Al Jadar*, as a measure "within the scope of [its] powers which, judged reasonably, might have been expected to avoid [the] risk."[219] Alternatively, at the very least, it should have refrained from asking it to assume OSC, a task that MRCCs must allocate "taking into account the apparent capabilities of the on-scene co-ordinator and operational requirements."[220] Rather, it should have preferred the better alternatives offered by the SW3 and the multiple units readily available within the *Mare Sicuro* and EUNAVFOR MED missions present in proximity, which could have completed the rescue safely.

6.2. *The Decisive Influence Element*

Besides the impact element, the decisive influence element regards the exercise of functional jurisdiction through indirect means. "Public

[217] *See, e.g.*, *Leray v. France*, App. No. 44617/98, (16 January 2001), <http://hudoc.echr.coe.int/eng?i=001-60010> (06/20), where the Strasbourg court concluded that SAR operations are susceptible of judicial review in light of the right to life. For an elaboration, *see* L.M. Komp, "The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?", *in* Violeta Moreno-Lax, Efthymios Papastavridis (eds.), *"Boat Refugees" and Migrants at Sea: A Comprehensive Approach,* Brill, Nijhoff , 2016, p. 236.

[218] The CoE CommHR wrote a letter to the Italian authorities making clear that, in his view, and in light of the *Hirsi* judgment, *supra* note 13, "handing over individuals [in any way whatsoever] to the Libyan authorities or other groups in Libya would expose them to a real risk of torture or inhuman or degrading treatment or punishment." *See Letter from Nils Muiznieks, Commissioner for Human Rights, to the Italian Minister of the Interior, Marco Minniti*, CommHR/INM/sf 0345-2017 (28 September 2017), <https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea> (06/20). Expressing similar concerns, *see* U.N. Comm. Against Torture, Concluding Observations on the Fifth and Sixth Periodic Reports of Italy, U.N. Doc. CAT/C/ITA/CO/5-6 (17 December 2017).

[219] Osman v. United Kingdom, App. No. 87/1997, para. 11 (28 October 1998), <http://hudoc.echr.coe.int/eng?i=001-58257> (06/20).

[220] SAR Convention, Annex, para. 4.7.2> (06/20).

powers," in this instance, rather than being carried out by the authorities of the state concerned, are deployed through the medium of a local administration in a third country – whether with its legal consent, *de facto* connivance or none of them, as the situation was in *Ilaşcu* and subsequent line of cases.[221]

The Strasbourg Court has maintained in this constant jurisprudence, regarding Russian and Moldovan (co-)responsibility for the violations perpetrated by the separatist government of Transdniestria, that an ECHR party engages its jurisdiction for the actions and (crucially also for the) omissions of a third actor, when the latter comes under its "decisive influence."[222] Such "decisive influence" can lead to the establishment of functional jurisdiction on account of the degree of dependency of the third actor in question on the support received by the ECHR party. Where the third actor survives "by virtue of the military, economic, financial and political support given to it" by the ECHR party,[223] this entails "that [same ECHR party's] responsibility *for its policies* and actions."[224] The reason is that this kind of critical support engenders a "continuous and uninterrupted link of responsibility . . . for the applicants' fate."[225] And this is true even when there may not be any "direct involvement" of the influencing ECHR party in the specific human rights violations

[221] *Ilaşcu*, App. No. 48787/99. *See also Catan*, Apps. 43370/04, 8252/05, and 18454/06; *Ivantoc and Others v. Moldova and Russia*, App. No. 23687/05 (15 November 2011), <http://hudoc.echr.coe.int/eng?i=001-107480> (06/20) ; *Mozer v. Moldova and Russia*, App. No. 11138/10 (23 February 2016), <http://hudoc.echr.coe.int/eng?i=001-161055> (06/20); *Turturica and Casian v. Moldova and Russia*, App. Nos. 28648/06 and 18832/07 (30 August 2016), <http://hudoc.echr.coe.int/eng?i=001-166480> (06/20); Paduret v. the Republic of Moldova and Russia, App. No. 26626/11 (9 May 2017), <http://hudoc.echr.coe.int/eng?i=001-173464> (06/20); Cotofan v. Moldova and Russia, App. No. 5659/07 (18 June 2019), <http://hudoc.echr.coe.int/eng?i=001-193871> (06/20).

[222] *Ilaşcu*, App. No. 48787/99 at paras. 392–394.

[223] *Id*. at para. 392.

[224] *See* ECtHR, *Guide on Article 1 of the ECHR*, para. 47 and authorities cited therein (31 August 2019), <https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf > (06/20) (emphasis added).

[225] *Ilaşcu*, App. No. 48787/99 at para. 392.

alleged.[226] What is more, such a "continuous and uninterrupted link of responsibility" is considered to give rise to positive obligations to prevent human rights violations in the area controlled by the dependent third actor over which the ECHR party exercises "decisive influence."[227]

Although the Court designed this paradigm with a geographical rather than a functional area of control in mind, the parallels with *S.S.* are paramount, considering the multiple ways in which Italy has influenced Libya's policy and practice in the Central Mediterranean, entailing control over a wide range of interdependent stakes, as Part C demonstrates. In November 2017, Libya lacked an SRR, an MRCC, and a coastguard function capable of receiving and responding to distress calls autonomously, which is why Italy's input was essential.[228]

In 2016, the LYCG was barely functional, due to vital assets and equipment having been destroyed by the NATO's offensive during 2011–12.[229] For the former Italian Minister of Interior, Minniti, prior to 2017, "when we said we had to re-launch the Libyan coastguard, it seemed like a daydream."[230] Plans to develop a system of border surveillance in Libya, in general, and a functioning LN/LCG, in particular, as Part C has shown, were entirely "dependent" on Italy's (and EU's) assistance.[231] It was only after the MoU, and the related financial, logistic, and operative support provided by Italy, that the

[226] *See Mozer*, App. No. 11138/10 at para. 101, where the Court admits there is "no evidence of any direct involvement of Russian agents in the applicant's detention and treatment."

[227] *See Ivantoc*, App. No. 23687/05 at para. 119, where the Court condemns Russia for "continu[ing] to do nothing . . . to prevent the violations of the Convention allegedly committed . . .".

[228] Confirming, *see* T05-EUTF-NOA-LY-07, *supra* note 84, p. 2.

[229] *See, e.g.*, Joint Task Force Odyssey Dawn Public Affairs, *US Navy P-3C, USAF A-10 and USS Barry Engage Libyan Vessels*, U.S. NAVY (29 March 2011), <https://www.navy.mil/submit/display.asp?story_id=59406> (06/20). *See also* European External Action Service, *EUBAM Libya Initial Mapping Report Executive Summary*, EEAS, 2017, 0109, p. 41 (18 January 2017), <https://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf> (06/20).

[230] G. Paravicini, *Italy's Libyan "Vision" Pays off as Migrant Flows Drop*, Politico (10 August 2017), <https://www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/> (06/20).

[231] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 121.

LYCG performed 19,452 pullbacks in 2017,[232] up from 800 in 2015.[233]

However, rather than contributing to diminishing the "horrific abuses" faced by migrants,[234] in accordance with the due diligence obligations attached to (an exercise of functional jurisdiction taking the form of) decisive influence,[235] the Italian plan deliberately led to their containment in Libya. Its interventions so far "have done nothing … to reduce the level of ill-treatment suffered by migrants" in the country. On the contrary, UN monitoring "shows a fast deterioration of their situation,"[236] including at the hands of the LYCG and after being pulled back.[237]

What is clear and the European authorities have recognized is that the "increased performance of the Libyan Coast Guard [is a] *direct consequence* of the support … provided."[238] "[T]here could not be a sufficient operational capability [of the LYCG] without … [the] training [and] equipment" delivered.[239] As the Italian Ministry of Foreign Affairs acknowledged in a public report, it is their

[232] Int'l Org. for Migration, *Maritime Update Libyan Coast: 25 October–28 November 2017*, <https://www.iom.int/sites/default/files/situation_reports/file/IOM-Libya-Maritime-Update-Libyan-25Oct-28Nov.pdf> (06/20).

[233] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 3. *Cf.* EUNAVFOR MED, *Six-Monthly Report 1 January – 31 October 2016*, 7 (on file), according to which 2015 interdictions totalled 600 only.

[234] U.N. High Comm'r for Refugees, Opening Statement by Zeid Ra'ad Al Hussein (11 September 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E> (06/20).

[235] *Ivantoc*, App. No. 23687/05 at para. 119.

[236] U.N. Office of the High Comm'r for Human Rights, *UN Human Rights Chief: Suffering of Migrants in Libya Outrage of Conscience of Humanity* (14 November 2017), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393> (06/20). Confirming: *Frontex Consultative Forum on Fundamental Rights Sixth Annual Report – 2018*, p. 37 (March 2019), *available at* <https://frontex.europa.eu/media-centre/news-release/frontex-consultative-forum-publishes-annual-report-MgLqPI> (06/20).

[237] Amnesty International, *Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean*, August 2018, pp.17–18 <https://www.amnesty.org/en/documents/eur30/8906/2018/en/> (06/20).

[238] *See* Letter Ref. Ares(2019)1755075, *supra* note 102. This correlation has also been noted by the EUNAVFOR MED, in its *Six-Monthly Report 1 June – 30 November 2018*, *supra* note 70, Part C, p. 11.

[239] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 29.

"partnership with Tripoli which … has … produced [these] important results."[240] It is "thanks" to Italy,[241] rather than to Libya's independent efforts,[242] that there has been a near 90 per cent decrease in the number of arrivals at Italian shores by mid-2018.[243]

These results are not accidental, unforeseen or unintended. They are planned and expected. They stem from the direct application of the Treaty of Friendship and the 2017 MoU. They constitute the concrete realization of their object and purpose. Indeed, Italy's support has specifically been targeted at "reinforcing the autonomy of [Libyan] operational capacities," [244] with a view to transferring coordination responsibilities for rescue and interdiction in what was to become the Libyan SRR. And that investment in capacity building of the LYCG is not unconditional. In the words of the EUNAVFOR MED command, it is provided "in exchange for [Libyan] cooperation in tackling the irregular migration issue."[245] So, the support lent to the LYCG has explicitly been understood as a *quid pro quo*, in a bid to exert influence over the manner in which Libyan constabulary functions are implemented at sea, in order to achieve the desired outcome of foreclosing maritime crossings towards Italy. Accordingly, it has only been "under pressure" from Italy (and the EU) that "Libyan authorities [have] increased their efforts to address the irregular flow of migrants."[246]

The pressure has come from different directions, not only from the political and operational spheres, but also from the dedicated Italian-

[240] MAE Report, *supra* note 47, p. 21.

[241] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 29.

[242] In this sense, *see Chiragov and Others v. Armenia*, App. No. 13216/05, para. 178 (16 June 2015), <http://hudoc.echr.coe.int/eng?i=001-155353> (06/20). *See also* Sargsyan v. Azerbaijan, App. No. 40167/06 (16 June 2015), <http://hudoc.echr.coe.int/eng?i=001-155662> (06/20).

[243] EUNAVFOR MED, *LYCG Monitoring Report*, *supra* note 30, p. 29. *See also* EUNAVFOR MED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, p. 4.

[244] *Letter from Marco Minniti, former Minister of Interior of Italy, to the Council of Europe Commissioner for Human Rights*, Ref. 0921 (11 October 2017), <https://rm.coe.int/reply-of-the-minister-of-interior-to-the-commissioner-s-letter-regardi/168075dd2d> (06/20).

[245] EUNAVFOR MED, *Sophia End of Month 6 Report – January–December 2015*, EEAS, 2016, 126, p. 3 (on file).

[246] EUNAVFOR MED, *Six-Monthly Report 1 June – 30 November 2017*, *supra* note 66, p. 6.

Libyan Joint Commission created by the MoU.[247] In accordance with its mandate, the Joint Commission has formulated the "strategic priorities" of the Italian-Libyan collaboration pursuant to which Italy has delivered funding, training, equipment, and the main patrol vessels in the Libyan fleet. So, the definition of such "strategic priorities" and their practical implementation are key towards the establishment and full capacitation of the LYCG. They are, arguably, tantamount to "the formulation of essential policy," as defined by the Strasbourg Court in *Jaloud*,[248] further supporting the conclusion that Italy, although not directly involved in each and every individual action of the LYCG, did not merely exert pressure, but "decisive influence" in the overall implementation of the plan to stem irregular migration across the Central Mediterranean. It is Italy's comprehensive investment that made pull-backs a reality in the course of 2017, thus providing "a strong indication" that it exercised decisive influence over the LYCG in a way such as to trigger Article 1 ECHR.[249]

6.3. *The Operative Involvement Element*

Beyond its implication from a distance, through the "impact" and "decisive influence" elements identified in the previous Parts, Italy's involvement in the operative capacities of the LYCG, especially in the course of 2017, has been very direct too – so much so that it fits the "public powers" doctrine to the letter, as formulated in *Al-Skeini*. To be sure, not only did Italy assume state functions of those normally pertaining to the territorial sovereign, but it did so on the grounds of the MoU and related decisions of the Joint Commission established by it – therefore, with "the consent, invitation, or acquiescence of the state concerned."[250]

As elaborated upon in Part C, November 6, 2017, was not an isolated occurrence, in terms of the overall functional authority undertaken by Italy in the coordination of SAR in the waters off Libya.

[247] MoU art. 3.

[248] *Jaloud*, App. No. 47708/08 at para. 63.

[249] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at paras. 122–123; *Chiragov*, App. No. 13216/05 at para. 186.

[250] *Al-Skeini*, 53 E.H.R.R. 18 at para. 149. *See also* Aliyeva and Aliyev v. Azerbaijan, App. No. 35587/08, paras. 56–57 (31 July 2014), <http://hudoc.echr.coe.int/eng?i=001-145782> (06/20).

Although Libya had ratified the SAR Convention, it had not officially declared an SRR according to the applicable formalities at the time of the *S.S.* events. An information document submitted by Italy (not Libya) to the IMO in December 2017 reveals that the process of "assist[ing] the relevant Libyan authorities in identifying and declaring their SRR" was still ongoing.[251]

Actually, for the declaration of an SRR to be valid, the SAR Convention foresees that there be an agreement among the Parties concerned (usually including all neighboring coastal states) to be notified to the IMO for dissemination,[252] and that SAR services be fully operational within the SRR being declared, so that they "are able to give prompt response to distress calls."[253] That the existence of a functioning MRCC is "a prerequisite for efficiently coordinate [sic] search and rescue within the Libyan search and rescue zone, in line with international legislation," has been jointly declared by the EU Commission and the EU High Representative for Foreign Affairs.[254]

The obligation on coastal states is to run "an adequate and effective" SAR service.[255] To that end, parties responsible for an SRR normally undertake "overall coordination of SAR operations,"[256] for which purpose they "shall make provision for the coordination facilities required to provide SAR services round their coasts" and "shall establish a national machinery for the overall coordination of SAR services,"[257] in the form of rescue coordination centers.[258] Above all, MRCCs "shall have adequate means for the receipt of distress communications" and "adequate means for communication with its rescue units and with MRCCs in adjacent areas."[259] And rescue units attached to them must, in turn, be "suitably … equipped," staffed and managed, with appropriate "facilities and equipment" that allow for

[251] IMO Sub-Committee on Navigation, *Communications and Search and Rescue, Libyan MRCC Project – Submitted by Italy, NCSR 5/INF.17*, p. 3 (15 December 2017), <https://www.transportstyrelsen.se/contentassets/3aba2639739e4e53afd3c7eb22f82ed6/5-inf17.pdf> (06/20).

[252] SAR Convention, Annex, paras. 2.1.4, 2.1.6.

[253] *Id.* Annex, para. 2.1.8.

[254] Joint Communication, *supra* note 57.

[255] UNCLOS art. 98(2).

[256] SAR Convention, Annex, para. 2.1.9.

[257] *Id.* Annex, paras. 2.2.1, 2.2.2.

[258] *Id.* Annex, para. 2.3.1.

[259] *Id.* Annex, para. 2.3.3.

an effective response[260] – all of which was, and still is, lacking in the Libyan case.

As shown in Part C, Libyan MRCC functions have, instead, been secured by Italy, arranging for the dispatch and coordination of resources within SAR missions, ascertaining the movement and location of vessels in distress, developing rescue plans, designating OSC, communicating with rescue assets at sea, coordinating their action, and even arranging for briefing and debriefing of LYCG personnel.[261] Italy should, therefore, be considered to have assumed "overall control," in the functional sense, of this Libyan competence,[262] which it exercises both "directly, through its [own naval] forces" – deployed in Libya and at sea, within Operation *Nauras*, and within its own Coastguard and MRCC – as well as "through a subordinate local administration" embodied in the LYCG.[263] It is Italy (also with the EU's input) that has put in place the whole technical and material infrastructure (not only the ships and the equipment, but also the whole detection and communication apparatus) that enables the interception and return of migrants back to Libya. And it is Italy that has assumed "effective authority" over individual SAR operations,[264] including the one it deployed in *S.S.* As a result, Italy should be considered responsible to "secure, *within the [policy] area under its control*, the entire range of substantive rights set out in the Convention" that arise in SAR and interdiction situations.[265]

The nature of the LYCG as a subrogate Italian proxy for interdiction and pull-back at sea has been confirmed by the Tribunal of Catania adjudicating on a related case concerning the rescue ship *Open Arms* of the NGO *Proactiva.* In his decision, the judge takes as proven the crucial role played by the Italian *Nauras* assets in detecting migrant boats off the Libyan coast and in leading LYCG operations.[266]

[260] *Id.* Annex, paras. 2.4.1.1, 2.5.

[261] For the full list of MRCC responsibilities, *see* IMO, *Amendments to International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual*, MSC.1/Circ.1594 (25 May 2018), Annex, at 169 et seq.

[262] *Ilaşcu*, App. No. 48787/99 at paras. 315–316. *Cf. Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para.106, using the word "domination" instead.

[263] *Ilaşcu*, App. No. 48787/99 at para. 314.

[264] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 111.

[265] *Id.* at para. 106 (emphasis added).

[266] Tribunale di Catania, Case No. 3476/18 R.G.N.R and Case No. 2474/18 R.G.GIP, pp. 3–4 (27 March 2018) on the flow of communications between the

The judge goes as far as to affirm that the interventions of Libyan patrol vessels happen "under the aegis of the Italian navy" and that the coordination of SAR missions is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans."[267] The phone number of the LYCG, as provided in their official headed paper, at least until the spring of 2018, corresponded to the phone number of the Italian *Nauras* vessel docked in Tripoli,[268] which further corroborates the "high degree of integration" between the two.[269] Ayoub Qassem, a spokesperson for the LYCG Tripoli sector, back in November 2017, had already confirmed this *modus operandi*. He explained how the LYCG uses "the information [delivered by Italy] to intercept people and return them to Libya, even if they are apprehended [rather than rescued] in international waters."[270]

Italy *de facto* commands the SAR and interdiction response of the LYCG. In these circumstances, it should not be able to "evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya."[271] It should, instead, be considered that the practice it promotes of *refoulement* by proxy, employing the LYCG to that end, amounts to an "exercise of [Italy's] sovereign authority, the

Italian navy assets in Libya, MRCC Rome, and the LYCG, <https://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf> (06/20).

[267] *Id.* pp.21–22. *See also*, Tribunale di Ragusa, Case No. 1216 – 1282/18 R.G.N.R. and Case No. 1182/18 R.G.GIP (16 April 2018), <http://www.questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf> (06/20).

[268] A. di Palladino, *Cercate i guardacoste libici? Telefonate a Roma: 06/…,* Il Fatto Quotidiano, (28 April 2018), <https://www.ilfattoquotidiano.it/premium/articoli/cercate-i-guardacoste-libici-telefonate-a-roma-06/> (06/20). Only recently have Libyan phone numbers been provided to the IMO and uploaded onto its Gisis database, most of which are however inoperative or answered by non-English speaking operators. *See Migranti, il telefono dei soccorsi libici squilla a vuoto: ecco cosa succede se si prova a chiamare,* Repubblica TV (22 January 2019), <https://www.youtube.com/watch?v=lJWlYn-dTTs> (06/20).

[269] *Chiragov*, App. No. 13216/05 at paras. 176, 186.

[270] Z. Campbell, *Europe's Plan to Close its Sea Borders Relies on Libya's Coast Guard Doing Its Dirty Work, Abusing Migrants*, The Intercept, 25 November 2017, <https://theintercept.com/2017/11/25/libya-coast-guard-europe-refugees/> (06/20).

[271] *Hirsi*, App. No. 27765/09 at para. 129.

effect of which is to prevent migrants from reaching [its] borders," thus engaging ECHR responsibility.[272]

On November 6, 2017, the measure of comprehensive dominium that Italy exercised over Libya's SAR and interdiction functions was similar to that recognized by the Strasbourg Court in relation to occupied areas of territory of a foreign country in its case law.[273] Against this background, it should not be necessary to determine whether Italy exercised "detailed control" over every individual action of the LYCG.[274] Italy's significant naval presence, through its *Nauras* and *Mare Sicuro* missions, as well as its all-encompassing provision to the LYCG – which only "survives as a result of [that] support"[275] – determine that it exercised "effective control" over the *S.S.* applicants throughout the chain of events of November 6, 2017. This includes those who drown or were injured at sea, alongside those who were maltreated by LYCG officers and/or pulled back to Libya, "during the course of or contiguous to [SAR/interdiction] operations" carried out under Italy's direction.[276]

7. Conclusions. Limits, and Implications of the Functional Model

When jurisdiction is understood in a functional sense, as an expression of public powers that may combine elements of legislative, executive and/or judicial action, there is no longer a need for unjustified distinctions between territorial and extraterritorial, or between personal and spatial manifestations. Ultimately, what underpins the various jurisdictional models accepted by the Strasbourg Court and other adjudicators of international human rights law is the sovereign-authority nexus established between the state and the individual in a specific situation through an exercise of "public powers." And in extraterritorial settings, like in territorial locations, this can be ascertained not only through the exertion of direct physical constraint, but also through indirect forms of control. What makes

[272] *Id.* at para. 180.

[273] Starting with the judgments in *Loizidou*, 310 Eur. Ct. H.R. (ser. A.), 23 Eur. Ct. H.R. 513, and *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967.

[274] *Ilaşcu*, App. No. 48787/99 at para. 315.

[275] *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 106.

[276] *Al-Skeini*, 53 E.H.R.R. 18 at para. 150.

control "effective" under the functional reading of jurisdiction is its capacity to determine a change in the real and/or legal position of those concerned with human rights-relevant implications. The isolation of particular segments of that control is not warranted, however. I posit that the evaluation of a concrete situation requires that attention be paid to the entire constellation of all the relevant channels through which state functions are exercised, be they factual, legal or both at the same time. Rather than insulating supposedly prevalent *de facto* elements, the proposition is to appraise situations *in toto*, taking account of *de jure* factors that may concur with exercises of physical force.

This approach allows for contextualized applications and principled outcomes. Under this paradigm, the very act of bombing taken in isolation or the absence of comprehensive control over the air space above the TV station in Belgrade would not have been the only elements considered to assess jurisdiction in *Bankovic*. The entire operation of which the bombing was but one part would also have been taken into account. It would not have been the power to kill or its random occurrence, but the orchestration of a military mission with a specific target and its implementation through deliberate recourse to lethal force that would have counted as an exercise of jurisdiction. State operations—military or otherwise—are multi-staged processes, entailing elements of prescriptive and enforcement action, comprising a sequence of planning, launching, and completion phases. Isolating one of them, or selecting a single factor detaching it from the rest, misses the wider structure to which it belongs and through which it articulates itself. It is arbitrary and – as in *Bankovic* – it leads to arbitrary findings.

If what is significant is not one part but the whole of the operation, its foreseeable impact and the knowledge of likely consequences of operational action are relevant and come to inform the jurisdictional analysis. Planning and deployment must be considered together as part of the same continuum. They must take account of predictable results and be undertaken in a human-rights compliant fashion. This applies both when state intervention is carried out directly, through its own organs and agents acting or producing effects abroad, and when it is undertaken indirectly, by a proxy third actor.

Italy's actions and those it orchestrated in Libya should, therefore, be taken as a whole, rather than disaggregated. When taken as a

whole, its sovereign decisions (adopted territorially, but producing effects abroad) together with the comprehensive support lent to the LN/LCG (including through direct involvement in their command and control capabilities) create a system of contactless, yet effective, control of the SAR and interdiction functions of Libya that amounts to an exercise of functional jurisdiction. Taking together the "impact," "decisive influence" and "operative involvement" factors through which its public powers materialized, the conclusion should be that, on November 6, 2017, Italy triggered Article 1 ECHR. Through its pervasive investment in the LYCG, it created the fiction of Libya's "ownership" of its intervention at sea,[277] achieving, by proxy, the same result for which it was condemned in *Hirsi*, accomplishing through another state what it was forbidden from doing itself.[278] And, like in *Hirsi*, it should be condemned in *S.S.* as well, for its "recourse to practices which are not compatible with [its] obligations under the [European Human Rights] Convention."[279]

One of the implications of the functional jurisdiction model, as posited herein, is the potential chilling effect it may have on joint efforts to administer migration, and on international cooperation more broadly. Since it requires that the human rights repercussions of state action be taken into account when planning and rolling out operations, this may be seen as overburdening states and rendering collaborative projects more difficult. Nonetheless, this difficulty is not tantamount to inapplicability. Even in (extraterritorial) situations of armed conflict has the ICJ affirmed that the application of human rights is not suspended,[280] also in the most atypical of circumstances,

[277] The creation of such "ownership" is the ultimate goal of bilateral efforts as well as efforts pursued through the EUNAVFOR MED. *See* EUNAVFOR MED, *Six-Monthly Report 1 December 2017 – 31 May 2018*, *supra* note 71, p. 15, 32.

[278] U.N. Int'l Law Comm., *Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts*, Y.I.L.C., Vol. II, Part 2, Ch IV, p. 66, para. 6, 2001 [hereinafter ARSIWA Commentary].

[279] *Hirsi*, App. No. 27765/09 at para. 179.

[280] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, [2005] ICJ Rep. 116. For the interaction between international human rights law, international humanitarian law, and international refugee law, see V. Moreno-Lax, "Systematising Systemic Integration: "War Refugees", Regime Relations and A Proposal for a Cumulative Approach to International Commitments", *Journal of International Criminal Justice,* 2014, p. 907.

when the use of nuclear weapons is being contemplated.[281]

This conclusion that human rights obligations continue to bind when states cooperate with one another has been embraced within the ECHR domain. In several cases has the Strasbourg Court concluded that the Convention imposes obligations on ECHR parties that these cannot evade through collaboration *inter se* or with other entities. It is not that the Convention prohibits international cooperation. It just conditions the conclusion of international agreements (in whatever form), and any cooperation based thereupon, on the continued observance of human rights commitments.[282] When this is not possible, ECHR parties cannot see themselves as relieved from their obligations. On the contrary, they become precluded from "enter[ing] into an agreement with another state which conflicts with its obligations under the Convention," with the principle carrying "all the more force" in the case of absolute and non-derogable rights – such as those at stake in *S.S.*[283]

Due diligence is required too, so that ECHR parties' conduct, on the basis of such agreements, does not contribute (directly or indirectly) to the perpetration of human rights violations. What is more, faced with a risk of irreversible harm, the Convention "places a number of positive obligations . . . designed to prevent and provide redress" for any ill-treatment that may eventually occur.[284] And in situations where a country – like Libya – is perpetrating "a serious breach" of "an obligation arising under a peremptory norm of general international law,"[285] a migration management agreement, conflicting with *jus cogens* norms – like the prohibition of torture, slavery, or

[281] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8).

[282] *Al-Skeini*, 53 E.H.R.R. p.18 at para. 138; *Catan*, Apps. 43370/04, 8252/05, and 18454/06 at para. 106.

[283] *Al-Saadoon*, App. No. 61498/08 at para. 138; and *Hirsi*, App. No. 27765/09 at para. 129.

[284] *Id.*

[285] U.N. Int'l Law Comm., *Articles on the Responsibility of States for Internationally Wrongful Acts*, UNGA A/56/10 and A/56/49(Vol.I)/Corr.4 ,2001 [hereinafter ARSIWA], arts. 41(1) and 41(2). These provisions are considered to reflect the current state of customary law. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, paras. 173, 385, 388 (Feb. 26).

arbitrary deprivation of life[286] – becomes invalid outright.[287] In such circumstances, states must not only refrain from cooperation, but must also proactively engage in collaboration with others "to bring an end [to the violations in question] through lawful means."[288] Italy, in a situation like the one in *S.S.*, rather than facilitating abuse by the LYCG, is "required by *its own international obligations* to prevent certain conduct by another state, or at least to prevent the harm that would flow from such conduct,"[289] and to take the necessary steps to mitigate any related foreseeable damage.

I understand there can be a potential backlash, if the Strasbourg Court follows my reasoning, embraces the functional conception of jurisdiction and the operational model, and finds in favor of the *S.S.* applicants.[290] At the most extreme, countries could menace withdrawal from the ECHR.[291] Another possibility is that the ruling precipitates a counter-reaction by State parties that is worse than the pull-back policy the ruling may illegalize—like the shift from the US extraordinary rendition program, comprising indefinite offshore detention and "enhanced" interrogation techniques in Guantanamo, to targeted killings via drone strikes.[292] However, these shifts are

[286] The Tribunale di Trapani, *supra* note 199, p. 32, has included the principle of *non-refoulement* in this list.

[287] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 53. *See also* Tribunale di Trapani, *supra* note 199, p. 38, declaring the 2017 MoU invalid on this ground.

[288] ARSIWA art. 41(1).

[289] ARSIWA Commentary p. 64, para. 4 (emphasis added). *See also* Corfu Channel, (U.K. v. Albania), Judgment, 1949 I.C.J. 4, p. 22 (Apr. 9).

[290] M. Baumgärtel, "High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan "Pullback" Policies to the European Court of Human Rights", *EJIL:Talk!* (14 May 2018), <https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/> (06/20).

[291] Like U.K. Conservative governments have threatened to do at different points in time. *See, e.g.*, Conservative Party in the Run Up to the May 2015 General Election, *Protecting Human Rights in the UK*, undated, <https://www.conservatives.com/~/media/files/downloadable%20files/human_rights.pdf> (06/20). *See also* R. Merrick, *Theresa May to Consider Axeing Human Rights Act after Brexit, Minister Reveals*, The Independent (18 January 2019), <https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html> (06/20).

[292] Alerting to this, *see* R. Wilde, *The Unintended Consequences of Expanding Human Rights Protections*, AJIL UNBOUND (12 March 2018),

already taking place.[293] They will not be changes that *S.S.* might instigate. Blocking strategies of potential migration flows are already happening further down the line, and ever closer, if not directly within, countries of origin of potential refugees, like Sudan or Afghanistan.[294] The apparatus of border coercion and extraterritorial containment has deep roots and has been forming for decades now, containing the movement of those most needing to move.[295]

To my mind, there is more to gain than there is to lose with *S.S.* Just like a positive decision in *Al-Skeini* helped build the case in *Hirsi*, a positive finding in *S.S.* will, in incremental fashion, provide tools to counter the changing means through which states perpetrate violations offshore. *S.S.* can, therefore, make a crucial contribution to close the gap between *extraterritorial* interventions and the traditional, and still predominantly *territorial*, mechanisms of legal accountability, giving teeth to ECHR guarantees, and bringing borders and globalization closer to human rights.

<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/unintended-consequences-of-expanding-migrant-rights-protections/3F2C1AFDBFF42E08DD6F226DF55FDE6E> (06/20).

[293] *See, e.g.*, U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Unlawful Death of Refugees and Migrants*, U.N. Doc. A/72/335 (15 August 2017).

[294] EEAS, *Joint Way Forward on Migration Issues between Afghanistan and the EU* (4 October 2016), <https://eeas.europa.eu/headquarters/headquarters-Homepage/11107/node/11107_nl> (06/20); A. Nestlen, *EU Urged to End Cooperation with Sudan after Refugees Whipped and Deported*, The Guardian (27 February 2017), <https://www.theguardian.com/global-development/2017/feb/27/eu-urged-to-end-cooperation-with-sudan-after-refugees-whipped-and-deported> (06/20).

[295] For analysis of the main measures in the EU, *see* Moreno-Lax, *supra* note 147, especially Part I, chs 2 to 6.

THE RECEPTION DIRECTIVE 2013/33/EU: LEGAL FRAMEWORK AND ANALYSIS IN RECENT JUDGMENTS OF THE EUROPEAN COURTS

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1. Introduction

The refugee crisis is above all a political crisis[1] and the Union's response to the massive influx of migrants and asylum-seekers who have arrived in Europe confirms that it "is not a refugee crisis facing Europe, but a European crisis facing refugee" [2].

The need to manage the Union's external borders through a legal standard common to all Member States has "the ultimate aim to creating a single legal area"[3]. The Union is seeking to achieve this objective by moving past the first stage of *Common European Asylum System*[4] (hereinafter Ceas) which was based on minimum standards to regularize the asylum sector, towards a new phase that includes, pursuant to Article 78 TFEU, common asylum procedures and a uniform standard of protection for both asylum seekers and anyone in need of subsidiary protection, through a "full and inclusive application

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[1] See M. Den Heijer, J Rijpma, T. Spijkerboer, "Coercion, prohibition, and great expectations: The continuing failure of the common European asylum system", *Common Market Law Review* ,53, 2016, p. 607; G. Campesi, "Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border**"**, *Refugee Survey Quarterly*, 37, 2018, pp. 44 ff.

[2] M. Basilien-Gainche, "Hotspots, cold facts. Managing Migration by Selecting Migrants", in Carolus Grutters, Sandra Mantu, Paul Minderhoud (eds.), *Migration on the Move. Essays on the Dynamic of Migration*, Brill, 2017, p. 153.

[3] E. Zaniboni, "No room for you in here? The past and the future of the asylum seekers' reception conditions in Italy", *Freedom, Security & Justice*, 2, 2018, p. 80.

[4] Launched by the Tampere Program of 1999 and concluded on 1 December 2005. See also S. Carrera, "The impact of Treaty of Lisbon over EU policies on migration, asylum and borders: the struggles over the ownership of the Stockholm Program", in E. Guild, P. Minderhoud (eds.), *The first decade of EU migration and asylum law*, Martinus Nijhoff Publisher, Boston, 2012, pp. 232 ff.

of the Geneva Convention and other relevant Treaties"[5]. The aim of the second phase of the Ceas and the recasting of acts adopted in the first stage[6], has certainly not led to the expected results with a view to harmonizing asylum procedures between Member States.

The crisis of 2015, following the arrival of thousands of migrants seeking protection, represents "a "turning point" in the operation of the CEAS, revealing the latent tensions of the system"[7]. However, Europe has only provided a fragmented response, unable to meet its obligations to welcome those seeking refuge in adequate and dignified conditions. In a context in which "protectionism prevailed over protection"[8], the intensification of internal border controls within Europe, the implementation of policies that have created new obstacles to the integration of asylum seekers and an insufficient degree of cooperation between Member States has "contributed to revealing the weakness of the Ceas and its structural flaws"[9].

Thus the crisis that Europe is facing – and that's what we're interested in emphasizing – is linked more to its reception system than to the actual number of migrants.

[5] See C. Favilli, "Il trattato di Lisbona e la politica dell'Unione europea in materia di visti, asilo e immigrazione", *Diritto, immigrazione e cittadinanza*, 2, 2010, pp. 26 ff.; among others, see also G. Morgese, "La riforma del sistema europeo comune di asilo e i suoi principali riflessi nell'ordinamento italiano", *Diritto immigrazione e cittadinanza*, 4, 2013, pp. 16 ss.; S. Carrera, "The impact of Treaty of Lisbon over EU policies on migration", cit.

[6] The so-called asylum-package adopted on June 26, 2013 includes Directive 2011/95/EU (recast), Procedures Directive 2013/32/EU (recast), Asylum Procedures Directive 2013/33/EU (recast), the Regulation (EU) No 604/2013 (Dublin III Regulation), replacing the Dublin II Regulation and being part of the so-called Dublin System and the Regulation (EU) 603/2013 Eurodac (recast).

[7] G. Campesi, "Seeking Asylum in Times of Crisis", cit., p. 46.

[8] S. Lavenex, "'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System", *Journal of Common Market Studies*, 56, 2018, p. 1201.

[9] 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", cit., p. 258; See also V. Chetail, "Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System", *European Journal of Human Rights*, 2016, p. 584 ss.

In this context, we consider it highly important to analyze Directive 2013/33/EU[10] which regulates the standards of reception applied to applicants for protection in the European Union.

Although this Directive aims at harmonizing reception conditions among European countries by providing for "dignified standards of living" [11] for applicants, it also aims to help reduce secondary movements, limiting as far as possible the movements [12] of the applicants and their choices which might affect the balance of the Dublin system[13].In other words, two opposing forces regulate the Directive through "two potentially conflicting policy objects (…), the protection of fundamental rights and migration management objectives"[14]. From the foregoing it is clear that one of the aims is to achieve a real securitarian management of the reception that actually tends to prevail over the purpose of protecting the fundamental rights of applicants. The "failure" of its original purpose to implement a standardized legislation in the reception of applicants is probably inherent in the very nature of the directive. By leaving Member States a wide discretion in the implementation of the Directive's provisions in their own reception systems, these conditions are implemented differently within the various national systems, bringing to light already existing deficits and accentuating the structural limitations of national asylum systems[15]. In a limbo of practice where the initial reception is mixed with detention practices and the second reception is often subordinated to the increasingly frequent use of emergency accommodations, there is the risk of overestimating the true capacities of the States to offer an adequate level of reception that is not below the required standards and is in line with the protection of the

[10] *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), L 180/96*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=IT> (06/20).

[11] *Ibid.*, Recital 11.

[12] *Ibid.*, Recital 12.

[13] See also G. Campesi, "Seeking Asylum in Times of Crisis, cit., p. 48.

[14] See J. Silga, "The fragmentation of reception condition for asylum seekers in the European Union: Protecting fundamental rights or preventing long-term integration?", *Freedom, Security & Justic*e,3, 2018, p. 90.

[15] *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdfhttp://www.asylumineurope.org/> (06/20).

fundamental rights of applicants, in line with the protection offered by international instruments. In addition, the so-called Dublin System has done nothing but contribute to exacerbate this situation by making the burden of applications and the subsequent reception of applicants for protection in the countries of first entry[16], in particular Italy and Greece[17], unsustainable and unreasonable. In this regard, the judgments of the Courts of Strasbourg and Luxembourg have had fundamental importance in revealing the profound deficiencies in the reception systems of these countries, penalized by the "Dublin transfers"[18]. A proper reform of the Dublin Regulation[19] would therefore be extremely urgent, not least in order to help alleviate reception problems. This contribution aims in particular at focusing on the regulatory framework offered by Directive 2013/33/EU, with particular regard to the contribution of the case-law of the Court of Justice and the capability of that Court to respond to the complex challenges related to reception.

[16] See G. Caggiano, "Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione di responsabilità fra gli Stati membri e tutela dei diritti degli individui", *Studi sull'integrazione europea*, 3, 2015, pp. 468 ss.

[17] Besides these, Spain, Poland and Hungary must also be mentioned.

[18] In the leading case *M.S.S. v Belgium and Greece*, the ECTHR condemned Greece, directly responsible, and Belgium, indirectly responsible, for the delay in the applicant's asylum request under Regulation Dublin II, precisely because of the serious systemic deficiencies in the reception and asylum system of Greece. Resuming these principles, the Court of Justice of the European Union in the N.S. v Secretary of State for the Home Department and others reiterated that States cannot ignore these lacks when "they constitute serious and proven reasons to believe that the applicant runs a real risk of undergoing inhuman or degrading treatment" under Article 4 of the Chart of Fundamental Rights. Among others, see comment on C. Favilli, "*L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*", *Questione giustizia,* 2, 2018, in particular par. 6.

[19] On this point see C. Favilli, "La crisi del Sistema Dublino: quali prospettive?", in Mario Savino (ed.), *La crisi migratoria tra Italia e Unione europea*, Editoriale scientifica, Naples, 2017, pp. 293 ss.; with regard to future prospects for reforming the current Dublin system, see also *Between tighter controls at EU's external borders and a will to impose compulsory solidarity, Asylum and Migration Pact slowly maturing*, 10 July 2020, <https://agenceurope.eu/en/bulletin/article/12524/2>(07/20); *Pact on Asylum and Migration will not be presented "before early summer", says Ylva Johansson*, 19 May 2020, <https://agenceurope.eu/en/bulletin/article/12489/14>(07/20).

2. Directive 2013/33/EU: the fragmentation of reception conditions for international asylum seekers

Directive 2013/33/EU, recast act of the previous 2003/9/EC, covering all Member States except the United Kingdom, Denmark and Ireland, was adopted on 26 June 2013 within the framework of the Common European Asylum System, which represents "a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union"[20]. Its aim is to ensure an improvement in reception conditions by offering applicants an equivalent level of protection in all EU Member States[21]. Deviating from the provisions of the first Directive 2003/9/EC laying down minimum requirements, it aims to ensure a harmonization of the reception conditions in the EU and a uniform standard of protection for any third-country national in need of protection, pending, in the light of Article 78 TFEU, realization of a "much more ambitious common policy"[22]. As specified in the preamble to the current Directive, this policy follows the natural development of a "uniform status for those granted international protection based on high protection standards and fair and effective procedures"[23].Although the possibility for Member States to establish or maintain more favourable provisions is likely to further delay achievement of the desired harmonization, it is the directive itself that makes it clear that this is possible "insofar as these provisions are compatible with this Directive"[24], as also stated in the Saciri judgment[25] with which the Court of Justice states that such discretion by Member States must in any case comply with the minimum requirements laid down by the

[20] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), cit.

[21] Recital 8 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[22] Art. 78 TFUE.

[23] Recital 5 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[24] *Ivi*, Art. 4.

[25] CJEU, judgment of 27 February 2014, *Federaalagentschapvoor de opvang van asielzoekersvSelverSaciri and Others*, case C-79/13.

Directive [26]. In the Reception Directive "the very notion of "reception", however, is clouded by conceptual uncertainty" [27]. Reception conditions are defined as "the full set of measures that Member States grant to applicants in accordance with this Directive"[28], definition that appears generic and incomplete in its content, avoiding any reference to both the obligations of the Member States in this regard, and with respect to the fundamental rights that are completely absent in this definition[29]. Before giving a general overview not only of the material reception conditions but also of the procedural guarantees, it is important to stress that, going beyond the original scope of application provided by Directive 2003/9/EU for asylum seekers only, the current Directive refers to applicants for international protection, including applicants for subsidiary protection, in line with the existing Union *acquis*[30]. Pursuant to art. 3.1 "all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants" benefit from the reception measures, even when a form of protection different from the one provided by the "Qualifications Directive" 2011/95/EU[31] is requested.

[26] *Ivi*, par. 49; see E. Guild, V. Moreno-Lax, "Reception Conditions", in S. Peers, V. Moreno-Lax, M. Garlick, E. Guild (Eds), *EU Immigration and Asylum Law*, 2nd rev. ed., Brill Nijhoff, Leiden, 2015, p. 505.

[27] *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, cit., p.8.

[28] Art. 2 (f) of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[29] See J.Silga, *The fragmentation of reception condition for asylum seekers in the European Union*, cit., p. 99.

[30] Recital 13 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.; it should be said that most of member States had already extended the scope of Directive 2003/9/EC to include applicants for subsidiary protection although this status was not yet contemplated in the acquis of the Union, on this point see A. Del Guercio, "La seconda fase di realizzazione del Sistema europeo commune d'asilo, *AIC, 2014,* p. 14, <https://www.osservatorioaic.it/images/rivista/pdf/Osservatorio%20Del%20Guercio_FINALE%20(1).pdf>(06/20).

[31] It is emphasized that States can decide, pursuant to art. 3.4 of Directive 2013/33 / EU, to include different types of protection covered by national law, compared to those provided by directive 2011/95 / EU.

It is, of course, important to define when an applicant can actually begin to enjoy the reception conditions laid down. This may give rise to problems with regard to the concepts of "making and lodging an application"[32], as provided in the original wording since the Directive uses those terms in various ways in some articles[33]. In this sense, the same Directive tries to evade the issue by stating at art. 17, with reference to material reception conditions, that "Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection", even though it is the Procedures Directive 2013/32/EU[34] that clarifies the point by stating "given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and Directive 2013/33/EU"[35]. Art. 3.1 should also be read in conjunction with Recital 8 which, by establishing its implementation at all stages and in all types of procedures relating to applications for international protection, in all places and in all reception centers, implements what is stated in the judgment of the Court of Justice in *Cimade and Gisti*[36], providing that common standards in reception procedures should be guaranteed for all applicants for international protection also in reference to the transfer procedure under the Dublin III Regulation. In this respect, not only does the EU Court of Justice state that Directive 2003/9/EC "provides for only one category of asylum seekers"[37], but also that it must be read in the light of the fundamental rights and principles recognized by the Charter of

[32] Vedi J. Silga, *The fragmentation of reception condition for asylum seekers in the European Union*, cit., p. 100; see also L. Slingenberg, *The Reception of Asylum Seekers under International Law – Between Sovereignty and Equality*, Hart Publishing, 2016, pp.46 ss.

[33] See art. 17.1, 14.2, 5.1, 6.1 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[34] Directive 2013/32/EU of the European Parliament And of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *L 180/60*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en>(06/20).

[35] *Ivi*, recital 27.

[36] CJEU, judgment of 21 September 2012, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, caseC-179/11

[37] *Ibidem*, par. 40.

Fundamental Rights of the European Union, since the purpose of the Directive is to "ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter"[38]. Accredited doctrine believes that in full respect of the human dignity of protection applicants the reference in the Reception Directive to article 1 of the Charter may entail obligations of a wider scope than the prohibition of torture and inhuman and degrading treatment[39]. The Court, having clarified that those requirements do not exclude applicants for protection pending the determination of the Member State competent to examine the application under the Dublin III Regulation, states that the asylum seeker cannot be deprived of the reception conditions laid down in the Directive "even for a temporary period"[40]. In this respect "only the actual transfer (...) by the requesting Member State brings to an end the examination of the application for asylum by that State and its responsibility for granting the minimum reception conditions"[41].

After a full review of the scope of this directive, we will now deal with the general provisions on reception conditions. In this respect, we shall not explore the issue of detention any further, referring the point to the next paragraph.

Among the procedural rights of the Directive, with regard to the right to information, Article 5 provides that "Member States shall inform applicants for international protection, within a period of 15 days, at least as regards the benefits granted and their obligations with regard to reception conditions, in writing and in a language which the applicant understands or is reasonably supposed to understand"[42], regarding the possibility of coming into contact with organizations providing legal or humanitarian assistance. As regards the right to documentation, Member States must provide, within three days of the submission of the application, a document certifying the status of the applicant, allowing him to stay in the territory of the State for the time

[38] *Ibidem*, par. 42.

[39] See E. Tsourdi, "EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?", in V. Chetail, P. De Bruycker, F. Maiani (eds.), *Reforming the Common European Asylum System – The New European Refugee Law*, Brill, Nijhoff, 2016, p. 301.

[40] CJEU, *Cimade e Gisti*, cit., par. 56; see E. Guild, V. Moreno-Lax, *Reception Conditions*, cit., p. 510.

[41] *Ibidem*, par. 55.

[42] Art. 5.2 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

required to examine an application that is pending or under consideration[43].The subsequent provision seems to be more problematic because it allows Member States to circumvent the obligations of the aforementioned article for applicants in detention, for those who are at the border during the examination of the application for protection or in the context of a procedure aimed at determining whether the applicant has the right to enter the territory.[44] This provision makes the situation of such applicants particularly uncertain[45]. They could be excluded from access to material reception conditions, as required by the directive, from the moment they arrive until they obtain the documents allowing them to stay in the country, assimilating their status to that of those who are illegally in the country. This is in opposition to art. 27 of the Geneva Convention, according to which "the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document" as well as with art. 31 prohibiting the imposition of criminal penalties on applicants for asylum who are not allowed to enter or stay illegally on national territory.[46]As far as this is concerned, it is interesting that the recent *Sadikou Gnandi*[47] judgment, citing the *Cimade and GISTI* case, although the latter deals with an applicant whose application has been rejected and a repatriation decision taken on the matter, clarifies the concept of being "allowed to remain in the territory" under the Directive. The Court of Justice states that even pending an action at first instance on the rejection of an application for protection, the person concerned is entitled to benefit from the guarantees of Directive 2003/9/EC because "[the] article 3(1) makes its application conditional only on the existence of an authorization to remain on the territory as an applicant and, therefore, does not exclude the directive's application in the case where the person concerned has such an authorization and is staying illegally, within the meaning of Directive 2008/115"[48] since the individual retains the

[43] *Ibidem*, art. 6.1.

[44] *Ibidem*, art. 6.2.

[45] J. Silga, *The fragmentation of reception condition for asylum seekers in the European Union*, cit., p. 100.

[46] See A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo*, cit., p. 15; see also E. Guild, V.Moreno-Lax, *Reception Conditions*, cit., p. 513 e ss.

[47] CJEU, Judgment of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16.

[48] *Ibidem*, par. 63.

status of an applicant for protection until the final decision on his application.

As regards material reception conditions, these shall include "housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance"[49] .The Member States, as mentioned above, must ensure that applicants can benefit from these conditions as soon as they wish to apply for international protection, ensuring "an adequate standard of living (…), which guarantees their subsistence and protects their physical and mental health"[50] . In accordance with art. 20.5, States shall in all circumstances ensure not only access to healthcare, but also "a dignified standard of living for all applicants". What constitutes this *standard* and how it should be achieved is not only not specified in the directive, but is left to the discretion of the Member States. Reception standards therefore remain fragmentary and particularly variable between States, failing to achieve a uniform level of treatment for applicants for protection[51]. Accommodation can be provided in the form of an economic grant or, as explained by art. 18, in kind**.** Art. 18.9 also grants the possibility of derogating from this provision by laying down different material reception conditions than those provided before, where accommodation capacities are temporarily unavailable, "exceptionally" and only "for a reasonable period which shall be as short as possible". The judgment by the Court of Justice in the case of *Saciri*[52] intervened to interpret the scope of that article regarding the granting by States of material reception conditions in the form of economic subsidies. On the basis of the principles cited above in the *Cimade and Gisti*[53] case, the Court states that

where a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, that those allowances must be provided from the time the application for asylum is

[49] Art. 2 (g) of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[50] *Ivi*, Art. 17.2.

[51] *Current migration situation in the EU: Oversight of reception facilities*, September 2017, p. 5, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-september-monthly-migration-report-focus-oversight_en.pdf>(06/20).

[52] CJEU, *Selver Saciri and Others*, cit.

[53] CJEU, *Cimade et Gisti*, cit., par. 56

made (…).That Member State must ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs[54].

Furthermore, the principle stressed by the Court that "saturation of the reception networks not being a justification for any derogation from meeting those standards"[55], appears to be particularly effective and relevant with regard to the assessment of the compatibility of the reception systems implemented in the Member States with the rules laid down in the European *acquis*[56].

In the zones designated as places of accommodation for applicants for international protection, Member States have a duty to ensure the protection of family life, the possibility of interviews with relatives, lawyers or representatives of international organizations and the UNHCR, but also to take into account gender and age differences, prevent incidents of violence especially against women and train personnel who are qualified in assistance.

Directive 33/2013/EU also calls for Member States to provide health care, including, as a minimum, first aid and necessary medical and mental care to applicants with special needs. Access to the labor market shall be granted within nine months (no longer twelve months as in Directive 2003/9/EC) from the date on which the application was submitted. The host State may authorize the applicant's vocational training, even if he has not already had access to a job. Although these provisions are more secure than the previous directive in this area, they remain much too vague to govern such a complex matter, leaving a broad margin for Member States with regard to the conditions of access and in practice leading to differentiated treatment from one Member State to another[57].

The applicants for international protection "do not have an

[54] CJEU, *SelverSaciri and Others*, cit., par. 46.

[55] *Ibidem*, par. 50.

[56] See E. Zaniboni, *Money for Nothing, Push-back 'for Free': On the (Missed) Implementation of the CEAS*, cit., p. 274.

[57] Vedi J. Silga, *The fragmentation of reception condition for asylum seekers in the European Union,* cit., p. 105.

absolute right to reception"[58]. In fact, article 20 states that material reception conditions may be revoked or reduced when the applicant leaves his residence without informing the authorities, contravenes the obligation to report to the authorities to provide information or to be interviewed for the asylum procedure, "has lodged a subsequent application as defined in Article 2(q) of Directive 2013/32/EU, … or has not lodged an application for international protection as soon as reasonably practicable, … has concealed financial resources, and has therefore unduly benefited from material reception conditions"[59]. Although Member States have a wide margin of discretion, decisions to this effect must be taken objectively and impartially on a case-by-case basis. In view of the grounds for withdrawal or reduction of reception conditions, applicants for protection may avail themselves of Article 26, which provides for the possibility of challenging the decision of the State authority, and, at the last instance, for the possibility of an appeal before a judicial authority, where States must ensure, on request, a free legal representation provided by appropriately qualified personnel. Member States may, in accordance with paragraph 4 of that Article, apply penalties in respect of serious infringements by applicants of the rules of reception centers. It is precisely with regard to such an infringement that the Court of Justice ruled in the recent judgment *Zubair Haqbin v Federal agentschapvoor de opvang van asielzoekers*[60]. The applicant, an Afghan citizen who arrived in Belgium as an unaccompanied minor, following a brawl in which he was involved in the reception center where he was staying, the Belgian authorities had temporarily withdrawn the reception measures and all the services associated with them such as medical and psychological assistance, forcing the child to seek makeshift accommodations. Without going into the specific issues with reference to a preliminary ruling, what is of interest here is the Court's interpretation of the compatibility of the scheme for the withdrawal of material reception conditions with the protection of fundamental rights, in particular with regard to the category of unaccompanied minors in need of special protection. Although the Court highlights

[58] G. Campesi, "Seeking Asylum in Times of Crisis", cit., p. 49.

[59] Art. 20 par. 1,2,3 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[60] CJEU, judgment of 12 November 2019*, Zubair Haqbin v Federal agentschapvoor de opvang van asielzoekers*, case C-233/18.

the lack of a definition of the concept of "sanction"[61] in Directive 2013/33/EU to ensure a certain margin of discretion in the imposition of such measures, it also states that in reducing or withdrawing reception conditions Member States must take into account the particular situation of the applicant for protection and all the circumstances of the case which "complies with the principle of proportionality and does not undermine the Dignity of the applicant"[62]. In this judgment, in view of the overriding interest of the child as a fundamental criterion in the implementation of the relevant provisions of the Directive, "the legality of a withdrawal measure in the present case is excluded, in view of the characteristics of the case and the vulnerability of the applicant as an unaccompanied minor"[63].

The Court concluded that "Article 20(4) and (5) of Directive 2013/33 (…) must be interpreted as meaning that a Member State cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centers as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions"[64]. Although it leaves a possible margin of discretion to the Member States, it limits the same margin strictly in order to protect not only the fundamental rights of applicants for protection but also the purpose and aims of the directive itself.[65]

Directive 2013/33/EU, as clarified by the Court of Justice in the judgment analyzed above, places the interest of the child as a fundamental criterion. States must provide for the possibility of family reunification, ensure the well-being and development of the child, also in the light of his or her life experiences, considering his or her security. Children, depending on their age, must have the opportunity to play and to enjoy recreational activities in spaces to be provided in the reception centers, and must have access to rehabilitation services, in case they have suffered any form of abuse. Member States shall ensure, in accordance with the Directive, that minors are

[61] Ibid., par. 41.

[62] Ibid., par. 51.

[63] M. Marchegiani, "Revoca delle condizioni materiali di accoglienza e minori richiedenti protezione: l'orientamento della Corte di giustizia nel caso Haqbin", *SIDIBlog*, http://www.sidiblog.org/ (07/07).

[64] CJEU, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, cit., par. 56

[65] See M. Marchegiani, "Revoca delle condizioni materiali di accoglienza", cit.

accommodated together with their parents, younger siblings or adults who are responsible for them, allowing them access to the education system "under similar conditions as their own nationals"[66] and, if necessary, language courses to facilitate access to education[67].

Particular attention is paid to unaccompanied minors for whom, pursuant to art. 24, Member States "shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive"[68]. They can be accommodated with a foster family, in reception centers with specific facilities or in other accommodations for minors, who shall, as far as possible, remain with their siblings. In this regard, it should be noted that States have the burden of tracing the family members of the unaccompanied minor as soon as possible, including with the assistance of international organizations or with the assistance of competent organizations[69]. Emphasis is placed on vulnerable people in respect of whom the previous Directive 2003/9/EC provided rather limited legislation[70]. Once the application has been submitted Member States should, assess, within a reasonable time, whether the applicant has special needs and, consequently, provide for specific reception, even if this occurs at a later stage of the asylum procedure. In addition, special treatment and access to necessary medical and psychological care is provided for those who have suffered torture or violence.[71]

[66] Art. 14 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[67] See *Access to Education for Refugee and Migrant Children in Europe,* September 2019,<https://www.iom.int/sites/default/files/press_release/file/access-to-education-for-refugee-children.pdf>(06/20); see also E. Guild, V. Moreno-Lax, *Reception Conditions*, cit., p. 530.

[68] In this regard see the document of the European Commission of the 28 September 2012 *Shaping a common approach on unaccompanied minors* <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_716>(06/20).

[69] See A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo*, cit., p. 16.

[70] Art. 21 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.; see art. 17 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, L 31/18, <https://eur-lex.europa.eu/>(06/20).

[71] *Ivi*, art. 25.

3. The administrative detention of applicants for international protection in the "Reception Directive"

With the 2013 asylum package, the European Union has a body of rules (Directive 2013/33/EU and 2013/32/EU). Procedures, as well as provisions, are also provided for in Regulation no. 604/2013), aimed at regulating the matter of detention of applicants for protection. Detention of protection applicants is one of the most interesting aspects of Directive 2013/33/EU.[72]

In the previous Directive 2003/9/EC it was stated, in a rather vague and concise manner, that Member States could, where necessary for legal or public policy reasons, confine asylum seekers to a place in accordance with national law[73]. Following fragmented practices and widespread use of administrative detention among Member States[74] , as well as numerous criticisms by international and NGOs[75], including the UNHCR[76], the European Commission proposed "to clarify the rules on detention and address the issue in a holistic way in the recast

[72] See G. Morgese, *La riforma del sistema europeo comune di asilo e i suoi principali riflessi nell'ordinamento italiano*, cit., p. 25.

[73] Art. 7.3 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, cit.; Art. 18 of the directive procedures 2005/85/ CE also established the obligation for Member States to subject the arrest of the asylum seeker to a quick judicial review.

[74] For what concerns the length of detention different timeframes as well as different legal basis with regard to the States practice were highlighted: in Germany this limitation occurred in an exceptional way, in other countries such as Malta, however, it was used almost systematically towards everyone who entered the territory irregularly. See European Commission, *Report from the Commission to the Council and to the European Parliament On The Application Of Directive 2003/9/EC Of 27 January 2003, Laying Down Minimum standards for the reception of asylum seekers*, COM(2007) 745 final, Brussels, 26.11.2007, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0745&from=EN>(07/20). For more detailed data on the situation of the Member States, please refer to the report of European Migration Network (EMN), *Reception Systems, their Capacities and the Social Situation of Asylum Applicants within the Reception System in the EU Member States*, http://ec.europa.eu/(07/20).

[75] *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301)*, 2007, https://www.refworld.org/docid/472723902.html(06/20).

[76] *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007,<https://www.unhcr.org/4d934aa19.html> (06/20).

Reception Conditions Directive"[77] , providing for legislation making detention possible only in certain circumstances, after an individual assessment, in line with the principle of necessity and proportionality[78]. Although the recasting act of the 2013 Reception Directive in this sense represents an improvement over the previous act[79], by introducing not only a detailed regime for administrative detention with an exhaustive list of cases in which it is possible to use it as well as many procedural guarantees in this regard, this legislation does not put an end to arbitrary detention practices by Member States, as it still leaves a broad margin for discretion both in terms of transposition of the directive itself and in the practices and treatment of applicants for protection.[80]

In the reception Directive, art. 7 states "that applicants may move freely within the territory of the host Member State or within an area assigned to them", although the host State may derogate from this provision by providing for the possibility of residence, established for reasons of public policy or for the rapid analysis of their application, from which applicants may depart only if authorized. If this appears as a possibility of confinement of applicants without the norm detailing the material conditions within those places[81] , the following art. Article 8 of the Directive provides for a genuine restriction of the freedom of applicants for protection by implementing specific rules on detention.

Article 8 opens with a reference to the Geneva Convention (Art. 31) which states that the Member States "shall not hold a person in Detention for the sole reason that he or she is an applicant", in line with recital 15, which reiterates the reference to the provisions of the

[77] Proposal for a Directive of the European Parliament and of The Council laying down minimum standards for the reception of asylum seekers, COM(2008) 815 final, 3 December 2008, Brussels, <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0815_/com_com(2008)0815_en.pdf> (06/20).

[78] See E. Guild, V. Moreno-Lax, *Reception Conditions*, cit., p. 519.

[79] E.L. Tsourdi, "Asylum Detention in EU Law: Falling between Two Stools?", *Refugee Survey Quarterly*,35(1), 2016, pp. 13–14; C. Costello & M. Mouzourakis, "EU Law and the Detainability of Asylum-Seekers", *Refugee Survey Quarterly*, 35(1), 2016, p. 71.

[80] See A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo nel diritti dell'UE e in quello italiano", in G. Cataldi, A. Del Guercio, A. Liguori (eds.), *Il diritto di asilo di Europa*, Naples, 2014, p.36, G. Campesi, "Seeking Asylum in Times of Crisis", p. 50.

[81] G. Campesi, "Seeking Asylum in Times of Crisis", cit., p. 49.

Refugee Convention, the ECHR and the EU Charter. On the basis of the *necessity* criterion and after a case-by-case assessment, Article 8 allows for detention of the applicant where access to less coercive[82] alternative measures is not possible, such as the obligation to report regularly to the authorities, a stay in an assigned place or the provision of a financial guarantee. It is interesting to underline the requirement of necessity with regard to all the cases provided for detention, a parameter that does not appear among those in the analysis of the ECHR on compatibility, in particular art. 5.1 as regards the arbitrary nature of the measure of deprivation of personal freedom, since "there is no requirement that the detention is justified as necessary for detaining aliens to prevent their entry or for their expulsion and deportation"[83].

The detailed list pursuant to Article 8.3 of the cases in which detention is envisaged offers a series of possibilities that make detention systematic.[84]

The first of these concerns the application of a detention measure to determine or verify the identity of the applicant. This situation is vague indeed as many of the applicants who have just arrived on national territory do not possess documents that are often lost on the difficult route to Europe. Although the UNHCR guidelines state that "the inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate"[85] since such information may be acquired through less coercive measures, they clarify that "minimal periods in detention may be permissible to carry out initial identity and security checks"[86]. The EU Court, in judgment *K.*[87] of

[82] On this subject, see A. Edwards "'Less coercive means': The legal case for alternatives to detention for refugees, asylum seeker and other migrants", in S. S. Juss (eds), *The Ashgate research companion to migration law, theory and policy*, Routledge, 2013, p. 447 ff.

[83] See M. Pichou, "Reception or Detention Centres? The Detention of Migrants and the New EU 'Hotspot' Approach in the Light of the European Convention on Human Rights", *Critical Quarterly for Legislation and* Law, 2, 2016, p. 118.

[84] See A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo", cit., p. 67.

[85] *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <https://www.refworld.org>(07/20).

[86] Unhcr takes up the 1983 Conclusion on the detention of refugees and asylum seekers, the original source of the Reception Directive 2003/9/EC, Unhcr ExCom,

2017, also ruled that this reason for detention is valid in the light of Article 6 of the EU Charter (right to freedom and security), in so far as it is necessary for the proper functioning of the Common European Asylum System and in order to strike the right balance between the right to freedom of the applicant and the requirements relating to the identification of the applicant for the purposes of determining the elements on which his application is based.

The second reason why a detention measure is possible is: "in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of Detention, in particular when there is a risk of absconding of the applicant" pursuant to art. 8.3 (b). Detention is justified only as a last resort and this measure constitutes an exception to the general principle that cannot be used to justify detention for the entire duration of the procedure to grant status, nor for an unlimited period[88]. It also seems clear that the risk of flight will always be the determining reason for such detention by the "host" State, because, in the absence of such intention by the applicant, there could be no other reason to resort to deprivation of liberty.

As regards the possibility of detention "in order to decide, in the context of a procedure, on the applicant's right to enter the territory", provided for in point (c) of the aforementioned article, the Directive seems implicitly to exclude a right of entry by the applicant. To confirm this, in fact, the 2003 Recommendation of the Committee of Ministers[89], among the reference sources of the original reception directive, specifies "when a decision needs to be taken on their right to enter the territory of the state concerned". The 2013 recast act, in line with the abovementioned, only provides for a mere concession by the Member State, placing an obstacle to entry into the territory if "it is

Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) –1986, <http://www.unhcr.org/>(07/20).

[87] CJEU, judgment of 14 September 2017, *K. c Staatssecretaris van Veiligheiden Justitie*, case C-18/16.

[88] *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, cit.

[89] *Recommendation Rec(2003)5of the Committee of Ministers to member states on measures of detention of asylum seekers*, 16 April 2003, <https://www.refworld.org/docid/3f8d65e54.html> (07/20).

not compatible with the principle of non-refoulement, a principle expressly enshrined in European Union law"[90].

Another case of detention concerns a return procedure under Directive 2008/115/EC, when the Member State "can substantiate on the basis of objective criteria … that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision"[91]. Although, as further defined by the UNHCR guidelines, authorities may "consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed", detention for expulsion purposes "can only occur after the asylum claim has been finally determined and rejected"[92]. As a guarantee of this we cannot fail to highlight important judgments of the Court of Justice. Having stated in the judgment *Hassen El Dridi*[93] that detention under the Return Directive can be used where less coercive measures are not sufficient and only to proceed with removal, in the *Arslan*[94] ruling the Court, to answer two preliminary questions concerning the interaction between the Procedures Directive and the Return Directive, wonders whether the applicant's detention should be terminated if he applies for international protection. Without going into the substance of that decision, as far as the reception directive is concerned, it is interesting to report what the Court has specified, namely, whether following an individual assessment "appears in such circumstances to be objectively necessary to prevent the person concerned from permanently evading his return", such measure is compatible with art. 7.3 of Directive

[90] Principle affirmed by art. 78.1 TFEU and art. 19.1 of the Charter of Fundamental Rights, to be interpreted in the light of the jurisprudence rendered by the Court of Strasbourg on the basis of art. 3 ECHR. See A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo", cit., p. 68; A. Saccucci, "The protection from removal to unsafe countries under the ECHR: not all that glitters is gold", *Questions of International Law*, 5, 2014, p. 3 ff.

[91] Art. 8.3 (d) of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[92] *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, cit.

[93] CGUE, judgement of 28 April 2011, *Hassen El Dridi*, case C-61/11 PPU.

[94] CGUE, judgement of 30 May 2013, *Mehmet Arslan c. Policie ČR, KrajskéředitelstvípolicieÚsteckéhokraje, odborcizinecképolicie* (Czech Republic), case C-534/11.

2003/9[95] . However, it stresses that "the mere fact that an asylum Seeker, at the time of the making of his application, is the subject of a return decision and is being detained (…) not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardize the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention"[96]. In the *Gnandi* judgment [97] already cited, the Court confirms the suspensive effect of the decision on repatriation as "the period granted for voluntary departure (...) should not start to run as long as the person concerned is allowed to remain. In addition, during that period, that person may not be held in Detention with a view to removal pursuant to Article 15 of that directive" [98] and while the applicant holds the status of applicant for international protection.

Grounds of security or public order as a reason for detention were examined in the *J.N.*[99] judgment. The Court of Justice, in verifying the validity of art. 8.3 (e) with respect to art. 6 (right to freedom and security) of the EU Charter of Fundamental Rights, stresses that this ground for an applicant's deprivation of freedom is subject to a number of procedural and judicial limitations. A prejudice to national security or public order may justify the detention of the applicant for protection under that Article of Directive 2013/33/EU "only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned"[100].

Detention of applicants for protection during transfer to the State responsible for the analysis of the application for protection in accordance with Article 28 of the Dublin III Regulation is also covered by Article 8.3 (f) of the Reception Directive. Deprivation of the personal freedom of the applicant is provided for only if there is a considerable risk of absconding of which the Regulation mentioned gives a definition that is rather elusive and not exhaustive. The

[95] *Ibidem,* par. 59.

[96] *Ibidem,* par. 62.

[97] CJEU, *Sadikou Gnandi v État belge*, cit.

[98] *Ibidem*, par. 62.

[99] CGUE, judgment of 15 February 2016, *J.N. c. Staatsecretariat van Veiligheid en Justitie* case C-601/15 PPU

[100] *Ibidem*, par. 67; see J. Silga, *The fragmentation of reception condition for asylum seekers in the European Union,* cit., p. 111.

provision states that such a risk may be assumed where there are "reasons ... which are based on objective criteria defined by law to believe that an applicant ... may abscond"[101]. In addition to a case-by-case assessment, detention, which is only possible if less coercive measures are not available, must be necessary and proportionate. Once again the Court of Justice, in the recent *Al Chodor*[102] judgment of 2017, clarifies that objective criteria in the event of a risk of abscondment, is absent in the Regulation in question and cannot be deduced from the consolidated jurisprudence on the matter, but that such criteria must be contained and prepared "in a binding provision of general application" which the Member States are obliged to lay down. The absence of such a rule makes it illegal to deprive applicants of their freedom, thereby undermining the applicability of the detention measure under this article[103].

The 2013 Directive presents important procedural guarantees for detained applicants. Pursuant to art. 9 the duration of detention must be as brief as possible, without the Directive making any specific reference to it, as long as the circumstances of art. 8.3, of which we have spoken extensively, persist. The administrative formalities must be carried out with due diligence, without any delay in this regard justifying an extension of detention, which must always be ordered by the court or administrative authority in writing. It is interesting to note that there is no time limit to detention, though it is laid down in other acts such as the Return Directive 2008/115/EC. This point can be criticized not only because it is contrary to the very purpose of the Directive "to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter"[104], but also to the desired harmonization within the CEAS of state practices which the Reception Directive contributes to make particularly varied in the differential treatment of applicants for protection. Even the assumption of due diligence seems somewhat vague and not sufficient

[101] Art. 2 (n) del Regulation (EU) no 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), L 180/31, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=en> (07/20).

[102] CJEU, judgment of 15 March 2017, *Al Chodor*, case C-528/15.

[103] *Ibidem*, par. 45 – 47.

[104] CJEU, *Cimade e Gisti*, cit., par. 42.

to prevent long periods of detention although "the length of detention should not exceed that reasonably required for the purpose pursued"[105].

The right to information of detained applicants is explained in par. 4 of art.9 wherein it is stated that they must be informed of the reasons for detention, national procedures to counter the measure and be provided with access to legal assistance in writing "in a language which they understand or reasonably supposed to understand". This formulation does not appear to be much of a guarantee with regard to the correct information of the applicant and his rights, not being, moreover, in line with art. 5.2 of the ECHR and the jurisprudence of its Court so that "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him" although this wording is nevertheless better than the earlier Commission proposal, which referred "only to a language which is reasonably supposed to be understandable to them"[106].

Detention must always be authorized by a judicial or administrative authority and, if ordered by that authority, must be subject to review by a court, as soon as possible, at the request of the applicant or of its own motion (if it were found to be unlawful, this would lead to the immediate release of the applicant).[107] The detention order pursuant to art. 9.5 is carried out at regular intervals, regardless of whether it was issued by a judicial or administrative authority[108] , at the request of the applicant and especially in the case of long-term

[105] See M. Pichou, *Reception or Detention Centres? The Detention of Migrants and the New EU 'Hotspot' Approach*, cit., p. 119. See also D. Wilsher, **"**Immigration detention and the common European asylum policy", in A. Baldaccini, E. Guild, H. Toner (eds), *Whose freedom, security and justice? EU immigration ad asylum law and policy*, Hart Publishing, Oregon, 2007, p. 399 ff.

[106] See A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo", cit., p. 72. See also *European Commission, Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)*, COM(2011) 320 final, Brussels, 1.6.2011, <https://eur-lex.europa.eu/>(07/20).

[107] See art. 9 par. 2 and 5 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[108] Even the Court of Strasbourg has constantly highlighted the fundamental nature of this guarantee: among others the ECtHR judgement of 22 September 2009, *Abdolkhani e Karimnia c. Turchia*, application n. 30471/08; ECtHR, judgement of 11 June 2009, *SD c. Grecia*, application n. 53541/07.

detention, also to verify new factors that may call into question the legitimacy of the imposed measure. In cases of judicial review of this measure, Member States will ensure that the applicant can obtain free legal assistance from suitably qualified staff, but there are several exceptions which have given rise to the concerns of humanitarian organizations that legal assistance should always be granted to the applicant for protection in view of his special status[109].

With regard to detention conditions[110], the examined directive provides that it takes place in specialised detention facilities, allowing that the state, if obliged, can place applicants in a prison accommodation, but keeping them separately from ordinary prisoners and applying the detention conditions provided for in the Directive.

Since applicants held in detention must be treated with full respect for human dignity, they must have access to the outdoors, they must be able to communicate with representatives of the UNHCR and with lawyers, family members and representatives of NGOs. Par. 4 of art. 10 is controversial as it states that States may impose restrictions on access to the detention center, where objectively necessary, under national law, for reasons of security, public order or administrative management, as long as they do not drastically restrict or make access impossible[111].

Also questionable is the provision of par. 5 on the basis of which applicants are first expected to be systematically informed of the rules regarding their rights and duties, but allows for a derogation with respect to places of transit or at the border "for a reasonable period which shall be as short as possible"[112]. The legislation on vulnerable persons is also highly questionable, given that the reception of persons with special needs should be "a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs"[113] as the same directive

[109] A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo", cit., p. 73.

[110] See on this point art. 10 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[111] A. Del Guercio, "La seconda fase di realizzazione del sistema europeo comune d'asilo", cit., p. 20.

[112] See art. 10.5 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

[113] Recital 14 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, cit.

does not exclude the detention provided for in article 11. In order to protect the vulnerable, it would have been more appropriate to exclude the possibility of detention altogether, at least by avoiding the possibility of prison which, in the light of the directive, is also envisaged for the most vulnerable of all, that is minors.

As far as detention is concerned, this should be used as a last resort, only if less coercive measures cannot be applied, be as short-lived as possible and in suitable accommodations. Unaccompanied minors "shall be detained only in exceptional circumstances … and shall never be detained in prison accommodation" [114] ensuring accommodations that meets their needs and separates them from adults. In this regard, it seems difficult to believe that the primary protection of the child referred to in art. 23 and the best interests of the child in the light of the 1989 United Nations Convention on the Rights of the Child, mentioned by the same directive in Recital 18. The Member State must ensure that minors, whether accompanied or not, have access to education, including special classes in detention centers, since the rule does not exclude this possibility[115]. With due regard for families and their unity, accommodation must be provided to protect the intimacy of the family (Art. 11.4) and, except in the case of members of the family or in the case of those concerned, women and men must be separated (Art. 11.5).

4. Conclusive remarks

We have examined the main aspects of the 2013 Reception Directive in the light of the jurisprudence of the Court of Justice and its contribution to the interpretation of the provisions contained therein. However, further observations are still necessary. The aim of the directive to guarantee common standards in the reception systems of the Member States is in practice disregarded. Profound differences exist not only in the definition of the expected standards in qualitative terms, but also in the actors and procedures responsible for the management and control of reception facilities [116]. Although the

[114] *Ivi*, art. 11 par. 3.

[115] *Ivi*, Art. 14; see A. Del Guercio, "La detenzione amministrativa dei richiedenti asilo", cit., p. 71.

[116] *Current migration situation in the EU: Oversight of reception facilities*, cit., p. 2.

directive itself urges States to put in place appropriate mechanisms with which to ensure adequate levels of reception conditions, it "does not create any individual rights"[117] leaving wide discretionary powers also in this important respect. Although the 2013 recast act represents an improvement over the previous one, in other various respects it "fails" in the full implementation of the obligations of the States with respect to the protection of applicants seeking protection. This aspect cannot fail to affect the needs of vulnerable people. Although the Directive contains ad hoc provisions, it does not provide for an administrative procedure to assess whether an applicant has particular reception needs and thus leaves Member States ample room to choose the type of assistance provided and thus risks making such provisions meaningless.

Another particularly problematic point concerns the administrative detention of applicants for protection. In practice, the boundary between reception and detention is somewhat blurred, especially in the very first reception. The practice known as the *Hotspot* method[118], provided by the European Agenda on Migration[119] as a response of the European Union to the strong wave of migration in 2015[120] proved to be particularly problematic. This approach, based on the old logic of "permanent emergency"[121], has not led to "a reform

[117] *Ivi*, p.3.

[118] This approach has been carried out in Italy and Greece. For comments see M. Basilien-Gainche, *Hotspots, cold facts. Managing Migration by Selecting Migrants*, cit. p. 153 ff.; F. Casolari, "The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *The Italian Yearbook of International Law*, 2016, p. 109 ff.; M. Den Heijer, J Rijpma, T. Spijkerboer, "Coercion, prohibition, and great expectations: The continuing failure of the common European asylum system", cit., p. 623.

[119] European Agenda On Migration, COM (2015) 240 final, Brussels, 13.5.2015, <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf> (07/20).

[120] S. Carrera et al. (eds.), "The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities", *CEPS Essay*, n. 20/16, December 2015, <https://www.ceps.eu/>(07/20).

[121] In this regard and for a comment on the reception system for asylum seekers in Italy see E. Zaniboni, "No room for you in here?", cit., p. 87; see also J. Silga, "The fragmentation of reception condition for asylum seekers in the European Union", cit., p. 92.

of the legal basis concerning the reception of asylum-seekers"[122], which remains essentially the one defined by the directive under consideration, although it has a deep impact on it. In such "crisis points", in fact, "the line between open accommodation and confinement often becomes difficult to draw in practice" [123] not sparing, in some cases, even the most vulnerable of all, that is, unaccompanied minors whose living conditions inside are often well below the standards set out in the 2013 Directive.

Although, on the one hand, the case law of the Court of Justice has never intervened with regard to the compliance of the conditions for reception of applicants for protection in *hotspots* with European Union law and the Charter of Fundamental Rights, on the other hand, it sets out the fundamental rights of applicants at the forefront of the treatment arrangements in transit zones. By judgment *C-924/19 PPU and C-925/19 PPU, FMS and Others*[124] the Court establishes the primacy of the protection of those seeking protection over the securitarian logic of border management implemented by the States and in this case by Hungary[125] . The facts underlying the reference for a preliminary ruling concern two families, one Iranian and the other Afghan, who arrived in the transit zone at the Serbian-Hungarian border of Röstze in December 2018 and February 2019, respectively. According to the Hungarian legislation, the applications for protection submitted by the applicants had been declared inadmissible, with the national authorities attempting the readmission card in Serbia, a country considered "safe". Following the latter's refusal to take charge of the persons concerned, Hungary adopted a return decision replacing Serbia with the two countries of origin of the appellants and also examined their request for international protection. After seeing their administrative appeals rejected, without the possibility of legal remedies provided for by Hungarian law, the applicants appealed to

[122] G. Campesi, "Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border", cit., p. 53.

[123] *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, cit., p. 12.

[124] CJEU, judgment of 14 May 2020 (GC), *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság.* joined cases C-924/19 PPU e C-925/19 PPU.

[125] Among others *Ungheria: l'orribile trattamento dei richiedenti asilo, un volute stratagemma populista*, September 2016, <https://www.amnesty.it/>; *Hungary: Locked up for Seeking Asylum*, December 2015, <https://www.hrw.org/>(07/20).

the Administrative and Labour Court which suspended execution of the provision and requested the Court of Justice for a preliminary ruling on important questions.

This case will not be further analysed in all its parts here. I shall not go into the details either regarding the interpretation of art. 13 of Directive 2008/115, read in the light of Article 47 of the Charter, elaborated by the Court, or of the possibility for the Hungarian authorities to change in the return order to the destination country of those subject to this procedure without the latter having recourse to a judge to establish the legality of such an order.[126]

The issue here, however, is the legality of the applicants being placed in the Röszke transit area and whether this measure can be qualified as detention. The referring court questions the interpretation by the Hungarian authorities of the provisions of Directive 2013/33/EU and Directive 2008/115 on the detention of applicants and asks whether an obligation for a third-country national to remain permanently in a transit zone at the border of a Member State, without being able to leave that place freely, may constitute a "detention" within the meaning of that Directive.

According to the Court, starting from the concept of detention under Directive 2013/33/EU and also the UNHCR Guidelines on detention[127], this measure, as defined in art. 2 (h) must be interpreted as "a coercive measure which deprives that applicant of his freedom of movement and isolates it from the rest of the population, by requiring

[126] CJEU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság.* cit., par. 109-147. In this regard see L. Marin, "La Corte di Giustizia riporta le 'zone di transito' ungheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali)", *ADiM Blog*, May 2020, <http://www.adimblog.com/wp-content/uploads/2020/05/ADiM-Blog-maggio-2020-Osservatorio-L.Marin_.pdf> (07/20).

[127] According to the UNHCR Guidelines "[detention] refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities (...) Detention can take place in a range of locations, including at land and sea borders, in the "international zones" at airports, on islands, on boats, as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially". See *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, cit, p. 9.

it to remain permanently within a restricted and closed perimeter"[128]. This notion must also be considered valid for the purposes of the Return Directive 2008/115 "in the absence of definitional rules found in the same and other reasons from which to infer that the Union legislator has considered to give it a different meaning"[129]. The Court also assesses the conditions imposed in the transit area, which is also surrounded by barbed wire and fences, without the applicants being able to visit or move freely, as they are constantly monitored by the police authorities. The Court rejected the Hungarian Government's objection that the applicants could have walked away to Serbia. In that case, on the one hand, removal from the transit zone would have entailed, under Hungarian law, the surrender of the application for asylum and the possibility of obtaining the status of applicant for protection in that country, on the other hand their entry into Serbia would be considered "illegal" and therefore subject to sanctions[130] . In the light of the foregoing, it is not possible for the Court to consider that applicants had the real possibility of leaving Röszke's transit zone, defining it as "a deprivation of liberty, characteristic of 'detention'"[131] in accordance with the directives in question.

The above-mentioned judgment is particularly important because, in supporting a genuine detention of the applicants, the Court reports the "rule of law" and respect for human rights in Hungarian legislation. The decision of the Court of Justice is a better guarantor than that of the ECHR in the case of *Ilias and Ahmed c. Hungary*[132].

[128] CJEU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság.* cit., par. 223.

[129] S. Zirulia, "Per Lussemburgo è "detenzione", per Strasburgo no: verso un duplice volto della libertà personale dello straniero nello spazio europeo?", *Sistema Penale*, 25 May 2020, <https://sistemapenale.it/> (10/07).

[130] CJEU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, cit., par. 229-230.

[131] *Ibidem*, par. 231.

[132] ECtHR, judgment of 21 November 2019 (GC), *Ilias e Ahmed c. Ungheria*, applicationn. 47287/15; For comments see V. Stoyanova, "The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode", *Strasbourg Observers*, 23 December 2019, <https://strasbourgobservers.com/> (07/20); F. L. Gatta, "Diritti al confine e il confine dei diritti: La Corte Edu si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte II – Detenzione e Art. 5 CEDU)", *ADiM Blog*, January 2020, <http://www.adimblog.com/> (07/20); S. Zirulia, *Per Lussemburgo è "detenzione", per Strasburgo no*, cit.

The Court of Strasbourg in the judgment cited, in fact, completely reverses the decision of 2017[133] which condemned the applicants' deprivation of freedom pursuant to art. 5.1 Cedu during the 23 days spent in the transit zone of Röszke[134]. The Court, taking a "practical and realistic approach, having regard to the present-day conditions and challenges", recognizes not only the right of states to control their own borders, but also that of "taking measures against foreigners circumventing restrictions on immigration"[135]. Not only did the applicants enter the transit zone of their own free will[136], but the 23-day stay did not seem excessive in carrying out the administrative procedures necessary for the analysis of the asylum application. Unlike the previous judgment *Amuur c. France*[137], the Court considers the return to Serbia and the possibility of leaving the transit zone of Röszke "not only theoretical but realistic"[138]. In the light of that assessment of the facts, it does not consider that art. 5.1 of the Convention by taking a further step backwards in the protection of fundamental rights creates uncertainty about the criteria that constitute the arbitrary measure of deprivation of personal freedom[139].

On the contrary, the decision of the Court of Justice through the correct interpretation of the Treaties and European secondary law adds "an important element to the most complex mosaic of "personal freedom" in the Euro-Union context"[140], giving prominence to the protection of applicants and the exercise of the right to seek asylum even in transit and border areas.

In the decision examined, by guaranteeing the protection of applicants it thus re-establishes the primacy of the law over practices of deprivation of freedom of those seeking refuge in the Member States of the Union, concerned with focusing their attention on border

[133] ECtHR, judgment of 14 March 2017, *Ilias e Ahmed c. Ungheria*, application n. 47287/15; for comments B. Gornati, "'Paesi terzi sicuri', respingimenti a catena e detenzione arbitraria: il caso Ilias e Ahmed", *Diritti umani e diritto internazionale*, 11, 2017, p. 542 ff.

[134] *Ibidem*, par. 58 – 69.

[135] ECtHR, (GC), *Ilias e Ahmed c. Ungheria*, cit., par. 213.

[136] *Ibidem*, par. 220.

[137] ECtHR, judgment of 14 June 1996, *Amuur c. France*, application n. 19776/92.

[138] ECtHR, (GC), *Ilias e Ahmed c. Ungheria*, cit., par. 236.

[139] See F. L. Gatta, "Diritti al confine e il confine dei diritti: La Corte Edu si esprime sulle politiche di controllo frontaliero dell'Ungheria", cit.

[140] S. Zirulia, "Per Lussemburgo è "detenzione", per Strasburgo no", cit.

controls and return practices rather than on a full compliance with basic human rights standards and principles.

THE PROTECTION OF MIGRANTS AGAINST COLLECTIVE EXPULSIONS BETWEEN RESTRICTION AND UNCERTAINTY: READING THE ECtHR'S *N.D. AND N.T. V. SPAIN* JUDGMENT

ANNA FAZZINI*

1. Introduction

The *N.D. and N.T.* judgment of February 13th 2020[1], in which the Grand Chamber of the European Court of Human Rights (henceforth ECtHR) ruled for the first time on the so-called "hot returns" implemented at Melilla's land borders, was met with great dismay by the academic world[2]. The Court, indeed, overturning what the Third Section had stated in 2017[3], concluded that there was no violation of

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[1] European Court of Human Rights (Grand Chamber), *N.D. and N.T. v. Spain* Judgment of 13 February 2020, Application No. 8675/15 and 8697/15.

[2] See, *inter alia*, M. Pichl, D. Schmalz, "Unlawful may not mean rightless", *Verfassunblog*, 14 February 2020, <https://verfassungsblog.de/unlawful-may-not-mean-rightless/> (7/20); C. Oviedo Moreno, "A Painful Slap from the ECtHR and an Urgent Opportunity for Spain", *Verfassunblog*, 14 February 2020, <https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/> (7/20).

[3] European Court of Human Rights (from now on ECtHR), *N.D. and N.T. v. Spain*, Application No. 8675/15 and 8697/15, Judgment of 3rd October 2017. For comments on the case, see G. Cellamare, "Note in margine alla sentenza della Corte europea dei diritti dell'uomo nell'affare N.D. e N.T. c. Spagna", *Studi sull'integrazione europea,* 1-2018, XIII, pp. 153-164; <https://www.academia.edu/36343861/Note....N.D._e_N.T._c._Spagna.pdf> (7/20); L. Salvadego, "I respingimenti sommari di migranti alle frontiere terrestri dell'énclave di Melilla", *Diritti Umani e Diritto Internazionale*, 12, 2018, no. 1, pp. 199-206; A. Pijnenburg, "Is N.D. and N.T. v. Spain the new Hirsi?", *Ejil:Talk!,* 2017, <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/> (7/20); D. Moya, "Judgment N.D. and N.T. v Spain: on the legality of police 'push-backs' at the borders and, again, on the prohibition of collective expulsions", *Strasbourg Observers*, 2017, <https://strasbourgobservers.com/2017/10/16/judgement-nd-and-nt-v-spain-on-the-legality-of-police-push-backs-at-the-borders-and-again-on-the-prohibition-of-collective-expulsions/> (7/20).

the prohibition of collective expulsions and of the right to an effective remedy in relation to the immediate return of two migrants to Morocco, N.D. and N.T, who had attempted to cross the border irregularly. In the present case, according to the Court's judgment, the absence of individual expulsion orders against the two migrants is not imputable to the Spanish State, but to the applicants themselves, on the basis of their "culpable conduct". Such conduct is determined by the fact that they voluntarily placed themselves in an illegal situation, attempting to cross the border irregularly and exploiting group dynamics, when it was possible to resort to legal access routes, which the Spanish authorities had made available.

The reasoning developed by the Court, in fact, presents a complex argument, which is not exempt from contradictory and questionable aspects.

Indeed, if on the one hand the Court stands in view of the progressive strengthening of the protection guaranteed by the Article 4 of Protocol no. 4 (henceforth art. 4 Prot. n. 4) to the European Convention of Human Rights (henceforth ECHR), subject to all the cornerstones of its own jurisprudence, on the other hand the Court reduces the scope of the provision, by introducing a highly controversial exception to the rule, which in fact exempts the States from complying with their obligations in some cases.

In this regard, it is important to note that the interpretation of the prohibition of collective expulsions developed in the jurisprudence of the Court has not been subverted and its general structure remains intact[4]. The Court reaffirms the general principles on the matter, recalling, in particular, that the prohibition of collective expulsions applies to all foreigners and not to particular categories of foreigners, such as those who fall within the scope of art. 3 ECHR, that is to say those who would run the risk of suffering torture and inhuman and

[4] See D. Thym, "A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T. Judgment on 'Hot Expulsions'", *EU Migration Law Blog*, 17 February 2020, <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> (7/20); R. Wissing, "Push backs of 'badly behaving' migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)", *Strasbourg Observers*, 25 February 2020, <https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/> (7/20).

degrading treatment once sent back to their countries of origin or transit.

However, the argument developed later by the Court "nullifies" those same principles: by relating factual issues, such as the irregular entry and the "possibility" of accessing legal channels, with the State obligations under the ECHR and in particular under art. 4 Prot. n. 4, which should exist regardless, the Court *de facto* excludes the application of the safeguards provided by the prohibition of collective expulsions if special circumstances arise[5].

Indeed, the Court seems to attempt a not perfectly successful "test of equilibrium" between the maintenance of consolidated safeguards and new restrictions. The effect is to produce a "confused" picture of the protection provided by art. 4 Prot. n. 4, inconsistencies between purely formalistic safeguards and effective safeguards and new uncertainties and contradictions.

In this article, after having looked into the meaning of the prohibition of collective expulsions, the "heart" of the judgment in question, I will analyze the case *N.D. and N.T.*, highlighting the most questionable aspects of the Court's reasoning from a legal point of view, with particular reference to the notion of "culpable conduct" and to the standard of "legal pathways" within the context of art. 4 Prot. n. 4. Finally, the relationship emerging between the prohibition of collective expulsions and the principle of *non-refoulement*, which is equally ambiguous, will be deepened.

2. The protection of migrants against collective expulsions

The expulsion of a foreigner from the territory of a State represents the "paradigm of the classic tension between sovereignty and the protection of human rights in the field of migration"[6]. In fact,

[5] F. Mussi, "La sentenza N.D. e N.T. della Corte europea dei diritti umani: uno schiaffo ai diritti dei migranti alle frontiere terrestri?", *SIDIBlog*, 19 March 2020, <http://www.sidiblog.org/2020/03/19/la-sentenza-n-d-e-n-t-della-corte-europea-dei-diritti-umani-uno-schiaffo-ai-diritti-dei-migranti-alle-frontiere-terrestri/> (7/20).

[6] F.L. Gatta, "The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case Law of the European Court of Human Rights", in Giovanni Carlo Bruno, Fulvio Maria Palombino et Adriana Di Stefano (eds.), *Migration Issues before International*

States have the sovereign right to control the entry and stay of foreigners in their territory and to decide on their admission or expulsion, as repeatedly affirmed by the ECtHR's jurisprudence[7]. However, these sovereign prerogatives must be exercised in compliance with the obligations under international human rights law towards foreigners and migrants. This assumption is reflected in the international framework relating to the expulsion of foreigners. In fact, it is the premise of the "Memorandum by the Secretariat on Expulsion of Aliens"[8] of 2006, which states that "every State has the right to expel aliens", but that, however, "this right is subject to general limitations as well as specific substantive and procedural requirements"[9], and of the "Draft Articles on the Expulsion of Aliens"[10], adopted in 2014 within the International Law Commission, which is the point of arrival of the codification process on the matter.

Within this framework, it is also clear that, unlike individual expulsions, which are allowed in compliance with certain substantive and procedural guarantees, collective expulsions are firmly prohibited, as "contrary to the very notion of the human rights of individuals"[11].

Within the ECHR system, the prohibition of collective expulsions, sanctioned by art 4 of Protocol no. 4 of the Convention[12], has been the subject of an evolutionary interpretation by the ECtHR, which played an essential role in clarifying the fundamental aspects of the rule, such

Courts and Tribunals, Consiglio Nazionale delle Ricerche Edizioni, Rome, 2019, p. 121.

[7] The "undeniable" right of the States to control the entry and stay of foreigners in their territory has been more recently affirmed in ECtHR (Chamber), *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment of 1st September 2015, para. 119.

[8] International Law Commission (from now on ILC), *Memorandum by the Secretariat, Expulsion of Aliens*, UN Doc. A/CN.4/565 of 10 July 2006.

[9] Ivi, p. 1.

[10] ILC, *Draft Articles on the Expulsion of Aliens, with Commentaries*, in Yearbook of the International Law Commission, UN Doc. A/69/10, 2014.

[11] ILC, *Memorandum*, cit., p. 2; the "Draft Articles on the Expulsion of Aliens" states that collective expulsions are forbidden in art. 9.

[12] Protocol no. 4 to ECHR, adopted in 1963, is the first international text to have codified the prohibition of collective expulsions. Other regional instruments that provide for such a prohibition are: the American Convention on Human Rights (Art. 22. 9), the Arab Charter on Human Rights (Art. 26. 2) and the African Charter on Human and Peoples' Rights (Art. 12. 5).

as its scope, the notion of expulsion and its "collective" character[13]. Indeed, by adopting a broad and dynamic interpretative approach in its jurisprudential path, the Court of Strasbourg has strengthened the protection of migrants' rights in this matter, limiting the sovereign prerogatives of the States.

As is known, the first ruling in which the Court ascertains the violation of the prohibition of collective expulsions is the *Čonka*[14] case, relating to the expulsion of a group of foreigners of Roma origin from the Belgian territory. It should be noted, in this regard, how the Court immediately identified the crucial element for ascertaining the violation of the provision in the lack of an individualized examination of the situation of each foreigner. The Court affirmed in the judgment that art. 4 Prot. n. 4 applies "to any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"[15].

However, if the first pronouncements in which art. 4 Prot. n. 4 finds application concern cases of expulsion of foreigners who were already in the territory of the State (often, as in the aforementioned case, as a consequence of discriminatory measures[16]), it is in the last decade that the violation of the prohibition of collective expulsions is found also in cases of push-backs at the European external borders, together with the increase of the control and interception practices of the migratory flows in the Mediterranean Sea promoted by the European States.

[13] For more details on the interpretative evolution of the standard, see F.L. Gatta, *The Problematic Management*, cit. pp. 131-146.

[14] ECtHR, *Čonka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002

[15] Ivi, para 59

[16] It should be noted that the discriminatory character is not a requirement for ascertaining the "collective" character of the expulsion, but it may represent an additional circumstance which, in certain cases, reinforces the suspicion of the existence of a collective expulsion, see Gatta, *The Problematic Management*, cit. p. 142 ff. Several cases, in which the violation of the provision was ascertained, were about discriminatory measures based on ethnicity or nationality: besides the Čonka case, see ECtHR (Grand Chamber) *Georgia v. Russia* (I), Application No. 13255/07, Judgment of 3 July 2014

In particular, it is with the *Hirsi*[17] ruling that the protection guaranteed by art. 4 Prot. n. 4 is significantly extended, with particular reference to the territorial scope of the rule and to the evolutionary interpretation of the term "expulsion"[18].

With regard to the first aspect, in fact, the Court affirms the extraterritorial scope of the rule, which for the first time finds application in the context of rejections that occurred on the high seas. According to the Court, in fact, similarly to the notion of jurisdiction under the ECHR, art. 4 Prot. n. 4 has a primarily territorial character and most often finds application in removals from the territory of a State. However, it can also be applied in extraterritorial contexts. If this were not the case, it would result in "a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4"[19].

The notion of "expulsion", on the other hand, in the light of the *travaux préparatoires* of Protocol no. 4, must be understood "in the generic meaning, in current use (to drive away from a place)"[20]. Therefore, it includes not only actions that imply expulsion in the strict sense (removal from the territory), but also actions and practices that take place without the foreigners necessarily having reached the territory of the State. So, the notion includes interception on the high seas, push-back operations and other practices aimed at preventing the landing of migrants on the territory of a State.

The Court also adopts a similar approach in the subsequent *Sharifi*[21], which is about the immediate return to Greece of asylum seekers who had landed in Italian and Greek ports. These judgments actually complete the evolutionary trajectory of the prohibition of collective expulsions, which is therefore consolidated as "une

[17] ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09, Judgment of 23 February 2012; for a comment on the case, see A. Liguori, "La Corte Europea Condanna L'Italia Per I Respingimenti Verso La Libia Nel 2009: Il Caso Hirsi", *Rivista di diritto internazionale*, 2, 2012, pp. 415-443.

[18] M. Di Filippo, "Walking the (barbed) wire of the prohibition of collective expulsions: an assessment of the Strasbourg case law", *Diritti umani e Diritto internazionale*, 2, 2010 (forthcoming).

[19] ECtHR (Grand Chamber), *Hirsi,* para. 178.

[20] Ibid., para. 174.

[21] ECtHR, *Sharifi e and Others v. Italy and Greece,* Application No. 16643/09, Judgment of 21 October 2014.

obligation plus générale d'opérer an examen individualisé de la situation d'un étranger avant de procéder à son expulsion"[22].

However, the Court subsequently preferred not to infer specific procedural guarantees from this general obligation. In the *Khlaifia*[23] case, relating to the detention and then the return of three Tunisian citizens, the Grand Chamber affirmed that the prohibition of collective expulsions does not in any circumstances imply a real right to an individual interview, but it is sufficient that the foreigner "has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State"[24]. These conclusions reduce the procedural guarantees under art. 4 Prot. n. 4, the content of which appears rather uncertain, being able to "vary" depending on the examined situation. They also seem to contrast with the framework outlined in *Hirsi* and *Sharifi*, where the Court had highlighted the need to ensure a detailed examination of the situations of individuals for the purpose of compliance with the provision. In these rulings, in fact, it should be noted the importance given to some elements for the purpose of ascertaining the violation: the presence of staff members who were not adequately trained to

[22] L. Leboeuf, "Interdiction des expulsions collectives et mesures d'expulsions immédiates et systématiques : la Cour européenne des droits de l'homme entre équilibrisme et contorsions", *CeDIE*, 1 April 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/cour-eur-d-h-13-fevrier-2020-n-d-et-n-t-c-espagne-req-nos-8675-15-et-8697-15.html#_ftn6> (7/20).

[23] ECtHR (Grand Chamber), *Khlaifia and Others v. Italy*, cit. The second section had instead affirmed the violation of art. 4 Prot. n. 4, noting that the rejection measures in question were completely identical to each other and the Government had not provided evidence that individual talks had been conducted with respect to the specific situation of each applicant. Furthermore, the same treatment had been reserved to many other citizens who had the same nationality, on the basis of an agreement between Italy and Tunisia. This element supported the suspicion that the Italian practice had the purpose of determining simplified procedures for the expulsion of Tunisian citizens. See A. Giliberto, "The judgment of the Grand Chamber of the ECtHR on the detentions (and consequent rejections) of Lampedusa in 2011", *Diritto Penale Contemporaneo*, 23 December 2016; <https://archiviodpc.dirittopenaleuomo.org/d/5123-la-pronuncia-della-grande-camera-della-corte-edu-sui-trattenimenti-e-i-conseguenti-respingimenti-di> (7/20).

[24] Ivi, para. 248.

conduct individual interviews and the absence of interpreters or legal advisors in such circumstances[25].

Khlaifia, in fact, represents the first case that stops the evolutionary path of art. 4 Prot. n. 4, in favor of a "new" restrictive trend, aimed at compressing the qualitative standard of the procedural guarantees under the prohibition of collective expulsions[26].

3. The *N.D. and N.T.* case and the Court's assessment

As anticipated, the case *N.D. and N.T.* is based on facts that occurred in August 2014, when the two applicants, N.D. and N.T., respectively from Mali and the Ivory Coast, attempted to irregularly cross the border of Melilla, a Spanish enclave located in Moroccan territory, after having stayed several months in Morocco[27]. In particular, the two applicants, together with about eighty people, attempted to climb over the fences placed at the border, which were several kilometers long and characterized by multiple levels of height. Arriving at the highest point of the fence at different times, the Civil Guard made them climb down and immediately returned them to Morocco, without identifying them or subjecting them to any

[25] See in particular *Hirsi*, para. 185, but also the *Sharifi* judgment para. 217, in which the Court deemed the presence of an interpreter fundamental.

[26] For a critical reading of the judgment, see, *inter alia*, A.I. Matonti, "Garanzie procedurali derivanti dall'art. 4 del Protocollo n. 4 CEDU: il caso Khlaifia", *Diritti umani e diritto internazionale* 2017, p. 523 ff .; A. Saccucci, "I 'ripensamenti' della Corte europea sul caso *Khlaifia*: il divieto di trattamenti inumani e degradanti e il divieto di espulsioni collettive «alla prova» delle situazioni di emergenza migratoria", *Rivista di diritto internazionale* 2017, p. 552 ff.; A. Pacelli, "Khlaifia and others v. Italy: lights and shadows in the judgment of the Great Chamber of the European Court of the Human Rights", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds), *Migrations And Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019.

[27] The story of the two applicants does not represent an isolated case, but falls within the controversial practice of "devoluciones en caliente" that has been carried out by Spain in the enclaves of Ceuta and Melilla in recent decades. Following the numerous protests by civil society and NGOs, the Spanish government modified the "Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social" into the "Ley Orgánica 4 / 2015 de Protección de la Seguridad Ciudadana", introducing a new and controversial provision that converts "rejections" into legitimate "rechazos en frontera". The Spanish Constitutional Court will rule on the law in the near future.

individual examination of their situations. After several months, finally, they managed to cross the border and entered Spanish territory, where they were subjected to a new expulsion measure.

In February 2015, N.D. and N.T. addressed the European Court of Human Rights, in relation to the facts of the first crossing, complaining a violation of art. 3 of the ECHR, art. 4 of Protocol n. 4 and art. 13 of the ECHR in conjunction with art. 4 Prot. n. 4.

In October 2017, the ECtHR (Third Section), ruled against Spain for the violation of art. 4 Prot. n. 4 and art. 13 ECHR, since the applicants had been subjected to a forced removal without any individual examination of their situation. The complaint relating to art. 3 ECHR, instead, had been previously declared inadmissible, as the Court did not find the risk that the applicants could suffer torture or inhuman and degrading treatments in Morocco.

At the request of the Spanish government, the case was referred back to the Grand Chamber, that, with a final and unappealable judgment, ruled on February 13th 2020 and reached opposite conclusions.

In the judgment in question, the Court focuses primarily on the possibility of asserting the Spanish jurisdiction in relation to the events that had occurred. The Court recalls its case law (in particular *Banković*[28] and *Ilaşcu*[29]), stating that, although essentially territorial, jurisdiction under the ECHR can also be established in extraterritorial contexts, in particular where the State exercises effective control over an area. After unquestionably placing the facts in question in Spanish territory[30], the Court rejects the preliminary objection of the defendant government, which had invoked an exception to the exercise of jurisdiction on the basis of the difficulties encountered in the management of migratory pressure and in particular of the assault suffered at the borders of Melilla. The Court states in a passage that, although in previous cases it had found that the enormous difficulties faced by States, due to the strong migratory pressure at the external borders of the Schengen area, represent a peculiarity in the current political context, this does not constitute a valid element to exclude

[28] ECtHR, *Bankovic and Others v. Belgium,* Application No. 52207/99, Decision of 28 October 1999.

[29] ECtHR, *Ilascu and Others v. Moldova and Russia,* Application No. 48787/99, Judgment of 8 July 2004.

[30] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain*, para. 104.

the exercise of jurisdiction. The Convention – the Court states – "cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction"[31]. The Court also does not fail to note the full authority exercised by the Guardia Civil on the facts in question and the absence of other authorities operating in the area.

Therefore, the Court proceeds with the examination of the complaint relating to art. 4 of Prot. n. 4, by analyzing whether the removal of the applicants could constitute "expulsion" within the meaning of the provision and, in this case, whether it could be defined as "collective" in nature.

With regard to the first point, the Court refers to its case law (in particular *Khlaifia*) and the aforementioned "Draft articles on the expulsion of aliens", stating that "expulsion" means any measure of forced removal from the territory of a State (and exceptionally also in extraterritorial contexts), regardless of the circumstances of the case, of the legal or irregular stay of the foreigner and of the conduct assumed during the crossing[32]. This way the argument of the defendant government regarding the possibility of excluding the "non-admission to borders" from the notion of expulsion is rejected.

Once it is established that the removal of N.D. and N.T. constitutes "expulsion", the Court examines whether it can be considered of "collective" nature. In this regard, the Court recalls that "collective character" means an expulsion of foreigners not carried out on the basis of an individual examination of the circumstances[33]. With respect to the case in question, however, the Court states that, in the light of its established case law (the Court cites the *Berisha and Haljiti*[34] and *Dritsas*[35] cases), in certain circumstances the lack of an individual examination can be attributed to a "culpable conduct" of the applicants. Therefore, in the first place, the Court found that the applicants voluntarily placed themselves in an illegal situation, taking advantage of the numerical dynamics in order to create a situation of

[31] Ibid., para. 110.

[32] Ibid., para. 173-187.

[33] Ibid., para. 193.

[34] ECtHR, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, Application No. 18670/03, Decision of 10 April 2007.

[35] ECtHR, *Dritsas and Others v. Italy*, Application No. 2344/02, Decision of 1 February 2011.

danger to public safety. In the second place, the Court checked whether the Spanish State had made authorized access points available along the border, at which it was possible to apply for international protection, and whether the applicants had had cogent reasons not to use these channels. By applying the reasoning to the present case, the Court concludes for the non-violation of art. 4 Prot. n. 4. From the Court's assessment, in fact, it emerges that the Spanish State guaranteed effective legal entry channels (in particular the border crossing point of Beni-Enzar, which was not far away from the applicants' crossing point, but also the embassies present in the countries of origin and transit) and that there were no valid reasons on the part of the applicants for not using these channels (reasons which were, in the Court's opinion, mostly of a practical nature).

4. Main critical issues: the exception of "culpable conduct" and the "legal pathways" requirement

The exception to the protection afforded by art. 4 Prot. n. 4, thus outlined by the Court, represents one of the main weaknesses of its reasoning, as well as a "hole of unclear dimensions"[36].

In the first place, it is questionable that the focus of the Court's assessment is the "own conduct" of the applicants and not the conduct of the Spanish State. In fact, the Court does not evaluate to what extent the State had observed or not its obligations under the ECHR and, therefore, violated or not human rights, but rather to what extent individuals can access the protection guaranteed by the Convention, in relation to their "behavior". This type of approach is at odds with the function of the Court, which, as enshrined in art. 19 ECHR, was established to ensure that the "High Contracting Parties" respect the commitments under the ECHR and its Protocols and more generally the mandate of the Convention itself, that is focused on the person and aimed at safeguarding their human rights in interactions with States[37].

[36] See N. Markard, "A Hole of Unclear Dimensions; Reading N.D. and N.T. v. Spain", *EU Migration Law Blog,* 1 April 2020, <http://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/> (7/20).

[37] See S. Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?*, EUI Working Papers RSCAS n° 2020/21, pp. 8-10,

Furthermore, the argument proposed by the Court is questionable. It claims to be based on a consolidated definition of "culpable conduct" by making references to its precedents (the aforementioned *Berisha and Haljiti* and *Dritsas*), which however do not appear to be legally relevant. In fact, in them the culpable conduct was found in the context of the obligations to cooperate with the State authorities (for example in case of the refusal to show ones' documents and the consequent impossibility for the authorities to formalize individual expulsion orders). This case is completely different, since N.D. and N.T. had not posed obstacles for the Spanish authorities to examine their situations individually. In N.D. and N.T., it rather appears that a new "culpable conduct" test has been introduced, which acts as a general criterion for identifying behaviours suitable to exclude the operability of the prohibition on collective expulsions[38].

Secondly, the assessment regarding the "effective availability" of the legal entry channels, the other key element in ascertaining the violation of art. 4 Prot. n. 4, appears to be very deficient.

In fact, the Court fully accepts the government's argument, which affirms the existence of an access channel at the Beni-Enzar border crossing, even before the actual establishment of an office in September 2014. This argument was validated by the fact that, from January to August 2014, 21 asylum applications had been sent to Melilla and 6 of them were from this same crossing[39]. The Court therefore does not seem to take into consideration what was stated by the intervening third parties[40], who had highlighted the absence of a realistic possibility for Sub-Saharan Africans to access such channels: the Beni-Enzar crossing could only be reached by Syrian refugees, since Sub-Saharan migrants were discriminated and subjected to racial profiling and much stricter controls by the Moroccan authorities[41].

<https://cadmus.eui.eu/bitstream/handle/1814/66629/RSCAS%202020_21.pdf?sequence=1> (7/20).

[38] Mussi, *La sentenza N.D. e N.T.,* cit.

[39] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 212-213.

[40] In particular, the intervention of the Commissioner for Human Rights of the Council of Europe and the United Nations High Commissioner for Refugees. Other parties involved were OHCHR, AIRE Center, Amnesty International, ECRE, International Commission of Jurists and the Dutch Council for Refugees.

[41] The reports of the intervening third parties also testify to a very small number of asylum applications lodged in Melilla by Sub-Saharan citizens over the past few years. These data are also reflected in the statistics relating to the issue of work visas

Furthermore, the Court notes (raising further doubts) that "even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation has been established before the Court"[42].

Therefore, Spanish practice seems to be assessed in rather abstract terms, while the control over the effectiveness of the legal pathways for entry would seem quite formalistic or at least superficial. This is at odds with the claim that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[43].

Finally, the legal implications relating to the introduction of the standard of "legal pathways" within the context of art. 4 Prot. n. 4 add to the criticism. In this regard, the Court states that "the effectiveness of Convention rights requires that ... States make available genuine and effective access to means of legal entry" and that these means must allow people "to submit an application for protection, based in particular on Article 3 of the Convention"[44].

In this regard, in fact, it is not clear whether the Court introduced a positive obligation for States to provide effective legal access routes under art. 3 ECHR, a completely new obligation, which would lead the Court to move away from its own jurisprudence on the matter, or if it only expressed complementary considerations to the assessment of the applicants' culpable conduct[45]. In fact, the meaning of the standard of legal pathways within the context of art. 4 Prot. n. 4 remains completely vague and imprecise and, together with the nebulous and formalistic evaluation of the effectiveness of the Spanish practice, it rather seems to constitute "an illusory judicial revolution"[46].

by the Spanish authorities. There is a clear preference for visa applications made by North African citizens, in particular those from Morocco, Tunisia, Algeria and Egypt. For an in-depth picture about these data, see Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain*, cit.

[42] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 221.

[43] *Ibidem*.

[44] *Ibidem*, para. 209.

[45] D. Thym, *A Restrictionist Revolution?,* cit.

[46] *Ibidem.*

5. The relationship between art. 4 of Protocol no. 4 and the principle of *non-refoulement*

With respect to the applicability of art. 4 Prot. n. 4, the Court – as anticipated – stated that the notion of expulsion refers to all foreigners, "irrespective of ... his or her status as migrant or as asylum seeker and his or her conduct when crossing the border"[47].

This represents the main point of disagreement with Judge Koskelo, who, in her partially dissenting opinion, maintains that such a broad notion of expulsion makes the scope of art 4 Prot. n. 4 unlimited and indefinite. Indeed, the judge argues that an individual examination of the circumstances of each foreigner should be guaranteed only in the presence of the risk of *non-refoulement*, by virtue of a restrictive interpretation of art. 4 Prot. n. 4, to be read in close connection with art. 3 ECHR. Therefore, unlike the majority, Judge Koskelo believes that the Court should have ruled for the non-applicability of art. 4 Prot. n. 4, since a violation of art. 3 ECHR had already been excluded[48].

The judge's position is questionable in several respects[49], although it was also appreciated by those[50] who pointed out that this differentiation would have been a valid alternative to the "Court's baffling proposition that those entering irregularly cannot rely on the Convention"[51]. It should be noted in this regard that judge Koskelo herself considers the approach adopted by the majority "paradoxical", since they do not set "limits" to the scope of art. 4 Prot. n. 4 and then "develop a "carve-out" in the assessment of whether there has been a

[47] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 185.

[48] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* (partly dissenting opinion), para. 44.

[49] The essence of the prohibition of collective expulsions, as an independent and autonomous provision with respect to art. 3 ECHR, consists in preventing the arbitrariness of State authorities in their border policies and in ensuring a set of guarantees for each individual, not only for those who apply for asylum: e.g. fair trial guarantees, access to effective remedies for forcibly returned persons who had not received an individual assessment of their situation, access to complaint mechanisms, essential in the event of violence or ill-treatment. This approach also aims to ensure access to essential protections such as: legal representation, interpretative assistance, medical and psychological assistance, respect for the best interests of the child. See Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain*, cit. p.2 ff.

[50] See in particular Thym, *A Restrictionist Revolution?*, cit.

[51] *Ibidem.*

violation of that provision"[52]. This way, in her opinion, the majority determined a shift of focus from the notion of *non-refoulement* and its safeguards to that of "own conduct", as elaborated in the judgment, which is based on new and problematic application criteria[53].

In any case, rejecting the restrictive interpretation of Judge Koskelo, the Court has, on a theoretical level, preserved the autonomous scope of the prohibition of collective expulsions, from which guarantees derive that are additional and independent from the principle of *non-refoulement*.

However, at the same time, in assessing the compliance with art. 4 Prot. n. 4, the Court does not seem to "detach" from evaluating a potential violation of art. 3 ECHR, thus providing a confused and inconsistent picture.

In fact, the Court, due to the fact that art. 4 Prot. n. 4 applies to all foreigners without any distinction, seems to resort to a certain flexibility in assessing the compliance with the provision, which would justify a more superficial individual examination, as already happened in *Khlaifia* (the absence of an individual interview) and now in *N.D. and N.T.* (absence of an individual examination in certain circumstances of "culpable conduct"), when the applicants do not fall within the scope of application of art. 3 ECHR[54].

Actually in *N.D. and N.T.*, the Court repeatedly observes that the case in question does not concern a violation of art. 3 ECHR and points out that the two applicants, after the events in question, had not obtained the refugee status (N.T. had not even requested it). The absolute character of the principle of *non-refoulement*, which the State authorities must nevertheless respect when "protecting" their borders, is also reiterated[55].

[52] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* (partly dissenting opinion), para. 33.

[53] Ivi, para. 34-36 and 43.

[54] See L. Leboeuf, *Interdiction des expulsions collectives,* cit.

[55] ECtHR (Grand Chamber), *N.D. and N.T. v. Spain,* para. 232. In any case, the argument proposed by the Court in para. 210 raises perplexity. Here the Court states that ECHR does not prevent States from requesting that asylum applications be presented at existing border crossings and that, consequently, States can refuse entry into their territory of foreigners, including potential asylum seekers, who did not comply with these provisions. It is in fact questionable how this argument is compatible with the absolute and mandatory nature of the principle of *non-*

Therefore, if the restriction introduced to the prohibition of collective expulsions does not affect the principle of *non-refoulement*, one can reasonably assume that, if in *N.D. and N.T.* the admissibility of art. 3 ECHR had remained outstanding, the Court would have developed different arguments.

In any case, by restricting the scope of art. 4 Prot. n. 4, when in some way it is a *gateway* to the protection of art. 3 ECHR[56], a contradiction is generated[57].

By downsizing the scope of the prohibition of collective expulsions and assuming that the absence of an individual examination does not *a priori* violate the ECHR, is there no risk of compromising the absolute protection of the principle of *non-refoulement* itself, since such an examination is necessary to ascertain its violation?[58] In other words, is it possible to legitimize collective expulsions in particular circumstances and, at the same time, to keep ensuring that no one is sent back to countries where there is a risk of treatments contrary to art. 3 ECHR?

In this regard, in the recent *Ilias and Ahmed*[59] judgment, the Grand Chamber stated that it is only through the examination of asylum applications that it can be assessed whether the applicant runs the risk of undergoing treatments contrary to art. 3 in his/her country of origin. The *post-factum* finding that the applicant did not take such a risk cannot absolve the State of this procedural duty, otherwise it

refoulement, see Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain.*, cit., pp. 5-6.

[56] The Court affirms in the judgment that the prohibition of collective expulsions "is aimed at maintaining the possibility for each of the aliens concerned to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – ", para. 198.

[57] See Leboeuf, *Interdiction des expulsions collectives,* cit., A. Fazzini, "La sentenza N.D. e N.T. e il divieto di espulsioni collettive: una prova di equilibrismo tra flessibilità, restrizioni e più di una contraddizione", *ADiM Blog*, Osservatorio della Giurisprudenza, April 2020, <http://www.adimblog.com/2020/04/30/la-sentenza-n-d-e-n-t-e-il-divieto-di-espulsioni-collettive-una-prova-di-equilibrismo-tra-flessibilita-restrizioni-e-piu-di-una-contraddizione/> (7/20).

[58] *Ibidem;* See also A. Lübbe, "The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?", *Verfassunblog*, 19 febbraio 2020, <https://verfassungsblog.de/the-elephant-in-the-room/> (7/20), in which the author refers to this contradiction by using the expression "The elephant in the room".

[59] ECtHR (Grand Chamber), *Ilias and Ahmed v. Hungary,* Application No. 47287/15, Judgment of 21 November 2019.

would risk to render "meaningless the prohibition of ill-treatment in cases of expulsion of asylum seekers"[60].

In conclusion, the interaction between art. 4 Prot. n. 4 and art. 3 ECHR seems to be the result of a failed test of equilibrium between elements of dynamism and restriction, which in fact produces some contortions[61]. Preserving the dynamism of art. 4 Prot. n. 4, in the scope of which *all the aliens* fall, and restricting its scope, while considering it *instrumental* to art. 3 ECHR, may cause the risk of decreasing the safeguards provided by the same art. 3.

6. Conclusions

The analysis carried out so far has attempted to prove that, although in the present case the Court did not intend to authorize collective expulsions at the borders, it did in fact elaborate an highly controversial exception to the rule, which allows to exclude from its scope of application those who cross land borders irregularly while being able to access effective channels to request international protection. The emerging picture poses many uncertainties, with regard to both the effective protection of migrants against collective expulsions, and the obligations for the States under art. 4 Prot. 4.

As we have seen, the Court's reasoning raises concerns in several respects. Issues such as the irregular border crossing and the possibility of using legal access channels should not in fact constitute arguments that can discharge Spain from the compliance with the procedural guarantees under art. 4 Prot. n. 4, since these guarantees should instead exist regardless. Furthermore, the same argument that led to the elaboration of the notion of "culpable conduct" is debatable and the assessment of the effective availability of the legal access routes is ascertained in formalistic and not very rigorous way. Finally, this same notion is not exempt from further legal implications, because

[60] Ivi, para. 137; for more information see F.L. Gatta, "Diritti al confine e il confine dei diritti: La Corte Edu si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte I – espulsione e Art. 3 CEDU)", *ADiM Blog*, December 2019, <http://www.adimblog.com/2019/12/23/corte-europea-dei-diritti-delluomo-grande-sezione-sentenza-del-21-novembre-2019-ilias-e-ahmed-c-ungheria-ric-n-47287-15/> (7/20).

[61] See Leboeuf, *Interdiction des expulsions collectives,* cit., Fazzini, *La sentenza N.D. e N.T. e il divieto di espulsioni collettive,* cit.

it is not clear whether the Court intended to establish a positive obligation for the States parties pursuant to art. 3 ECHR to provide for effective legal access routes, thus creating an even more nebulous picture.

These uncertainties actually risk to reduce the scope of the safeguards provided by ECHR as well as the effectiveness of the principle of *non-refoulement* itself. In fact, it has been noticed how, by reducing the scope of art. 4 of Prot. n. 4, which is the "access door" to the protection under art. 3 ECHR, there is the risk of causing a reduction in the safeguards provided by art. 3 itself.

Several authors have observed how these legal conclusions, together with the "worrying" language used by the Court (that repeatedly uses expressions such as "assault on borders", "use of force"), can represent a concession to the pressure of States that are increasingly inclined to take repressive measures in the management of migratory flows[62]. The concern is also justified by the most recent jurisprudence of the Court of Strasbourg: the *Asady* [63] case, immediately following the judgment under examination, confirms the tendency of the Court to reduce the qualitative standard of the guarantees under the prohibition of collective expulsions started with *Khlaifia*, and feeds the indeterminacy that surrounds the obligations of the States in this matter[64].

There is no shortage of those who, however, hope for a "change of course" by the Court of Strasbourg, and appeal for the consolidation of a restrictive interpretation of the "culpable conduct" exception,

[62] See, *inter alia*, Mussi, *La sentenza N.D. e N.T.*, cit., Carrera, *The Strasbourg Court Judgement N.D. and N.T. v Spain,* cit.

[63] ECtHR, *Asady e altri c. Slovakia*, Application No. 24917/15, Judgment of 24 March 2020.

[64] In the *Asady* case, several Afghan citizens were expelled from Slovakia after being identified and interviewed for about ten minutes each, with completely identical questions. The Court did not find the breach of art. 4 Prot. n. 4. Also in this case, it is possible to highlight a weak reconstruction of the facts in question by the Court and the use of an approach which is marked by an empty formalism rather than the evaluation of the effective possibility for the applicants to assert their arguments against expulsion, see A. Bufalini, "L'insostenibile incertezza sul contenuto degli obblighi degli Stati derivanti dal divieto di espulsioni collettive", *ADiM Blog*, Osservatorio della Giurisprudenza, April 2020, <http://www.adimblog.com/2020/04/30/linsostenibile-incertezza-sul-contenuto-degli-obblighi-degli-stati-derivanti-dal-divieto-di-espulsioni-collettive/> (7/20).

which the Court will have, in the near future, several opportunities to "perfect"[65].

If this were not the case, after decades of revolutionary judgments, the credibility of the Court of Strasbourg, as a fundamental stronghold for the protection of human rights, would risk to be seriously compromised, together with the very foundations of the European project.

[65] Di Filippo, *Walking the (barbed) wire of the prohibition of collective expulsions.* cit.

LOOKING BEHIND *TEITIOTA V. NEW ZEALAND* CASE: FURTHER ALTERNATIVES OF SAFEGUARD FOR "CLIMATE CHANGE REFUGEES" UNDER THE ICCPR AND THE ECHR?

MARIA FERRARA*

1. Introduction

Issues dealing with individual migrations caused by climate change have been very rarely addressed at the international level by human rights treaty bodies[1]. Although in the last decades the different, but related, question of the impact of environmental pollution on the effective enjoyment of human rights was explored, especially by the European Court of Human Rights[2], the specific problem of migrations due to environmental degradation made its appearance only recently in some act or documents released by human rights international organizations[3]. As known, the Human Rights Committee had the

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[1] For a comprehensive and thorough study of the issue of forced migration due to climate change, under the perspective of the international law, see J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford, Oxford University Press, 2012.

[2] For an analysis of the jurisprudence of the European Court of Human Rights on the right to a healthy environment see *ex plurimis*: O. W. Pedersen, "The European Court of Human Rights and International Environmental Law", in J. Knox, R. Pejan (eds.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, pp. 86 ff.; A. Saccucci, "La protezione dell'ambiente nella giurisprudenza della Corte europea dei diritti umani", in G. Cataldi, N. Napoletano E A. Caliguri (eds.), *La tutela dei diritti umani in Europa*, Padova, CEDAM, 2010, pp. 493-531; M. Bothe, "The right to a healthy environment", in F. Bestagno (ed.), *I diritti economici sociali e culturali*, Milano, Vita e pensiero, 2009, pp. 129 ff.; D. García San José, *La protection de l'environnement et la Convention européenne des Droits de l'Homme*, Éditions du Conseil de l'Europe, Strasburgo, 2005; M. Dejeants-Pons, "Les droits de l'homme à l'environnement dans le cadre du Conseil de l'Europe", *Revue Trimestrielle des droits de l'homme*, XV, 60, 2004, pp. 861 ff.; L. Loucaides, "Environmental Protection through the Jurisprudence of the European Convention on Human Rights", *British Yearbook of International Law*, 75, 1, 2004, pp. 249 ff.

[3] See Committee on the Elimination of Discrimination against Women, *General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in*

opportunity to adopt views on this matter for the first time when ruling on the case *Ioane Teitiota v. New Zealand* on October 24, 2019[4].

Before focusing on the mentioned decision, it is worth clarifying that phrases like "climate change refugees" or "environmental refugees" are often used in an interchangeable way to indicate groups of people crossing national borders because of environmental factors that seriously affect their quality of life or jeopardize their existence. Nevertheless, this terminology is evocative, but not technical and

the context of climate change Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/GC/37, 13 March 2018: "The increasing frequency and intensity of extreme weather events and environmental degradation resulting from climate change are likely to lead to significant population displacement both within countries and across borders" (par. 73); "… States parties should: (a) Ensure that migration and development policies are gender responsive and that they include sound disaster risk considerations and recognize disasters and climate change as important push factors for internal displacement and migration. This information should be incorporated into national and local plans to monitor and support the rights of women and girls during migration and displacement" (par. 78 (a)). See also Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Tuvalu*, Forty-fourth session, 20 July-7 August 2009, UN Doc. CEDAW/C/TUV/CO/2, par. 56: "The Committee recommends that the State party develop disaster management and mitigation plans in response to the potential displacement and/or statelessness arising from environmental and climatic change and that women, including women in the outer islands, be included throughout the planning processes and adoption of such strategies".

[4] Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 October 2019. For doctrinal comments concerning this decision see: J. McAdam, "Climate refugees cannot be forced back home", *The Sydney Morning Herald*, 20 January 2020, https://www.smh.com.au/environment/climate-change/climate-refugees-cannot-be-forced-back-home-20200119-p53sp4.html (06/07); E. Delval, "From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?", *EU Immigration and Asylum Law and Policy*, 8 aprile 2020, <http://eumigrationlawblog.eu/> (06/20); J. Hamzah Sendut, "Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law", *EJIL: Talk! Blog of the European Journal of International Law*, 6 February 2020, <https://www.ejiltalk.org/climate-change-as-a-trigger-of-non-refoulement-obligations-under-international-human-rights-law/> (06/20); B. Behlert. "A significant opening. On the HRC's groundbreaking first ruling in the case of a 'climate refugee' ", *Voelkerrechtsblog*, 30 gennaio 2020, <https://voelkerrechtsblog.org/a-significant-opening/> (06/20). F. Maletto, "Non refoulement e cambiamento climatico", *Sidiblog*, 23 March 2020, <http://www.sidiblog.org/2020/03/23/non-refoulement-e-cambiamento-climatico-il-caso-teitiota-c-nuova-Zealanda/> (06/20).

therefore misleading[5]. The use of the term "refugees", in fact, does not mean that these people fall under the legal definition of "refugee" laid down in article 1 lett. A(2) of the 1951 Convention relating to the Status of Refugees, or even that they are entitled to international protection within the meaning of article 33.1 of the mentioned Convention[6]. On the contrary, as a general rule, the principle of *non-refoulement* cannot be applied to them[7]. This is exactly why human rights treaty bodies play a crucial role for the protection of these individuals. More precisely, as it is well known, the main judicial and quasi-judicial human rights bodies, both at the regional and at the

[5] See J. McAdam, *Climate Change, Forced Migration, and International Law*, cit., p. 39.

[6] United Nations Convention relating to the Status of Refugees, adopted in 1951 and entered into force on 22 April 1954, read in conjunction with the Protocol adopted in 1967. Pursuant to article 1, lett. A(2) of this Convention: "the term "refugee" shall apply to any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". Moreover in accordance to article 33.1 of the same Convention: no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[7] For an examination of the reasons why it is very difficult to argue that people displaced by the impacts of climate change can be defined as "refugees" within the meaning of the Refugee Convention, see J. McAdam, *Climate Change, Forced Migration, and International Law*, cit., p. 42 ss. The author identifies even some exceptional cases in which individuals exposed to climate impact or environmental degradation might be defined as "persecuted" in the meaning of the Refugee Convention (Ivi, p. 47). It might be added that another phrase sometimes used to define people displaced because of environmental degradation is "environmental migrants": this term was criticized too, since it covers even phenomena which are irrelevant for international law, as it is attributable to any kind of displacement, even those taking place inside the same country. For a reconstruction of the terminological debate see W. Kälin, N. Schrepfer, "Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches", *Legal and Protection Policy Research Series*, 2012, p. 28 ff., <https://www.unhcr.org/4f33f1729.pdf> (06/20). See also: E. Delval, "From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?", cit.

global level, provide protection from expulsion and extradition through an extensive interpretation of some human rights. The chiefly concerned rights are those to life and not to be subject to torture; however, although less frequently, other rights are involved, such as the right to a fair trial and the right to respect for private and family life. Thus, in the practice of the aforementioned organs, the *non-refoulement* principle is widened and even individuals who are not classifiable as "refugees" in a strict sense may be safeguarded from forcible return. The *Teitiota* case can be placed precisely in this decisional strand.

After a description of the content of the cited ruling (par. 2), the present article will be focused on the issue of the burden of proof and it will explore possible developments of the practice of the Human Rights Committee under article 17 ICCPR, which would make the threshold easier to reach (par. 3). Then, in the last part, a brief reference will be made to the topic of protection of "climate refugees" within the European Convention on Human rights and the European Union systems.

2. The ruling of the Human Rights Committee and its innovative features

The petitioner, Ioanne Teitiota, had migrated to New Zealand from the atoll of Tarawa, in the Republic of Kiribati, because of the extremely precarious conditions of life in his homeland, due to climate change. After having unsuccessfully tried to apply for asylum in New Zealand, and having exhausted all available domestic remedies[8], he submitted an individual communication to the Human Rights Committee, claiming the breach of the right to life under article 6 of the International Covenant on Civil and Political Rights (ICCPR). In particular, he argued that the sea level rise, caused by global warming, had led in Tarawa to a series of consequences, such as: the scarcity of habitable space, related violent land disputes, severe environment degradation, including saltwater contamination of freshwater supply.

[8] For an in-depth analysis of the domestic proceeding see Xing-Yin Ni, "A Nation Going Under: Legal Protection for 'Climate Change Refugees'", *Boston College International and Comparative Law Review*, 38, 2, 2015.

Under such circumstances, by removing him to Kiribati, New Zealand would exposed him to a risk of violation of his right to life[9].

The Committee firstly considered whether the communication was admissible, given that the State party had contested the claimant's victim status. New Zealand, indeed, had argued that Mr. Teitiota had not sufficiently demonstrated an existing or imminent threat to his enjoyment of the right contemplated by article 6 ICCPR. On this point, it is remarkable that the Committee assessed that "in the context of attaining victim status in cases of deportation or extradition, the requirement of imminence primarily attaches to the decision to remove the individual, whereas the imminence of any anticipated harm in the receiving state influences the assessment of the real risk faced by the individual"[10]. In other words, according to the Committee, in order to verify the precondition of imminence of harm, what is mainly at stake is the temporal proximity of the expelling decision implementation. Regarding the assessment of the "real risk" faced in the receiving State, imminence seems to play a less decisive role. And yet, the Committee does not clarify precisely to what extent the imminence affects this evaluation. Anyway, it can be said that, according to the Committee, the assessment on the "real risk" cannot be limited to the simple foreseeability of the event, disregarding the temporal element[11]. In the case taken into consideration in the present article, however, the Committee found that "the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of the Republic of Kiribati and on the security situation in the islands, he faced … a real risk of impairment to his right to life under article 6 of the Covenant"[12].

Having considered the admissibility, the Committee then took

[9] Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 3.

[10] Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 8.5.

[11] For a criticism of the introduction of the test of imminence in international refugee and human rights law, see A. Anderson, M. Foster, H. Lambert, J. McAdam, "Imminence In Refugee and Human Rights Law: A Misplaced Notion for International Protection", *International and Comparative Law Quarterly*, 68, 1, 2019, pp. 111 ff. In B. Çalı, C. Costello, S. Cunningham, *Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies*, *German Law Journal*, 21, 3, the authors hold that "while some language in the decision emphasizes imminence as the standard, overall the approach cites foreseeability" (there, p. 368).

[12] Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 8.6.

under examination the merits. It started by recalling some relevant principles. More precisely, the Committee reminded[13] its *General Comment No. 31* on the nature of the general legal obligation imposed on States parties to the Covenant, in so far as it states that the latter are required: "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, … in the country to which removal is to be effected"[14]. It also referred to its *General Comment No. 36*, according to which "the obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status"[15]. In addition, it stressed that the right to life must be interpreted in a wide sense and that in implies positive obligations to the States parties. Again, it recalled its General Comment No 36, where it stated that the right to life includes the right to "enjoy a life with dignity" and "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death"[16], and where it also maintained that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"[17].

Against this background, the Human Rights Committee pointed out that in the case at stake, rather than establishing autonomously if the claimant faced a real risk to the enjoyment of his rights to life, it must be verified "whether there was clear arbitrariness, error or injustice in the evaluation by the State party's authorities of the

[13] Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.3.

[14] Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, par. 12.

[15] Human Rights Committee, *General comment No. 36 on article 6 of the Covenant on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, par. 31; Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.3.

[16] Human Rights Committee, *General comment No. 36*, cit., par. 3; Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.4.

[17] Human Rights Committee, *General comment No. 36*, cit., par. 62; Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.4.

author's claim"[18]. This evaluation, in particular, must have provided the author "with an adequate and individualized assessment"[19]. This means that the decision on the merits is based on monitoring judicial domestic proceedings. Notably, concerning the author's claim about the scarcity of habitable land, which had caused violent disputes endangering his life, the Committee recalled its previous practice, according to which a general situation of violence may create a real risk of irreparable harm under article 6 and 7 only in the most extreme case[20]. In any case, the Committee noted the absence of a situation of general conflict in Kiribati, as the author had referred only to sporadic incidents of violence. Moreover, it considered that Mr. Teitiota had not demonstrated clear arbitrariness or error in the domestic authorities' assessment. The second item under examination was the problem of the lack of access to potable water, due to the saltwater contamination produced by sea level rise. Dealing with this matter, the Committee noted that the claimant had not provided sufficient information about the inaccessibility, unsafeness or insufficiency of fresh water supplies in Tarawa, so that had he been returned there he would predictably suffer health risk, severe enough to undermine his right to enjoy a life with dignity or even cause his unnatural or premature death[21]. Finally, the Committee focused its attention on the applicant's allegation concerning the threat to his right to life, due to the deprivation of means of subsistence, as his crops had been destroyed because of salt deposit on the ground. Also with regard to this assertion, it maintained that the information available to the Committee itself did not indicated a real and foreseeable risk that Mr. Teitiota would be exposed to a situation of indigence, deprivation of food and extreme precarity in Kiribati that would endanger his right to life. Moreover, it estimated that it was not proven that the domestic authorities had analysed this subject in a clearly arbitrary or erroneous way[22].

Following these considerations, the Committee formulated an extremely noteworthy *obiter dictum*. After having recognized that

[18] Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.6.
[19] Ibid., par. 9.7.
[20] Ibid., par. 9.7.
[21] Ibid., par. 9.8.
[22] Ibid., par. 9.9.

change-induced harm can occur through both sudden-onset events and slow-onset processes, it asserted that:

> without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized[23].

As it can be seen, through a broad interpretation of article 6 and 7 ICCPR the Committee identified a new obligation of *non-refoulement*. Albeit in principle and with a statement having no effect in the concrete case, it established the unlawfulness of the expulsions towards places where, by reason of climate-change, individuals could be exposed to violations of the right to life or the right not to be subjected to torture or inhuman or degrading treatment[24]. It also highlighted that the specific case of a country being likely to be submerged might give rise to such negative obligation.

The above mentioned statement is undoubtedly a significant feature of the decision, but it is not the only relevant one. In fact, even if shortly thereafter the Committee considered the communication as ill-founded on the merits, it also made another remarkable assertion.

In particular, it noted that the estimated time frame of 10 to 15 years[25], within which the Republic of Kiribati would become uninhabitable so that serious harm would occur to the author, "could allow for *intervening acts by the Republic of Kiribati, with the assistance of the international community*, to take affirmative measures to protect and, where necessary, relocate its population"[26]. Therefore, bearing in mind that the national courts had "thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to

[23] Ibid., par. 9.11.

[24] With an emphasis on this part of the pronouncement, J. McAdam talk about a «landmark decision», see J. McAdam, "Climate refugees cannot be forced back home", *cit.*, p. 1.

[25] The Committee briefly dwelled on the determination of the time frame at par. 9.10 of the decision (Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.10).

[26] Ibid., par. 9.12 (italics added).

reduce existing vulnerabilities and build resilience to climate change-related harms", the Committee concluded that the assessment of the domestic authority and the consequent negative decision on the author's claim for asylum was neither clearly arbitrary or erroneous in this regard, neither amounted to a denial of justice. Getting to the point, if it is true that, on the one hand, the Committee dismissed the petition, it cannot be overlooked that, on the other hand, its decision is based on the assumption that the Republic of Kiribati, with the assistance of the international community, was already taking actions, and would do so even in the following years, in order to protect its population from the negative effects of climate change. As it has been observed, it sounds like a warning [27] made to the international community as a whole to cooperate in stemming the harmful consequences of environmental degradation on individuals. It should be further noted that the unfavourable outcome for the applicant seems closely connected to the temporal element: the Committee held that the time frame of 10-15 years was wide enough to enable the Republic of Kiribati to adopt sufficient measures to protect the author's right to life. It could be argued that, in this assessment, the above referred element of imminence plays an important role.

In short, the main elements of interest in the Human Rights Committee decision, here under analysis, are the following. The Committee paves the way to feasible future decisions, in which the *non-refoulement* obligations under articles 6 or 7 of the Covenant for the safeguard of the so-called "climate refugee" would be activated. At the same time, the Committee establishes some procedural obligations under the ICCPR. Before expelling an individual from his territory, indeed, the State party is required to take thoroughly into account the environmental situation in the land toward which he is to be returned, having recourse to new and updated data[28]. Finally, the views adopted by the Committee contain an indirect exhortation to the international community to cooperate in reducing the impact of climate change.

[27] E. Delval, "From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?", cit., p. 3.

[28] The Committee specified that its ruling was "without prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels thereupon" (Human Rights Committee, *Ioane Teitiota v. New Zealand*, cit., par. 9.12).

3. The burden of proof and further alternatives of safeguard under article 17 of the International Covenant on Civil and Political Rights

As it can be deduced from the previous considerations, the burden of proof placed on the petitioner to establish the real risk of arbitrary deprivation of life is heavy. Actually, the Committee members Vasilka Sancin and Duncan Laki Muhumuza, in their dissenting opinions, addressed considerations concerning precisely this high standard[29]. In particular, the Committee member Vasilika Sancin focused on the evidence of access to safe drinking water. She noted that in Kiribati, the 2008 National Water Resources Policy and a 2010 National Sanitation Policy's priorities set for the first 3 years (both containing policies and goals of direct relevance to the water) have yet to be implemented. Hence, in her appraisal, the burden of proof should be reversed: it should fall on the State Party, and not on the author, to demonstrate that the applicant would in fact enjoy access to safe drinking or even potable water in Kiribati[30]. Whereas, the Committee member Duncan Laki Muhumuza held more in general that the State Party had placed an unreasonable burden of proof on the author. Viewed the considerable difficulty in accessing fresh water, the significant difficulty to grow crops, the circumstance that in Kiribati the child of the author had already suffered significant health hazards on account of the environmental conditions, he is of the opinion that the claimant risks, in his homeland, a livelihood short of the dignity that the Convention seeks[31].

Now one might wonder if the threshold would have been the same even if the communication had concerned a right different from the

[29] Individual opinion of Committee member Vasilka Sancin (dissenting), *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 October 2019, Annex 1; Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 October 2019, Annex 2.

[30] Individual opinion of Committee member Vasilka Sancin (dissenting), cit., par. 5.

[31] Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), cit., par. 5. Interestingly, he emphasized that "it would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met" (*Ivi*, par. 5) and that "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board" (*Ivi*, par. 6).

one to life and, more specifically, the right to a private and family life provided for in article 17 ICCPR.

Just before the adoption of his Views in *Teitiota v. New Zealand*, the Human rights Committee decided the case *Portillo Cáceres v. Paraguay*[32], establishing for the first time a connection between environment degradation and the right to a private and family life. In the mentioned case, the communication was submitted by the members of two peasant families, who, because of large-scale use of toxic agrochemicals by neighbouring industrial farms, had suffered negative consequences on their health, living conditions and livelihood. As a result of the pollution due to pesticides, water resources and aquifers had been contaminated, causing the loss of fruit trees, the death of various farm animals and severe crop damage. In addition, the authors of the claim had experienced pollution symptoms and had been hospitalized; one of them had even died. Besides the violation of the petitioners' right to life, the Human Rights Committee, even acknowledged the breaching of article 17 ICCPR. It observed that the applicants depended on their crops, fruit trees, livestock, fishing and water resources for their livelihoods, so that these elements constituted components of their way of life and fell under the scope of protection of article 17 of the Covenant. Therefore, the member State was compelled to adopt positive measures to ensure the effective exercise of this right, even in the light of interference by physical or legal persons. Deemed that the State party did not place appropriate controls upon illegal activities that were creating pollution, the Committee recognised the violation of the authors' right to private and family life[33].

Patently, the case differs from the one here at stake, because it does not address the issue of expulsion. But it might serve as a precedent to acknowledge the violation of article 17 ICCPR also in the event of forcible return to a country where the individual faces a real risk of serious interference in the enjoyment of his right to private and family life, due to environment degradation. In other words, the recognition of the right to a healthy environment, through the progressive interpretation of article 17 ICCPR, is a first step that could lead to the enactment of this practice even in the event of forced

[32] Human Rights Committee, *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, Views of 25 July 2019.

[33] *Ivi*, par. 7.8.

removal. Furthermore, the Human Rights Committee has already recognised that the protection against expulsion can stem from article 17 ICCPS, albeit in cases – it seem needless to specify – not involving matters of environmental degradation[34].

Relying on article 17 ICCPR in the so-called climate refugee cases could result in an interesting opportunity to safeguard this category of people, insofar it might imply a lower burden of proof than the one employed in the *Teitiota* case. Clearly, the threshold needed to substantiate an infringement of the right to life is higher than that necessary to prove an invasion in the right to private and family life.

But a question still remains without answer. Could the Human Rights Committee have considered of its own motion the case *Teitiota* under article 17 ICCPR, even if the complaint did not relied on this disposition of the Covenant? Or, on the contrary, the Committee was bound by the characterisation given in law by the applicant to the facts of the case? Technically the Human Rights Committee can make use of the principle *iura novit curia*, and thus address a communication on the basis of provisions different from those invoked by the petitioner. Nevertheless, it did so very seldom in the past, especially with the aim of avoiding a declaration of inadmissibility[35], which is not the case in this instance.

4. The "Climate refugees" and the European regional systems

Could the views published in the case *Ioane Teitiota v. New Zealand* produce an impact at the European level? Neither the European Court of Human Rights, nor the European Court of Justice of the European Union (hereinafter EU Court of Justice) have this far ruled on cases of returns connected to climate change.

The European Convention on Human Rights (ECHR) system

[34] See Human Rights Committee, *Jama Warsame v. Canada*, Communication No. 1959/2010, Views of 21 July 2011, par. 8.7; Human Rights Committee, *Stefan Lars Nystrom v. Australia*, Communication No. 1557/2007, Views of 18 July 2011, par. 7.7 ff.

[35] Moreover, without making express mention of the principle under consideration. See D. Shelton, "Jura Novit Curia in International Human Rights Tribunals", in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds.), *International Courts and the Development of International Law. Essays in Honour of Tullio Treves*, Springer-Verlag, Berlin-Hidelberg, 2013, pp. 189 ff., particularly p. 194.

certainly seems to be a fruitful ground to extend the *non-refoulement* principle even to climate refugees for two reasons. Firstly, as it is well known, the Strasbourg Court developed a nourished and constant jurisprudence about protection of individuals from expulsion. Since the case *Soering v. The United Kingdom*, which more precisely dealt with extradition, it affirmed the principle that the article 3 ECHR prohibits the expulsion to a country where the person concerned faces a real risk of being subject to torture or to inhuman or degrading treatment[36]. Subsequently the monitoring body at stake had broadly applied this principle, considering *non-refoulement* cases non only under article 3 ECHR, but even under other provisions, such as article 2 (right to life)[37], Article 6 (right to a fair trial)[38] or Article 8 (right to respect for private and family life)[39]. Secondly, there is a quite well established case-law of the Strasbourg Court that recognizes the right to a healthy environment. It is here briefly recalled that this right is not provided for by the text of the European Convention on Human Rights, but the Court in several cases had identified a positive obligation incumbent on member States in environmental issues, either under article 2 ECHR[40], either, more frequently, under article 8 ECHR[41]. The mix of these two jurisprudential trends just described, could result in the adoption of judgments in which climate refuges would find protection. The Strasbourg Court, namely, may apply

[36] European Court of Human Rights, *Soering v. The United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989, par. 91.

[37] See, for instance, European Court of Human Rights, *Al Nashiri v. Poland*, Application No. 28761/11, Judgment of 24 July 2014.

[38] For instance: European Court of Human Rights, *Othman (Abu Qatada) v. The United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

[39] For instance: European Court of Human Rights, *Paposhvili v. Belgium*, Application No. 41738/10, Judgment of 13 December 2016.

[40] To give some examples under article 2 CEDUECHR: European Court of Human Rights, *Öneryildiz v. Turkey* [GC], Applications No. 48939/99, Judgment of 30 November 2004; *Budayeva and others v. Russia,* Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), Judgment of 20 March 2008.

[41] To give some examples under article 8 ECHR: European Court of Human Rights, *Tătar and others v. Romania*, Application No. 67021/2001, Judgment of 27 January 2009; European Court of Human Rights, *Di Sarno e altri v. Italy*, Application No. 30765/2008, Judgment of 10 January 2012; European Court of Human Rights, *Taşkın e altri v. Turkey*, Application No. 46117/99, Judgment of 3 March 2004, *Cordella and others v. Italy*, Application Nos. 54414/13 54264/15, Judgment of 24 January 2019. For some references to the scholars on this topic, see above, nt. No. 1.

articles 2 or 8 ECHR , dispositions which are already used in environmental cases, to the events of forced return toward countries affected by climate change or environmental disasters.

As far as the European Union system is concerned, it is necessary to make reference to article 15 lett. b) of the so-called "Qualification Directive", according to which the third country nationals are eligible for subsidiary protection if they risk suffering torture or inhuman or degrading treatment or punishment in the country of origin[42]. This provision must be connected to article 4 of the Charter of Fundamental Rights of The European Union, which establishes the prohibition of torture. This ban, according to article 52, par. 3 of the mentioned Charter, must be interpreted in the light of the analogous prevision of article 3 ECHR. Accordingly, the wide interpretation of article 3 ECHR, as provided for by the European Court of Human Rights, may be mirrored by the EU Court of Justice. But, clearly, the EU subsidiary protection regime is not permeable to a broad interpretation of other ECHR articles. As stated right above, the Strasbourg Court usually analysed cases concerning the impact of environmental condition on human rights under article 2 or 8 ECHR[43]. Unless the European Court of Human Rights will develop a jurisprudence on the right of a healthy environment even based on article 3 ECHR[44], it seems impossible for the EU Court of Justice to

[42] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

[43] More precisely the European Court of Human Rights examined under article 3 ECHR cases concerning the partially different question of prison environment. For instance: European Court of Human Rights, *Florea v. Romania*, Application No. 37186/03, Judgments of 14 September 2010; European Court of Human Rights, *Elefteriadis v. Romania*, Application No. 38427/05, Judgment of 25 January 2011.

[44] It is indeed possible to envisage a development of the jurisprudence involving migrants affected by severe diseases. In this event, according to the European Court of Human Rights, the removal could amount to a violation of Article 3 ECHR (European Court of Human Rights, *Paposhvili v. Belgium* [GC], Application No. 41738/10, Judgment of 13 December 2016 par. 172 ff. (spec. par. 183); European Court of Human Rights, *D. v. The United Kingdom*, Application No. 30240/96, Judgment of 2 May 1997, par. 46 ff. (spec. par. 53)). Obviously, the cause of the illness could be of any source, even pollution or precarious environmental condition. Nevertheless, these are cases in which the claimant's health conditions acquire a decisive role (scholars usually talk about 'medical cases'): without this precondition it would be impossible to fall into the scope of article 3 ECHR. Furthermore, the transposition of this jurisprudence to the EU system met the resistance of EU Court of Justice. In fact, in

recognise climate refugees as eligible for subsidiary protection trough the combined provisions of article article 15 lett. b) of the "Qualification Directive" and the articles 4 and 52, par. 3 of the Charter of Fundamental Rights of the European Union.

5. Conclusions

The views of the Human Rights Committee in the case *Ioane Teitiota v. New Zealand* paves the way to afford protection, within the scope of article 6 ICCPR, to people who escaped from their country of origin, by reason of environmental degradation. Moreover, this case could act as a leaver to foster international cooperation for the protection of the environment. One might wish that the safeguards granted by the Human Rights Committee to the so-called 'climate refugees' or 'environmental refugees' would be strengthened in the future. A way to reach this aim could be providing protection to them under article 17 ICCPR. This could allow the use of a burden of proof easier to meet. The recently adopted practice of the Human Rights Committee could lead other international bodies to choose analogous solutions. In particular, within the European Convention on Human Rights system it is possible to trace the preconditions, which should lead to the extension of the *non-refoulement* principle to individuals who cross borders on account of negative impact of climate change or, more in general, precarious environmental conditions.

some judgements, this latter Court affirmed that the expulsion of the ill migrant is contrary to article 15 lett. b) of the "Qualification Directive" only if he faces the risk to be subject to "intentional" deprivation of health care (see: Court of Justice of the European Union, *MP v. Secretary of State for the Home Department*, Application No. C353/16, Judgement of 24 April 2018; Court of Justice of the European Union, *Mohamed M'Bodj v. Belgium*, Application No. C542/13, Judgement of 18 December 2014, par. 35 and 36). Only partially in agreement with this approach, see E. Delval, "From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?", p. 4.

PART III

The Stakeholders Point of View

Speech of Antonio Di Muro-UNHCR

Naples, October 1951. In a day like this, this unique city was the venue of one of the most ambitious migration policy initiatives of those times: the ILO Migration Conference.

The conference objective was the institution of an ILO Migration Administration, through which that organisation, with the United Nations support, would have helped some 1,700,000 refugees and migrants, stranded and strained in the post-war Europe, to successfully resettle in other European Countries or overseas.

Political tensions, rivalries between States and the emerging logic of the cold-war divisions doomed the conference to fail.

This is only one example of the many failures in the History of refugee and migration policies, and the core cause for all failures is always the same: lack of sufficient cooperation and solidarity among States.

In the aftermath of WWII, The United Nations decided to engage in the refugee issue because they clearly saw its international scope and nature, and the impossibility to reach satisfactory solutions without organised cooperation between States.

While this awareness is clearly expressed in the 1951 Refugee Convention preamble, the States have so far failed to translate it into practical action to an adequate extent.

Whilst some voices in Europe continue to spread fear by misrepresenting a manageable flow of refugees and migrants as an unprecedented crisis, the developing regions of the world continue to host the overwhelming majority of the refugee population, and at least one refugee out of three is hosted, with laudable generosity but limited resources, by the poorest countries.

On December 2018, all EU States, with the sole exception of Hungary, have approved the Global Compact on Refugees, whose first line explicitly says that "*the predicament of refugees is a common concern of humankind*".

What we expect from EU States and EU Institutions is now to honour their undertaking, by pledging themselves to concrete steps for showing their concern. The Global Refugee forum convened in Geneva for December 2019 will offer them the right opportunity to do so.

The solidarity we expect should aim at two distinct, but complementary objectives: the first one consists in helping refugees thrive, and not just survive, where they are, by mobilising more appropriate resources in support of them, the communities they live in, and the States who are hosting them. The second consists in expanding and strengthening the opportunities of resettlement. To this end, we would strongly encourage an ambitious, protection-oriented EU Resettlement programme, and a Humanitarian protection framework.

Humanitarian corridors, an initiative recently awarded with the Regional Nansen prize, have hugely helped vulnerable refugees and migrants; other Complementary Pathways, including University VISA, have also proven to be useful tool to expand solidarity and reduce the need of refugees to engage in dangerous journeys to pursue their life objectives and realise their potentials.

A second aspect on which we see a clear need of more solidarity is the issue of sea rescue and disembarkation.

Saving lives and minimising the suffering of those in distress at sea should be seen as an essential element of any decent policy on migration and asylum. We have unfortunately assisted, in the recent years, to a despicable reduction of rescuing capacity in the Mediterranean, as a consequence of downsizing of public SAR operations first, and unfair penalisation of NGO rescue later.

At any rescue ship approaching the European shores, we have also assisted to intolerably long negotiations among EU States, unduly delaying the assignation of a port of safety and the access of the sea survivors to that first assistance and relief they were urgently in need of.

In this context, UNHCR has consistently reminded to all concerned States that saving lives at sea is not a choice, nor a matter of politics, but an age-old obligation. We have publicly commended the NGOs for their invaluable role in saving the lives of refugees and migrants, and expressed our deep concern for legal initiatives, including the Italian "Security bis" decree, aimed at making more difficult for them to perform their role.

UNHCR has also consistently advocated for replacing the logic of ship-by-ship negotiations, fraught with avoidable political tensions and unnecessary human costs, with predictable, well-planned sharing of responsibilities, capable of honouring that aspiration to a deeper solidarity which constitutes the *raison d'être* of European Union itself.

UNHCR, aware of the legal and political complexities of this objective, is appreciating the progress the EU States are now making in this direction, and is supporting their effort. We felt encouraged by the discussions held in Paris in July, and we do hope that, in the today's ministerial meeting in Malta, further steps in the right direction will be taken.

A third policy aspect which I would like to focus on is integration. Investing in well-designed, participative and culturally-sensitive integration programmes is beneficial to everyone: it is beneficial to refugees, who face disproportionate challenges in adjusting to a new country and often need support to rebuild their life, and it is beneficial to the hosting societies, which get enriched, culturally and economically, by the diverse set of talents, experiences and skills the refugees can give.

While, under the EU treaties, integration policies chiefly remain in the responsibility of the Member States, the European Union and Its institutions have an important role to play, by providing appropriate incentives and support.

In all EU States, we have seen many examples of civil society organisations, including those in the for-profit private sector, local institutions and single citizens passionately engaged, in full partnership with migrants and refugees, to build a more just, more inclusive and more tolerant society for all.

The free initiative of the civil society is, in this regard, an irreplaceable force, to be nurtured and preserved, but in order to have a systemic and long-lasting impact, the integration initiatives also need to be coordinated and promoted by the Governments, which only can provide strategy and vision at a national scale.

As for Italy is concerned, on 26 September 2017 we publicly commended the Government for having adopted its first national integration plan for international protection beneficiaries.

We saw in it an essential tool for the promotion of concrete initiatives in this sense, and particularly appreciated its understanding of integration as a two-way process, as well as its being based on the outcome of focus group, facilitated by UNHCR, were refugees had the opportunity to direct express their views.

Unfortunately, in the following years, integration does not seem to have been among the top priorities of our governmental counterparts. We are firmly convinced, however, that, in Italy and elsewhere in

Europe, times are ready for departing from the recent hyper-politicization of the refugee and migration issues, and returning to the more constructive effort of addressing the complexity through effective and inclusive policies, functioning and human-centred systems, and realistic, protection-oriented solutions.

If this direction is taken, under the guiding star of solidarity, UNHCR will never miss to provide its contribution and support.

Thank you

Naples, 23 September 2019

Speech of Riccardo Gatti-OPEN ARMS

My name is Riccardo Gatti, I represent here the NGO Open Arms, the volunteers who collaborate with us and all the people who work in the NGO. I am the head of mission aboard the ship Open Arms, often also as commander of the Astral sailing ship and I am also president of the Association Open Arms Italy.

Open Arms was born in 2015 in Greece, on Lesbos, to cope with one of the most dramatic humanitarian emergencies of our century. Since then, we have rescued about 60,000 people and completed 65 missions in the Central Mediterranean, and after almost two years in the Aegean Sea. our goal was (and continues to be) that people do not die at sea in an attempt to reach a safe place;

We are going to rotate their rights, first of all the right to life, and they denounce violations at sea of their own rights.

Reaching a safe haven inherently means crossing real or sometimes imaginary borders.

When we started operating in September 2015, we immediately realized that there was a gap caused by the absence of coordinated EU action in the field of sea rescue, a vacuum in protecting the lives of people trying to reach European shores in search of better living conditions. We have also seen the lack of decisive and direct action in the defense and protection of their rights.

Since then, we have realized that enormous abuses were taking place, perpetrated by the institutions, through actions or inactions, against the migrants and against those who defend their rights.

The agreement signed between Turkey and the EU sought to erect an invisible wall with the aim of outsourcing borders instead of safeguarding and protecting people and their rights. It is unfortunately well known that the creation of this "barrier" between Turkey and Europe, as between Spain and Morocco, creates situations of serious violations of people's rights; violence and inhumane conditions have been documented on both sides of "borders".

If we give in to thinking about borders in this way, we are not talking or seeking the common goal of prosperous coexistence for all.

In 2016, at Open Arms we started the rescue project at sea also in the central Mediterranean, thanks to our ships Astral first and then Open Arms.

As I said, we had found ourselves in the Aegean Sea filling a void left by the institutions with regard to the protection of human life at sea and the same situation we found in the Central Mediterranean. I would like to remind you that after the Italian government's operation "Mare Nostrum" concluded in 2014, no coordinated operation on SAR (search and rescue) was created and organized by any EU member state. At that time, in the central Mediterranean, only the Italian coastguard dealt with SAR operations.

When the NGOs started operating in the central Mediterranean, thanks to the coordination, direction and cooperation of the Italian Coast Guard, it was possible to build an "informal international rescue operation", counting with 12 different rescue vessels of NGOs.

Since the first half of 2017 everything I am expressing has been gradually destroyed. Slowly, we were faced with the destruction of the structure of coordinated rescue operations and currently the scenario that the NON-governmental organizations of the SAR are facing is very hostile and has been so for the last two years and half. There is no active support from the authorities, even when it comes to receiving information about people who are at risk to their lives. Since the beginning of the self-proclaimed Libyan SAR zone, normal sea rescue procedures have now been largely distorted.

Duties that should be respected by the authorities, and which should lead to the maximizing of resources to complete the rescue as soon as possible with the landing of the people rescued in a safe place, are not respected.

Proof of this are the long waits before a safe haven is dictated to which the rescued persons are subjected and of which they suffer the violence of having to stay on board our ships for long periods before they can be landed in a safe place.

Prohibition or denial of the disembarkation of people rescued at sea not only shows an impunity for international conventions and maritime law, but clearly shows the worst face of discriminatory policies that put in place a despicable contempt of human life.

In the Central Mediterranean, the process of outsourcing the borders has led to the creation of the so-called Libyan Coast Guard, of dubious origin, now in charge, with the support and help of the Italian and European military forces, of intercepting boats in the Central Mediterranean and return them to Libya, where people's lives run a real danger.

The number of non-governmental organizations at sea has fallen dramatically and each of us has witnessed multiple abusive and repressive actions that go beyond regulatory procedures. It is easy to demonstrate the campaign of criminalization to which NGOs have been subjected, attacks and defamation by the media or politicians, with the obvious aim of creating a false narrative and avoiding dissent. A dynamic of institutionalized abuses has been established and has been reiterated in totally impunity. There have been armed attacks at sea by the so-called Libyan Coast Guard. There have been blockades in ports or restrictions on access to Italian ports - we have been denied supplies and food. There have been prosecutions and investigations by numerous Italian prosecutors, but after years, they have not led to any charges. Indeed, the ship Ocean Viking only received permission yesterday to disembark, after a long wait at sea.

Let me remind you that until a few weeks ago our ship Open Arms was in the same situation, stranded at sea for 20 days with more than 150 people on board who were repeatedly denied by the Italian and Maltese government requests to disembark, a situation that has worsened the condition of those rescued on board and aggravated their suffering. After the emergency landing by the Sicilian prosecutor's office in the city of Agrigento, our ship was placed under pre-emptive seizure in order to collect the evidence that highlights all the irregularities carried out by the various political authorities and Italian administrations; our NGO agrees with the investigations which have been opened to find those responsible for the worsening of people's mental and physical conditions as a result of the long wait at sea produced by the landing prohibition.

I would also like to emphasize the importance of the presence of NGOs at sea, which allows citizens to know what is happening, the rescue and rejections and, unfortunately, the deaths as well.

We protect by presence because when we are at sea we not only follow the laws and defend human rights, but we force all actors who are present to do so.

Unfortunately, the conditions of people on land living in the streets or refugee camps in different places in Europe, such as in Greece, Bosnia, Italy, Spain, are shameful and unacceptable. We cannot accept this kind of violence against the human being at all. These are situations in which the creation of barriers to the movement of people, of borders that would be impassable, create as a direct

consequence danger, abuses, violence and deaths. 71,000,000 as Filippo Grandi, high commissioner of UNHCR, recalled to be the number of people who are migrants and who are now moving in search of a better future.

The tools of violence, danger and death cannot be used as deterrents to achieving real and feasible management of migration flows on land. It is mandatory to first require the protection of people on the move and abuses on them must be prosecuted in a firm manner.

We must continue to create lawyers to protect people's inalienable rights and their dignity.

At Open Arms, we are confident that this moment will pass, but we believe it is essential to continue to imagine moments of confrontation that focus on respect for international law, people's lives and dignity and that can be a stimulus. to find structural solutions that protect men, women and children. Moving, traveling, emigrating in this world is not possible for all people equally. It is not a real right, even if enshrined in the *Universal Declaration of Human Rights.* If it is not a right for all, it means that it is a privilege, and in itself privileges are based on abuses of one another.

Abuse is the basis of what lies in the exact opposite of peace and coexistence: violence.

As a society worthy of being called civilized, realities such as those of Moria, Ventimiglia, Calais, the Central Mediterranean, the enclaves of Ceuta and Melilla, the violence against migrants, the shootings and collective rejections and still all people left at the mercy of their fate, are not acceptable or justifiable reality.

Universities are the best platforms in which to create intellectual and material tools that lead to the full respect of people and in which to develop proposals and structural solutions to animate inclusive, ecological and socially sustainable policies.

We, as defenders of human rights, must continue to witness the realities that live the people we seek to support, we need the support of civil society and the whole university body. We must demand policies that put human beings at the center of economic and social decisions.

Finally, we strongly demand respect for international laws and conventions. It is necessary to create safe ways of movement for people, especially those most in need. There are real and concrete

examples of humanitarian runners put in place by non-governmental actors (the community of St. Egidio and the federation of Italian evangelical churches, for example) but we believe that governments should institutionalize such safe routes.

We must stop the dynamic in which NGOs continue to be under attack and criminalized because there is no shadow about our work. We need clarity about what is happening on our borders. It is the media's responsibility to provide truthful, objective information.

We must ensure a quick and smooth disembarkation of those rescued at sea, remember that the rescue operation ends once the people are landed in a safe place where all their rights are safeguarded.

The relocation system by EU member states must therefore also be normalized, fluid and systematic. Today's Malta summit should give some answers on this.

We must approach the migration discourse with normality and with an active and open attitude, an attitude that the old EU does not often show.

I would like to inform you that our ship arrived last night here in Naples, tomorrow morning it will enter the port where it will remain a few days to prepare for the next mission of observation and protection of human life at sea. I thank Laura Marmorale and the municipality of Naples for the availability and support vis-à-vis Open Arms and the sensitivity and respect of human dignity. We chose Naples as our base port in Italy, as we feel at home: a city where our volunteers can walk down the street without being attacked as happened in other places. A direct consequence of hate speech against migrants that in recent years has been freely disseminated too often by representatives of the Italian government.

I want to end my speech with the words of Ibrahim, Egyptian, after disembarking from our ship Open Arms: "I wanted to come to Europe for the humanity that there is here, it is people who treat human beings well, who respect and appreciate people". Words said after, as the last cry for help after 20 days aboard the Open Arms, Ibrahim threw himself into the sea in a desperate gesture, without knowing how to swim.

He was rescued by our rescuers.

Thank you.

Naples, 23 September 2019

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