

A MEDITERRANEAN PERSPECTIVE
ON MIGRANTS' FLOWS
IN THE EUROPEAN UNION:
PROTECTION OF RIGHTS,
INTERCULTURAL ENCOUNTERS
AND INTEGRATION POLICIES

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Napoli

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Publication realized with the contribution of the University of Naples
'L'Orientale', Department of Human and Social Sciences and Jean Monnet Centre
of Excellence on Migrants' Rights in the Mediterranean

PROPRIETÀ LETTERARIA RISERVATA

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Via San Biagio dei Librai, 39 – 80138 Napoli
ISBN 978-88-6342-905-3

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“ECONOMIC” MIGRANTS AND REFUGEES: EMERGENCIES
(REAL AND ALLEGED) AND THE LAW OF THE SEA

*Giuseppe Cataldi**

1. Because of the economic crisis and widespread political instability that exists throughout the African continent and that became more acute because of the ‘Arab Springs’, the departure of migrants seeking a better life in Europe has become a constant over the past few years. However, as we are well aware, the right of each human being to migrate is not matched by an equal duty on the part of the country of destination to welcome such migrants.¹

Thus the massive phenomenon of unauthorized migrations, in respect of which we can make a general distinction between forced migration, determined by the need to escape political persecutions or contingent events (war, revolutions, environmental disasters) and migrations for economic reasons, the result of widespread and endemic poverty.²

The transit of these migrants through the Mediterranean is dramatic, for although migration by sea is a minority percentage of the whole it involves serious risks to human life because of the means of transportation used. It is by now a known fact that transnational criminal organizations control and profit from the entire chain of migratory movements, from initial departures, often from sub-Saharan countries, to transit across the desert, to detention in ‘clearing houses’ along the Southern shores of the Mediterranean, to embarkation on board rafts or, in some cases, ‘mother-ships’ from which migrants are then transferred to small dilapidated boats directed toward European coasts, up to the moment of the ‘assistance’ provided when, once they have reached land, they need to reach their chosen destination. The ‘corridors’ most commonly travelled by these ships are: the Channel of Sicily, the Ionian Sea, the Straits of Gibraltar. The Mediterranean is therefore the principal natural ‘wall’ obstructing migration. To this we must add the walls that the governments of several European nations have recently

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¹ On the ‘Asymmetrical Right to Emigrate’ see T. Scovazzi, “Human Rights and Immigration at Sea”, in R. Rubio-Marin (ed.), *Human Rights and Immigration*, Oxford, 2014, p. 212 ff.

² On the different meanings of ‘irregular migrant’ see S. Trevisanut, *Immigrazione irregolare via mare. Diritto internazionale e diritto dell’Unione europea*, Naples, 2012, p. 1 ff.

constructed, following the ‘collapse’ of Syria, to block the use of a ‘land route’ through Turkey, Greece, Macedonia, Serbia, Hungary, Croatia.

How do we handle this phenomenon? The national and supranational legal tools currently available are inadequate and often obsolete. We know, for example, that responding to ‘emergency’ situations (real or alleged) is the guiding principle of the Italian policy on immigration. This is the policy implemented since 1989, when the s.c. *Martelli law* was approved, up to the present, to deal with the ‘North Africa emergency’, subsequent to the ‘Balkan emergency’, the ‘terrorism emergency’ and the ‘nomad emergency’. The intervention of the European Union has also been invoked in responding to these emergencies, but because of the contrast that exists among its member States it continues to provide evidence of its immobility when faced with the growing number of migratory flows through the Mediterranean and the increasing number of tragedies at sea. The challenge, for nations of the Northern shore and especially for the European Union now that it has decided to implement a common immigration policy, should be that of not denying its founding principles, and implementing the dictates of the Treaty of Lisbon and the EU Charter of Fundamental Rights. It follows that instead of building ‘walls’ (material and otherwise), we should be reconciling the humanitarian aspects, always a priority, with the need to control borders and the prevention and repression of crime, moving away from the logic of emergency. This because the true emergency is the ‘South-South’ emergency, with, for example, almost four million Syrian refugees in Lebanon and Jordan, a territory significantly smaller than that of the 28 EU Member States. It is essential that we first act on the causes that are forcing migrants to leave. Secondly, any decision regarding the management of migratory flows cannot deny the imperatives of ‘solidarity’ and respect of human rights. Finally, cooperation among States is indispensable if we are to prevent and suppress crimes connected to the traffic of migrants, managed by transnational criminal organizations.

On a strictly humanitarian level, the most significant example of intervention is operation *Mare Nostrum*, inaugurated by Italy following the tragedy that took place off the coast of Lampedusa on October 3, 2013, an incident that caused over 350 deaths. This was a strictly national operation that lasted until the end of 2014 and was wholly compliant with the principles of the European Union. Equipment and men from various administrations, spread throughout a vast area of the Mediterranean (up to the Libyan coast) were employed, executing a

truly enormous number of operations and saving a great number of lives. Unfortunately, the high cost of this operation, and the criticism from numerous partners of the Union led to its conclusion. The principal criticism from domestic political oppositions and European governments (especially Spain and Greece) consisted in an alleged incentive to departures, known as a ‘calling effect’, given the likely possibility of being intercepted in a very vast area, ‘saved’ by Italian coast guard cutters and accompanied to ports of the peninsula. The validity of these claims was soon proven wrong in light of the tragic events during the months following the end of operation *Mare Nostrum*.³ The incentive to departure by sea, and this is proven by the numbers and tragedies of the early months of 2015, is determined solely by the socio-political conditions of the countries of origin and transit, in addition to such contingent initiatives as the construction of ‘walls’ of containment along the frontiers of Bulgaria and Hungary, rejection by rather ‘energetic’ means by Greece and Spain (as pointed out by several humanitarian organizations) and the restrictive policies in granting visas recently adopted by many countries of Northern Europe.

Operation *Mare Nostrum* was replaced by operation *Triton*, which has very different characteristics. It is first of all an operation that, though taking place in maritime spaces close to Italian coasts (within a 30 mile limit), is managed and financed by the European Union, in particular with the involvement of the Frontex Agency.⁴ Secondly, the primary purpose of this operation is surveillance of the frontiers, bearing in mind, as stated by its Executive Director, the need to safeguard human life at sea.⁵ It follows that, presumably (and as partly already

³ Departures continue without interruption, as do the tragedies at sea such as the disaster of 8 February 2015 when 29 persons died of hypothermia in spite of rescue efforts (see *La Repubblica*, 10 February 2015, interview with the Mayor of Lampedusa titled: “*Tragic proof of the ineffectiveness of Triton, under Mare Nostrum they arrived alive*”), up to the carnage of 18 April when the number of dead were estimated to be between 700 and 900.

⁴ Frontex (complete name: “European Agency to Coordinate Cooperation along the External Borders of Member States of the European Union.”), is an agency of the European Union, headquartered in Warsaw. It is tasked with coordinating border patrols along air, maritime and land borders of all member states of the Union and implementing agreements with nations bordering member states of the EU for readmission of migrants from non-EU countries who were denied entry along the borders.

⁵ As stated when *Operation Triton* was first launched (see Frontex web site): “According to the mandate of Frontex, the primary focus of Operation Triton will be

demonstrated by the events of 2015) rescuing migrants at sea will still be entrusted primarily to the authorities of the coastal States, *in primis* Italy. We believe that this consideration remains valid even after the meeting of the extraordinary European Council of 23 April 2015, convened after the tragedy at sea of April 18. The final documents in fact basically indicate that the economic commitment of the Union will be tripled and that members of the Council reached an agreement to intensify the struggle against migrant traffic. On the other hand, no consideration is being given to establishing, finally, an extraordinary humanitarian operation in the Mediterranean and in the countries of origin and of transit. The rescue and assistance operations thus remain functional to the prevention and repression of irregular, or illegal, migration, in accordance with the original mandate of operation *Triton*.⁶

2. The question of refugees merits a separate discussion. On June 26, 2013, the European Union adopted what is known as the ‘Asylum Package’, consisting of two directives and two regulations to which we must add the recasting of the ‘qualifications’ directive adopted in 2011.⁷

border control, however I must stress that, as in all our maritime operations, we consider saving lives an absolute priority for our agency”.

⁶ Concerning these latest development, and to see relevant documents, refer to a C. Favilli, “Le responsabilità dei Governi degli Stati membri nella difficile costruzione di un’autentica politica dell’Unione europea di immigrazione e di asilo”, in *SIDIBlog (blog of the Italian Society of International Law)*; *ivi*, F. De Vittor, “I risultati del Consiglio europeo straordinario sull’emergenza umanitaria nel Mediterraneo: repressione del traffico di migranti o contrasto all’immigrazione irregolare?”.

⁷ Directive 2013/32/UE, establishing a common procedure for granting and withdrawing international protection, and 2013/33/UE, laying down standards for the reception of applicants for international protection; regulations 604/2013, 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, and. 603/2013, on Eurodac (system for the comparison of digital fingerprints of asylum applicants and some categories of illegal immigrants). These acts were adopted in accordance with the ordinary legislative procedure (art. 294 TFUE – *ex art.* 251 TCE) that, together with the Treaty of Lisbon, has become the primary legislative procedure of the EU decision-making process. On December 13, 2011 directive 2011/95/UE was adopted, establishing the 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, replacing directive 2004/83/CE. For doctrine see G. Cataldi, A. Del Guercio, A. Liguori (a cura di), *Il Diritto di asilo in Europa*, Napoli, 2014; G. Morgese, “La riforma del sistema europeo comune di asilo e i suoi principali riflessi nell’ordinamento italiano”, in *Diritto*

This reform, though introducing novelties and improvements compared to the past, is still not sufficient to reach the final objective, and that is “regardless of the Member State in which the asylum application is lodged... ensure that similar cases are treated alike and result in the same outcome”,⁸ due to the vast discretionary power granted to Member States.

Subsequent to the entry and identification of the asylum seeker, assessment of the request for international protection is the competence of one Member State, usually the migrant’s State of initial entry, regular or irregular (with exceptions regarding minors and the possibility of family reunification). The goal is to prevent the asylum seeker from submitting applications to multiple Member States (known as Asylum Shopping) and reducing the number of asylum seekers ‘in orbit’, that is transferred from Member State to Member State. According to the Dublin Regulation, if a person who has submitted an application for asylum in one nation of the Union, or was identified upon entering said nation, enters another Member State, he is to be sent back to the former State. This mechanism is based therefore on trust among the Member States that consider themselves mutually ‘safe’ for purposes of application of the principles and rules of the Union on asylum, principles based on the 1951 Geneva Convention on the Status of Refugees and thus, primarily, on the principle of *non refoulement*.

Application of the criterion of ‘initial entry’ has nevertheless produced a disproportionate pressure on frontier States, which have furthermore demonstrated that they are not always capable of responding adequately to needs of reception and examination of asylum applications.⁹ This criterion also increases responsibility for the increased number of victims at sea as migrant traffickers organize longer and more dangerous voyages to Italy instead, for example, of taking them to Malta and Cyprus, because of the greater possibility of acceptance of an application for international protection. Finally, the presumption that member States must always be considered mutually

immigrazione e cittadinanza, n. 4/2013, p. 15 ff.; A. Del Guercio, “La seconda fase di realizzazione del sistema europeo comune d’asilo”, 2015, www.osservatorioaic.it/la-seconda-fase-di-realizzazione-del-sistema-europeo-comune-d-asilo.html.

⁸ Cfr. Stockholm Program – An open and secure Europe saving and protecting citizens, *Official Journal of the European Union*, C 115 dated 4.5.2010.

⁹ On this topic see the *European Agenda on Immigration*, 13.5.05. In 2014 five Member States (including Italy) handled 72% of all asylum applications.

secure for purposes of reception has been refuted by European courts. Regarding the European Court of Human Rights, we note the case of *M.S.S. vs. Belgium and Greece* (21.1.11, *Grand Chamber*) in which Belgium was sentenced, among other things, for having sent an asylum applicant back to Greece, the country of initial entry, pursuant to the Dublin Regulation.¹⁰ The Strasburg judges stated that complying with the law of the European Union does not exempt from responsibility for violation of the European Convention on Human Rights (ECHR), confirmed in this particular case (Art. 3, prohibiting “inhuman and degrading treatment”) by the conditions of asylum seekers in Greece. The more so considering that the Dublin Regulation contemplates what is known as a “sovereignty” clause that allows a member State to accept an application for protection even though it is not its responsibility. Even more interesting and recent is another ruling of the Grand Chamber handed down on 4.11.14 in the case of *Tarakhel v. Switzerland*. Faced with Switzerland’s refusal to grant asylum to an Afghan family of refugees because the family had to be returned to Italy, the country of first entry, the refugees appealed to the Court of Strasburg, in accordance with Art. 3 of the ECHR. The Court sentenced the country convened because, in light of the data provided by the Italian Interior Ministry, there was an obvious discrepancy between the number of asylum requests and the places available in the SPRAR facilities (System of Protection for Asylum Seekers and Refugees). Switzerland therefore should not have mechanically applied the Dublin system, as the absence of ‘systemic deficiencies’ in Italy (deficiencies noted by the Court in respect of Greece in the previously cited case) cannot exempt the State from ascertaining whether there is a real risk of inhuman and degrading treatment in the country of destination, especially when minors are involved as in this particular case.

Similar principles were also affirmed by the European Union Court of Justice, specifically the preliminary ruling handed down on 21.12.12 (*N.S. case*) upon referral by a court of the United Kingdom. The Court confirms the presumption of safe country status to be attributed mutually among the member States, a presumption that, however, is not

¹⁰ On case law relating to the Dublin Regulation, see A. Liguori, “Clausola di sovranità e regolamento “Dublino III””, in G. Cataldi, A. Del Guercio, A. Liguori, *op. cit.*, p. 43 ff. and Conference Reports on “Il sistema di Dublino versus la libertà di movimento dei rifugiati in Europa”, held in Rome, in the Chamber of Deputies on 24 February 2014, published in *Diritti dell’uomo. Cronache e battaglie*, n. 1/2014, p. 96 ff.

absolute but a relative one; it thus establishes the obligation to suspend transfer in cases in which the authorities of the sending State “cannot ignore the fact that systemic deficiencies in the asylum procedure and conditions for welcoming asylum applicants in the Member State are serious and proven grounds for believing that the applicant may risk being subjected to inhuman or degrading treatment” as such forbidden by Art. 4 of the EU Charter of Fundamental Rights.

Other issues concerning the common European asylum regime were raised regarding persons belonging to ‘vulnerable categories’, specifically minors, who can be subjected to administrative detention, in addition to accelerated procedures in examining the application for international protection, and may thus not be sufficiently protected. Even the correct and uniform assessment of the concept of ‘safe third country’ in which to send the foreigner is far from being defined. Is the safety requirement the only valid one? And how can one substantiate it? As frequently pointed out in the case law of the European Court of Human Rights,¹¹ it is not sufficient for third States to simply meet the requirements of ratification of treaties on human rights or to provide government assurances.

Indeed, it is not surprising, especially in light of the events of the summer of 2015, that there has been a general rethinking of the Dublin system, the subject of abundant criticism by the European Commission, as well as by the doctrine and associations active in the safeguard of human rights. At the time of this writing the situation is still fluid, even though there appear to be significant changes on the horizon, on a European but also on a national level. The 2015 European immigration crisis led to an even sharper division among the Member States regarding the overall approach and the measures to be adopted. Starting June 23, 2015, Hungary began to push back migrants along the frontier with Serbia.

On August 24, 2015, on the other hand, Germany decided to suspend the Dublin Regulation with reference to Syrian refugees and to process their applications for asylum directly, announcing they would welcome all refugees from that country who so requested. This latter position, though commendable from a humanitarian aspect, poses the problem of ‘selective acceptance’. There is no doubt that there are serious situations that require an immediate response, but it is difficult to diversify

¹¹ See European Court of Human Rights, *Hirsi e altri c. Italia*, appeal n. 27765/09, ruling of 23 February 2012 (discussed further in following paragraph).

persons who have the same rights on the basis of nationality. This is also in conflict with the 1951 Geneva Convention on recognition of refugee status, which prohibits any discrimination in benefiting from guaranteed rights.¹²

Finally, there is a growing conviction in Europe of the need to elaborate a mechanism for resettlement in other countries, principally Germany, France and Spain, of part of the asylum seekers currently in Italy, Greece and Hungary. According to the proposals submitted by the Commission on September 9, 2015, a system of automatic permanent resettlement that would go into effect whenever there any sudden and conspicuous increases in the number of arrivals could be introduced.¹³ The quota assigned to any one country would depend on its GNP, level of unemployment, number of inhabitants and the number of asylum applications already processed. Nations that refuse to receive migrants would be subject to economic sanctions. The quota system has the drawback of not considering the aspirations of the asylum seekers, who may have acquaintances, ties and desires that do not necessarily coincide with the destinations to which they are assigned. We also need to avoid hazardous voyages by sea, without however preventing those who are escaping from reaching a safe place.

One final observation concerns Italy. A country that, at Art. 10, par. 3, of the Constitution has a provision on the right to asylum that is one of the most advanced in Europe, a provision that allows for welcoming those who do not enjoy fundamental rights, not just those who are being pursued, as indicated in the 1951 Geneva Convention. It is also a fact that to date there still does not exist any organic law that implements the constitutional principle, and only the ‘substitutive responsibility’ of the judge has at times obviated this lack (see the decision by the *Corte di Cassazione*, Joint Civil Sections, 26 May 1997, No. 4674). On May 26, 2015, a draft law was presented before Chambers (No. 3146), on the “organic discipline of the right to asylum and other forms of international protection”. However this is not the appropriate forum to discuss this particular section, which consists of 45 articles. However, it should be pointed out that for the first time, Art. 25 puts forward the

¹² The Geneva Convention was ratified by Italy by means of law 722, on 24 July 1954. The amendments made to the Convention by the New York Protocol were transposed into our own legal system by Law 95 on 14 February 1970.

¹³ See: *Refugee Crisis: European Commission takes decisive action*: http://europa.eu/rapid/press-release_IP-15-5596_en.htm?locale=en.

interesting possibility, one that could be the harbinger of positive developments (although it does not lack counter-indications), in which “application for international protection can also be lodged in the applicant’s country of origin, following an interview with ACNUR or other national and international bodies and NGOs present in the country. Following the positive outcome of the interview said bodies will forward the application electronically to the Italian embassy or consulate competent for the territory”. By examining the application in the country of origin the creation of legal channels of entry could certainly prevent those ‘journeys of hope’ that, especially at sea, have turned out to be so dangerous to human life.

3. After the humanitarian needs, always to be considered as the priority, and the issue of border controls, the third significant aspect in managing migration by sea concerns the prevention and repression of crime either from the perspective of exercising force against ships and the people on board and from the perspective of the right to exercise jurisdiction, obviously following different rules and methods according to the maritime spaces in question.¹⁴

On this particular topic we point to the recent case law of the Italian *Corte di Cassazione*, whose common denominator consists of illegal conduct, directly attributable to a unitary criminal plan that takes place partly in areas under Italian jurisdiction and partly on the high seas.¹⁵

Criminal organizations involved in human trafficking have for some time come up with a new system, as effective as it is cynical, to facilitate the transit by sea of unauthorized migrants, minimizing the risk of interception by the police forces of the country of arrival. A ‘mother ship’ takes off from North African coasts and, once on the high seas, transfers the migrants to inflatable rafts or small boats offering little or no safety, usually assigning one of the migrants, usually with no knowledge of the matter, to drive the boat, directed toward the northern Mediterranean. At this point the ‘mother ship’ returns to the port from which it had left, issuing an SOS in order to involve, and thus

¹⁴ Regarding this issue in general, and with numerous references to relevant Italian case law, see U. Leanza, F. Graziani, “Poteri di *enforcement* e di *jurisdiction* in materia di traffico di migranti via mare: aspetti operativi nell’attività di contrasto”, in *La Comunità internazionale*, 2014, p. 163 ff.

¹⁵ Of the many cases, some examples are the trial held by the Corte di Cassazione Criminal Section (Section I), on 23 January 20125, No. 33455; Corte di Cassazione Criminal Section (Section I), 27 May 2014, n. 14510; Corte di Cassazione Criminal Section (Section I), 23 May 2014, n. 36052.

instrumentalise, police units of the country of arrival (usually Italy). The police of course cannot avoid intervening for humanitarian reasons, carrying out what is technically known as a ‘SAR intervention’ (Search and Rescue), pursuant to the 1979 International Convention on search and rescue at sea. It should be pointed out that this obligation was confirmed, specifically in respect of Italy, by the ruling of the European Court of Human Rights (GC) in the case of *Hirsi Jamaa and others*, handed down on February 22, 2012, which also clarified the context of validity of the obligation of *non-refoulement* in marine spaces, and that is that the high seas is equivalent to a national frontier, requiring application of the same principles in the case of “occupation” by the military ships of a State (in this case Italy) involved in the rescue and ascertainment of refugee status of the persons on board. Consequently Italy was sentenced for having forcibly accompanied the persons rescued to Libya (in application of the bilateral treaty Italy-Libya).¹⁶

Very effectively Italian case law highlighted that, in the cases under judgment, the action of the rescuers is, from the aspect of criminal law (art. 54.3 of the Italian Criminal Code) quantifiable as an “action of the indirect offender”. Consequently, the rescue appears “not as an unforeseeable event but as one that was foreseeable, sought and provoked” and that since the state of need is attributable to and provoked by traffickers, the activities of the latter are “sanctionable in our State” even though they took place in an extra territorial sphere.

The *Corte di Cassazione* is responsible both for the exercise of jurisdiction and the exercise of concrete and immediate powers of coercion. For purposes of applying Italian jurisdiction it is sufficient for a ‘fragment’ of the criminal activity to be connected with Italian territory. Proof of the existence of a direct link of communication via radio, telephone or even by electronic means between the coast and the naval units involved is sufficient, it is a question of each time qualifying the fact as committed in Italy (art. 6, Criminal Code) or abroad (art. 7, Criminal Code).

What we find truly interesting however are the developments, in line with the evolution of the conventional international framework, regarding forced intervention on ships involved in migrant trafficking. Using the precedent of *Pamuk and others*, a ruling handed down by the

¹⁶ For commentary see A. Liguori, “La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi”, in *Rivista di Diritto internazionale*, 2012, p. 415 ff.

Court of Crotona on 27 September 2007,¹⁷ the *Corte di Cassazione* is demonstrating that it is in favor of increasing the possibility of intervention by the coastal State and is consequently in favor of a significant, additional redimensioning of the principle of freedom on the high seas in the name of defending the common interests of the international community as a whole.

Can the coastal state, in this case Italy, exercise coercive powers in marine spaces that are not subject to its sovereignty or jurisdiction? The problem of course does not exist in respect of ships flying the national flag. In the case of ships with no flag or of foreign nationality on the other hand, one must first refer to article 110 of the United Nations Convention on the Law of the Sea (UNCLOS), governing the right to board on the high seas. This provision does not contemplate, among the exceptions to exclusive power of control by the coastal State, the possibility of migrant traffic and only a very broad and debatable interpretation of the definition of “slave trade” (possibility contemplated at art. 110) has at times been referred to in order to allow the use of coercive power in cases similar to those under review.

The Palermo Convention against transnational organized crime is much more specific and detailed, especially Protocol 4, against migrant trafficking on land, sea and air, with art. 8 containing measures against migrant trafficking by sea.¹⁸ According to this provision, the boarding and inspection of a ship, and the adoption of appropriate coercive measures are always allowed, with reference to actions intended to combat migrant trafficking, if there is a suspicion that the ship has no nationality, while if a ship on the high seas is flying the flag of a State other than the State that intervenes, the measures in question must be authorized. Applying this principle (in our opinion valid even from the aspect of customary law), by confirming the mentioned decision of the *Corte di Cassazione* the ruling at comment provides operational indications that may be summarised as follows:

If there are justified grounds to connect the ‘mother ship’ (or even ‘daughter boat’) to accomplices operating on Italian territory (local

¹⁷ The ruling is published in *Rivista di Diritto internazionale*, 2001, p. 1155 ff. and summarised in *Italian Yearbook of International Law*, 2001, p. 273 ff. with commentary by G. Andreone.

¹⁸ United Nations Convention and Protocols against transnational organized crime, adopted by the General Assembly on December 15, 2000 and 31 May 2001, ratified by Law 146 on 16 March 2006.

organizers), Italian jurisdiction and the exercise of coercive powers on the high seas may be considered legitimate. If however there is no connection with Italy, one must wait for the daughter boat to enter the contiguous zone. When this happens, and because of the link that exists between the two ships, coercive powers may be exercised in respect of the smaller boat and the mother ship, even if the latter is in navigation or has stopped on the high seas, obviously with the consent of the flag State unless the ship is not flying any flag. In this case the principles of hot pursuit and constructive presence (art. 111 UNCLOS) apply.

This last conclusion presupposes a permanent solution to the question of Italy's adoption of the contiguous zone, at least for purposes of prevention and repression of national laws on immigration. It is known that there has never been a formal proclamation, as envisaged by international law; it is also known, however, that art. 11, letter d, law 189 of 30 July 2002 specifically envisages that:

An Italian police boat meeting a ship in respect of which there are justified grounds for believing it may be involved in illegally transporting immigrants in the territorial sea or contiguous zone may stop and inspect such ship and if they find elements confirming the ship's involvement in migrant trafficking, may confiscate it and lead it to the port of the State.

We can thus deduce that, for the sole purpose of immigration (thus excluding any other possibilities provided for in case of establishment of a contiguous zone), the contiguous zone exists, and its existence is enforceable against all States as it is an institute contemplated by customary law. We emphasize this fact in order to once again reiterate the erroneousness of the conclusions reached on this issue by the *Corte di Cassazione* in its ruling of 8 September 2010.¹⁹ This decision, in fact, affirms the illegitimacy of the claim confirming the existence of the contiguous zone in respect of Turkey, as this State did not ratify the UNCLOS. Unfortunately this decision continues to condition and limit the actions of the police in the contiguous zone.

In accordance also with the tendencies that appear to prevail within European institutions, as already mentioned, we believe that there should be an even broader interpretation of the rules governing

¹⁹ *Kircaoglu Mehemet e Sanaga Mehemet*, cfr. *Italian Yearbook of International Law*, 2010, p. 419 ff., with comment by G. Andreone; ID., "Immigrazione clandestina, zona contigua e Cassazione italiana: il mistero si infittisce", in *Diritti umani e diritto internazionale*, 2011, p. 183 ff.

connection with the coast, in the interest of repressing the crime of migrant trafficking and saving human lives at sea. It should also be pointed out that the techniques used to intercept communications, and the cooperation that exists among States, now allows us to anticipate, with respect even to the recent past, verification of this connection. Important in this regard is the EUROSUR system, created by the European Union by regulation 1052 on 22.10.2013, “which establishes a European system of surveillance of the frontiers”.²⁰ Secondly, in order to permanently discourage the practices of migrant traffickers, we believe it necessary to allow the use of coercive actions, even when there is no proof of contact with the coast, but both the transfer on the high seas from the mother ship to the daughter ship, or the route taken by the latter, prove the existence of a criminal plan and the goal of reaching the Italian coast. The more so (but we do not consider it an essential requirement) if the larger ship has issued an SOS activating search and rescue procedures in an instrumental manner. A good example of this possibility is the ruling handed down by the *Tribunale di Reggio Calabria* whereby, in the wake of investigations carried out since the beginning, including with the help of Frontex, intervention on the ships and persons involved was considered legitimate even though everything took place on the high seas.²¹ It is our hope that the *Corte di Cassazione* may in the future confirm this position.

In conclusion, we believe the time has come for the European Union and the individual States to take a step back and abandon the concept of emergency in order to finally achieve an effective and lasting policy to manage migrations, one that is first of all shared and that implements the dictates of the Treaty of Lisbon and the Charter of Fundamental Rights of the Union. The priority is to act on the causes that are inducing migrants to leave. Secondly, any decision concerning management of migratory flows cannot deny the fundamental principles of European Union law and thus the imperatives of ‘solidarity’ and respect of human rights. Finally, cooperation among nations is indispensable in order to prevent and repress crimes connected to migrant traffic managed by transnational criminal organizations.

²⁰ See S. Carrera, V. Den Hertog, “Whose *Mare*? Rule of Law Challenges in the field of European Border Surveillance in the Mediterranean”, in *CEPS Paper in Liberty and Security in Europe*, n. 79, January 2015, p. 17 ff.

²¹ Tribunale di Reggio Calabria (Sez. Gip – Gup) - 28 July 2014, n. 223 - *Hazer Elshat Mohamed Elmokader e altri*.

History teaches us that civilizations that have raised walls to prevent the arrival of migrant populations were soon overpowered, while the acceptance of a ‘melting pot’ has encouraged the social, economic and civil development of nations.

These principles were reiterated and led to several operational proposals on the concluding day of the works presented in this volume, the day of the Stakeholders’ Workshop with representatives of maritime professionals, migrations and human rights activists, military and police forces, representatives of State and International Institutions, and that led to the drafting of the “Naples Charter”, titled “From Mare Nostrum to Triton and the Way Forward to Deal with Migration in the Mediterranean Sea”, provided at the appendix.

I PART

Migrants' Rights in the Mediterranean: a Juridical Overview

REFUGEES AND MIGRANTS AT SEA: DUTIES OF CARE
AND PROTECTION IN THE MEDITERRANEAN
AND THE NEED FOR INTERNATIONAL ACTION

*Guy S. Goodwin-Gill**

I am particularly pleased to be here today at the ‘initiation’ of the Jean Monnet Centre of Excellence on Migrants’ Rights in the Mediterranean, and I would like to express my thanks to Professor Giuseppe Cataldi and to Dr Anna Liguori for the invitation and for what is a most timely initiative in a most appropriate location.

Above all, however, I would like to express my thanks to Italy, to the people of Italy, for all that they have done over the past eighteen months and more to bring safety and protection to those putting their lives, their future, at risk on the sea. It is a noble record. Italy has acted as the conscience of Europe, putting into daily practice the values which so many of us, speaking as a European, count dear. But it has done so without the degree of support – material, moral and practical – which it is entitled to expect from its partners in the community.

Europe, or at least, the European Union, claims the right to manage the movement of people across the Mediterranean, but it is too ready to decline the responsibilities and to dispute the obligations that go with that claim. Many of us hope that this will change, and this afternoon, I want to follow up my thanks with what I hope will be some insights into the nature of those duties, and some suggestions about what needs to be done next.

Let me begin, however, with some views from outside, from across the Atlantic. Writing in *The New Yorker* on 4 May, Philip Gourevitch put it clearly and succinctly:

“... every year, people drown in the waters between Africa and Europe. And this year almost two thousand have died, including, last week, nearly eight hundred on one ship, which capsized and sank en route to Italy. Before that horrifying incident, this year’s death rate for Mediterranean boat people was ten times higher than it was for the same period a year ago. Now it’s thirty times higher, and that increase is attributable to Europe’s dereliction of duty...”

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After reviewing aspects of that continuing failure and the predilection for tightening border controls and acting militarily against traffickers, he went on to note that Europe's leaders seem,

“... to be avoiding the fact that, as long as people are prepared to risk everything for a better life, there will be boat people, and that when dealing with them the law of the sea is the place to start: rescue first, then sort out the rest on land. When it comes to the drowned and the saved, we know dereliction of duty when we see it”.

Turning closer to home, as one Syrian refugee said to the *Guardian* (4 May 2015), he had been,

“... determined to go, whether or not there is a rescue operation. I'm risking my life for something bigger, for ambitions bigger than this... If I fail, I fail alone. But by risking this, I might create life for my three children”.

1. Europe's role and Europe's responsibilities

In a paper which I presented in Athens in March,¹ I considered what the European Union might do, indeed, ought to do, with regard to so-called irregular migration, and I looked in particular at the 'inwards-looking' dimensions of the EU's common policy on refugees and asylum.

The strategy of implementing a common policy through twenty-eight national systems, I suggested, was always bound to fail, no matter how comprehensive the top-down, legislative agreement on qualification, standards and criteria. The Dublin scheme, too, for all that it guarantees a decision for the asylum seeker somewhere, contributes nothing to what is and always was clearly needed in Europe, namely, effective, equitable sharing of protection responsibilities among a community committed to common, fundamental principles.

The situation for refugees and asylum seekers is now further compounded by the fact that the EU remains uncertain how to

¹ Regulating 'Irregular' Migration: International Obligations and International Responsibilities, Keynote Address to the International Workshop, National and Kapodistrian University of Athens Faculty of Law, Friday, 20 March 2015.

respond to the essentially demographic and economic drivers of movement between States, (a substantial working age population with no work to turn to), which accompany flight from conflict and persecution, and which could already be anticipated two or three decades ago.

I suggested that, given the nature of the Union, its basis in common values and shared international obligations, what was needed was a truly European response, in which ‘Europe’s refugees’ would enjoy European asylum, European protection and the rights and benefits accorded by European law. This would require, in turn, an EU institution, a *European Migration and Protection Agency* competent to fulfill collectively and to implement the individual obligations of Member States and the policy and protection goals of the EU. Moreover, it is essential to add ‘migration’, along with refugees and asylum seekers, precisely because the arrival of those in an irregular situation, whether directly or following interception or rescue at sea, presents Member States with legal and practical challenges that demand a community-based response.

But the ‘internal’ dimension can only ever be but one aspect of a coherent response. Europe must also look outwards and engage beyond the region, beyond the Mediterranean, for the movement of people today affects the interests of multiple States and stakeholders.

There is no European Migration and Protection Agency just yet, and while existing institutions, such as the European Asylum Support Office and the Fundamental Rights Agency, can play a role in monitoring for effective protection the sorts of ‘solutions’ to which I will now turn, a much more international approach is still needed.

2. Duties of care and protection

When thinking about the movements of people and about international legal obligations – ‘Whose obligations?’ is a question to which I will return – it helps to recall certain basic principles.

States party to the 1951 Convention relating to the Status of Refugees accept that those leaving their country for fear of persecution, are entitled to *special protection*, on account of their

position. The European Court of Human Rights has spoken to like effect, noting that asylum seekers are a “particularly underprivileged and vulnerable population group in need of *special protection*...”

The ‘vulnerability’ of the migrant, not in the sense of weakness, so much as in exposure to smuggling and trafficking and the absence of any effective protecting authority, was recognized by the Commission on Human Rights back in 1997, and their need for *protection* has been underlined since in the work of successive Special Rapporteurs on the Human Rights of Migrants and in a series of UN General Assembly resolutions.

Children seeking refuge are also entitled to “receive *appropriate protection and humanitarian assistance*”, whether accompanied or not; and in 2014, of the roughly 170,000 who arrived one way or another in Italy, more than 13,000 were children travelling alone; this year already, the number is approaching 2,000.

This same emphasis on ‘protection’ appears expressly in the Palermo Protocol on Trafficking – to protect and assist the victims – and again in the Palermo Protocol on Smuggling. In each case, the Protocol includes specific ‘savings clauses’ preserving the “rights, obligations and responsibilities of States and individuals...”, under the refugee treaties and the principle of *non-refoulement*.

How, if at all, are these principles to be made meaningful in the Mediterranean today, and how should they govern Europe’s operations?

In my view, that comes about through a combination of context, circumstance, knowledge and, in particular, engagement. Europe already asserts the right to manage the movement of people across those waters, and with that comes obligations.

Some might argue that protection is compromised by fragmentation, by the apparently contradictory pull of obligations relating to interception and rescue at sea or combating smugglers and traffickers, on the one hand, and of human rights, on the other. States’ responsibilities are certainly not part of a seamless web of rights and obligations when it comes to seaborne migration, but some things are clear. A State minded to take action, as it should, against smuggling and trafficking, ‘already’ has duties towards the victims. A State which elects to intercept boats believed to be carrying irregular migrants likewise has protection obligations

to those over whom it exercises authority and control, irrespective of the legality of any particular interception.

The State which commendably engages in a dedicated search and rescue operation situates itself straightaway within the legal framework set by the UN Law of the Sea Convention, the Safety of Life at Sea Convention, the Search and Rescue Convention, the standards set by the International Maritime Organization, and the basic principle of disembarkation in a place of safety.

All of this is known to the EU and to its Member States. After all, the 2014 EU Regulation governing Frontex search, rescue and interception operations at sea could not be clearer on the basics, underscoring the obligation of Member States to render assistance to any vessel or person in distress at sea, and prohibiting the disembarkation of intercepted or rescued persons in a country where they would risk serious harm.

It is common knowledge, of course, that notwithstanding the primary role of the State responsible for a Search and Rescue Region to ensure cooperation and coordination, an obligation deficit remains with regard to disembarkation – in large measure, I suspect, because no State can come close to anticipating with confidence the potential scope of its responsibilities; and none, it seems, can yet rely on the support of others. There's a contingency issue here which calls for closer examination, and it is precisely the reason why we need to step beyond the field of individual State responsibilities to consider the regional dimension and the distinct opportunities for co-operation and mutual support presented by this unique environment.

3. Due diligence

The Mediterranean is an interesting place to start. It covers some 2.5 million square kilometers. Some twenty-three States have littoral responsibilities, and for twelve or thirteen of them, that involves responsibility for Search and Rescue Regions.

The Mediterranean has also become something of a proving area, where a few States have sought to question the applicability of certain protective principles in the context of extra-territorial operations, but where the European Court of Human Rights, among others, has confirmed what students of the law of State responsibility already knew, that liability can follow the flag.

The Mediterranean is special, and being a shared and much exploited space, it raises questions about collective responsibility, and the ways in which that might be translated into practical results.

Certainly, the EU has a collective role and a collective responsibility. Through the operations of individual Member States, but particularly through Frontex, it has staked a claim to control or manage large areas of the Mediterranean with a view to curbing irregular migration, and regular calls on search and rescue responsibilities have helped to underline the EU's practical engagement in the area.

What, then, are its duties? 'Responsibility' in international law has a number of facets, and we need always to look at the nature of the primary obligations involved.

Fault, in the sense of willful or negligent conduct may be relevant in some instances; or responsibility may be consequential on the breach of due diligence obligations, understood as an objective, international standard; and actual liability itself may be contingent on circumstances, such as the parties involved, knowledge, capacity, the requisite goals, and so forth.

For a number of reasons, the Mediterranean provides the basis for a special regime which engages, in general, the responsibility of littoral States and those which stand behind them or otherwise involve themselves in relevant conduct; the result, I suggest, is a special regime, linking States which act both in the fulfillment of their individual obligations and in the interests of the community, to those which are part also of that community and share those interests.

4. Bases of obligation: Search, rescue, interception, protection and solutions

The reasoning of the International Court of Justice in the *Hostages* case suggests a useful approach for identifying the key elements of legal responsibility in comparable situations, including:

- where States are fully aware of urgent ongoing situations of risk, endangering life at sea, in part as a result of smuggling and trafficking;
- where States are fully aware of their obligations (a) to establish search and rescue regions in the area; (b) to provide

and/or to co-ordinate search and rescue services; (c) to combat smuggling and trafficking, including by taking preventive measures against non-State actors whose conduct violates human rights; (d) to protect human rights; and

- where States and their institutions have the capacity and the means at their disposal to respond through surveillance and rescue, both individually and collectively.

Unlike the *Hostages* case, where two parties only were involved, the situation in the Mediterranean engages many potential actors, few of which will necessarily have a direct juridical relationship with the individuals at risk. Nevertheless, the circumstances and the known facts clearly put in issue the individual and collective responsibility of identifiable States to save lives at risk and to ensure, respect and protect human rights.

The Mediterranean is a large, but enclosed maritime area, subject to regular, close surveillance and to a certain level of effective control. The failure by those States (and their institutions) to respond comprehensively and in such a way as to maximise protection and solutions engages their responsibility, whether individually or *inter se*, irrespective of the availability of a remedy in the individual case.

This is *not* a counsel of perfection, or a statement of obligation to achieve the required result in all circumstances, but rather, "... an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result", as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea described it in 2011.

What we see is nonetheless a positive protection obligation, not immediately absolute in the sense of the prohibition of torture, but a positive due diligence obligation to save lives; and thereafter to treat those rescued or otherwise brought within the jurisdiction in accordance with settled law.

Moreover, given the nature of the humanitarian crisis, this regime of responsibility does not stop at the shore line. The phenomenon of contemporary migration has much deeper roots and so long as the drivers of desperation continue, so too will the search for refuge. The legal interests of States of origin, transit and intended or accidental destination are all engaged, and only a rights- and protection-based strategy can have any impact. This is a bigger

question, requiring more time and more thought, and this paper can do little more than signal the urgent necessity to respond both to symptoms and to causes.

5. Rescue at sea

On one issue in particular, there is a pressing need to act, and to reduce and ideally eliminate the disjuncture between rescue and safety of life at sea, on the one hand, and solutions, on the other; disembarkation in a place of safety is essential, but it cannot be the end of the story.

In principle, a starting point for disembarkation could be flag-State responsibility in the case of rescue or interception by public ships (that is, a State's naval or equivalent vessels). But although a beginning, that must not be allowed to result in ultimate gross disparities between States, lest they be disinclined to commit resources to the safety of life at sea. States committed to search and rescue in the Mediterranean fulfill a community responsibility, and a formula for equitable sharing is called for which, while securing prompt disembarkation, then leads on to land-based assistance, processing, and solutions.

Nor can flag-State responsibility be applied to merchant vessels. What is needed here, as experience with the Indo-China refugee crisis demonstrated, is an internationally agreed and administered scheme or pool of disembarkation guarantees, together with provision for compensating ships' owners for at least some of the costs incurred when ships' masters fulfill their international legal duties.

In thinking medium- and long-term, attention must also focus on assistance to States of transit, many of which are facing new challenges in the management of migration, but without the infrastructural capacity to accommodate, assist, protect and process non-nationals on the move. The EU has taken initiatives with third States in the region, but too often they are oriented to control alone (in the EU's interest), with no regard to the wider, international dimensions.

If those intercepted or rescued at sea are not disembarked in European space, then effective, open and internationally supervised agreements will be essential to ensure their landing and accommodation in a place of safety, their treatment and

protection in accordance with applicable international and European standards, and a solution appropriate to individual circumstances, such as asylum, resettlement, facilitated third country migration, or return in safety and dignity to countries of origin. Indefinite detention of refugees, asylum seekers and migrants in sub-optimal conditions ought never to be on Europe's agenda, and given the extraterritorial reach of Europe's obligations (both EU and ECHR), may well engage its liability.

This means bridging, in law and practice, the migration/refugee protection gap, which is what Mediterranean transit is effectively achieving *in fact*. And it means a readiness on the part of the EU and its Member States to integrate their own human rights and fundamental values into truly cooperative relations with transit and other affected States.

6. Next steps

What we are witnessing in the Mediterranean today is not just a European phenomenon. It is international, engaging States on all sides of the sea, and many also beyond the littoral.

Certainly, it has resonance in the European Union, because we have mutually agreed principles of cooperation – solidarity and fair sharing of responsibility; because we are committed to certain values – democracy, the rule of law; because we are obliged to protect those fundamental rights now set forth in the Charter; and because we have elected to engage pro-actively in this maritime space.

But the 'international' dimension, the impact of EU policies and practices on third States is also evident, whether in the EU's negotiation of readmission agreements; its endorsement of individual Member States' use of so-called safe third country removals outside the Dublin scheme; in the management of internationally agreed search and rescue areas (for better or worse); and necessarily also in the interests of a variety of non-State stakeholders, whether international organizations or representative organizations such as the International Chamber of Shipping.

Given the manifest need for a concerted, internationally agreed and implemented response, why does the EU continue to dither? Why do the practical proposals of key organizations, such as UNHCR, seem to fall on deaf ears? The EU's response to date is

woefully inadequate, in principle, in practical proposals, in comprehending the situation and the power and magnitude of the drivers at work, in looking beyond narrow self-interest, and in characterizing the challenges almost exclusively in terms of control and security.

This lack of direction and sense of purpose seems due in part to the nature of the entity, and to the fact that, for all its formal espousal of ‘community’ goals and ‘community’ values, the Union remains a congeries of dislocated, dysfunctional sovereign States, unable to contemplate working together on what is perceived perhaps as a ‘difficult’ issue touching sovereignty, security, and, of course, ‘the other’.

As the European Council on Refugees and Exiles noted last month, commenting on the then latest response to the crisis, current proposals merely seek to prevent migrants and refugees reaching Europe, essentially by moving border control farther and farther outwards, ‘fighting’ the traffickers, destroying the boats, building fences, and, we suppose, ‘preventing’ illegal migration.

But one look at ‘who’ is moving and ‘why’ shows how the focus on smuggling and trafficking misses the big picture. What is needed, clearly, are ‘opportunities’ – substantial safe, legal access to Europe, through resettlement, family reunion, humanitarian visas, and temporary protection, coupled with greater protection capacity along the way and real solidarity between north and south.

But we have been here before, and we know that with the right political will, workable and working solutions can be found; that mechanisms can be put in place which will ensure disembarkation against appropriate guarantees (such as assistance in identification and determination of status, or with care and accommodation, or with appropriate solutions in asylum, migration or return); that transit States (which also have problems of accommodation, processing, solutions) ‘can’ be brought on board as partners in a protection oriented response with international and regional oversight; that countries yet more distant can be brought into what will have to be longer-term planning for development.

The Mediterranean, though, has an ‘international’ and not purely regional dimension. It is a microcosm of indecision and inaction, but it also brings forth issues and challenges common to many other parts of the world – the Caribbean and the Pacific, to

name just two. What could be achieved in the Mediterranean, properly founded on principles of protection and accountability intrinsic to a democratic community oriented to the rule of law, could serve as a model for elsewhere (unlike the unilateralist Australian approach, which is premised on arbitrariness and clouded in secrecy).

In the 1970s, too, there were difficulties galvanizing political will and political action around the no less desperate situation of Indo-Chinese refugees, and it took an international conference to kick-start serious progress. Ironically, given the nonsense spouted by British ministers apparently content until recently to witness continuing loss of life at sea, it was the United Kingdom which, in May 1979, proposed to the United Nations Secretary-General that he convene an international conference to deal with the problem. The Secretary-General, together with the High Commissioner for Refugees, conducted intensive preliminary consultations, following which he called a meeting in Geneva in July that year, with representation at the ministerial level.

Sixty-five governments participated in the conference, chaired by the Secretary-General, together with observers, international organizations and NGOs. Building on the preceding informal consultations, it led to substantial increases in the funding of relief and the provision of resettlement places; in the offer of sites for processing centres; in opening discussions with the principal source country, Viet Nam, on family reunion, orderly departures, and return; and, as already mentioned, in practical proposals regarding rescue at sea.

Looking at the results of that conference and at the concrete initiatives which followed, it is surprising how similar are the issues we are facing today, notwithstanding the very different political situation. Then, as now, it was essential to maintain the primacy of protection principles; to engage with governments across the broadest spectrum; to secure commitments both from within and outside the region; to ensure the involvement of competent international organisations and NGOs; to promote practical and humanitarian relations with source countries; and to bring in the shipping community and build on its commitment to rescue at sea by devising practical disembarkation schemes.

That was just the beginning. Ten years later, the Secretary-General was back in the picture, working again with UNHCR and convening a second international conference on Indo-Chinese refugees, this time to adopt a Comprehensive Plan of Action which would eventually bring to an end a humanitarian crisis which had nevertheless changed dramatically over the years.

A new international consensus was needed, and the Secretary-General urged States to refrain from acting unilaterally. The outcome of this international approach, to what by then comprised both refugee and migration dimensions, was ultimately effective in restraining 'clandestine' departures, enhancing regular family reunion programmes, confirming the principle and practice of temporary refuge, determining entitlement to protection against international standards, making continuing provision for third country resettlement, developing internationally administered return and repatriation operations, and reviewing progress over time.

7. Conclusions for now

Today we need a similar initiative, for what we are facing in the Mediterranean is not an isolated issue, not a purely European problem. On the contrary, it is truly international. The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Only a long-term approach, combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing causes can have any impact.

The Secretary-General is already involved in a number of migration and development projects. It is time now to think and act wider and deeper, to turn to and address constructively the humanitarian dimensions. It is time to learn from Indo-China and other experience that international cooperation can work.

It is time to convene an international conference, perhaps on a rolling basis, for this is not a one-off situation. It is time to draw on the knowledge and experience of the United Nations; on the UN High Commissioner for Refugees; the UN High Commissioner for Human Rights; the Emergency Relief Coordinator and the Office for the Coordination of Humanitarian Affairs; the Special Rapporteur on the Human Rights of Migrants; the UN

Development Programme; the UN Children's Fund; the World Health Organisation; the International Maritime Organisation.

It is time to bring in regional organizations – Europe, of course, in its different cooperative forms; the African Union; ASEAN; the Organization of American States.

It is time to bring in other international and non-government organisations, including the International Chamber of Shipping, the Inter-Parliamentary Union, the International Organisation for Migration, the International Committee of the Red Cross and the grass roots capacities of the International Federation of Red Cross and Red Crescent Societies.

Only by engaging across the broadest spectrum of interest can we make a start to what will and must be a generations-long project of protection and opportunity, in strengthening asylum, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

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THE HUMAN TRAGEDY OF ILLEGAL MIGRANTS

*Tullio Scovazzi**

In the last years too many people have put at risk their lives in attempts to cross a border. They are driven by the desire to enter into a country where they will be safe from persecution, poverty, conflicts, natural disasters or other calamities and where they will have the chance to spend a decent life. They are ready to face social discrimination and vulnerability, after arriving somewhere and living there irregularly. The hope to migrate is the reason why the waters of some seas, such as the Mediterranean, have become the graveyard of thousands of human beings, including children, who are moving from a number of African or Asian countries to reach the European Union. This is a great human tragedy that unfortunately is not yet completely understood by the States of destination, including the European Union where an adequate immigration and asylum policy is lacking.

The human right to mobility is not fully protected by international law. Art. 13, para. 2, of the 1948 Universal Declaration of Human Rights provides that every individual has the right to leave any country, including his own. The same right is protected by Art. 12, para. 2, of the 1966 International Covenant on Civil and Political Rights. However, it remains an asymmetrical right, as it is not complemented by a corresponding right to immigrate. Under customary international law and unless different provisions are applicable because of treaties in force, any State has the sovereign right to allow or not to allow migrant aliens to enter its territory and can adopt legislation limiting immigration flows. Such legislation is in force today in many States for a number of reasons.

In the present situation of so-called globalization, goods and capitals move freely or almost freely, but not human beings. If they want to escape from persecution, poverty or conflict, human beings are often forced to cross borders clandestinely at the cost of great risk and suffering. Looking at the question from the point of view of the migrant, one may ask what is the meaning of a right to emigrate without a corresponding right to immigrate. Where are migrants entitled to settle if they are rejected by the States of destination? On the high seas? In the unclaimed sector of Antarctica? On the Moon or in outer space?

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If illegal migrants are in distress at sea, the duty to render assistance to persons in danger is an expression of the principle of protection of human life which has a longstanding tradition in maritime custom and is reflected in Art. 98 of the 1982 United Nations Convention on the Law of the Sea. Several treaties adopted within the framework of the International Maritime Organization aim at ensuring safety of life at sea, in particular the 1979 International Convention on Maritime Search and Rescue. It provides that any person in distress at sea has the right to be rescued and brought to a place of safety. Unfortunately, the thorny question left open by the Search and Rescue Convention is how to determine where the place of safety is located and consequently where the rescued persons are to be delivered. This does not help to ensure adequate assistance to rescued people, especially if they consist of large groups of migrants.

According to the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, illegal migrants have the right to be treated humanely and not as criminals. Also illegal migrants enjoy the human rights granted to any individual and arising from customary international law and treaties in force. In particular, they have the right not to be returned to a State where they could be tortured, as provided for, *inter alia*, in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Some illegal migrants qualify to be considered as refugees under the 1951 Convention Relating to the Status of Refugees. Unfortunately, the international definition of refugee does not include people who are trying to flee conflicts, either international or internal, poverty or natural disasters (so-called war, economic or environmental refugees). Most of present illegal migrants belong to this kind of people.

If illegal migrants qualify as refugees, they have the right not to be returned to a place where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. While the right to receive asylum might be granted under the national legislation of States parties, the Refugees Convention does not provide the refugee with such a right. Here is another instance of asymmetrical rights in international law. A refugee, who has a right not to be returned to a country where he is threatened, has no right of entry into a given State. He could be rejected to a State where he is not threatened. But the latter in its turn has no

obligation to allow the refugee to enter its territory. If States, one after the other, reject the refugee, where should he be entitled to settle? On the high seas? In the unclaimed sector of the Antarctic continent? On the Moon or in outer space?

Although the Refugees Convention is not clear enough on such a crucial question, it seems implied in the object and purpose of this treaty that a refugee who is outside his country and presents himself to an official of a State party has a right to submit an application for asylum and to have it processed and screened in a fair and efficient way. States cannot play with 'asymmetrical rights' beyond a certain extent and reach the point where the true objective of a treaty of humanitarian nature is denied. If the refugee cannot decide whether, where and when he will be admitted, he must at least be granted a right to present himself to submit an application.

At sea, the identification of asylum-seekers and the processing of their applications are activities that normally cannot be carried out on ships. Consequently, the rescuing or intercepting State is under an obligation to disembark the potential refugees in a place where they can exercise their right to fair and efficient asylum procedures. Regrettably, some States have taken the position that human rights treaties, including the Refugees Convention, do not apply outside the national territory and have engaged in policies of 'pushing-back' potential refugees at sea. This was in the past also the policy of Italy which in 2012 was held by the European Court of Human Rights responsible for violations of the European Convention of Human Rights in a case relating to the pushing-back to Libya of illegal migrants.[†] In fact, the theory that human rights treaties apply only within the territory of States parties is not only wrong, but is also a mockery of the rule of law. Respect for human rights is due to any individual who is under the power or effective control of any agent of a State party, wherever he or she happens to act, including the high seas.

[†] Judgment of 23 February 2012 in the case *Hirsi Jamaa and others v. Italy*. The Court found violations of Art. 3 (Torture) and Art. 13 (Right to an effective remedy) of the Convention and Art. 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens). See also the report of the visit made in 2009 by a delegation of the European Committee for the Prevention of Torture, established under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The report casts many doubts on Italy's compliance with its international obligations.

Today Italy has radically changed its previous attitude. In October 2013, after 366 migrants drowned in the vicinity of the island of Lampedusa, it started a policy of engaging units of the navy and police bodies (Coast Guard, Finance Guard) to face the humanitarian emergency occurring in the waters of the South-Central Mediterranean Sea. Illegal migrants and asylum seekers found in unseaworthy boats, where they are often abandoned by smugglers, are rescued and transported to the Italian territory where applications for asylum are processed. A new and more balanced regime of asylum is expected at the European Union level to better share the burdens met by Mediterranean member States.

The situation has not changed after the adoption by the United Nations Security Council of Resolution 2240 (2015) of 9 October 2015,[‡] which temporarily authorizes for the purpose of saving human life interventions on the high seas off the coast of Libya:

The Security Council,

...

7. *Decides*, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorise, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution,

[‡] The resolution has been adopted with fourteen votes in favour and one against (Venezuela). This State disagrees on the use of Chapter VII of the United Nations Charter (Action with respect to threats to the peace, breaches and acts of aggression) to meet illegal migration from Libya: "... we believe that the current humanitarian crisis of refugees, who are desperately trying to cross the Mediterranean cannot be tackled with a military approach with the pretext of combating international organized crime. This serious problem cannot be solved by building walls or by taking military action. ... Venezuela therefore rejects the notion of making migrants, refugees and asylum seekers into a security issue, as has been done on this occasion. The complexity and multidimensional nature of this problem requires a comprehensive approach that goes beyond the purely military and security approach that some States Members of this body seek to promote. ... We believe it is not through the use of force or criminalizing the phenomenon that this human tragedy will be resolved. It seems that, beyond the argument in favour of fighting criminal gangs, the purpose of the resolution is simply to prevent these human beings from reaching a safer destination; in other words, to set up a policy of raising barriers, where, in the end, we will have a world where the rich countries are surrounded by walls that prevent them from seeing and feeling the terrible reality of poor people battered by wars, most of which have been supported and promoted by the power centres in these rich countries" (intervention by Ramirez Carreño at the meeting of 3 October 2015, in U.N. doc. S/PV/7351, p. 4).

Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph;

8. *Decides* to authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya, and *underscores* that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith;

...

The resolution clearly points out that the rights belonging to immigrants and asylum seekers must be fully respected:

The Security Council,

...

12. *Underscores* that this resolution is intended to disrupt the organised criminal enterprises engaged in migrant smuggling and human trafficking and prevent loss of life and is not intended to undermine the human rights of individuals or prevent them from seeking protection under international human rights law and international refugee law;

13. *Emphasises* that all migrants, including asylum-seekers, should be treated with humanity and dignity and that their rights should be fully respected, and urges all States in this regard to comply with their obligations under international law, including international human rights law and international refugee law, as applicable;

...

In conclusion, many of the relevant facts show that illegal migrants are too often the victims not only of smugglers, but also of a number of States which try to evade their legal and moral duties by resorting to shows of strength against the weakest human beings or to hardly

credible legal technicalities. The treaties so far concluded are not sufficiently clear to deal with all the problems posed by this great human tragedy. The very invention of asymmetrical rights undermines the merits of international law in addressing the basic human needs of illegal migrants and asylum seekers among them. This is the reason why, where different views are admissible, a clear position should be taken in favour of the weaker subject, that is the illegal migrant, and against the stronger subject, that is the State. If it appears that the international rules in force do not offer sufficient protection for the weaker party, the only conclusion to be drawn is that the present regime should be changed and improved as soon as possible.

CONSTITUTIONAL NORMS OF A COMMON EUROPEAN ASYLUM SYSTEM

*Roberto Zaccaria**

1. Introduction. A brief overview of legislation on asylum

The term ‘asylum’ appears in the first legislative texts of the modern era. Article 120 of the 1793 French Constitution specifically states that the French people are to “give asylum to foreigners who have been banished from their homeland in the name of liberty and refuse it to tyrants”. In contemporary times almost all Constitutions contemplate asylum.

I will of course focus on the Italian Constitution. We must remember that on the international level asylum is also covered by the United Nations Universal Declaration of Human Rights and the Geneva Convention. On a European level asylum is included in the EU Charter of Fundamental Rights and in the European Union Treaty.

But not all contemporary constitutional texts are equally convincing. For example consider the case of France, closer to the approach taken by the Geneva Convention, which focuses on the *refugee status*. The French Constitutional law of 1993 includes a provision that integrates the constitutional text of 1958. This norm, considered as unclear by part of French doctrine, establishes at Art. 53-1, that: “(...) the authorities of the Republic always have the right to grant asylum to any foreigner who is persecuted because of activities in favor of liberty or who requests the protection of France for other reasons”.

We will not linger further on this aspect but we will highlight the different approaches that can exist among the different States on this subject.

Some preliminary considerations are necessary also on the numerical level. Immigration from Africa and the Middle East continues to be extremely intense. During the first five months of this year 41,703 immigrants landed on our shores, compared to 39,900 during the same period of last year. The numbers are even greater if we consider Europe as a whole and the new routes toward Greece.

Speaking before the Constitutional Affairs Commission of the Senate, Chief of Police Alessandro Pansa stated that during the same period of 2015, “there were 24,678 asylum seekers, but this does not

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mean that they were all entitled to asylum". Pansa went on to say that: "in 2014, 15,726 were actually repatriated, that's 52% of the expelled, while this year only 5,823 out of 12,154 of the expelled were repatriated".

2. The Framework of Constitutional Principles and EU principles

In Italy the obligation to accept asylum seekers issues from its Constitution (Art. 10, par. 3) and from the 1951 Geneva Convention relating to the Status of Refugees.

Art. 10, par. 3 states that "the foreigner who is denied in his own country the real exercise of democratic liberties guaranteed by the Constitution has the right of asylum in the territory of the Republic in accordance with the conditions established by law". The right of the individual is directly recognized by the Constitution. The law can only regulate the conditions of its exercise.

According to Art. 1 of the Convention a refugee is an individual who flees from his homeland because of the fear of being subjected to persecution for one of the reasons listed. Over the years this notion has been broadly interpreted (religious or sexual orientation: for example in order to protect women who are pursued because of their sex or persons who risk criminal prosecution because of their sexual orientation).

The Convention establishes a more limited notion compared to the Constitution, but it has become the cornerstone of the right of asylum on a global level.

Recently the European Union adopted its own system of asylum, completed in June 2013 and based on the concept of international protection, articulated in the three forms of refugee status, subsidiary protection and temporary protection, intended to allow anyone to be recognized the status appropriate to his situation.

A vast discipline is contained in the qualifications, reception and procedures directives, of which there is an initial version and one that is more recent. The European delegation law of 2013 (Law No. 96/2013) contains a delegating act for the transposition of the new 'qualification' directive of 2011 (Dir.2011/95/EU adopted to replace Dir. 2004/83/EC). The delegation was exercised with the adoption of Legislative Decree 18, dated 21 February 2014.

The asylum package is completed by various other measures, including the new 'reception' directive and the new 'procedures' directive that, together with the already cited 'qualification' directive,

form the regulatory basis for this subject matter. The transposition of these two acts is contemplated by the 2013 European Delegation Law - second semester (Law No. 154/2014) and will go into effect in the next few months.

3. Implementation in Italy: delegation for a Unified Act on Asylum Procedures

The European Delegation Law for the second semester of 2013 (at Art. 7, Law No. 154/2014) gives the Government mandate to adopt a unified act implementing EU directives on the right of asylum, subsidiary protection and temporary protection (par. 1).

The deadline for exercising the delegation is 12 months, starting on the entry into force of the legislative decrees for implementation of the last two community directives mentioned (reception and procedures).

Furthermore, an additional delegation is granted to the Government to issue any corrective and supplementary provisions to the unified act, to be exercised within 24 months from the entry into force of the unified act (par. 2).

Finally, a financial neutrality clause is also contemplated, according to which adoption of the Unified Act may not lead to any new or greater burdens to public finance, as the administrations involved will be responsible for any tasks associated with implementation of the delegation using the resources available according to current legislation (par. 3).

4. Italian Case Law: the Court of Cassation and the Constitutional Court

In our country the right of asylum, not lacking in interpretative disagreements, has been consolidated by case law. We will refer first to ordinary case law and specifically to the Court of Cassation, distinguishing three separate phases.

a) Phase One. A 1997 decision of the Court conferred upon the ordinary judge jurisdiction over constitutional asylum, affirming several important principles. *In primis*, the Supreme Court maintains that the foreigner who is prevented from the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his homeland enjoys, pursuant to Art. 10, par. 3 of the Constitution, a “subjective right of asylum”.

From the constitutional provision, in fact, it is possible to derive a norm that is directly effective since “although (it) partly requires implementing legal measures, it sets out with sufficient clarity and precision the case that grants the right of asylum to the foreigner”.

The Court maintains that justification for the right of asylum is to be found in the “obstacle to the exercise of democratic liberties”, specifically highlighting the ‘effective’ nature of such illiberality. Nevertheless the Supreme Court is concise regarding one focal point, that is on the actual scope of the rights of asylum seekers in the absence of any law enforcing Art. 10, par. 3. Here the Court limits itself to stating that “nothing else is guaranteed except entry into the State”.

b) A second phase began around 2006. In the brief period of little more than five years the Court of Cassation takes another route and inaugurates a new direction, relegating constitutional asylum to a limited and marginal role through an argumentative *iter* that is not always linear.

A more restrictive idea takes shape, maintaining that the content of the right of asylum pursuant to Art. 10, par. 3 of the Constitution, in the absence of an ordinary implementation law, “must be viewed as the right to enter the territory of the State in order to carry out the procedure to obtain refugee status”.

Starting from these premises, Cassation reaches the point of claiming that, in view of the legislative gap, “the right of asylum, which may be exercised under the conditions established by law, in reality does not exist.” And continues, “the existence of an autonomous right of asylum” is considered, *apertis verbis*, to be “inconsistent”.

Given the inertia of the legislator, the new legal course of the court reduces the right to constitutional asylum to a very slight one. There is a return to the ancient, unhealthy controversy of the first half of the 50s on the limits and scope of constitutional provisions and on the preceptive nature of fundamental rights even in the absence of an intervention by the ordinary legislator. The right of asylum, albeit proclaimed in a solemn and emphatic manner in the fundamental principles of the Charter of the Republic, loses consistency, limited to the refugee status in spite of the fact that such status is based on other legally appreciable motivations.

c) The third phase is decidedly a more comforting one. Following two fundamental actions by the legislator regarding international protection, implementing two European directives, the Court of

Cassation abandons its restrictive case law and arrives at an interpretation of constitutional asylum that is vaguely ‘internationalist’.

In brief, the Supreme Court explicitly transcends previous case law according to which the right outlined in Art. 10, par. 3 of the Constitution is relegated to a mere procedural or instrumental position, but continues to maintain that there is no margin for direct application of constitutional asylum. In other words, given the framework of protections provided within this international system, it would no longer be necessary to have a specific implementation law for constitutional asylum. The Court of Cassation has added various other aspects to this reasoning in subsequent and even recent decisions, maintaining, with greater clarity, that the system of international protection (specifically subsidiary protection), as well as internal residual protection (humanitarian protection), fulfills the need to

“include in the system [...] cases of risk of serious harm to personal safety or other relevant violations of human rights, not attributable to the persecutory model of refuge, because generated by endemic situations of conflict and domestic violence, by inertia or by the collusion of state powers or subjective conditions of vulnerability that cannot be corrected in the country or origin”.

This led the judge to state, perhaps with too much emphasis, that the two types of international protection (refuge and subsidiary protection) and the internal humanitarian measure, residual and atypical, “have finally led to implementation of the constitutional right of asylum”.

The Constitutional Court did not specifically intervene on the subject of asylum but did take the opportunity to affirm important principles in its case law concerning the legal condition of the foreigner.

We point out in particular decision 148/2008 regarding residence’s permit. Through various interventions (see decisions 203/1997, 252/2001, 432/2005 and 324/2006) the Court was able first of all to recognize that the foreigner is entitled to all the fundamental rights to which individuals are entitled by the Constitution.

Secondly, the Court pointed out the need for the legislator to respect the canon of reasonableness, the expression of the principle of equality, that, in general terms, affects the enjoyment of all subjective positions.

Finally, the Court emphasized that regulating the entry and residence of foreigners into the national territory is connected to the consideration

of diverse public interests, such as, for example, public safety and health, public order, international obligations and the national policy on immigration and that this consideration is the responsibility primarily of the ordinary legislator, who has broad discretionary powers on the matter, limited, from the perspective of compliance with the Constitution, only by the obligation that his choices not be manifestly unreasonable (as per decision No. 206/2006 and decree No. 361/2007).

5. The Dublin Regulation and the Common System of Asylum. Humanitarian Operations: Mare Nostrum, Frontex and Triton

It is within this constitutional and legal context that we must place the supranational law that concerns the European framework within which our country operates. Since the end of the 90s the European Union has been involved in the creation of a common European system of asylum (CEAS) intended to guarantee a common approach by member States on the subject of asylum in order to provide high standards of protection for refugees. In this initiative an essential role is played by the Dublin System. The first edition of this system is contained in the Dublin Convention of 1990.

This system was updated with the Dublin Regulation II (Reg. (EU) 343/2003, thus called as adopted to replace the Dublin Convention concerning determination of the State competent to examine an application for asylum.

After completion of the first phase there began a reflection on further development of the common system. The 2007 Green Book was the basis for a public consultation that led to the development by the Commission of a Plan of Action on Asylum, presented in June 2008, and the updating of the norm in order to identify more flexible, fair and effective laws and to produce a true common policy on asylum. As noted by a study of the European Council on Refugees and Exiles (ECRE) in September 2013, there are still significant differences in regulations and practices among the member States.

The second phase concluded in 2013 with the final approval of new provisions to replace previous ones. The legal apparatus is very complex and regrettably also very recent. Let's take a look at why all that has happened and that is still happening unfortunately risks making this complex normative system that we must nevertheless remember, anachronistic.

The new provisions intended to reform the entire discipline were the following: Dublin Regulation III (EU) n. 604/2013 dated 26 June 2013 replacing Dublin Regulation II (implemented as of 1 January 2014); the new EURODAC regulation for comparison of fingerprints for purposes of application of the Dublin Regulation Reg. (EU) No.603/2013 dated 26 June 2013, replacing Reg. (EU) No. 2725/2000; the EASO regulation that establishes the European office for asylum support: Reg (EU) No. 439/2010 dated 19 May 2010.

But what are the facts, in many respects dramatic, that have so profoundly changed the status of things? In October 2013, after an extremely serious tragedy near Lampedusa (with over 350 victims) Italy launched operation *Mare Nostrum*. Heroic and extraordinary rescue operations were performed by our armed forces, employed in a peace operation of gigantic proportions. A year later, in an attempt to involve Europe, *Mare Nostrum* ceased and was replaced by Frontex and *Triton*, with however more limited goals.

A new tragedy took place the beginning of 2015 in which more than nine hundred persons lost their lives in the collision between a boat overloaded with immigrants and a rescue merchant ship which deeply disturbed all Europe.

Numerous extraordinary conferences and meetings of community bodies, the European Commission, Parliament and Council are being held these weeks.

6. *The new 'positions' of Europe*

An increasingly clear and plural dimension of Europe begins to emerge. The various bodies do not always speak in the same tone. The President of the European Commission, even though representative of a conservative party, is the spearhead of a new and more open policy. Little of new and a tendency to hold back rather than provide new impulses is issuing from the various European councils. We must remember that a new document outlining 10 points has come out in the past few weeks, one with many lights but also with many shadows. And we must also take note of the much more significant positions taken by the European Parliament.

The Commission has finally presented a European Agenda with some significant novelties.

One interesting premise contained in the Agenda is the frank admission by the EU Commission that “our common European policy

on immigration was not adequate”. For this reason, the European Agenda on immigration lays the groundwork for a new policy. The road indicated by Brussels, in effect, contemplates four significant moves, designated as ‘pillars’. First: decrease incentives to illegal immigration, specifically by assigning liaison officers and European delegations to the principal third countries. Second: manage frontiers, saving lives and reinforcing external boundaries. This will be possible by increasing the role and the capabilities of Frontex and by helping third countries to reinforce their frontier management capabilities. Third: a strong common policy on political asylum. In this case, priority must be to give full implementation of the common European system of reception, specifically by promoting the identification of migrants, setting up a systematic file of digital fingerprints, strengthening directives on asylum in countries of origin and reviewing the Dublin Regulation (the rule that obliges migrants to remain in the country of initial entry) in 2016. Finally, the fourth pillar calls for adoption of a new policy on legal immigration: through the modernization and review of the system of Blue Cards (the residence’s permit for workers from non-EU countries), giving new priorities to our policies on integration and maximizing the benefits of the immigration policy for privates and for countries of origin, also by facilitating safer remittances.

The first and instinctive consideration that should be accomplished concerns a sort of ‘non-vision’ of Europe. One of the problems that has always existed in the EU is that it has always considered the economic aspect as the sole horizon, almost never considering the political aspect. The greatest sin of the EU is the fact that it continues to observe every event that affects our interests from a strictly economic-financial perspective, thus the blind allocation of public money as the sole practicable solution.

Allow me however to assess these European decisions in a more insightful manner, in the words of the Italian Refugee Council of which I have been President for little over a year. Were I to express a brief assessment I would speak only of a ‘moderate’ satisfaction.

First of all, the extension of the territorial mandate and financial capability of the *Triton* and *Poseidon* missions accomplished by Frontex is highly significant.

“One of the most pressing demands during these months has been the resumption of the *Mare Nostrum* mission in a European

perspective. With the expansion of the Frontex mission as currently defined, covering the same geographic area as *Mare Nostrum* and envisaging a slightly greater financial endowment, and with clear specification of the function of search and rescue as one of the priority tasks of the European mission we must say that we have reached an important goal in attempting to reduce the risks of victims at sea”.

Regarding on the other hand the subject of mandatory ‘quotas’ on the basis of which asylum seekers in clear need of international protection arriving in Greece and Italy are to be redistributed, there are various ways of viewing this system: the European one, the Italian one and perspective of the asylum seeker.

From the European perspective, this introduction seems to be the first true derogation of the Dublin System and from this aspect it is of fundamental importance. For Italy, the possibility of transferring 24,000 asylum seekers in 2 years can help decongest a system that is deteriorating with reference to both reception and analysis of asylum applications.

But from the perspective of asylum seekers we fear this system is not useful at all.

If in determining the countries to which they are to be transferred we do not take into serious consideration family and cultural ties and their potential for integration, we believe these transfers will be a failure. After a short while the refugees will begin to move toward other countries of the Union, thus increasing their secondary movements even further.

We believe that the 6 thousand euro that the European Union is contemplating for States who take in asylum seekers, should be used to structure more credible programs of integration. We are also perplexed by the fact that the asylum seekers to be transferred are selected according to their nationality – only Syrians and Eritreans – when the international framework of protection always starts from the individual situation rather than national groups.

Finally, another positive aspect: the program of resettlement for 20 thousand refugees.

“We are however perplexed both concerning the number that seems frankly too small and the membership of member States on a voluntary basis. This is a first step, albeit a small one, in the

right direction. We now ask that the European institutions take a more courageous road to open legal channels of entry in order to provide an effective response to the growing need for protection: the resettlement programs should be greatly strengthened, programs of humanitarian admission and sponsorship activated and the presuppositions to ask for asylum from countries of origin and transit created”.

7. Conclusions

We must realize that these great migrations, either for economic or humanitarian reasons, are not an isolated factor: the economic conditions of the planet and the current state of wars form a dramatic chessboard.

Those who are under the mistaken impression that they can be stopped with walls, naval blockades or weapons are profoundly mistaken. Of course there are xenophobic movements in all of Europe, but they will not change the course of history. A great cultural movement is needed. We require national and European policies appropriate to the times in which we live.

In Italy fundamental laws are needed, laws that we have been waiting for far too long: a law on citizenship, a law on immigration, a law on religious freedom. It is indispensable for there to be a greater opening and greater solidarity within Europe. These matters must pass to European competence.

The system of asylum must be managed in a European manner. Centers of initial reception must be European and not national. The large centers must be abandoned and replaced with a capillary system in the various countries.

We must put in place new policies, rapidly abandon the logic of emergency, prepare adequate investments, demonstrate that our nations and Europe as a whole will be able to offer models of reception, in a word we must build bridges, open doors and demolish all barriers with determination.

THE EUROPEAN AGENDA ON ASYLUM AND IMMIGRATION.
FROM THE STRUGGLE TO STOP 'ILLEGAL' IMMIGRATION
TO THE WAR AGAINST REFUGEES

*Fulvio Vassallo Paleologo**

1. Crocodile tears and measures of dissuasion. Europe denies its own fundamental principles

The great tragedies of immigration, from the disappearance at sea of thousands of persons south of Lampedusa to the continuing massive influxes along the Balkan route, provide the opportunity for yet another reinforcement of policies to combat what is defined as 'illegal' immigration. With our own eyes we are witnessing the construction of new walls and concentration camps. There is a proliferation of summary practices of collective expulsions, without the long awaited decisions to enact more effective rescue operations at sea and no prospects of legal and safe channels of entry. In the more exposed European countries, such as Italy and Greece, there are no proper and dignified systems of reception that respect the choices of refugees. Hundreds of thousands of people are being forced to move through Europe in an irregular status and thus exposed not only to blackmail by traffickers on land and sea but also to the hostile actions of European police forces.

The proposals submitted by the European Commission to open legal entry channels (limited for the time being only to highly skilled workers), for the easing of the Dublin III Regulation through the introduction of a system of shared responsibility for those seeking asylum, and for their relocation from countries of initial entry and their transfer from third countries in which they have found refuge, seem destined to be abandoned. This is happening primarily because of the opposition of Eastern European countries of recent entry into the Union, especially Hungary, the Czech Republic and Slovakia, following the clear opposition to any large-scale reception schemes already expressed by Denmark, Great Britain and France. The entire issue seems to be shifting toward repressive measures to combat 'illegal' immigration and agreements to be concluded with third countries for their involvement in the repatriation of irregular 'economic' migrants.

It really is not sufficient to point out that the situation in the Mediterranean is a 'tragedy', as acknowledged in the final declaration issued by the Extraordinary European Summit of 23rd April, convened

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at the request of Italy. And it is hypocritical to claim that that best way to reduce the number of victims at sea is to seek cooperation agreements with the countries of origin and of transit. The times required to conclude such negotiations are medium to long term at best and in the meantime people could continue to die. In addition to the fact that the majority of migrants is escaping from dictatorships and wars that are being fuelled by those very countries with which the European Union would like to negotiate. To say that these talks aimed at entering into new bilateral agreements are an 'immediate priority' means recognising that the cooperation of countries like Sudan, Eritrea, Niger, Chad, Gambia and Mali is required in order to stop and detain migrants before they reach Europe. Such is the political scheme, linked to a re-launching of commercial exchanges, as per the Khartoum Process, submitted by Italy to the Presidency of the European Union during the second semester of last year, and re-launched by the Extraordinary Council of Brussels. A plan that could be achieved completely with the support of the European Council, as evidenced by the proposals already defined as disseminated by Statewatch. In this area in fact the European Council has deprived the European Parliament of competences assigned to it by European Treaties on immigration and asylum.

In order to restore a deterrent effect to repatriation policies it appears that the principal goal now consists in a clearer separation between economic migrants and asylum seekers. The European agenda on immigration presented by the Commission this past 13 May placed great emphasis on the distinction between economic migrants, to be arrested and denied entry, and asylum seekers, in light of the stricter norms (now obsolete, given the current characteristics of internal conflicts) of the 1951 Geneva Convention. Any summary practice of refoulement and administrative detention seems justified, even to the detriment of human life, as absolute priority is still given to fighting human trafficking, in the wake of the Protocols to the U.N. Convention on transnational crime adopted in Palermo in the year 2000. Documents that in 2008 led to agreements for re-admission and refoulement even with such countries as Libya, a country that had not even adhered to the 1951 Geneva Convention on refugees. Not even the negative ruling of the European Court of Human Rights on the Hirsi case regarding the illegal push-backs to Libya carried out by Italy was sufficient. An issue that today no longer seems to matter. Yet, on September 1, 2015, the European Court of Human Rights handed down another ruling against Italy's collective

refoulement toward Tunisia in 2011. If countries are no longer allowed to enact collective refusals they attempt to block escapees before they depart, transferring to the governments of countries of transit resources and means to stop those migrants that Europe also considers as ‘illegal’, just as Gadhafi defined potential asylum seekers from Somalia and Eritrea.

Regarding the conclusions adopted by Brussels on 25 June 2015 “Return policy: Mobilise all tools to promote readmission of unauthorised economic migrants to countries of origin and transit ...” a distinction is introduced between economic migrants and asylum seekers or refugees that in no way considers the current composition of migration nor the very diversified application, in the various EU countries, of Directives on repatriation and international protection, especially concerning qualifications and methods of appeal against rejection and/or expulsion rulings.

2. Prospects of military intervention in Libya

Brussels states that “instability in Libya is creating an ideal environment for the criminal activities of traffickers” and that all efforts by the United Nations will be sustained for the re-establishment of government authority in that country. Furthermore, efforts to “address the conflicts and instability as key push factors of migration, to include Syria”, must be intensified, and they are already considering a series of ‘targeted’ military interventions, not only in Libya but also in the countries along its southern border. Operations that the European Union by itself obviously cannot sustain, and that are being asked to be activated within the context of a United Nations mandate and forces. Regarding this issue European Commissioner Mogherini received a mandate from the European Council on April 23, 2014, to request a decision by the Security Council. However, we do not see on what legal and *de facto* basis one can invoke a United Nations Charter that envisages, in chapt. VII, the Security Council having determined the existence of any threat to the peace, breach of the peace or act of aggression (art. 39), in addition to enacting sanctions against a State (but not implying the use of force) such as the partial or total interruption of communications and economic relations by other States (art. 41), actual armed actions (Art. 42). The proposal submitted by the Italian government to Brussels, to “establish safety zones along areas of the Libyan coast” is a violation of sovereign rights, attributable to the two

Libyan governments currently involved in a difficult process of reconciliation under the sponsorship of the UN, and appears to be completely impracticable on the basis of an international mandate that should be conferred upon the European Union by the United Nations Security Council. A proposal that after being denied by the government of Tripoli met with the complete opposition of the UN Secretary General following the clear stance taken by the Rapporteur for the High Commissioner of the United Nations on Human Rights, Francois Crepeau.

The negative judgment on targeted military interventions over Libyan territory “against criminal organizations involved in trafficking”, a clear ruling reiterated by Ban Ki-Moon on various occasions, certifies the failure of this attempt from the very start, one that was recommended on a European level by Italy and that is a true folly from a political and military perspective. “There is no military solution to the human tragedy that is taking place in the Mediterranean”, stated the Secretary General of the UN, in an interview published in the *Stampa* and in the *Secolo XIX* following his latest meeting with Renzi. For Ban Ki-Moon what is required is a “collective response that addresses the root causes, the security and the human rights of migrants and refugees, such as safe and legal channels of migration”.

What is needed is a comprehensive approach to the entire regional context of migrations in the Mediterranean, with no simplistic solutions based on military operations and blockades, in respect of the primary values of human life, peace and the rights of refugees. From this perspective it is essential that in addition to pacification in Libya, we reach a political solution to the crisis in Syria that has produced a number of refugees without precedent in neighbouring countries, while only a minimum number of the refugees forced to flee have been able to reach Europe. Syrian refugees must be provided with guaranteed secure channels of evacuation, especially from Lebanon, Jordan and Turkey, and humanitarian corridors for resettlement, not only toward the European Union, by the immediate suspension of the Dublin III Regulation, implementation of the measures envisaged by Directive 2001/55/CE on the mass influx of displaced persons, and mutual recognition (among the different countries of the EU) of the procedures for international protection, until the cessation of hostilities that have destroyed the majority of the cities and caused hundreds of thousands of victims.

Similar possibilities of rescue and protection of human life must be guaranteed to all potential asylum seekers, of different nationalities, trapped in Libya, the Sudan and Niger, who are increasingly subject to kidnappings and torture for purposes of extortion. For the Eritreans also, who are arriving in great numbers these months with marks of violence and abuse, we must open legal channels of evacuation from Libya and protected entry into Europe, by granting entry visas for reasons of temporary protection, activating the measures envisaged by Directive 2001/55/CE for cases of mass influx of refugees.

3. Modify or suspend the Dublin III Regulation. Mutual acknowledgment of decisions recognising the right to international protection

The points of the decision adopted by the European Council calling for a “rapid and full transposition and effective implementation of the Common European Asylum System by all participating Member States” and to “increase humanitarian aid to frontline member States and take into consideration the options to organize emergency transfer among all member states on a voluntary basis” do not modify the Dublin III Regulation currently in force, as the concept of first country of entry, the lynchpin of the readmission system, remains unchanged, nor do they appear to guarantee their full implementation from the perspective of possible family reunification. The recent mass movements of refugees through the Balkan Route profoundly impacted the concrete value of the Dublin III Regulation, before it was modified as had been demanded for years. A growing number of nations have reintroduced border controls and it does not appear that this situation will change in the short term. In addition to the Dublin III Regulation, suspended or not implemented along European frontiers that are becoming increasingly militarized, the principle of free movement affirmed in the Treaty and in the Schengen Regulation is also at risk.

The proposal, expressed in the decisions of the European Council in June 2015, to “distribute teams of EASO in member States in order to jointly process applications for asylum, including identification and fingerprinting” appears to be an innovative aspect with unforeseeable consequences regarding the secondary mobility of refugees in the various European countries. If the European Union should actually succeed in sending these teams to the ports of entry there could be an explosion of reception centres in the event of a mass influx of refugees.

The photosignalling and recourse to measures of administrative detainment, which would be mandatory at that point, could cause a grave humanitarian crisis overburdening the few centres of detention that have remained in operation, exactly as occurred in Italy prior to the implementation of the European Union Directives on reception and on procedures for recognition of international protection.

Mutual recognition of the decisions that establish the right to international protection is needed, eliminating the requirement for procedures for recognition of international protection in the country of first entry.

The refugees' right to free movement in Europe must be ensured by accelerating and simplifying procedures. In the immediate future all those who are re-admitted into Italy by other European countries must be supported through special measures of an assistance, legal and psychological nature, by implementing the Regulation. This will ensure subsequent possibilities of mobility, the right to appeal and the right to family reunification.

4. From the European Commission a proposal on forced repatriation beyond the rule of law and the principle of non-refoulement.

Concerning the reinforcement of policies on forced repatriation, furthermore, the creation of 'hotspots' in the areas closest to the sites of arrival in Europe, at least two in Sicily, should allow, in addition to greater cooperation between Frontex, Eurojust and Europol in the search for alleged smugglers, and with the assistance of EASO (European agency of 'support' for nations in difficulty with requests for asylum), for rapid selection regarding those who are admitted to procedures for recognition of international protection and irregular migrants. This should lead to more rigorous identification procedures. In this manner, through an improved functionality of the SIS (Schengen Information System), we could stimulate repatriation from a country other than the country that adopted the provision for forced removal, always remaining within the context and with the guarantees of the Directive on return 2008/115/CE. According to the documents proposed by the European Commission, these forced repatriations should be entrusted to Frontex (the agency for external border control), which should be further strengthened and refinanced.

In conclusion we risk witnessing the total distortion of the founding Regulation of the Frontex Agency 2007/2004/CE and non-compliance

with the procedures that European Union law establishes for modification of the Regulations. This risk is also noted in Brussels, such that the more recent documents issued by the Commission highlight the need for substantial changes to the founding Regulation of Frontex No. 2007/2004/CE.

5. New cases of administrative detention of denied asylum applicants and forced fingerprinting

The increased possibilities of administrative detainment and forced repatriation, following an accelerated examination of asylum requests, with a binding extension of the “list of safe third countries”, the objective toward which the new European policy on asylum is directed, could violate both the minimum guarantees granted in terms of the right to defence as outlined in Directive 2008/115/CE and the procedures envisaged by the recently issued Directive Procedures 2013/32/CE. A risk already present in Italy in light of the scheme of the Legislative decree of transposal approved by the Council of Ministers on May 18, and that will go into force on September 30, envisaging the administrative detention in the CIE of asylum applicants at “risk of flight” or who are rejected. But there could be new cases of administrative detainment for those migrants who refuse to provide fingerprints. Following Italy’s conviction by the European Court of Human Rights, there are other possibilities of appeal, both before the European Court of Human Rights for violation of norms that prohibit torture and inhuman or degrading treatment (art. 3) and that recognise the right to effective remedy (art. 6) ECHR, and before the Court of Justice of Luxembourg for non-implementation of Union Directives or Regulations or for the discord that exists among the more recent operational instructions issued by the Frontex Agency and the limits of its mandate.

The purpose of the European Plan against human trafficking (2015-2020) approved by the Commission aims to overcome those regulations of the rule of law, beginning with *habeas corpus* and jurisdictional competence, that are experienced along European frontiers, especially by the police forces, as a brake to repressive activities. Activities considered essential to discourage what for many remains simply ‘illegal immigration’. Even in the instructions issued by the Brussels authorities, it is clear that the attention of the public is shifting from the tragedies of the migrants who continue to die at sea, and the many walls

that block the movement of persons in Europe, toward the “war against human trafficking”, perhaps with military intervention in the countries of transit, such as Libya. It is thus important to inform of the real content of the decisions adopted by the various bodies of the European Union before the effects are felt in the practices applied by police authorities, as usual, against migrants and those who provide them with assistance. Immigration and the right to asylum are becoming an increasingly democratic concern. It is not the European identity that is at risk, but the rule of law.

L'EXPULSION DES ETRANGERS POUR DES RAISONS DE
SECURITE NATIONALE A LA LUMIERE DE LA CONVENTION
EUROPEENNE DES DROITS DE L'HOMME

*Anna Liguori**

1. Introduction

L'exigence de la lutte contre le terrorisme – qui s'est accentuée après le 11 septembre 2001 et à nouveau après les attaques de 2015 à Paris – peut comporter de sérieux problèmes d'incompatibilité avec les droits de l'homme. Parmi les catégories de sujets les plus directement concernées, il y a celle des étrangers: non seulement ils peuvent être victimes de violations de droits humains de même que les citoyens¹, mais les règles en matière d'entrée et d'expulsion², en particulier à travers l'augmentation des pouvoirs discrétionnaires de l'exécutif et la réduction des garanties procédurales³, ont été modifiées dans le sens d'une restriction. Comme le souligne E. Guild, “The 11 September

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¹ Dans un rapport de la FIDH (Fédération internationale des droits de l'Homme), rendu public au mois d'octobre 2005, rapport qui «s'attache à démontrer que lutte anti-terroriste et respect des droits de l'homme sont non seulement compatibles, mais que le second est une condition de l'acceptabilité et de l'efficacité de la première» (voir H. Mock, “‘Guerres’ contre le terrorisme et droits de l'homme”, in *Revue Trimestrielle des Droits de l'Homme*, 2006, p. 23 et ss.), sont dégagées six catégories de droits fondamentaux les plus menacées par les mesures anti-terroristes. Les cinq premières catégories concernent tous, citoyens et non, et sont les garanties relatives à: 1) arrêt et détention; 2) procès; 3) vie privée; 4) libertés d'expression et d'information; 5) propriété privée; la sixième par contre concerne spécifiquement les garanties reconnues aux immigrés, réfugiés et demandeurs d'asile.

² Voir E. Guild “Aliens and Counter-terrorism”, *Routledge Handbook of Law and Terrorism* (G. Lennon, C. Walker dir.); London, 2015; *Terrorism and the Foreigner- A decade of tension around the rule of law in Europe* (A. Baldaccini, E. Guild dir.), Leiden, 2006; *Lutte contre le terrorisme et droits fondamentaux* (E. Bribosia, A. Weyembergh dir.), Bruxelles, 2002; P. De Sena, “Esigenze di sicurezza nazionale e tutela dei diritti dell'uomo nella recente prassi europea”, in *Ordine internazionale e valori etici, Atti VIII Convegno SIDI* (N. Boschiero dir.), Naples, 2004, p. 195 sqq. Pour un examen des modifications intervenues au niveau de l'Union européenne voir *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (F. de Londras, J. Doody dir.), London, 2015; A. Adinolfi, “Politica dell'immigrazione dell'Unione europea e lotta al terrorismo”, in *Diritti umani e diritto internazionale*, 2008, p. 483 ss.

³ A. Baldaccini remarque dans son Introduction: “Asylum and immigration law is more vulnerable to exceptional measures than other areas of law” (*Terrorism and the Foreigner...*, cit., p. xiv).

attacks transformed the face of the foreigner into a *prima facie* face of terrorism”⁴. Toutefois, s’il est vrai que les exigences relatives à la sûreté nationale peuvent être invoquées dans certains cas pour apposer des limites et des dérogations⁵ au respect des droits humains, de même qu’il est vrai que les États jouissent d’une marge d’appréciation à cet effet, il convient de noter, néanmoins, qu’un tel pouvoir n’est pas sans bornes.

Notre travail s’inscrit dans cette perspective et entend examiner quelles sont les limites que la Convention européenne des droits de l’homme pose au pouvoir d’expulsion pour des raisons de sécurité des États.

2. Cadre Légal

La Cour européenne des droits de l’homme a toujours fait appel à un principe de droit international général selon lequel les États ont le droit, sans préjudice pour les engagements dérivant des traités, de contrôler l’entrée, le séjour et l’éloignement des non nationaux⁶. Toutefois les organes de Strasbourg (la Commission et la Cour jusqu’à l’entrée en vigueur du Protocole n. 11, la nouvelle Cour à partir du 1^{er} novembre 1998) garantissent, à des conditions particulières, une protection «par ricochet» aux immigrés visés par une mesure d’expulsion ou un refus du permis de séjour, au cas où cette mesure comporterait un préjudice dans la jouissance des droits garantis par la Convention – en particulier en ce qui concerne le droit à ne pas être soumis à la torture ou à des traitements inhumains ou dégradants (article 3 CEDH) – et le droit au respect de la vie privée et familiale (article 8 CEDH).

La Cour a affirmé la possibilité de violation «par ricochet» également en ce qui concerne les articles 5 et 6 CEDH, qui protègent respectivement le droit à la liberté et à un procès équitable, mais uniquement dans les cas où le requérant serait exposé dans le pays de

⁴ Cf. E. Guild, “International terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11th September”, in *European Foreign Affairs Review*, 2003, p. 336.

⁵ Voir, parmi les nombreuses contributions, G. Cataldi, “Art. 15”, *Commentario breve alla Convenzione europea* (S. Bartole, P. De Sena, V. Zagrebeky dir.), Padova, 2012; T. Christakis, “Etat avant le droit? : l’exception de ‘sécurité nationale’ en droit International”, in *Revue Générale de droit international public*, 2008, p. 5 sqq.; P. Tavernier, “Art. 15”, in *La Convention européenne des droits de l’homme: commentaire article par article* (L.-E. Pettiti, E. Decaux, P.-H. Imbert dir.), 1999, Paris.

⁶ Par contre, les expulsions des nationaux et les expulsions collectives d’étrangers sont explicitement interdites (articles 3 et 4 du Protocole n. 4).

destination à un risque de «violation flagrante» de ces dispositions. Dans l'affaire *Othman c. Royaume Uni*, du 17 janvier 2012, la Cour a reconnu pour la première fois la violation «par ricochet» de l'art. 6 dans la mesure où, pour le cas du requérant expulsé vers la Jordanie, il existait un risque réel que des preuves obtenues par la torture soient admises lors du procès dans le pays de destination⁷. Par la suite, la Cour, dans l'arrêt *El Masri c. l'ex-République yougoslave de Macédoine*⁸, du 13 Décembre 2012, a condamné l'Etat défendeur pour violation «par ricochet» de l'article 5 pour avoir remis le requérant à la CIA alors même qu'il connaissait ou aurait dû connaître le risque inhérent à ce transfert : il s'agissait dans le cas d'espèce d'une «extraordinary rendition», impliquant – comme l'avait déjà reconnu la Cour dans des affaires précédentes⁹ – une détention «en dehors du système juridique ordinaire», et donc totalement incompatible avec l'Etat de droit¹⁰.

Enfin, des garanties ultérieures en cas d'expulsion d'étrangers, de nature procédurale, proviennent de l'art. 1 du Protocole n. 7, de l'art. 13 et de l'art. 5 par. 4.

3. L'expulsion de terroristes et le risque de torture ou de traitements inhumains et dégradants dans le pays de destination

La Convention européenne des droits de l'homme ne prévoit pas d'interdiction explicite de *non refoulement*; toutefois, à partir de l'affaire *Soering*, de 1989 (en matière d'extradition¹¹), la Cour européenne des droits de l'homme a reconnu une violation «par ricochet» de l'art. 3, qui interdit la torture et les traitements inhumains et dégradants, lorsque, en cas d'éloignement, il y a un risque réel de subir

⁷ Voir par. 3.

⁸ Voir N. Napoletano, "Extraordinary renditions, tortura, sparizioni forzate e «diritto alla verità»: alcune riflessioni sul caso El-Masri", in *Diritti umani e diritto internazionale*, n. 2/201, p. 331 ss.; F. Mussi, "Extraordinary Renditions as Enforced Disappearances? The Jurisprudence of the European Court of Human Rights", *ibidem*, p. 365 ss.; F. Fabbrini, "The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism", in *Human Rights Law Review*, 2014, p. 85 ss.

⁹ *Babar Ahmad et autres c. Royaume Uni*, arrêt du 6 Juillet 2010, §§ 113-114.

¹⁰ Voir aussi *Al Nashiri c. Pologne*, arrêt du 24 juillet 2014, § 531 et *Nasr et Ghali c. Italie (Abu Omar)*, arrêt du 23 février 2016, § 302.

¹¹ Voir, *ex multis*, G. Gaja, "Rapporti tra trattati di estradizione e norme internazionali sui diritti umani", in *Diritti dell'uomo, estradizione ed espulsione* (F. Salerno dir.), Padova, 2003, 125 ss.

un tel traitement dans le pays de destination. En outre, à partir de l'affaire *Chahal c. Royaume Uni*, du 15 novembre 1996, la Cour de Strasbourg a solennellement affirmé que cette interdiction a un caractère absolu et impératif, quelle que soit la conduite de la personne à éloigner, même si l'individu en question constitue un danger pour la sûreté nationale de l'État d'origine.

Cependant, plusieurs États¹² ont essayé de pousser la Cour européenne des droits de l'homme¹³ à modifier sa jurisprudence, en l'invitant à évaluer le risque de torture que l'individu encoure à la lumière de la menace qu'il représente pour la vie de la collectivité. Dans cette direction, une tentative a été faite pour la première fois dans l'affaire *Ramzy c. Pays Bas*, et introduite le 15 Juillet 2005¹⁴ (voir, à cet effet, les observations – en tant que tiers intervenants – de la Grande-Bretagne, de la Lituanie, de la Slovaquie et du Portugal). Toutefois, le premier arrêt sur le fond, dans lequel la Cour a solennellement réaffirmé ce qu'elle avait déjà déclaré dans l'affaire *Chahal c. Royaume Uni*, a été *Saadi c. Italie*, du 28 février 2008¹⁵: il concerne l'expulsion d'un

¹² La position de la Grande Bretagne a été particulièrement explicite : en 2003, le Premier ministre de l'époque Tony Blair avait même avancé la proposition de dénoncer la CEDH et de la ratifier à nouveau, seulement après l'apposition d'une réserve visant à éviter l'applicabilité de la jurisprudence *Chahal*: voir à ce sujet J. Rosenberg, "Should Britain Twist Human Rights Law to Meet its own Ends?", in *Daily Telegraph*, 30 janvier 2003, p. 21.

¹³ Voir aussi la position de la Suède et du Canada devant le Comité contre la torture et le Comité des droits de l'homme. Sur les décisions de ces organismes voir A. Liguori, *Le garanzie procedurali avverso l'espulsione degli immigrati in Europa*, Napoli, 2008, p. 193 ss.

¹⁴ Cette requête a été rayée du rôle le 20 juillet 2010, les avocats ayant perdu tout contact avec le requérant.

¹⁵ Sur cet arrêt voir D. Moekli, "Saadi v. Italy: the Rules of the Game Have not Changed", in *Human Rights Law Review*, 2008, p. 534 ss.; F. De Londras, "International Decisions: Saadi v. Italy", in *American Journal of International Law*, 2008, p. 616 ss.; G. L. Cernic, "National Security and Expulsion to a Risk of Torture", in *Edinburgh Law Review*, 2008, p. 486 ss.; A. Gianelli, "Il carattere assoluto dell'obbligo di non-refoulement: la sentenza Saadi della Corte europea dei diritti dell'uomo", in *Rivista di diritto internazionale*, 2008, p. 449 ss.; A. Saccucci, "Espulsioni, terrorismo e natura assoluta dell'obbligo di non – refoulement", in *I diritti dell'uomo: cronache e battaglie*, 2008, p. 33 ss; N. Hervieu, *Terrorisme et torture*, www.droits-liberts.org du 28 février 2008 (10/15); H. Tran, "La confirmation en Grande Chambre des principes posés par l'arrêt Chahal en matière d'extradition et de terrorisme: CourEDH, Gde Ch., *Saadi c. Italie*, 28 février 2008", in *L'Europe des libertés : revue d'actualité juridique (Europe des libertés)*, 8e année, n° 26 (mai 2008), p. 25; A. Fornerod, "L'article 3 de la

terroriste présumé vers la Tunisie, pays dans lequel il risquait d'être soumis à la torture. Par la suite, le 24 février 2009, la Cour a adopté une nouvelle décision contre l'Italie (*Ben Khemais c. Italie*), relative à une affaire similaire, avec la circonstance aggravante que l'Italie avait exécuté l'expulsion malgré l'arrêt *Saadi* rendu quelques mois auparavant, et bien que la Cour ait ordonné au gouvernement italien le sursis à l'exécution de l'expulsion, en application de l'art. 39 du Règlement intérieur. Par conséquent, la Cour a reconnu la violation non seulement de l'article 3 mais aussi de l'article 34, compte tenu de la jurisprudence *Mamatkulov c. Turquie*¹⁶. Par la suite, l'Italie a subi plusieurs condamnations pour des affaires semblables¹⁷. Notons que dans les affaires *Trabelsi c. Italie* et *Toumi c. Italie*¹⁸ il s'agit également de la violation de l'art. 34, les expulsions ayant eu lieu malgré l'ordre de suspension d'exécution (comme dans l'affaire *Ben Khemais*, déjà citée). Par contre, l'affaire *Cherif et a. c. Italie* a été rayée du rôle le 7 avril 2009 en ce qui concerne le requérant (expulsé le jour même où la mesure d'éloignement lui avait été notifiée) pour défaut de procuration

Convention européenne des droits de l'homme et l'éloignement forcé des étrangers : illustrations récentes", in *Revue trimestrielle des droits de l'homme*, 2010, p. 315 ss.

¹⁶ Par l'arrêt *Mamatkulov et Askarov c. Turquie* du 6 février 2003 (confirmé par le jugement de la Grande Chambre du 4 février 2005), la Cour européenne a affirmé pour la première fois l'existence d'une véritable obligation pour les États membres de la CEDH de respecter les mesures provisoires disposées sur la base de l'art. 39 du Règlement intérieur: la non observance de l'ordre de sursis de l'éloignement des requérants a comporté en effet une condamnation de cet État pour violation de l'article 34 CEDH (qui prévoit le droit de recours individuel), puisque dans le cas d'espèce l'extradition vers l'Ouzbékistan avait empêché les requérants de rester en contact avec leurs avocats, ce qui avait affecté de manière significative l'exercice effectif du droit de recours individuel devant la Cour.

¹⁷ Voir *Abdelhedi c. Italie*; *Bien Salah c. Italie*; *Bouyahia c. Italie*; *C.B.Z c. Italie*; *Darraji c. Italie*; *Hamraoui c. Italie*; *Ou. c. Italie*; *Soltana c. Italie*, du 24 Mars 2009 et *Sellem c. Italie*, du 5 mai 2009.

¹⁸ Respectivement du 13 avril 2010 et du 5 avril 2011. Par contre, l'affaire *Drissi c. Italie* a été déclarée irrecevable le 28 septembre 2010 car le juge d'application des peines avait décidé le 18 décembre 2008 de convertir la mesure de sûreté de l'expulsion par celle de la détention dans un institut de travail, à fin de respecter les mesures provisoires indiquées par la Cour. Il convient de signaler que par la suite la Cour de Cassation a explicitement statué, par l'arrêt n° 20514 du 28 avril 2010, que la jurisprudence de la Cour de Strasbourg, dégagée entre autre dans le cadre de l'arrêt *Saadi c. Italie*, entraînait pour les autorités judiciaires nationales l'obligation d'adopter des mesures de sûreté différentes de celle de l'expulsion à l'encontre de personnes jugées dangereuses pour la société et susceptibles d'être expulsées vers la Tunisie.

valide, tandis que la partie de la requête introduite par sa femme (pour violation de l'art. 8) a été déclarée recevable mais rejetée sur le fond: nous reviendrons sur cette décision dans le paragraphe n. 5.

Un examen approfondi de l'arrêt *Saadi c. Italie*, montre d'abord que deux argumentations ont été essentiellement utilisées pour convaincre la Cour à réviser sa jurisprudence *Chahal*: en premier lieu, la Grande Bretagne, tiers intervenant, et l'Italie, partie défenderesse¹⁹, avaient affirmé qu'il faut distinguer entre des traitements inhumains et dégradants, directement infligés par un Etat contractant, et des traitements infligés par les autorités d'un Etat tiers, pays de destination: dans ce dernier cas, c'est seulement sur l'Etat qui adopte la mesure d'éloignement, qu' incombe une «obligation positive» dont le respect pourrait, ou mieux, devrait faire l'objet d'une mise en balance du risque que court le requérant par rapport à la dangerosité qu'il représente, et cela en regard de la protection du droit à la vie de la collectivité. En deuxième lieu, le Royaume Uni demandait un seuil probatoire plus élevé, c'est-à-dire la preuve, plutôt que d'un «risque réel», d'un risque «more likely than not».

Ces deux arguments ont été rejetés, l'un et l'autre, par la Cour qui réaffirme, avec force, le caractère absolu de la protection offerte par l'art. 3²⁰. Cependant il convient de faire quelques observations et en particulier en ce qui concerne l'appel au «droit à la vie»: nous croyons, comme observé²¹, que “the invocation of the right to life is nothing more than an attempt by governments to appropriate human rights language for their own purpose and does not help to address the relevant legal issue”. En effet, la question n'est pas de savoir si les États doivent faire quelque chose pour lutter contre le terrorisme, mais plutôt comment ils

¹⁹ L'Italie a en substance appuyé les arguments de la Grande Bretagne (par. 115), même si elle a suivi une ligne d'argumentation partiellement différente, basée «sur la nécessité présumée de réaligner le régime applicable aux violations de l'interdiction de refoulement à celui applicable aux violations de l'art. 3 CEDH»: voir A. Saccucci, “Espulsioni ...”, cit, p. 35.

²⁰ Spécifiquement, en ce qui concerne le premier point, la Cour affirme que le risque que court le requérant et sa dangerosité «ne se prêtent pas dans ce contexte à un exercice de mise en balance car il s'agit de notions qui ne peuvent qu'être évaluées indépendamment l'une de l'autre» (par. 139); sur le deuxième volet, qu'il n'y a «aucune raison de modifier, comme le suggère le tiers intervenant, le niveau de preuve requis en la matière en exigeant, dans des cas comme celui-ci, la démonstration que la soumission à des mauvais traitements serait «plus probable qu'improbable»» (par. 140).

²¹ Voir D. Moekli, “Saadi v. Italy ...”, cit., p. 541-542

peuvent y arriver. Le Royaume Uni ne prend absolument pas en considération le fait que – pour reprendre les mots du juge Myjer auxquels se rallie le juge Zagrebelsky – «il n'est pas permis aux Etats de combattre le terrorisme international à n'importe quel prix. Les Etats ne doivent pas recourir à des méthodes qui sapent les valeurs mêmes qu'ils cherchent à protéger. Et cela vaut à plus forte raison pour les droits «absolus» auxquels il ne saurait être dérogé même en cas de danger public (article 15 de la Convention)». Les observations du juge Zupančič vont dans ce sens et affirment d'une manière particulièrement tranchante que, à l'égard du premier volet de l'argumentation du gouvernement britannique, «La logique policière avancée par l'Etat contractant intervenant ne tient tout simplement pas la route» et que, concernant le deuxième volet «Il est en revanche intellectuellement malhonnête de suggérer que les affaires d'expulsion exigent un faible niveau de preuve simplement parce que la personne est notoirement dangereuse».

En outre, selon nous, il est très important dans cet arrêt que la Cour se soit basée sur des rapports d'organisations non gouvernementales indépendantes (parmi lesquelles Amnesty International et Human Rights Watch), pour évaluer concrètement si le requérant courait un risque réel de subir des tortures et qu'elle arrive à affirmer que lorsque l'intéressé – sur la base de ces rapports – démontre qu'il y a des motifs sérieux et avérés de croire à l'existence d'une pratique contraire à l'article 3 vis-à-vis d'un groupe, il suffira de la preuve de son appartenance à un tel groupe et non plus d'un risque individuel²².

D'autre part, il est intéressant de s'arrêter sur ce que la Cour affirme en matière d'assurances diplomatiques. Il s'agit d'un moyen – initialement utilisé surtout dans les cas d'extradition, afin d'exclure l'application de la peine capitale dans le pays de destination – auquel les États ont de plus en plus recours pour contourner le principe de «non refoulement»²³, en signant des accords *ad hoc*, ou des conventions-cadre avec les pays de destination²⁴. Toutefois, dans la pratique, il arrive

²² Sur ce point voir aussi A. Saccucci, “Espulsioni ...”, cit., p. 36. Cette approche de la Cour a été confirmée dans plusieurs affaires (voir entre autres *N.A c. Royaume Uni*, du 17 Juillet 2008).

²³ Voir M. Jones, “Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings”, in *European Journal of Migration and Law*, 2006, p. 9 ss.

²⁴ C'est notamment le cas de la Grande Bretagne.

souvent que de telles assurances ne soient pas observées d'autant plus qu'elles ne prévoient presque jamais des mécanismes aptes à en contrôler l'efficacité; c'est la raison pour laquelle plusieurs institutions (Haut-Commissaire des Nations Unies aux droits de l'homme, Rapporteur Spécial des Nations Unies contre la torture, Assemblée Générale des Nations Unies, Commissaire pour les droits de l'homme du Conseil de l'Europe, Parlement européen²⁵, ainsi que de nombreuses ONG²⁶) ont considéré les assurances diplomatiques comme «inherently unreliable»²⁷. L'attitude du Comité pour les droits de l'homme, du Comité contre la Torture²⁸ et de la Cour européenne des droits de l'homme a été un peu différente. C'est le cas, en particulier, de la Cour de Strasbourg, qui pour l'arrêt *Chahal* avait considéré comme inadéquates les assurances offertes par le gouvernement indien, alors qu'elle les a jugées suffisantes dans de nombreuses affaires postérieures²⁹. Dans *Saadi*, la Cour a trouvé, dans le cas d'espèce, ces assurances tout à fait insuffisantes. Ce qui nous semble remarquable ce n'est pas le fait que la Cour ait trouvé les assurances fournies par la Tunisie non satisfaisantes : une conclusion différente aurait été vraiment surprenante car la Tunisie s'est limitée à renvoyer au droit interne et à rappeler qu'elle avait ratifié des traités internationaux sur les droits humains; il est surprenant, en revanche, que la Cour ait reconnu un poids décisif à l'absence d'un mécanisme apte à en contrôler l'efficacité

²⁵ Voir, plus spécifiquement, les observations de Louise Arbour, High Commissioner for Human Rights, Human Rights Day statement – On Terrorists and Torturers, United Nations, New York, 7 December, 2005 available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E (10/15); Rapporteur Spécial contre la torture des Nations Unies, Manfred Nowak, UN Doc. E/CN.4/2006/6 du 23 décembre 2005, par. 32; les résolutions de l'Assemblée générale des Nations Unies n. 61/153, 19 décembre 2006 (UN Doc. A/RES/61/153), et n. 62/148, 18 décembre 2007 (UN Doc. A/RES/62/148); au niveau européen voir, parmi les autres, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Sweden on 21-23 April 2004*, adopté le 8 juillet 2004, CommDH(2004)13, parr. 17-19) et la résolution du Parlement européen du 14 février 2007 (notamment le considérant G).

²⁶ Voir le *Joint Statement* signé par plusieurs ONG "Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment" du 12 mai 2005, disponible, entre autre, sur le site www.hwr.org.

²⁷ Voir le *Joint Statement* cité à la note qui précède.

²⁸ Pour la pratique de ces organismes voir S. Joseph, K. Mitchell, L. Gyorki & C. Benninger-Budel, *Seeking Remedies for Torture Victims*, Genève, 2007, pp. 224-227.

²⁹ Voir notamment *Al-Moayad c. Germania*, requête n. 35865/03, décision du 20 février 2007.

– d’une manière analogue à ce que le Comité contre la torture avait souligné dans l’affaire *Agiza c. Suède*³⁰.

La conclusion à laquelle est parvenue la Cour dans une affaire récente (*Othman c. Royaume Uni*, du 17 janvier 2012), relativement à l’accord (Memorandum of understanding, ci-après *MOU*) conclu avec la Jordanie au sujet du requérant, est tout à fait différente. Le demandeur – qui avait déjà subi dans le passé des tortures en Jordanie, d’où il s’était enfui en se réfugiant en Grande Bretagne qui lui avait donné le statut de réfugié – avait été emprisonné en 2002 sous l’accusation de terrorisme. En 2005, suite aux modifications apportées à l’*Anti-terrorism Crime and Security Act*, le requérant avait été libéré sous caution, mais pour faire l’objet, quelques mois après, d’un arrêté d’expulsion. Après l’épuisement des voies de recours internes, le requérant avait saisi la Cour de Strasbourg, en alléguant la violation de l’art. 3 CEDH (ainsi que de l’art. 6: voir par. suivant) dans le cas d’exécution de l’arrêté d’expulsion (et en demandant aussi des mesures provisoires de suspension de l’arrêté en question, aux termes de l’art. 39 du Règlement de la Cour: la Cour avait accueilli cette requête).

Le Gouvernement britannique affirmait qu’il n’y avait pas de risque de torture pour le requérant en vertu de l’existence du MOU. Après avoir rappelé sa jurisprudence en matière d’assurances diplomatiques, à savoir qu’il faut vérifier “whether the assurances obtained *in a particular case*³¹ are sufficient to remove any real risk of ill-treatment”, en considérant “both the general human rights situation in that country and the particular characteristics of the applicant”, la Cour avait fourni pour la première fois à cette fin une longue liste d’éléments à prendre en considération, parmi lesquels le caractère spécifique ou vague des assurances, mais aussi l’autorité dont elles émanent, la solidité des relations diplomatiques entre l’Etat d’envoi et celui de destination, l’existence de mécanismes de contrôle dans ce pays, la circonstance que la fiabilité des assurances ait déjà éventuellement fait l’objet de vérification de la part des juridictions internes de l’Etat d’envoi. Comme il s’agissait d’assurances très détaillées, fournies par le plus haut niveau de l’Etat, en mesure de lier le gouvernement jordanien, appuyées par le roi de Jordanie lui-même, et compte tenu aussi des fortes relations

³⁰ Décision du 20 juin 2005 (CAT/C/34/D/195/2002). Voir M. Jones, “Lies, Damned Lies and Diplomatic Assurances ...”, cit.

³¹ Italique ajouté.

diplomatiques entre les deux pays, la Cour avait conclu à leur fiabilité dans le cas d'espèce.

Pour finir, la Cour affirmera malgré tout que le requérant ne peut pas être expulsé parce qu'il risque de subir «un déni de justice flagrant» en Jordanie, concept que nous tenterons d'éclairer ci après. Cependant, il convient de souligner que, d'après la Cour il est possible d'expulser une personne, en présence d'assurances détaillées, même si le Pays de destination a systématiquement et impunément recours à la torture. Il s'agit sans aucun doute de l'un des points les plus controversés de l'arrêt³² et le plus favorable à l'Etat défendeur; le Royaume Uni a en effet préféré ne pas demander le renvoi à la Grande Chambre pour le réexamen de l'arrêt³³, de crainte que ce principe ne puisse être remis en question: comme l'a affirmé le Ministre de l'Intérieur britannique, demander le renvoi «would risk reopening our wider policy of seeking assurances about the treatment of terror suspects in their home countries»³⁴. La Grande Bretagne a par contre préféré suivre le chemin des assurances diplomatiques même sous l'aspect pour lequel elle s'est trouvée en situation de partie perdante, aspect relatif à l'art. 6; sur ce point voir le paragraphe suivant.

4. *L'expulsion et «le déni de justice flagrant»*

A partir de l'arrêt *Soering*, la Cour a en principe admis la possibilité d'une violation «par ricochet» de l'article 6 CEDH – qui consacre le droit à un procès équitable – en cas d'expulsion vers un pays où l'intéressé risquerait de subir un «déni de justice flagrant». Cette affirmation de principe a été réitérée dans plusieurs affaires, sans pourtant être suivie par des condamnations. Cela jusqu'à l'arrêt *Othman c. Royaume Uni*, déjà cité et dans lequel la Cour européenne des droits de l'homme a reconnu pour la première fois la violation de cet article, eu égard au risque réel que des preuves obtenues au moyen de la torture soient admises lors du procès de l'intéressé en Jordanie.

³² Voir C. Mc Carthy, “Diplomatic Assurances, Torture and Extradition: The Case of Othman (Abu Qatada) v. the United Kingdom”, www.ejiltalk.org/, 18 janvier 2012 (10/15).

³³ C'est par contre le requérant qui a demandé, le 17 avril 2012, le renvoi à la Grande Chambre, qui a été cependant refusé, en date du 9 mai 2012. Sur cette dernière décision voir H. Labayle, “Du bon usage des délais de renvoi devant la Grande chambre de la CEDH ... L'éloignement d'Abu Qatada est désormais possible”, in *RUEDELSJ*, 11 mai 2012.

³⁴ House of Commons Debate 17 Février 2012, colonne 175.

Une analyse approfondie de cet arrêt, montre que la Cour affirme d’abord que “A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article”. Par la suite, elle examine si l’admission de preuves obtenues au moyen de la torture constitue un déni de justice. A cette fin elle se réfère non seulement à sa jurisprudence antérieure sur ce sujet, notamment l’arrêt *Gäfgen c. Allemagne*, du 1er juin 2010, mais aussi au droit international, et en particulier à l’art. 15 de la Convention des Nations Unies contre la torture, qui interdit, en termes absolus, l’utilisation de preuves obtenues au moyen de la torture. Elle en déduit que “the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial”, en ajoutant que “It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome”.

Pour finir la Cour entreprend d’analyser si dans le cas d’espèce il y avait le risque que des preuves obtenues par la torture puissent être utilisées dans le procès auquel le requérant serait soumis en Jordanie. A cet effet la Cour, après avoir pris acte de ce qui avait déjà été constaté par les tribunaux internes – c’est-à-dire que l’incrimination de M. Othman se basait sur deux témoignages obtenus par la torture – est amenée à se poser la question de savoir s’il existe un «risque réel» que ces preuves puissent être admises dans le procès de M. Othman, après son renvoi en Jordanie. Après avoir affirmé que «the balance probabilities test» adopté par la Chambre des Lords dans l’affaire *A. et a. (n. 2)* n’était pas opportun dans ce cas³⁵, la Cour opte pour «un aménagement probatoire favorable au requérant³⁶, et cela sous un

³⁵ Dans ce cas la Chambre des Lords avait condamné l’utilisation de preuves obtenues par la torture, mais elle avait ensuite, à la majorité de quatre juges contre trois, décidé que les preuves ne devaient être exclues que dans les cas où, selon «a balance of possibilities», il était possible d’établir qu’elles avaient été obtenues par la torture. Pour une critique de la position de la Chambre des Lords et des considérations sur les implications de la prise de position de la Cour dans l’affaire Othman voir A. Tomkins. “National Security Case Law: A Continuing Trend”, <http://britgovcon.wordpress.com/category/national-security-and-counter-terrorism/> (10/15).

³⁶ Cfr. N. Hervieu, “Encadrements conventionnels des expulsions d’étrangers

double aspect: pour ce qui est relatif à la preuve que les déclarations rendues contre lui avaient été obtenues par la torture (par. 280), et ce qui concerne le fait qu'il existe un risque réel que ces témoignages soient utilisés lors du procès auquel il sera soumis en Jordanie (par. 282). La conclusion est que «l'expulsion vers la Jordanie violerait l'article 6».

Par la suite le Royaume Uni a obtenu des assurances diplomatiques concernant spécifiquement le procès en Jordanie, et a exécuté l'expulsion.

5. L'expulsion et la protection de la vie familiale

La CEDH offre aux étrangers une protection «par ricochet» également par le biais de l'art. 8. Cependant, contrairement à l'article 3, qui a une valeur absolue, cette norme prévoit le droit au respect de la vie privée et familiale mais admet des limitations : à condition qu'elles soient prévues par la loi et nécessaires dans une société démocratique, c'est-à-dire justifiées par un besoin social impérieux et proportionnées au but légitime poursuivi. La marge d'appréciation dont jouit l'État varie en fonction du but poursuivi et la sûreté nationale implique sans aucun doute un pouvoir discrétionnaire assez grand, mais cela ne veut pas dire qu'il est sans limites. Même dans ces cas, en effet, la Cour de Strasbourg devra évaluer si l'expulsion est proportionnée au but poursuivi.

Dans la plus grande partie des décisions concernant l'expulsion d'étrangers la Cour n'a pas examiné ce grief sur le fond parce qu'elle avait déjà conclu à la violation de l'art. 3³⁷, à l'exception de l'arrêt *Cherif et autres c. Italie*, du 7 juillet 2009. Dans cette affaire;

terroristes menacés dans le pays de destination”, in *Lettre «Actualités Droits-Libertés» du CREDOF*, 24 janvier 2012.

³⁷ Déjà dans l'arrêt *Chahal c. Royaume Uni* la Cour avait exclu l'examen du fond du grief visé à l'art. 8 avec la formulation (reprise dans l'affaire Saadi et suivantes) « N'ayant aucun motif de douter de ce que le gouvernement défendeur se conformera au présent arrêt, elle n'estime pas nécessaire de trancher la question hypothétique de savoir si, en cas d'expulsion vers l'Inde, il y aurait aussi violation des droits reconnus aux requérants par l'article 8 de la Convention”. Comme l'a montré l'opinion partiellement dissidente, dans l'affaire *Toumi c. Italie*, du juge Malinverni, opinion à laquelle se rallient les juges Björgvinsson et Popovic, il faudrait de toute façon distinguer entre violation hypothétique et violation réelle. Lorsque l'expulsion est exécutée (comme dans les affaires *Trebelsi e Toumi*), et le requérant a effectivement été séparé de son épouse et/ou de ses enfants, «la Cour n'aurait dès lors pas dû se satisfaire, comme elle l'a fait dans l'arrêt *Saadi*, d'examiner la requête sous le seul angle de l'article 3. Elle aurait également dû examiner le bien-fondé du grief tiré de la violation alléguée de l'article 8».

l'exécution de l'expulsion s'est produite le jour même de la notification, et le requérant n'a pas eu le temps de contacter un avocat, ni pour saisir les juridictions internes (s'agissant cependant d'une mesure d'expulsion adoptée en application de la loi n. 155/2005³⁸, concernant «mesures urgentes pour combattre le terrorisme», il aurait été en tout cas forclos au juge italien de suspendre l'exécution), ni pour demander à la Cour européenne des droits de l'homme l'adoption d'une mesure d'urgence, aux termes de l'art. 39 du Règlement intérieur. C'est seulement par la suite que le requérant a introduit une requête devant cette Cour, requête qui cependant a été rayée du rôle, comme nous l'avons déjà souligné auparavant, pour défaut de procuration écrite³⁹. Toutefois, un grief au titre de l'art. 8 a été également présenté par sa femme en son propre nom, avec une procuration valide, et pour cette partie le recours a été déclaré recevable et examiné sur le fond, suivant le schéma classique de lecture de l'art. 8, qui peut se résumer dans les cinq questions suivantes: 1) Existe-t-il une vie familiale effective? 2) Existe-t-il une ingérence dans la vie familiale? 3) Est-ce que cette ingérence est prévue par la loi? 4) Poursuit-elle une fin légitime? 5) Est-ce qu'elle est «nécessaire dans une société démocratique», c'est-à-dire justifiée par un besoin social impérieux et proportionnée au but légitime poursuivi? En effet, dans l'affaire *Cherif*, la Cour a d'abord reconnu l'existence d'une ingérence dans la vie familiale: à l'époque du renvoi, Cherif était régulièrement résident en Italie depuis quatorze ans et marié à une femme italienne, ainsi que père de trois mineurs (de 10, 7 et 3 ans); ensuite, après avoir rapidement observé que «l'ingérence était prévue par la loi» (sans s'arrêter cependant sur la «qualité de la loi»: nous reviendrons sur ce point d'ici peu) et que cette ingérence poursuivait un but légitime, la Cour en vient à examiner la proportionnalité de la mesure, en estimant que «dans les circonstances particulières de l'espèce, les exigences de protection de l'ordre public et de la sécurité nationale l'emportent sur les intérêts de la famille» (par. 66).

Selon nous, le raisonnement de la Cour est vicié et peu convaincant.

³⁸ Sur cette loi, voir P. Bonetti, «Terrorismo e stranieri nel diritto italiano. Disciplina legislativa e profili costituzionali. II parte. Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione e asilo», in *Diritto, immigrazione e cittadinanza* n. 4/2005, p. 13 ss.

³⁹ L'avocat du requérant a fourni une copie de la procuration pour la procédure devant les juridictions internes (T.A.R.), mais non pour la procédure devant la Cour européenne des droits de l'homme.

La Cour de Strasbourg, en effet, afin d'évaluer si dans le cas spécifique l'expulsion était nécessaire dans une société démocratique, fait référence à la jurisprudence antérieure en matière d'expulsion et vie familiale (et en particulier à la décision *Üner c. Pays Bas*⁴⁰), mais n'applique pas d'une manière cohérente les critères visés dans cet arrêt. En effet, pour soutenir la thèse gouvernementale de la dangerosité du requérant, la Cour rappelle aussi quelques condamnations pénales précédentes du requérant (pour possession et vente de stupéfiants⁴¹). Toutefois, comme l'explique l'opinion dissidente des juges Tulkens, Jociene et Popovič, «Par comparaison avec d'autres affaires dont la Cour a été saisie, on ne peut raisonnablement soutenir que le parcours délinquant du requérant soit d'une gravité telle que «les exigences de protection de l'ordre public et de la sécurité nationale l'emportent sur les intérêts de la famille» [par. 66 de la décision *Cherif c. Italie*]». En outre, à notre avis, non seulement la référence aux précédentes condamnations du requérant n'est pas décisive pour justifier une condamnation, mais elle est hors de propos parce qu'en réalité le décret d'expulsion n'a pas été ordonné pour ces raisons, mais plutôt pour l'existence de soupçons d'appartenance à une organisation terroriste, soupçons basés entre autre sur des «données fragiles et relatives», comme les juges dissidents n'ont pas manqué de le souligner (à savoir, la fréquentation de personnes liées à la mouvance islamique et faisant l'objet d'enquêtes judiciaires pour terrorisme⁴²). Ce sont justement ces soupçons qui représentent le véritable motif qui pousse la majorité des juges à conclure que l'État – en faisant prévaloir l'intérêt public sur la protection de la vie familiale de la requérante – n'a commis aucun abus. Toutefois, comme l'observent précisément les juges dissidents «Il s'agit là, dans la jurisprudence de la Cour, d'un critère entièrement nouveau qui est susceptible de toutes les interprétations, *risquant d'ouvrir la voie à l'arbitraire*»⁴³.

Nous sommes ici devant un point à notre avis crucial: suffit-il de

⁴⁰ Arrêt du 18 octobre 2006, sur lequel voir C. Raux, «Les mesures d'éloignement du territoire devant la Grande Chambre de la Cour européenne des droits de l'homme», e M. F. Valette, ««Double peine»: les fausses notes de la jurisprudence de la Cour européenne des droits de l'homme», in *Revue trimestrielle des droits de l'homme*, 2007, respectivement p. 837 ss. et p. 1101 ss.

⁴¹ En 1996 à dix mois d'emprisonnement avec sursis pour possession de stupéfiants et en 1999 à un an et un mois d'emprisonnement pour possession et vente de stupéfiants.

⁴² Voir par. 9 de l'arrêt *Cherif*.

⁴³ Italique ajouté.

simples soupçons pour expulser un étranger ou est-il nécessaire qu'il y ait des garanties contre les atteintes arbitraires de l'exécutif aux droits fondamentaux protégés par la CEDH? A vrai dire, une réponse partielle⁴⁴ avait déjà été donnée dans un arrêt du 20 juin 2002, *Al-Nashif c. Bulgarie*⁴⁵, (qui a déjà trouvé plusieurs applications)⁴⁶, en ce qui concerne justement une expulsion pour des raisons de sécurité nationale. Dans cette affaire, pour la première fois en matière d'expulsion, la Cour a affirmé un principe fondamental – exprimé déjà en d'autres occasions

⁴⁴ Partielle parce que la Cour n'exige pas de contrôle judiciaire (ce qui, pour nous, est au contraire particulièrement important en matière de terrorisme). Sur ce point voir les conclusions.

⁴⁵ Pour un premier commentaire sur ce jugement voir A. Liguori, "Garanzie procedurali e rispetto della vita familiare in un'importante sentenza della Corte di Strasburgo", in *Giurisprudenza italiana*, 2003, p. 2009 ss. Comme le remarque D. Bonner, ("Porous border: terrorism and migration policy", in *Irregular Immigration and Human Rights: theoretical, European and international perspectives*, (B. Bogusz, R. Cholewinski, A. Cygan, E. Szyszczak dir.), Leiden, Boston, 2004, p. 93 ss.), et comme nous le soulignerons par la suite, dans le cas d'espèce la condamnation a été infligée du fait qu'il manquait la qualité de la loi, tandis qu'il n'y a eu aucun examen concernant la proportionnalité. Auparavant, par contre, la Commission, dans son rapport sur l'affaire *Chahal*, a observé que "Whilst the Commission acknowledges that States enjoy a wide margin of appreciation under the Convention where matters of national security are concerned, with possibly lower standards of proof being required under Article 8 compared to Article 3, it remains ultimately for the Government to satisfy the Commission that the grave recourse of deportation is in all the circumstances both necessary and proportionate" (par. 137), en concluant dans le cas d'espèce à la violation de l'art. 8 (parr. 139-140). Par la suite la Cour, dans l'affaire *Nolan c. Russie*, du 12 février 2009, a reconnu la violation de l'art. 8 à l'égard d'une expulsion pour raisons de sûreté nationale, parce que dans le cas d'espèce la Russie, en refusant certains documents à la Cour, "did not offer any justification which could outweigh the legitimate interest of the applicant and his son in staying together" (la Cour a aussi reconnu une violation de l'art. 38: sur ce point, ainsi que sur la condamnation ultérieure pour violation de l'art. 1 du Protocole n. 7: voir *ultra*, par. 5). A propos de l'art. 8, la Cour ajoute que "Furthermore, the Court reiterates that the State has a positive obligation to ensure the effective protection of children ... The manifest absence of an assessment of the impact of their decisions and actions on the welfare of the applicant's son must be seen as falling outside any acceptable margin of appreciation of the State" (par. 88).

⁴⁶ Voir, *ex multis*, les arrêts *Lupsa c. Roumanie*, du 8 juin 2006, *Kaya c. Roumanie*, du 12 octobre 2006, *Musa et a. c. Bulgarie*, du 11 janvier 2007, *Bashir c. Bulgarie* du 14 juillet 2007; *Liu et Liu c. Russie*, du 6 décembre 2007; *C.G. et a. c. Bulgarie*, du 24 avril 2008; *Raza c. Bulgarie* du 11 février 2010; *M. et a. c. Bulgarie*, du 26 juillet 2011; *Kaushal et a. c. Bulgarie*, du 3 septembre 2010 et *Geleri c. Roumanie*, du 15 février 2011; *Madah et a. c. Bulgarie*, du 10 mai 2012.

(les arrêts *Klass c. Allemagne* et *Rotaru c. Roumanie*⁴⁷ que la Cour a cités parmi d'autres) – à savoir, que “there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power”⁴⁸. Cela se traduit, toujours de l'avis de la Cour, par des garanties procédurales: “Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information”⁴⁹. Dans le cas d'espèce la Cour a ensuite effectivement condamné la Bulgarie⁵⁰ parce que la loi, qui était

⁴⁷ Il s'agit de décisions rendues en matière de restrictions à l'art. 8 pour raisons de lutte contre le terrorisme. Dans l'arrêt *Klass*, en réalité, la Cour examine si les garanties procédurales offertes sont aptes à prévenir les abus dans le cadre de la proportionnalité, tandis que dans les cas postérieurs, comme pour les arrêts *Malone c. Royaume Uni* et *Rotaru c. Roumanie*, elle prend en considération la qualité de la loi. Sur ce point voir O. de Schutter, “La Convention européenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme”, in *Lutte contre le terrorisme...*, cit., p. 85 ss; ainsi que P. De Sena, “Esigenze di sicurezza nazionale...”, cit., p. 206 ss. L'examen de la qualité de la loi, dans des cas de restrictions rendues nécessaires par des exigences de lutte contre le terrorisme, se révèle particulièrement important, comme nous le verrons, même dans le cadre de la jurisprudence de la Cour relativement à l'art. 5.

⁴⁸ Par. 119.

⁴⁹ Par. 123.

⁵⁰ Pour les juges Makarczyk, Butkevych et Botoucharova, par contre, l'absence de garanties procédurales aurait dû être examinée dans le cadre de la proportionnalité (et par conséquent, à leur avis, cette approche aurait amené à exclure une violation de l'art. 8: voir par. 4 de l'opinion dissidente). Voir aussi F. Bernard et A. Berthe (“Les garanties procédurales en matière de reconduite à la frontière au regard de la Convention européenne des droits de l'homme”, *Revue trimestrielle des droits de l'homme*, 1997, p. 17 ss.), qui avaient supposé, avant que l'arrêt *Al-Nashif* soit rendu, la possibilité d'examiner l'aptitude des garanties procédurales en cas d'expulsion dans le cadre de la proportionnalité. Toutefois, la Cour a confirmé, dans une série d'affaires ultérieures (citées *supra*, note n. 46) de vouloir effectuer une telle vérification dans le cadre de la qualité de la loi. D'ailleurs, alors que l'arrêt *Al-Nashif* avait été adopté seulement à une majorité de 4 voix contre 3, les décisions suivantes ont été adoptées à l'unanimité; c'est la raison pour laquelle, selon nous, on peut parler d'une jurisprudence désormais consolidée.

la base légale de l'expulsion, n'avait pas une «qualité» suffisante à garantir «the necessary safeguards against arbitrariness» (par. 128) et partant elle n'a pas jugé nécessaire de vérifier si la mesure était proportionnée. À notre avis, même dans le cas d'espèce il aurait été souhaitable que la Cour approfondisse un peu plus l'examen de la qualité de la loi. Si elle l'avait fait, l'Italie ne pouvait qu'être condamnée, car la loi à la base de l'expulsion⁵¹, en excluant tout pouvoir de suspension de la part du juge du recours – même face à l'allégation de violations graves et irréversibles de droits fondamentaux – n'était pas du tout apte à assurer les garanties nécessaires contre l'arbitraire de la puissance publique.

Pour conclure, l'affaire *Cherif c. Italie* est à notre avis passible de critiques. Déjà l'évaluation faite par la majorité des juges sur la proportionnalité de la mesure ne nous semble pas entièrement partageable (compte tenu, comme le soulignent les juges dissidents, du jeune âge des enfants mineurs d'un côté et de l'autre, des faibles éléments à la base des soupçons, ainsi que de la «place prépondérante»⁵² du droit à la vie familiale). Ce qui, à notre avis, aurait dû être de toute façon décisif pour la constatation de violation de l'art. 8, en rendant superflu l'examen de la proportionnalité, c'est l'absence de la «qualité de la loi», autrement dit le fait que l'expulsion de Cherif ait été ordonnée “pursuant to a legal régime that does not provide the necessary safeguards against arbitrariness” (voir *mutatis mutandis* l'arrêt *Al-Nashif c. Bulgarie*, cité, par. 128).

6. Les garanties procédurales

L'arrêt *Al-Nashif c. Bulgarie* – qui reconnaît, pour la première fois, comme on l'a dit, la violation d'un droit substantiel (droit au respect de la vie familiale) en raison de l'absence de garanties procédurales dans le cas d'une expulsion pour des raisons de sûreté nationale – nous permet d'entrer dans le vif du sujet car il soulève la question des limites à l'expulsion des étrangers à la lumière de la CEDH, à savoir les garanties

⁵¹ Sur l'incompatibilité de cette législation avec la Constitution italienne et les traités internationaux voir P. Bonetti, “Terrorismo e stranieri ...”, cit.; A. G. Lana, A. Saccucci, “Il nuovo intervento legislativo alla luce delle norme internazionali sui diritti umani”, in *Diritto e Giustizia*, 2006, p. 149 ss.; A. Saccucci, “The Italian 2005 Anti-Terrorism Legislation in the Light of International Human Rights Obligations”, in *Italian Yearbook of International Law*, 2005, p. 167 ss.

⁵² Voir opinion dissidente citée.

procédurales. Il s'agit d'un aspect très important, compte tenu du fait que la reconnaissance de droits substantiels sans un droit d'agir correspondant est souvent illusoire⁵³. En matière d'expulsion, il faut cependant rappeler que jusqu'à présent la Cour européenne des droits de l'homme, malgré ce qu'elle a plusieurs fois réaffirmé à propos du rôle fondamental que revêt le droit à un procès équitable dans une société démocratique (caractérisée par la prééminence du droit, a toujours nié – avec des argumentations qui selon nous sont loin d'être décisives – l'applicabilité en la matière⁵⁴ de l'art. 6 qui prévoit le droit à un procès équitable.

Il s'ensuit que les articles qui peuvent entrer en jeu sont l'art. 1 du Protocole n. 7 (qui concerne spécifiquement les garanties procédurales en cas d'expulsion); l'art. 5 par. 4 (qui concerne en réalité les garanties en matière de détention, mais qui est particulièrement utile dans les cas – très fréquents – de détention en vue de l'expulsion) et l'art. 13, relatif au droit à un recours effectif et qui peut être invoqué seulement lorsqu'on allègue la violation d'un droit protégé par la CEDH (notamment ceux visés aux articles 3 et 8).

En ce qui concerne l'art. 1 du Protocole n. 7, il faut pourtant souligner que non seulement cette disposition n'est applicable qu'aux étrangers régulièrement résidants (et exclusivement à l'égard des États qui ont ratifié ce Protocole⁵⁵), mais qu'elle est en outre peu utile lorsque l'expulsion a été disposée pour des raisons de sûreté nationale : dans ce cas, en effet, la personne pourra être expulsée avant d'avoir exercé les garanties prévues et il est bien évident qu'effectuer une défense

⁵³ Sur l'importance des garanties procédurales voir aussi C. Harlow, "Access to justice as a Human right: the European Convention and the European Union", in *The UE and Human Rights* (P. Alston dir.), Oxford, 1999, p. 188 (qui cite à son tour J. Hart Ely, *Democracy and Distrust: A theory of Judicial Review*, 1980, Harvard Paperbacks), selon laquelle "Procedural rights, notably the rights of formal equality before the law and access to a court, are seen as an essential buttress for substantive rights". L'auteur souligne, entre autre, l'importance des garanties procédurales surtout pour les immigrés.

⁵⁴ Pour une critique de cette jurisprudence voir A. Liguori, *Le garanzie procedurali...*, cit., p. 12 ss; H. Tigroudja, "L'inapplicabilité de l'article 6, § 1 de la Convention à la procédure de relèvement d'une interdiction du territoire", in *Revue trimestrielle des droits de l'homme*, 2002, p. 446 ss; N. Blake, R. Husain, *Immigration, Asylum and Human Rights*, Oxford, 2003, 242 ss; N. Sitaropoulos, "The role and limits of the European Court of Human Rights in supervising state security and anti-terrorism measures affecting aliens' rights", in *Terrorism and the Foreigner ...*, cit., p. 101 ss.

⁵⁵ Les Etats qui ne l'ont pas encore ratifié, à l'heure actuelle, sont: Allemagne, Pays Bas, Royaume Uni et Turquie.

quelconque à partir de l'étranger est beaucoup plus onéreux et difficile – en outre, il se peut que des dommages graves se soient déjà produits⁵⁶. Toutefois, cet article, qui n'avait presque jamais été appliqué jusqu'à une époque récente, est en train d'acquiescer une nouvelle vigueur dans la jurisprudence de la Cour⁵⁷. En effet, le Rapport explicatif introduit une différenciation à propos des exceptions relatives à l'ordre public et à la sûreté nationale – exceptions qui, aux termes du par. 2, permettent de renvoyer l'exercice des garanties procédurales à une phase postérieure à l'exécution de l'expulsion: l'une et l'autre doivent respecter le principe de proportionnalité, mais c'est seulement dans le premier cas qu'il incombe à l'État de démontrer que l'expulsion est une mesure nécessaire; en revanche, si à l'origine de l'expulsion il y a des raisons de sûreté nationale, celles-ci doivent être considérées comme suffisantes⁵⁸. Cette affirmation, qui avait déjà fait l'objet de critiques en doctrine⁵⁹, a été récemment démentie par la Cour, qui n'a pas manqué de remarquer que, s'il est vrai que les États jouissent d'une vaste marge d'appréciation dans la détermination de ce qui est dans l'intérêt de la sûreté nationale, “however, that does not mean that its limits may be stretched beyond its natural meaning” (arrêt *C.G et a. c. Bulgarie*, du 24 avril 2008: dans ce cas la Cour exclut que la sûreté nationale puisse être invoquée pour justifier l'expulsion d'une personne soupçonnée d'être impliquée dans le trafic de stupéfiants). Par la suite, dans l'affaire *Nolan c. Russie*⁶⁰, du 19 février 2009, la Cour est même arrivée à exclure que cette exception peut être prise en considération, la Russie n'ayant pas fourni “any material or evidence capable of corroborating their claim that the

⁵⁶ Perte de travail, par exemple. Si, par contre, l'expulsion comporte la lésion de droits sauvegardés par la CEDH (tels que l'interdiction de la torture ou le droit au respect de la vie familiale) il sera possible d'invoquer l'art. 13, sur lequel voir *ultra*.

⁵⁷ Voir *Kaushal et a. c. Bulgarie*, du 3 septembre 2010 et *Geleri c. Roumanie*, du 15 février 2011.

⁵⁸ Voir Rapport explicatif, par. 15.

⁵⁹ Voir C. Campiglio, “Espulsione e diritti dell'uomo. A proposito dell'articolo 1 del Protocollo n. 7 addizionale alla Convenzione europea dei diritti dell'uomo”, in *Rivista di diritto internazionale*, 1985, 64 ss., selon laquelle «cependant, on ne peut pas se passer de remarquer que cette interprétation, quoique influente, ne trouve pas de vérification dans le libellé du texte conventionnel, qui ne semble pas vouloir diversifier les deux cas». Voir aussi P. Van Dijk, G. J. H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague, p. 507, pour lesquels cette interprétation serait contraire aux buts du Protocole.

⁶⁰ Sur cette affaire voir aussi la note n. 45.

interests of national security or public order had been at stake”⁶¹. En fait, la Cour avait demandé à la Russie de pouvoir examiner le rapport du Federal Security Service (qui avait été visionné par l’avocat du requérant dans la procédure interne), rapport qui contenait les contestations, couvertes par le secret d’état, à la base de l’expulsion. Sur la base du refus de la Russie la Cour de Strasbourg a déduit non seulement le défaut de la preuve de l’existence de raisons de sûreté nationale, mais encore une violation autonome de l’art. 38⁶².

Il convient de s’arrêter sur une autre norme très importante en matière de garanties procédurales: l’art. 5 par. 4, qui prévoit spécifiquement – contrairement à l’art. 1 du Protocole n. 7 et à l’art. 13 – le droit de s’adresser à un juge, au cas où la personne serait privée de la liberté au cours d’une procédure d’expulsion.

En ce qui concerne les détentions de personnes contre lesquelles des expulsions pour raisons de sûreté nationale sont en cours, la Cour a affirmé, à partir de l’arrêt *Chahal*, que les autorités nationales ne sont pas exemptées d’un “effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved”⁶³.

Le 19 février 2009, la Cour de Strasbourg s’est prononcée sur une affaire très importante, définie parfois comme «le Guantanamo britannique»⁶⁴ (*A. et a. c. Royaume Uni*). La Grande Bretagne, après le 11 septembre 2001, avait approuvé une loi qui permettait d’adopter à l’égard d’étrangers – soupçonnés d’exercer des activités terroristes – des «certificates» comportant l’incarcération sans inculpations pénales et sans limites de temps, en même temps qu’une dérogation (notifiée au

⁶¹ Dans son opinion dissidente, il observe, quant à l’art. 38, que “in Grand Chamber judgment *Stoll v. Switzerland* the Court accepted the idea of “a necessary discretion” for some confidential official documents of the member States (see *Stoll v. Switzerland* [GC], no. 69698/01, § 136, ECHR 2007)”; en ce qui concerne l’art. 1 du Protocole n. 7, que la Cour a donné “a new, rather radical, interpretation (very brief, I must say) of paragraph 2 of this provision”.

⁶² Sur la base de cet article les États doivent fournir toutes les facilités nécessaires aux fins d’un examen efficace de la question de la part de la Cour.

⁶³ Par. 131. Dans ce cas la Cour a statué que ni les procédures de *habeas corpus* devant les juridictions nationales, ni celles devant le comité consultatif n’étaient en mesure de satisfaire l’art. 5 par. 4.

⁶⁴ Voir N. Hervieu, “Lutte contre le terrorisme: état d’urgence et détention sans inculpations pénales de ressortissants étrangers”, in www.droits-liberts.org du 21 février 2009 (10/15). Sur cet arrêt voir aussi L. Zagato, “Ancora sul rapporto tra stato di eccezione e divieto di tortura”, in *La tortura nel nuovo millennio* (L. Zagato, S. Pinton dir.), Padova, 2010, p. 234 ss.

Secrétaire général du Conseil de l'Europe) aux termes de l'art. 15 de la CEDH. Plusieurs personnes effectivement soumises à la détention en application de cette loi introduisirent un recours devant les autorités nationales. Toutefois, n'ayant pas obtenu satisfaction (malgré la décision de la Chambre des Lords⁶⁵, qui en 2004⁶⁶ jugea la dérogation britannique contraire à l'art. 5 de la CEDH, en tant que disproportionnée et discriminatoire), elles décidèrent de saisir la Cour européenne des droits de l'homme, en invoquant l'art. 3 (soit tout seul soit combiné à l'art. 13) et l'art. 5 par. 1, 4 et 5. Alors que le premier grief, eu égard à la durée indéterminée de la détention, a été rejeté (la Cour, tout en reconnaissant l'angoisse profonde que cela a provoqué, nie qu'ait été atteint le seuil minimum permettant de parler de traitement inhumain), le Royaume Uni a été condamné pour les autres griefs. Avant d'examiner la partie de l'arrêt qui concerne spécifiquement les garanties procédurales prévues par l'art. 5 par. 4, il est intéressant de souligner que, par rapport à l'art. 5 par. 1, le juge de Strasbourg affirme avant tout que, dans le cas d'espèce, la détention des requérants⁶⁷ ne pouvait pas être considérée comme étant «en vue de leur expulsion», aux termes de l'art. 5 par. 1 lettre *f*, dès lors qu'il manquait «une perspective réaliste d'expulser les intéressés pendant la période où ils furent détenus»⁶⁸ (en fait, la détention à durée indéterminée avait été disposée à défaut de l'exécution de l'expulsion car celle-ci aurait exposé les terroristes présumés au risque de traitements inhumains et dégradants dans le pays de destination, en violation de l'art. 3 CEDH). Quant à la dérogation notifiée à cet égard par le Royaume Uni, qui s'était rallié à la décision de la Chambre des Lords, la Cour conclut que «les mesures dérogatoires

⁶⁵ Comme l'a écrit C. Bassu ("Corte europea dei diritti umani e piani antiterrorismo nazionali. Perché l'emergenza non legittima l'oblio dei diritti", in *Diritto pubblico comparato e europeo*, 2009, p. 1048), la décision de la Chambre des Lords – non contraignante – a donné lieu à une «épreuve de force institutionnelle tout à fait nouvelle». Pour une reconstruction de la complexité judiciaire et normative de cette situation voir aussi les par. 8 et ss. de l'arrêt. Parmi les nombreux commentaires voir, notamment, E. Sciso, "Libertà fondamentali della persona e misure di contrasto al terrorismo internazionale: Governo, Corti e Parlamento britannici a confronto", in *Rivista di diritto internazionale*, 2005, p. 454 ss.

⁶⁶ 16 décembre 2004 ([2004] UKHL 56).

⁶⁷ De quelques-uns d'entre eux: voir par. 170.

⁶⁸ Comme le remarque la Cour, c'est seulement en 2003 que le Royaume Uni commença à négocier avec l'Algérie et la Jordanie pour obtenir des garanties diplomatiques; il ne les a reçues concrètement qu'en août 2005 (par. 86).

étaient disproportionnées en ce qu'elles opéraient une discrimination injustifiée entre étrangers et citoyens britanniques»⁶⁹. En fait, comme le mentionne la Cour, «En choisissant de recourir à une mesure relevant du droit des étrangers pour traiter un problème d'ordre essentiellement sécuritaire, l'exécutif et le Parlement lui ont apporté une réponse inadaptée et ont exposé un groupe particulier de terroristes présumés au risque disproportionné et discriminatoire d'une détention à durée indéterminée».

En ce qui concerne plus spécifiquement les garanties procédurales pour contester la détention, l'arrêt permet d'éclairer un aspect crucial des expulsions pour raisons de sûreté nationale, à savoir l'utilisation de documents couverts par le secret. Déjà dans l'affaire *Chahal* la Cour avait reconnu que, s'il est vrai que l'utilisation de documents confidentiels peut être inévitable lorsqu'il s'agit de la sécurité nationale, «Cela ne signifie cependant pas que les autorités nationales échappent à tout contrôle des tribunaux internes dès lors qu'elles affirment que l'affaire touche à la sécurité nationale et au terrorisme». Elle avait ajouté par conséquent que toutes limitations dans l'exercice des droits de défense devaient pouvoir être compensées dans la procédure devant les autorités judiciaires. Or, dans l'arrêt *A. et a. c. Royaume Uni*, après avoir relevé que dans le cas d'espèce la loi anglaise avait effectivement prévu à cette fin le recours à des avocats spéciaux, autorisés à examiner les documents couverts par le secret, la Cour a constaté la violation de l'art. 5 par. 4 (à l'égard des quatre requérants) du fait que «les avocats spéciaux n'étaient aptes à remplir efficacement cette fonction que si les détenus avaient reçu suffisamment d'informations sur les charges retenues contre eux pour pouvoir leur donner des instructions utiles»⁷⁰. En conclusion, grâce aussi à l'interprétation offerte par la Cour de Strasbourg, les garanties prévues par l'art. 5 par. 4 sont très étendues. Toutefois, il convient de rappeler que cela ne concerne que l'hypothèse de détention en vue d'une expulsion.

Par contre, dans les cas où les étrangers ne sont pas soumis à des mesures de privation de liberté, il est possible d'invoquer l'art. 13⁷¹, qui

⁶⁹ Par. 190.

⁷⁰ Par. 220.

⁷¹ Article 13: «Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles».

prévoit le droit à un recours effectif, mais seulement s'il est question de droits protégés par la CEDH (il s'agira essentiellement de ceux visés aux articles 3 et 8, objet de protection «par ricochet»).

Comme la Cour l'a précisé, l'article 13 garantit un recours effectif devant une instance nationale à quiconque *allègue* la violation d'un droit prévu par la Convention⁷². Selon une jurisprudence constante, il se peut même que l'instance mentionnée à l'article 13 ne soit pas une autorité judiciaire, mais, de toutes façons, elle devra être indépendante⁷³.

En ce qui concerne plus spécifiquement les expulsions pour raisons de sécurité nationale, il convient encore une fois de se référer aux arrêts *Chahal* (pour les dispositions combinées des articles 13 et 3) et *Al-Nashif* (pour les dispositions combinées des articles 13 et 8).

Dans le premier cas, la Cour a affirmé tout d'abord que la notion de recours effectif au sens de l'art. 13 exige d'examiner en pleine indépendance s'il existe des raisons sérieuses de craindre un risque réel de traitements contraires à l'article 3 dans le pays de destination; ensuite que cet examen ne doit pas tenir compte des raisons qui ont porté à l'expulsion, quand bien même il s'agirait d'une menace à la sécurité nationale. À cet égard, un passage de l'arrêt a retenu notre attention: dans celui-ci la Cour de Strasbourg souligne que "the requirement of a remedy which is «as effective as can be» [qui avait été considéré suffisant, dans les affaires *Klass c. Allemagne* et *Leander c. Suède*, lorsque des exigences de protection de la sécurité nationale sont en jeu] is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial". Dans le cas d'espèce, la Cour est effectivement parvenue à la conclusion que, à la lumière de l'ampleur des carences tant des procédures juridictionnelles de contrôle, que des procédures devant l'organe consultatif, les recours, considérés dans leur ensemble, ne satisfont pas les conditions requises par les dispositions combinées des articles 13 et 3: c'est en particulier un examen indépendant qui avait manqué, aussi bien de la part de l'autorité judiciaire, que de la part de l'organe consultatif; en ce qui concerne plus spécifiquement la procédure devant ce dernier, le requérant n'avait reçu qu'une communication sommaire des raisons de son expulsion sans avoir eu droit, en outre, à se faire

⁷² Arrêt *Klass c. Allemagne*, du 6 septembre 1978. Le grief doit être en tout cas "défendable".

⁷³ Arrêt *Silver et a. c. Royaume Uni*, du 25 mars 1983.

représenter par un avocat; de plus, l'avis de l'organe consultatif n'était ni contraignant ni public⁷⁴.

Dans l'affaire *Al- Nashif*, (voir *supra*), affaire relative à un apatride d'origine palestinienne, expulsé lui-aussi pour des raisons de sécurité nationale, l'art. 13 n'avait pas été invoqué en relation avec l'art. 3, mais plutôt avec l'art. 8. Or, la Cour n'a pas manqué de souligner que, s'il est vrai que dans ce cas (ne s'agissant pas d'un droit absolu comme dans le cas où l'on invoque l'art. 3), "where national security considerations are involved, certain limitations on the type of remedies available to the individual may be justified", la garantie d'un recours effectif demande toutefois «as a minimum» que :

- l'autorité indépendante compétente à examiner le recours doit avoir accès aux raisons à la base de la mesure d'expulsion, même si ces raisons ne sont pas accessibles au public;
- cet organe doit avoir la compétence pour rejeter les affirmations de l'exécutif sur l'existence d'une menace pour la sécurité nationale, s'il les juge arbitraires ou déraisonnables;
- la procédure doit se dérouler en contradictoire;
- l'autorité doit pouvoir évaluer l'existence d'une proportionnalité entre l'intérêt collectif et le droit de l'individu à la protection de la vie familiale⁷⁵.

Rien n'est dit explicitement à propos de l'effet suspensif ; il s'agit d'un point d'importance cruciale, car les législations nationales adoptées vis-à-vis des étrangers pour combattre le terrorisme tendent souvent à faciliter l'éloignement de personnes dangereuses, au mépris des droits de l'homme et notamment des garanties procédurales. Une exception au caractère suspensif du recours – si l'expulsion est disposée pour des «raisons impératives de sûreté publique» – est même prévue dans la directive communautaire 2004/38/CE et des exceptions en ce sens sont également visées à l'art. 1 du Protocole n. 7 CEDH et à l'art. 13 du Pacte relatif aux droits civils et politiques. Toutefois, il est évident que ces exceptions sont particulièrement graves au cas où le renvoi exposerait la personne à un risque de torture dans le pays de destination: dans la pratique, l'interdiction de «refoulement» risque de devenir vaine si un recours effectif, pour contester l'expulsion et en obtenir la suspension, n'est pas prévu.

⁷⁴ Ces argumentations ont aussi amené à la condamnation pour violation de l'art. 5 par. 4.

⁷⁵ Par. 137.

En ce sens il est fort appréciable que dans l'affaire *Abdolkhani et Karimnia c. Turquie*, du 22 septembre 2009, relative à l'expulsion de deux anciens membres de l'OMP, expulsion disposée pour raisons de sécurité nationale, la Cour se soit prononcée clairement sur la question de l'effet suspensif. Dans cette décision, elle affirme explicitement que «le contrôle juridictionnel dans les cas d'expulsion ... ne peut être considéré comme un recours effectif, dans la mesure où une demande d'annulation d'un arrêté d'expulsion est dépourvue d'effet suspensif» (par. 116).

Cet arrêt atteste donc, encore une fois, la capacité de la Cour “to act as a strong bulwark against European States unwilling or incapable of providing effective protection to aliens charged with or suspected of terrorism-related offences, especially when the latter are in the most vulnerable state of being subject to deportation or extradition”⁷⁶. En outre, par cet arrêt, la Cour de Strasbourg se rallie à ce qui avait été affirmé précédemment par le Comité des droits de l'homme (affaire *Al-Azery c. Suède*), ainsi que par le Comité contre la torture (affaire *Agiza c. Suède*)⁷⁷.

7. Conclusions

Il est vrai que – même lorsque des exigences de sûreté nationale sont en jeu – la Cour européenne a manifesté sa fermeté en réaffirmant le caractère absolu⁷⁸ de l'interdiction de la torture et de la conséquente

⁷⁶ N. Sitaropoulos, “The role ...”, cit., p. 87.

⁷⁷ Respectivement décision du 10 novembre 2006 (CCPR/C/88/D/1416/2005) et décision du 20 juin 2005 (CAT/C/34/D/195/2002). Sur ce point voir A. Liguori, *Le garanzie procedurali ...*, cit., p. 207 ss. Les deux comités ont non seulement souligné la nécessité d'employer tous les remèdes effectifs possibles *avant* l'exécution de l'expulsion – lorsque la personne risque d'être soumise à la torture, même dans les cas où sont en jeu des exigences de sûreté nationale – mais ils ont aussi déduit, de l'exécution immédiate de l'expulsion, la violation du droit de recours supranational, respectivement prévu par l'art. 1 Protocole n. 1 CCPR et par l'art. 22 CAT: comme le souligne le Comité CAT, “in order for this exercise of the right of complaint to be meaningful rather than illusory, however, an individual must have a reasonable period of time before execution of a final decision to consider whether, and if so to in fact, seize the Committee”.

⁷⁸ A ce propos, soulignons que la Cour de justice de l'Union européenne, appelée à se prononcer sur l'interprétation des causes d'exclusion du statut de réfugié dans la directive 2004/83/Ce, dans l'arrêt *Allemagne c. B. et D.*, du 9 novembre 2010, s'est limitée à affirmer, entre autres, que les États membres peuvent reconnaître un droit d'asile au titre de leur droit national à une personne exclue du statut de réfugié en vertu

interdiction d'expulsion vers des pays dans lesquels la personne risque d'être soumise à un tel traitement⁷⁹. Par contre, nous considérons comme moins appréciables ses jugements en ce qui concerne la relevance accordée aux assurances diplomatiques, ainsi que l'examen du grief relatif à l'art. 8 (dans l'affaire *Cherif*). Toutefois, il faut se féliciter des affirmations contenues dans les arrêts *Othman c. Royaume Uni* et *Abdolkhani et Karimnia c. Turquie*: le premier affirmant l'existence d'un «dénî de justice flagrant», si dans le pays de destination il y a un risque réel que des preuves obtenues au moyen de la torture soient admises lors du procès de l'intéressé; le deuxième attestant la nécessité d'un effet suspensif même pour les recours contre des expulsions disposées pour raisons de sécurité nationale, lorsque ces expulsions exposent le destinataire d'une telle mesure au risque de torture dans le pays de destination⁸⁰.

Cependant sous l'angle des garanties procédurales, la jurisprudence de Strasbourg continue, selon nous, à prêter le flanc à une critique plus générale, qui ne concerne pas exclusivement l'hypothèse des expulsions pour raisons de sûreté nationale mais qui, relativement à telles situations, est particulièrement grave. Nous nous référons à l'arrêt

de l'une des clauses d'exclusion de la directive (sur cet arrêt, cf. T. Syring, "Joined Cases C-57/09 and C-101/09, Federal Republic of Germany v. B & D (E.C.J.), Introductory Note", *International Legal Materials*, 2011, p. 114 ss.). Il est, à notre avis, critiquable que la Cour de Luxembourg n'ait pas souligné en même temps que, indépendamment de l'éventuel permis humanitaire que l'Etat décide d'accorder, il existe une interdiction absolue de refoulement, en vertu, entre autres, de l'art. 3 de la CEDH, tel qu'il est interprété par la Cour de Strasbourg. Comme chacun sait l'Union Européenne doit respecter les droits de l'homme, tels qu'ils résultent des traditions constitutionnelles des Etats membres, de la Convention européenne et de la Charte des droits fondamentaux de l'Union européenne. Cette dernière prévoit explicitement, à l'art. 19, le principe de *non refoulement* et selon les explications relatives à la Charte (qui sont désormais explicitement mentionnées dans le texte de la Charte: voir art. 52 par. 7) «Le sens et la portée des droits garantis sont déterminés non seulement par le texte de ces instruments, mais aussi par la jurisprudence de la Cour européenne des droits de l'homme et par la Cour de justice de l'Union européenne» (Explication ad article 52 – Portée et interprétation des droits et des principes).

⁷⁹ En ce qui concerne plus spécifiquement le principe de «non refoulement», plusieurs États européens (outre l'Italie et la Grande-Bretagne, et certainement la Lituanie, le Portugal, la Slovaquie, tiers intervenants dans l'affaire *Ramzy c. Pays Bas*) et au moins un Etat non européen (le Canada, dans la célèbre affaire *Suresh*, du 11 janvier 2002) soutiennent la nécessité d'un balancement.

⁸⁰ La Cour a par la suite confirmé ce principe: voir l'arrêt *Auad c. Bulgarie*, du 11 octobre 2011, parr. 120-123.

*Maaouia c. France*⁸¹, qui exclut l'applicabilité de l'art. 6 – sur le procès équitable – en matière de séjour et d'expulsion d'étrangers. Comme le juge Loucaides l'a remarqué dans son opinion dissidente, opinion à laquelle s'est rallié le juge Traja, «il est inconcevable de garantir dans une Convention – qui, selon son préambule, était censée assurer «ces libertés fondamentales qui constituent les assises mêmes de la justice (...) dans le monde» et mettre en œuvre le principe de la «prééminence du droit» – une juste administration de la justice pour certains droits et obligations juridiques seulement, mais non pour les droits concernant les relations entre l'individu et l'Etat».

Plus spécifiquement, il nous semble particulièrement grave que l'individu faisant l'objet d'un décret d'expulsion n'ait pas de droit d'accès à un juge, lorsque des exigences liées à la sécurité nationale sont en jeu. S'il est vrai, comme il a été observé⁸², que «dans des situations d'urgence, telle que la lutte au terrorisme, le processus politique risque d'être trop réactif face à l'urgence des préoccupations populaires, amenant les autorités à dissiper les craintes du plus grand nombre au détriment des droits de quelques – uns», c'est justement à ce moment là que les juges devraient remplir avec une attention accrue⁸³ leur devoir de sauvegarder l'Etat de droit, principe fondamental de toute société démocratique.

⁸¹ Arrêt du 5 octobre 2000 : pour la doctrine voir la note n. 54.

⁸² Voir les conclusions de l'avocat général Poiares Maduro, déposées le 23 janvier 2008, dans l'appel relatif aux affaires *Kadi et Yusuf*, concernant la congélation de biens de terroristes présumés et la violation alléguée de certains droits fondamentaux des requérants, parmi lesquels justement le droit à un recours juridictionnel effectif. La Cour de justice, dans l'arrêt du 3 septembre 2008 (C 402/05 P et C 415/05 P), a affirmé que le principe de la protection juridictionnelle effective empêche de soustraire complètement au contrôle juridictionnel un acte concernant la sûreté nationale et le terrorisme.

⁸³ Voir aussi, dans un sens analogue, le Comité CAT qui, dans la décision *Agiza c. Suède* susmentionnée, a justement souligné que les considérations relatives à la sûreté nationale “*emphasize the importance of appropriate review mechanism*” (italique ajouté).

ASSESSING THE EFFECTIVENESS OF THE BLUE CARD
DIRECTIVE BETWEEN CHALLENGING TRANSPOSITION
PROCESSES, LACKLUSTRE RESULTS, AND PROPOSALS
FOR REFORM: REMARKS FROM THE ITALIAN PERSPECTIVE

*Marco Fasciglione**

1. Introduction

In the last decades the EU has made major efforts to introduce a new European scheme for labour immigration and, due to the idea that it can contribute to the economic vitality of the EU market, it has progressively welcomed the creation of flexible admission systems that are responsive to the priorities and volumes (number of people admitted) set by each member State. Under the Europe 2020 Strategy, the EU's ten-year growth strategy, the European Commission stressed the promotion of a forward-looking and comprehensive labour migration policy that responds in a flexible way to the needs of member States' labour markets with a view to raising employment levels¹ and to aiding the realization of the goal of the 2000 Lisbon Strategy: making the EU the most competitive and dynamic knowledge-based economy in the world. Hence, in a speech on 9 May 2013, the European Commissioner for Home Affairs, Cecilia Malmström, emphasised that Europe needs skilled workers in order to grow and, even though acknowledging the tough economic times, the Commissioner highlighted the serious labour market shortages, on the one hand, and the untapped pool of skills and talents of migrants, on the other one.² According to the point of view of EU institutions, well-managed migration policies aimed at attracting highly qualified migrants can contribute to boosting economic growth and competitiveness, addressing labour market shortages and offsetting the costs of demographic aging. It was this objective that led the EU to adopt in

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¹ European Commission, Communication from the Commission, *Europe 2020: the European Union strategy for growth and employment*, COM(2010) 2020, 3 March 2010, p. 18.

² Speech delivered by C. Malmström at the State of the Union Conference on 9 May 2013, "Europe should give migrants the opportunities they deserve", SPEECH/13/399.

2009 the so-called EU ‘Blue Card Directive’,³ in order to incentivize non-EU workers to enter the EU for the purpose of highly qualified employment. This legislation aspired to facilitating the admission and mobility of highly qualified migrants and their family members by harmonising entry and residence conditions throughout the EU and by providing for a legal status and a set of rights. The Directive gave birth, therefore, to a new work permit, the ‘European Blue Card’ to be released to third-country nationals aspiring to enter member States in order to take up highly qualified employment even in derogation to national rules on the entry of migrant workers, and particularly to those fixing quotas for the admission of third-country nationals. However, since the beginning the Blue Card *régime* has shown several deficiencies as to its effectiveness due to several factors. The Directive indeed only sets minimum standards and leaves much margin of appreciation to States in deciding to what extent to transpose the provisions of the Directive into their own legal systems. The Blue Card system also allows member States to leave in force domestic legislation, thereby accepting competition amongst national schemes and Directive’s on highly skilled migrant workers. As the Commission highlighted in its 2014 Report to the European Parliament and the Council on the application of the EU Blue Card Directive, this flexibility and the differences in the policy choices by member States in the implementation of the Blue Card directive at national level have led to wide differences between EU member States regarding legislative rules applicable and the number of Blue Cards issued to date.⁴

Only 3664 Blue Cards were issued in 2012 and around 15,000 in 2013. Though the number increased in 2013, this seems to be the consequence of delays in implementation of the Directive: the Blue Card scheme was in force only for few months in 2012 in most member

³ Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 25 May 2009.

⁴ See European Commission, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (‘EU Blue Card’), COM(2014) 287 final, of 22 May 2014. The Commission also expressed concerns about flaws in the transposition, the low level of coherence, the limited set of rights, the barriers to intra-EU mobility and a general lack of communication by MS of data and measures taken in application of the Directive, e.g. on volumes of admission, labour market tests, ethical recruitment, salary threshold (see p. 10).

States. In practical terms, fewer Blue Cards were granted in 2013 than the permits issued under various national schemes the year prior (around 20,000). In other words, the Directive did not increase highly skilled migration flows into the EU in the first two years of the scheme. As a consequence, and despite its relatively young age, several calls for a revision of the Blue Card legal system have begun to emerge, noting that the Directive has had little impact in achieving its objectives such as harmonization of the admission of highly qualified migrants at EU level and facilitating the conditions for those who wish to move to a second member State for highly qualified employment. At the end of the day, a review of the ‘EU Blue Card’ Directive has been put forward by the Juncker Commission as a first step towards a new European policy on legal migration, one of the ten priorities of this Commission. Indeed, in its work program the Juncker Commission has proposed revising the Blue Card Directive and recommended looking at this legislation “with a fresh pair of eyes to identify ways and means of substantially broadening this initiative”.⁵ Such a policy could help to address shortages of specific skills – alongside the development of skills within the existing EU workforce – and attract talent to better cope with the demographic challenge of the EU. Its aim is for Europe to become at least as attractive as such favourite migration destinations as Australia, Canada and the USA.⁶

2. The Directive 2009/50/ EC and the attraction of highly qualified workers in Europe

The reasons underlying the creation of the European Blue Card system are well-known and are already the subject of extensive analysis in literature.⁷ The Directive 2009/50/EC, indeed, is the first directive

⁵ See www.juncker.epp.eu/my-priorities.

⁶ At this time, a project of legislative initiative has been prepared by the Commission and is awaiting a final decision on whether this initiative will be pursued on, its content and structure (see European Commission, *Inception Impact Assessment, Review of Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (“EU Blue Card” Directive)*, of July 16th 2015.

⁷ As far as legal literature see E. Guild, “EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative”, in *CEPS Policy Brief*, No. 145, 15 November 2007 available at www.ceps.be/book/eu-policy-labour-migration-first-look-commissions-blue-card-initiative; S. Peers, “Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer

adopted by the European Union in relation to immigration work of third-country nationals after several failed attempts and originates from a Commission proposal of 2007 aimed at implementing the 2005 Policy Plan on legal migration prepared by the Commission itself.⁸ Amongst the many measures recommended by the Plan, the Commission decided to start from the conditions of entry and of residence of high-skilled third-country nationals. Arguments put forward by the Commission in support of the adoption of an harmonized European discipline in this field resided substantially in the attempt to enhance the EU's capacity to attract and retain high-skilled workers from third countries and overcome the hurdles represented by the diversity of the systems of admission at member States level and the complex bureaucratic procedures limiting the intra-Community movement of job-seekers. The Council of the EU adopted the Blue Card Directive on 25 May 2009 after a laborious negotiation process; the directive entered into force on 19 June 2009. According to Article 23 of the Directive member States were obliged to adopt national measures of transposition by 19 June 2011 and by 2014 the Commission started to prepare its periodic reports on the implementation of the Directive.

2.1. The attraction of highly qualified third-country nationals under the EU Blue Card régime

The directive authorizes member States to issue a permit to enter and work in their territories, the 'EU Blue Card', at the conclusion of a special procedure derogating national rules on entry and residence of third-country nationals, when the applicant aspires to stay in the EU country for highly qualified employment for a period exceeding three months. The *rationale* of the Directive is to attract highly qualified workers in member Countries in order to sustain the competitiveness

Sanctions Directives", in *European Journal of Migration and Law*, 2009, p. 387 ff.; Y. K. Gümüs, "EU Blue Card Scheme: The Right Step in the Right Direction?", in *European Journal of Migration and Law*, 2010, p. 435 ff.; L. Cerna, "The EU Blue Card: preferences, policies, and negotiations between member States", in *Migration Studies*, 2013, p. 1 ff., ID., "Understanding the diversity of EU migration in practice: the implementation of the Blue Card initiative", in *Policy Studies*, 2013, p. 180 ff.; S. Kalantaryan, I. Martin, "Reforming the EU Blue Card as a Labour Migration policy Tool?", in *Policy Brief*, 2015/08, 2015, available at www.migrationpolicycentre.eu.

⁸ See European Commission, Communication from the Commission on a policy plan on legal migration [COM (2005) 669 final, 21 December 2005.

and economic growth of the EU, addressing labour shortages and lack of skills in the European labour market.

The Directive applies to third-country nationals employed under national employment law and/or in accordance with national practice for the purpose of exercising genuine, effective and paid work for, or under the direction of, someone else, who have the required adequate and specific competence proven by higher professional qualifications. The Directive makes it clear that it does not apply to third-country nationals wishing to engage in a self-employed activities. In short, the release of the European Blue Card, is valid only in situations of highly qualified, subordinate employment. Furthermore, the Directive does not apply to third-country nationals who are authorised to reside in a member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;⁹ to non-EU citizens who are family members of Union citizens who have exercised, or are exercising, their right to free movement within the Community in conformity with Directive 2004/38/EC.¹⁰ Similarly, according to Article 3 of the Directive, the granting of a Blue Card is excluded for the following specific categories of third-country nationals: researchers who apply to reside in a member State in order to carry out a research project; those persons who enjoy EC long-term resident status in a member State in accordance with Directive 2003/109/EC and exercise their right to reside in another member State in order to carry out an economic activity in an employed or self-employed capacity; persons who are covered by Directive 96/71/EC¹¹ on the posting of workers within the framework of the provision of services as long as they are posted on the territory of the member State concerned; persons who enter a member State under commitments contained in an international agreement facilitating the entry and temporary stay of

⁹ This includes third-country nationals falling under the 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 and under the Directive 2005/71/EC

¹⁰ See Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, of 29 April 2004.

¹¹ See Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, of 16 December 1996.

certain categories of trade and investment-related natural persons;¹² persons who have been admitted to the territory of a member State as seasonal workers; and, finally, persons whose expulsion has been suspended for reasons of fact or law.

As far as the *ratione loci* scope of application of the directive is concerned, the United Kingdom, Ireland and Denmark, have exercised the opt-out clause established in Articles 1 and 2 of the Protocols annexed to the Treaty on European Union and to the Treaty establishing the European Community; these member States therefore are not part of this Directive and are not bound by or subject to its application.

Conditions of admission are set forth in Articles 5 and 6 of the Directive. According to Article 5 the release of the EU Blue Card is dependent upon the existence of a valid work contract or a binding job offer for highly qualified employment of at least one year in the member State concerned with a salary not inferior to a threshold of at least 1.5 times the average gross annual salary in the member State concerned. In the case of regulated professions, the Directive requires that the applicant present a document attesting fulfilment of the conditions set out under national law for the exercise by Union citizens of the regulated profession specified in the work contract or in the binding job offer. Also the Directive requires that third-country nationals interested in applying for the Blue Card present evidence of having, or having applied for, a health insurance for all the risks normally covered for nationals of the concerned member State. Finally, the Directive restricts the release of the Blue Card only to those third-country nationals who are not considered to pose a threat to public policy, public security or public health.

Other provisions of the Blue Card *régime* leaves a wide margin of appreciation to member States. Article 6 the Directive clarifies that the determination of the volume of admission of third-country nationals entering EU territory for the purposes of highly qualified employment rests upon member States. From this perspective, the Directive does not affect the prerogative of member States to determine the quotas of foreign nationals authorized to remain on their territory for work

¹² This provision, arguably, refers to those categories of migrant workers included within the scope of application of the GATS *Mode 4* (on this subject matter see M. K. Solomon, “GATS *Mode 4* and the Mobility of Labour”, in R. Cholewinski, R. Perruchoud, E. Macdonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, The Hague, 2007, p. 107 ff.).

purposes. Also, both the period of validity of the EU Blue Card released to third-country nationals and the determination of the subjects (third-country nationals, their employers, or both of them) entitled to submit applications for an EU Blue Card are entrusted to member States. The wide margin of appreciation conceded to member States by the directive highlights the underlying tensions “between openness and closure towards labour migration policy” coexisting at both member State and EU levels and the circumstance that “the resolution of these tensions at member State level can then lead to diverse policies as the example of the Blue Card Directive demonstrates”.¹³

Third-country nationals who have applied and fulfil the requirements set out in Article 5 of the Directive and for whom the competent authorities have taken a positive decision in accordance with Article 8 shall be granted an EU Blue Card. The period of validity of the EU Blue Card may be comprised between one and four years: if the work contract covers a period less than this period, the EU Blue Card shall be issued or renewed for the duration of the work contract plus three months. During the period of its validity, the EU Blue Card shall entitle its holder to enter, re-enter and stay in the territory of the member State issuing the EU Blue Card and the other rights recognised by the Directive.

The request for the release of the EU Blue Card may be rejected on the basis of a series of grounds for refusal set forth in Article 8 of the Directive. There are three major categories of grounds for refusal: a) vices and other formal or substantial defects of the application package; b) ground for refusal arising from internal necessities of member States and belonging to their sphere of margin of appreciation; c) ground for refusal depending from the situation of the employer. As far as the first category of vices is concerned, the defects can be determined both by the absence of the conditions required by Article 5 when the documents submitted have been fraudulently acquired, or falsified or tampered with. As far as the grounds for refusal falling within the scope of the margin of appreciation of member States, they may be listed, according to three subcategories. The first subcategory involves the needs arising from the national labour market and is disciplined by paragraphs 2 and 3 of Article 8 of the Directive. According to such provisions before deciding on an application for a Blue Card, or when considering

¹³ See L. Cerna, *Understanding the diversity of EU migration policy in practice ...*, cit., p. 181.

renewals or authorizations to be issued pursuant to Article 12 paragraphs 1 and 2 of the Directive, member States have the right to assess the situation of their national labour market and verify whether the concerned vacancy could not be filled by national or Community workforce, by third-country nationals lawfully resident in that member State and already forming part of its labour market by virtue of Community or national law, or by EC long-term residents wishing to move to that member State for highly qualified employment in accordance with Chapter III of Directive 2003/109/EC.¹⁴ The second subcategory involves limits arising from application of Article 6 of the Directive which safeguards the right of member States to determine the volume of admission of third-country nationals entering its territory for the purposes of highly qualified employment. The third subcategory, finally, is justified by the need to prevent the so-called 'brain-drain' practices and gives member States the power to refuse an application for a Blue Card in order to ensure ethical recruitment in sectors suffering from shortage of skilled workers in the countries of origin. This provision, designed to preserve human resources in the developing countries, expresses a sort of self-restraint of the EU member States in this field area.

As far as the ground for refusal of the EU Blue Card depending from the situation of the employer, Article 8 paragraph 5 authorizes member States to reject an application for an EU Blue Card if the employer has been sanctioned in conformity with national law for undeclared work or illegal employment. Finally, Article 9 of the Directive regulates those situations in which EU member States are obliged to withdraw or refuse to renew the Blue Card. This may occur in the following circumstances: a) when the Card has been fraudulently acquired, falsified or tampered with; b) when it appears that the Card-holder did not meet or no longer fulfils the conditions for entry and residence laid down in the Directive; c) when it is clear that the Card-holder resides for purposes other than that for which he was authorized to reside; d) finally, when it appears that the Card-holder has violated the rules applicable to the change of employment, as set forth in paragraphs 1 and 2 of Article 12, or when he is in a state of non-temporary unemployment as set forth in Article 13.

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

2.2. The rights recognized by the EU Blue Card

Articles 12 to 17 of the Directive recognize a series of rights to third-country nationals who have been granted the release of the EU Blue Card. These provisions are aimed at ensuring the basic economic and social rights and namely: access to the labour market; the treatment to ensure to the Card holder in the event of unemployment; recognition of equal treatment with nationals of the member State which has issued the Blue Card; the rights of family reunification and recognition of the status of long-term resident for Blue Card holders.

The release of the Blue Card grants the person concerned the right to access the labour market of the member State and the enjoyment of equal treatment with national work force; this applies, in particular, with regard to working conditions (including salary, dismissal, and the workplaces' health and safety provisions), freedom of association and participation in organizations representing workers, education and vocational training, recognition of diplomas and professional qualifications, social security, access to goods and services available to the public, the information and advice provided by the centres for the employment. According to Article 12, recognition of the right of access to the labour market is limited, for the first two years of legal employment in the member State concerned, exclusively to the exercise of the activities indicated in the initial request pursuant to Article 5. In other words, during this period any change of employer is prohibited, unless authorization of the competent authorities is obtained. Similarly, any other change that is likely to affect the initial conditions of admission is subject to prior notification or, if provided by national law, prior authorization by competent authorities.

In any event, paragraphs 3 and 4 of Article 12 authorise member States to restrict the access to labour market of Blue Card holders, if the work activities concerned involve, even on an occasional basis, the exercise of public authority, or the general interests of the State; the same applies for those situations in which these activities are reserved by the legislation to nationals or to Union citizens.

After eighteen months of legal residence in the first member State as an EU Blue Card holder, the person concerned and his family members may move to a member State other than the first member State for the purpose of highly qualified employment under the conditions set out in Article 18. The procedure in this case is identical to the procedure applied in relation to the first entry of the Card holder. The Blue Card

holder or his employer, must submit an application for an EU Blue Card to the competent authority of the second member State, as soon as possible and however no later than one month after entering the territory of the second member State. The request must include all the documents proving the fulfilment of the conditions set out in Article 5 of the Directive. The second member State may decide, in accordance with national law, not to allow the applicant to work until a positive decision on the application has been taken by its competent authority. The Directive expressly recognises that in such situations applications may also be submitted to the competent authorities of the second member State while the EU Blue Card holder is still residing in the territory of the first member State. The second member State is obliged to process the application fairly and to inform the applicant and the first member State, in writing, of its decision to either issue an EU Blue Card and allow the applicant to reside on its territory for highly qualified employment or refuse to issue the Blue Card and oblige the applicant and his family members to leave its territory. It is important to note that in this situation the first Member State is obliged to immediately readmit without formalities the EU Blue Card holder and his family members. This provision also applies if the EU Blue Card issued by the first member State has meanwhile expired or has been withdrawn during the examination of the application. After the readmission the provisions set forth in Article 13 as to temporary unemployment shall apply, if applicable.

3. The difficulties of the process of transposition of Directive

According to Article 23 of the Directive member States were obliged to complete the transposition of the EU Blue Card *régime* into national law by June 19th 2011. However, since its adoption, it has become apparent that the process of transposition would have been not an easy task. Indeed, between June and October 2011 the Commission launched the first of a series of infringement proceedings for the failure to transpose the Directive by six member States. Three of these member States (Italy, Malta and Portugal) had not even replied to the letters of formal notice (the first step of the infringement procedure) sent on July 18th 2011 by the Commission. The remaining three member States (Germany, Poland and Sweden) replied to the letters of formal notice but indicated that new implementing legislation would not enter into force before the following year. Accordingly, on October 27th 2011 the

Commission decided to issue reasoned opinions under Article 258 TFEU requesting these member States to take action.¹⁵ Subsequently, on February 27th 2012, the Commission sent another series of reasoned opinions to another group of three countries (Austria, Cyprus and Greece) which had delayed the implementation of the Directive, requesting them to bring their laws in line with EU legislation.¹⁶ Similar complaints were addressed also to Romania and Luxembourg. In the end, all member States completed the transposition process of the directive; however the wide margin of appreciation left by the Directive has contributed to the adoption of various ‘national versions’ of the EU Blue Card with in-depth differences mainly concerning admission requirements and conditions.

In Spain, for instance, the legislation transposing the Blue Card Directive was adopted with the royal decree of June 30th 2011. According to this legislation the Card may be released only where applicants demonstrate they are in possession of a higher education qualification of at least three years or a five-year work experience in the relevant occupation. According to Spanish legislation the salary threshold is at least 1.5 times the average annual salary (about Euro 33,767 *per year*). Apart from the existence of particular situations, prior exhaustion of the labour market test is necessary. The Blue Card is valid for one year (renewable), and family members are authorized to accompany the permit holder and seek employment.

As far as Germany is concerned, according to the transposition legislation passed in this country applicants for a Blue Card permit must prove they are in possession of a university degree and provide proof of earnings of at least Euro 44,800 *per year* (instead of Euro 63,600 *per year* fixed under general domestic rules). However, for engineers and technicians operating in sectors with severe skills shortages (such as IT, medicine and engineering), the annual earnings threshold is lowered to

¹⁵ See European Commission, European Commission Press Release, *Blue Card – Work permits for highly qualified migrants 6 Member States fail to comply with the rules*, IP/11/1247, 27 October 2011.

¹⁶ See European Commission, European Commission Press Release, *Blue Card: Commission warns Member States over red tape facing highly qualified migrants*, IP/12/167 of February 27th 2012. Austria had even passed a domestic legislation providing for a *régime* to attract highly skilled foreign workers (so-called Red-White-Red Card) competing with the EU system (see www.migration.gv.at/en/types-of-immigration/permanent-immigration-red-white-red-card.html) and delaying the transposition of the directive.

Euro 34,900 *per year*. Release of the Card entitles the holders to a temporary residence permit, which could become permanent after three years in a given job. According to German legislation prior exhaustion of the labour market test is not required, except for shortage occupations. In Bulgaria applicants for the Bulgarian Blue Card need to demonstrate possession of a higher education certificate and at least five years of experience in the job position, with an annual salary threshold of at least Euro 8,280. Furthermore, it is necessary that the so-called 'resident labour market test' be satisfied: in other words, it is necessary that no suitable Bulgarian worker be available for the vacant position. In France, the legislation of transposition requires that third-country applicants to the EU Blue Card must be in possession of a three-year degree or five years of work experience and an employment contract of at least one year. The remuneration must be at least 1.5 times the minimum salary set by the government (which is about Euro 47,898 *per year*). On the contrary, no labour market test is required. The Blue Card is valid for three years, or may coincide with the duration of the employment contract if this last is of a lesser duration. According to French legislation family members of the Blue Card holder are granted combined residence and work permits for one year; these permits may be renewed. Finally, as far as Romania is concerned, applicants to the Blue Card must demonstrate possession, of at least a post-secondary educational qualification and an annual salary of at least four times the average gross annual salary for a similar position in Romania (about Euro 24,000 *per year*). In the case of regulated professions, the applicant must prove possession of relevant educational qualifications or work experience. The transposition legislation gives a certain priority to EU Blue Card applications over applications for other permits, thus Blue Card requests are processed much more quickly than requests regular permits. The Blue Card is valid for two years (this duration is renewable), and family members are authorized to accompany the holder and seek employment.¹⁷

What is important to stress here is the circumstance that several member States have enacted domestic legislation to attract highly skilled third country nationals that is alternative to and in competition with the Blue Card *régime*: these competing legislations set forth

¹⁷ A broader analysis of the differences between the different national versions of the Blue Card is available in L. Cerna, *Understanding the diversity of EU migration policy in practice*, cit., and in particular pp. 188-193.

requirements and conditions that are often broader than those of the Blue Card Directive and national legislations adopted for its transposition. Apart from the already mentioned competing Austrian Red-White Scheme, a good example is provided by *The Netherlands' Knowledge Migrant Scheme*. This scheme co-exists with the EU Blue Card but it is more convenient from several aspects. It does not involve any skills or education test, and the salary threshold amounts to Euro 50,619 for those aged 30 or over, and Euro 37,121 for those under 30 (contrary to the salary threshold requested by the Dutch legislation transposing the Blue Card amounts to Euro 60,000 *per year*). Second, the Blue Card application process is particularly lengthy and slow compared to the fast procedure (two weeks) requested for completing the application under the *Knowledge Migrant Scheme*. Another interesting examples is the Belgian competing legislation on the attraction of highly skilled third country nationals. Indeed, while under the Blue Card transposed *régime* applicants need to have higher professional qualifications (diploma attesting to at least three years of higher education), and to hold a contract of indefinite duration or a minimum of one year with an annual gross salary amounting to at least Euro 49,995, the co-existing national legislation disciplining the so-called 'work permit type B for highly qualified personnel'¹⁸ only requires that applicants demonstrate they possess a diploma of higher education or university degree and an annual gross salary amounting to Euro 38,665. The differences between national transposition legislations for the Blue Card, as well as the co-existence of national parallel *régimes* competing with the Blue Card in attracting highly skilled foreign workers, risk lowering the appeal of the EU Blue Card for non-EU workers and may impact negatively on its effectiveness if such a co-existence is not 'governed' by coordinating supranational and national regulations.

¹⁸ The work permit B category is disciplined by Article 9, paragraph 6 of the Royal Decree of June 9th 1999 concerning the implementation of Law of 30 April 1999 (Law relating to the employment of third-country nationals). For more information see J. Antoons, A. Pirotte, *Attracting Highly Qualified and Qualified Third-Country Nationals to Belgium, EMN Focussed Study*, 2013, available at www.emnbelgium.be/publication/attracting-highly-qualified-and-qualified-third-country-nationals-belgium-and-eu-emn.

4. Entry and residence for work purposes of highly qualified third-country nationals and the transposition of the Blue Card Directive in Italy

As far as Italy is concerned, Article 27 of law No. 286/1998¹⁹ (the so-called *Testo Unico sull'Immigrazione*) regulates a series of situations in which the entry of non-EU citizens for reasons of work may derogate from the discipline of annual planning and annual quotas established by law. The rationale of Article 27 provisions resides in excluding from the immigration quotas those categories of workers that fulfil special needs of the national economic system, justifying 'out of quota' admissions. A simplified procedure is foreseen for delivery of the work permits in such circumstances. Also, in some special situations (seconded managers, university professors, skilled workers seconded to Italy, maritime workers, trainees and journalists) the work permit procedure is further simplified, and application for a visa can be filed with Italian Embassies or Consulates abroad. The procedure for out of quota admissions ends with the signing of the job contract and release of the permit which generally corresponds to the duration of employment. Such duration may not exceed two years but can be renewed for an equivalent period.

Directive 2009/50/EC was transposed by law No. 108 of June 28th 2012, entered into force on August 8th 2012, setting forth amendments to the *Testo Unico sull'Immigrazione* by adding two new provisions: a first provision (Article 9-ter) concerning the *status* of long-term residents in the EU for EU Blue Card holders, and a second provision (Article 27-quarter) on the entry and residence of highly qualified foreign workers and the release of the EU Blue Card. As far as highly skilled third country nationals admission is concerned, with the transposition a general and broader regime for the admission of qualified immigration has been introduced within the Italian legal system, provided that the criteria fixed by the law are satisfied.

In order to be considered 'highly qualified', the applicant must demonstrate having completed a high school course of study of at least 3 years in the country of origin, and must have obtained, consequently, a professional qualification recognized in Italy. A further condition for the application of the provisions of Article 27-quarter resides in the circumstance that authorization for the admission of foreign workers

¹⁹ See Legislative Decree No. 286, of 25 July 1998 setting forth the *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*.

depends on the existence of a paid work activity to be performed “under the direction and coordination of natural or legal person”. The abovementioned provision, therefore, excludes self-employment by the scope of application of the amended legislation and transposes Article 2 (b) of the Directive 2009/50/EC. According to paragraphs 2 and 3 of Article 27-*quater* these new rules on the attraction of highly skilled workers apply to third-country nationals who demonstrate possession of the requirements set forth in paragraph 1, whether they are resident in a third country or in a member State; to highly skilled third-country nationals already in possession of a Blue Card issued by another member State; to all third-country nationals already residing in the Italian territory on the basis of a permit for visits, business, tourism and study, provided that they satisfy the requirements set forth by Article 27-*quater*.

As far as the procedure for obtaining the Blue Card visa is concerned, Article 10 of the Directive leaves to the margin of appreciation of member States to decide whether to attribute this task to the employers, or to leave it up to the concerned employees, or both; the Italian legislation of transposition, according to the paragraph 4 of Article 27-*quater*, attributes to the employer the task of initiating the procedure and submitting the application before the competent territorial *Sportello unico per l’Immigrazione*.

In order to be validly submitted, the application must include a series of documents listed in Article 22 of the *Testo unico sull’Immigrazione*²⁰ and in addition: a work contract or a binding job offer of at least one year’s duration; certificate or other evidence of formal qualifications issued by a competent authority of the country of origin proving the level of education achieved and the professional qualifications obtained; the gross annual salary resulting from the monthly or annual salary specified in the work contract or in the binding job offer and its consistency with the amount fixed by the legislation of transposition. More important is the fact that the higher education and professional qualifications submitted by concerned foreign nationals must be recognized in Italy; these qualifications must be included within levels

²⁰ This documentation includes: the declaration of conformity with the law for the accommodation of the foreign worker; the work contract and its relevant clauses; the declaration of commitment by the employer to pay costs of repatriation of the foreign worker if necessary; the declaration of commitment of the employer to communicate any change in the employment *status*.

1, 2 and 3 of the national classification of the profession.²¹ The binding condition that professional and education qualifications be recognized in Italy may make it particularly difficult to obtain the EU Blue Card in this country. This is due both to the large number of foreign professional qualifications that are still unregulated in Italy and to the lengthy and cumbersome mechanism of recognition of foreign qualifications existing in Italy. It is for this reason, therefore, that Italy has introduced a special procedure, under the supervision of the Ministry of Education, obligating domestic authorities to quickly accomplish recognition of foreign qualifications when this is requested for the purpose of obtaining an EU Blue Card.

Following the signing of a work contract and the notification of the start of employment to the competent authorities, highly qualified third-country nationals authorized to work in Italy are entitled to obtaining the-release from the local police authorities of the EU Blue Card permit. Pursuant to paragraph 11 of Article 27-*quater* the permit has a duration of two years if the work contract is of indefinite duration; in all other cases the duration of the permit is equal to the duration of the employment, plus three months.

Paragraphs 9 and 10 of Article 27-*quater* regulate grounds for refusal and the circumstances for withdrawal or non-renewal of the authorization to work under the national EU blue Card scheme. From this perspective, national rules fully transpose the provisions set forth by Articles 8 and 9 of the Directive and their grounds for refusal, withdrawal and non-renewal. However, it must be noted that in the transposition legislation the grounds concerning reasons of public policy, security or public health, those related to the lack of notification of address by the person concerned as well as those concerning the request for social assistance of the concerned person have not been transposed. Accordingly, national authorities may refuse the EU Blue Card, in accordance with paragraph 9 of Article 27-*quater*, if the documents submitted have been obtained through fraud or have been falsified or tampered with. The same applies when the concerned foreign national who has successfully applied for the Blue Card fails to

²¹ See the ISTAT national classification of profession CP 20111, at www.cp2011.istat.it. The first level includes high-profile managers and entrepreneurs; the second level includes intellectual and scientific professionals such as engineers, doctors, researchers, academicians; the third level includes other experts (i.e., computer programmers, airplane pilots, nurses, artists, athletes, trainers, police officers, etc.).

appear, within eight days, before the *Sportello unico per l'Immigrazione* in order to sign the residence contract, provided that this delay is not due to force majeure. Some particular grounds for refusal or withdrawal concern the status of the employer and, in particular, his conviction, in the last five years, for serious offenses, and namely: the crime of aiding and abetting illegal immigration to Italy (or emigration from Italy to other states); the recruitment of persons for prostitution, the exploitation of prostitution, and the exploitation of minors for illegal activities; the crime of labour exploitation foreseen in Article 603-*bis* of the Criminal Code (also known as the crime of *capolarato*); the crime of employment of illegally staying third-country nationals, pursuant to Article 22 paragraph 12 of the *Testo unico sull'immigrazione* as amended by Legislative Decree 109/2012, transposing Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.²²

The specific case of the withdrawal or non-renewal of the Blue Card in the event of a protracted unemployment *status* of the concerned foreign workers merits further analysis. Indeed, Italian legislation correctly transposes Directive principles according to which the unemployment status should not be considered *per se* a valid reason for withdrawing the Card: such an eventuality is made possible by the Directive only in the presence of a protracted unemployment status. However, in a major departure from the provisions of Article 13 of the Directive envisaging a period of unemployment exceeding three months, Article 27-*quarter* does not quantify the permissible period of unemployment. This legal gap may be filled by applying, by way of analogy, general provisions fixed by Article 22 paragraph 11 of the *Testo unico sull'immigrazione*, quantifying the minimum period of unemployment tolerated in case of loss of the employment, or resignation by the employee, in 12 months. According to us this solution is to be preferred to the application of the shorter time-limit foreseen by the Directive. Several reasons support this conclusion: first, the need to ensure consistency amongst provisions inside the national legal system avoiding unjustifiable differences of treatments; second, the need to respect the principle of the most favourable rule in interpreting gaps and vacuums when the personal *status* and human rights of migrant persons

²² See Directive 2009/52/EC of the European Parliament and of the Council, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, of 18 June 2009.

are at stake; third, the fact that provisions of Directive 2009/50/EC constitute only *minimum* standards that States are obliged to ensure; and, lastly, the fact that on this specific issue the 1977 Convention on the legal status of migrant workers, which has been ratified by Italy, prescribes a time-limit of no less than five months.²³

Paragraph 13 of Article 27-*quater*, transposes Article 12 of the Directive and the ban, for the first two years of legal employment in Italy, on the exercise of paid employment activities different from those matching the conditions for admission and change of employer. While the first ban is absolute, the change of employer, even before the expiration of the two year period, may be admitted subject to prior approval by the competent labour market offices.

Furthermore, paragraph 14 of Article 27-*quater* explicitly prohibits Blue Card holders from performing activities involving direct or indirect exercise of public powers, even when carried out on an occasional basis, or concerning the protection of the national interest or other activities reserved to nationals, Union citizens or EEA citizens.

Except for the aforementioned restrictions to the labour market access, the transposing legislation incorporates the entire system of rights granted by the Directive, including the principle of equal treatment of Blue Card holders with Italian citizens. Indeed, according to paragraph 15 Article 27-*quater*, after the expiration of the two year period, EU Blue Card holders enjoy equal treatment with nationals of the member State issuing the Blue Card, as regards access to any highly skilled work activity. Furthermore, after eighteen months of legal residence in another member States the Card holder may enter Italy for the purpose of highly qualified employment without the need to apply for a visa.

²³ See Council of Europe, *European Convention on the Legal Status of Migrant Workers*, CETS No. 093, adopted in Strasbourg on November 24th 1977 and entered into force on May 1st 1983. The Convention has been ratified by several EU member States and quite all the EU funding members. Italy signed the 1977 Convention in 1983 and ratified it on February 27th 1995. According to paragraph 4 of Article 9 of the Convention: “[i]f a migrant worker is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed, this being duly confirmed by the competent authorities, he shall be allowed for the purpose of the application of Article 25 of this Convention to remain on the territory of the receiving State for a *period which should not be less than five months*” (emphasis is added).

Among the other rights recognized by the EU Blue Card scheme a pivotal position is held by the recognition of the right to family reunification enshrined in paragraph 16 of Article 27-*quarter*. Family reunification may not be made dependent upon the duration of the visa and is recognised pursuant to Article 29 of the *Testo unico sull'immigrazione*; accordingly, the legislation grants to family members a residence permit for family reasons of the same duration as that of the holder of the EU Blue Card.

Particular attention must be reserved to the circumstance that as far as the right to family reunification is concerned, the transposing legislation mirrors the basic *rationale* of the Blue Card Directive: *i.e.* introduction of a preferential system of access for highly skilled workers from third countries to derogate, for purposes of family reunification of Card holders, from the provisions of Directive 2003/86/EC,²⁴ and, from the strict conditions of stability and residence required therein.

In conclusion, as far as the Italian transposition of the Directive, domestic legislation shows several lights but also some shadows. In the first place, the transposed legislation lacks any measure to facilitate circular migrations; also, there is no reference to the need to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin. This is much more serious once considered that the prevention of practices of brain-drain and the preservation of human resources in developing countries, is, on the contrary, a key feature of the Directive. In the second place, if the purpose of setting up of a legal system to attract highly skilled migrant workers is, as we believe, instrumental to economic growth and markets, then the transposing legislation should have attempted to exploit any possibilities granted by the Directive to introduce more favourable access conditions than those applied in other national versions of the Blue Card: this might have made Italy a more attractive destination for highly skilled and qualified foreign workers-than other EU member States.

5. The lacklustre results of the Blue Card Directive and the perspectives for its reform

In May 2014, the Commission adopted the first implementation report assessing the transposition of the Directive into the national

²⁴ See Council Directive 2003/86/EC, on the right to family reunification, of 22 September 2003.

legislation of the 25 participating member States.²⁵ It also provided an initial identification of some of the main shortcomings of the Directive. More specifically, the report highlighted a fragmented implementation by member States with widely diverging rules and, furthermore, the circumstance that the number of Blue Cards issued has so far been limited. Regarding the reasons of such meagre results, analyses performed in the literature on this subject matter have clearly highlighted the main weaknesses of the Directive. In the first place, it sets only minimum standards, provides only a limited set of rights, and above all leaves much leeway to member States through many ‘may’ clauses and references to national legislation. Consequently, the level of coherence and harmonisation across member States remains low and the facilitation of intra-EU mobility – a clear EU-added value – remains strongly limited.

In the second place, many member States continue to run parallel national schemes to attract highly qualified third-country nationals: these national schemes are in open competition with the EU Blue Card and with each other. This creates a fragmented and complex landscape of many different regimes for admitting highly qualified third-country nationals. In the third place, and from the point of view of the *ratione personae* scope of application of the EU Blue Card Directive, this scope only applies to third-country national employees. It does not include pivotal categories of third-country nationals currently outside the scope of the Blue Card whose involvement would have been suitable to support the attainment of the Directive’s goals. This is especially true with respect to entrepreneurs and service providers. Indeed, Europe’s economic growth and jobs depend on its ability to support the growth of enterprises and the expansion of the services sector with its legacy of well-trained and highly skilled professionals. Since entrepreneurship creates new companies, opens up new markets, and nurtures new skills, developing the entrepreneurial potential in the EU has been recognized as a priority task. However, in the EU the potential of third-country nationals from this perspective is largely untapped because qualified third-country nationals often face legal difficulties to access self-employment. At the same time, some third countries have a migration

²⁵ European Commission, Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (‘EU Blue Card’), cit.

policy that is particularly attractive to entrepreneurs and service providers when compared to EU policies. A further reason of dysfunctionality of the EU Blue Card scheme resides in the fact that Blue Card related procedures are extremely costly for all stakeholders. It is 'costly' for the applicant through cumbersome bureaucracy. But the procedure is costly as well for national authorities because it requires case-by-case processing for which these authorities are often not prepared. Finally, the Blue Card is costly for the employer as well due to the one-year minimum contract duration (whereas national labour laws often establish three to six months probationary periods) and the minimum salary threshold.

Accordingly, the successive step resides in determining the modalities the EU may adopt to deal with the abovementioned shortcomings. Several policy options are on the table and the very first one is that European institutions may decide to completely repeal the existing EU Blue Card Directive letting member States go back to strictly national legislation. This would mean that some member States would have their national schemes for attracting highly skilled third-country nationals, other member States would have only specific provisions in a general migration scheme, and others would have only their general migration scheme for all skill levels. However, this alternative is neither desirable nor practicable as both the policy documents and the impact assessments made by the Commission have largely demonstrated.

Therefore, options involving the survival of the Blue Card *régime*, even profoundly reformed, must be analysed: there are several potential avenues to achieve this goal. A first option may consist in amending the existing discipline and prescribing the abolition or the limitation, at the very least, of parallel national schemes that target similar groups of persons as the EU Blue Card Directive. Amendments may also be made to foster intra-EU mobility by extending, to highly qualified workers the provisions on intra-EU mobility contained in Directive 2014/66/EU on intra-corporate transfers,²⁶ or considering other alternative solutions to facilitate intra-EU mobility (e.g. creating national priority lists of labour shortages in certain areas/sectors combined with an EU-wide database for Blue Card holders and a lower limitation on residence in a second

²⁶ See Directive 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, of 15 May 2014.

member State), or by improving residence conditions (*e.g.* working and residence rights, immediate family reunification, quicker acquisition of EC long-term *status*, accumulation of periods in different member States for the acquisition of EC long-term status, further facilitating circular migration and periods of absence). All these modifications would impact and reinforce the policy objectives of the European Blue Card discipline. Under this option, the rights attached to the Blue Card should also be enhanced. Specifically, family reunification for the relatives of Blue Card beneficiaries, the main advantage of the Blue Card in relation to national systems, should be granted simultaneously with the release of the Blue Card. Also, an extension of the maximum period of validity for the Blue Card would be welcomed: indeed in a labour market context where highly skilled labour migration needs in Europe seem to be largely long-term, it does not make sense to approach the Blue Card as a purely temporary work permit.

Another option may consist in revising the admission system foreseen under the Blue Card scheme. This might be performed by creating fast-track admission procedures, facilitating the matching of the work offer and supply, creating a skill-matching database, increasing the role for employers in the admission process, etc. Under this option the de-bureaucratization and the simplification of the Blue Card procedures for all concerned stakeholder should be pursued.

A third option, finally, may consist in differentiating and expanding the scope of the Blue Card discipline beyond highly qualified third-country national employees to cover the abovementioned categories playing a pivotal role in achieving the goal of strengthening the competitiveness of the European economy and its labour market. This option might be performed by removing legal obstacles to the establishment of businesses and giving qualified third-country national entrepreneurs and service providers a stable permit. Categories include but are not limited to: entrepreneurs who are willing to invest in Europe (including start-ups) as well as business persons supplying services not linked to commercial presence (contractual service suppliers and independent professionals).²⁷

²⁷ This assessment will include the consideration whether the Blue Card Directive is the appropriate instrument for such potential expansion of scope or whether a separate initiative focussed on such categories might be more opportune. In addition, as to the possible expansion to entrepreneurs who are willing to invest in Europe (including start-ups), the possibility and opportunity of complementing such a scheme for entry and stay

6. Conclusions

The effective implementation of the Blue Card Directive has been inevitably influenced in all EU countries by the modalities by which two opposing forces that involve contemporary immigration policies in Europe interact: the tendency towards an increase in the level of openness towards migration for work purposes, driven by the need to attract a skilled workforce in order to fill the gaps in supply existing in European labour markets, and a diametrically opposite tendency, driven by many different reasons, and aimed at restricting, or even discontinuing third-country nationals access to the EU area for work purposes. It is this clash that has contributed to the setting up of an European system of attraction for highly skilled third-countries workers which is firmly anchored to the member States' control and margin of appreciation, to the point of leaving the door ajar for member States to even block any admission for work purposes.

An excellent example of this situation is represented by the exclusion from the scope of application of both the EU Blue card Directive and of national legislations transposing the Directive, of refugees and other persons entitled to international protection. As convincingly highlighted by the Commission in its impact assessment to the Directive, the existence of highly skilled workers holding such a status and already resident in the member States, usually performing activities lower than their qualifications, would have fully justified the enlargement of the personal scope of application of the European discipline on attracting highly skilled migrants²⁸. However, the need to safeguard the prerogatives of member States prevented the adoption of such solutions.

Finally, the breadth of discretion that is given to member States not only regarding the modes of transposition of Blue Card provisions, but also the introduction of parallel national schemes represents, arguably, the most striking features of the Directive. Indeed, the existence of parallel *regimes*, paves the way to increased competition *amongst member States* in attracting a highly qualified labour force rather than

for entrepreneurs with an EU support scheme for high-skilled entrepreneurial innovators could be explored.

²⁸ This position is shared by the European Economic and Social Committee that had already had occasion to emphasize the importance of such issue (see European Economic and Social Committee, *Opinion of 12 March 2008 on the Green Paper on the future Common European Asylum System*, Rapporteur Le Nouail-Marlière, adopted at the plenary session on 12 and 13 March 2008).

strengthening the competitiveness of the European economy and its labour market. In other words, member States may feel authorized to continue to act as individual players in the ‘global competition for talent’, prioritizing national interests over a proper and previously agreed upon implementation of EU measures.

THE USE OF FORCE AGAINST THE BUSINESS MODEL
OF MIGRANT SMUGGLING AND HUMAN TRAFFICKING
TO MAINTAIN INTERNATIONAL PEACE AND SECURITY
IN THE MEDITERRANEAN

*Giorgia Bevilacqua**

1. The Mediterranean Migration Crisis

The Mediterranean sea has become a firm and fatal dividing border between ‘North’ and ‘South’.¹ Even though a minor percentage of the global phenomenon, immigration by sea entails a wide range of serious risks, some applicable to persons at sea generally, and others specific to unauthorized migrants, due, for instance, to overcrowding, inexperienced crew and captain, and substandard quality of the boats.²

Most migrants and asylum seekers who attempt to cross the Mediterranean sea depart from Libyan coasts. In Libya, the political crisis of 2014 has created various changes to the environment for migrants in the country, to the protection of asylum seekers, and to the characteristics of the flows entering and departing Libya.³ Additionally, the absence of routes for legal migration, as well as safe and legal access to the right to seek asylum in Europe,⁴ have also led a growing number of persons to migrant smuggling⁵ and human trafficking.⁶ These two

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¹ See International Organization for Migration (IOM), *Migration Trends Across the Mediterranean: Connecting the Dots*, June 2015, p. 1.

² See IOM, *Fatal Journeys: Tracking Lives Lost during Migration*, 2014, IOM, https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf (12/15).

³ IOM, *Migration Trends Across the Mediterranean: Connecting the Dots*, cit.

⁴ On the different definitions of ‘irregular immigrants’, see S. Trevisanut, *Immigrazione irregolare via mare. Diritto internazionale e diritto dell’Unione Europea*, Naples, 2012.

⁵ Pursuant to article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, the Smuggling of migrants is: ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’. See the Protocol against the Smuggling of Migrants, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in *United Nations Treaty Series*, Vol. 2241, Doc. A/55/383, p. 507.

⁶ Pursuant to article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Trafficking in persons is: “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of

different phenomena in the hands of transnational criminal networks share the common feature of exploiting the migratory movements for personal gain and disregard for human life.

In order to enhance the transit by sea of unauthorised immigrants, minimizing the risk of being intercepted by naval forces, migrant smugglers and human traffickers have devised a complex criminal system. A significant part of the illegal conducts takes place at sea and, specifically, partly in spaces under the national jurisdiction of the coastal States and partly in international waters, where no claims of sovereignty can be validly purported by any State. Their classical *modus operandi* involves the use of stateless vessels leaving the North African coasts to reach the high seas. Once there, hundreds of persons are transferred to smaller unsafe life-boats, that are supposed to bring them to Europe.⁷

For the purpose of managing the Mediterranean migration crisis, exacerbated by the unstable situation in Libya,⁸ different routes have been undertaken national, European and, ultimately, international level. Over the past two years alone, we have witnessed a rapid shift from saving lives at sea under the Italian-led *Mare Nostrum* Operation,⁹ to

the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". See the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational organized Crime, New York, 15 November 2000, in *United Nations Treaty Series*, Vol. 2237, Doc. A/55/383, p. 319.

⁷ For a punctual description of the illicit conducts undertaken by migrant smugglers and human traffickers, see G. Cataldi, "Traffico dei migranti nel Mediterraneo", in *Giurisprudenza italiana*, 2015, pp. 1498-1502; in particular, the author examines the decision of the Italian Supreme Court, *Criminal proceedings against Radouan Hai Hammouda*, No. 3345, 23 January 2015.

⁸ On the critical situation in Libya, see Resolution 2213 (2015), adopted by the Security Council at its 7420th meeting, on 27 March 2015, Doc. S/RES/2213 (2015), preamble; Resolution 2238 (2015), adopted by the Security Council at its 7520th meeting, on 10 September 2015, Doc. S/RES/2238 (2015), preamble.

⁹ The search and rescue naval operation *Mare Nostrum* was launched by Italy following the tragedy that occurred off the coast of Lampedusa on 3 October 2013 and was fully operational from October 2013 till October 2014 in a vast area of the Mediterranean. See S. Carrera, L. den Hertog, "Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean", in *Liberty and*

border control operations¹⁰ coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (Frontex).¹¹ Recently, with the specific aim of disrupting the business model of migrant smuggling and human trafficking networks in the South Central Mediterranean, the European Union (EU) opted for a military crisis management operation, EUNAVFOR MED.¹² Renamed Operation Sophia on 28 September 2015 (hereinafter EUNAVFOR MED-Sophia), this new undertaking has also received the unexpected¹³ support of the United Nations Security Council which on 9 October 2015 adopted Resolution 2240 (2015) under Chapter VII of the Charter of the United Nations in order to maintain international peace and security in the region.¹⁴

Against this dramatic, complex and unresolved background, this article aims to verify the legal conditions under which international law authorizes the use of force at sea against migrant smugglers and human traffickers. For this purpose, we will first examine the mandate of

Security in Europe, 79, 2015, Centre for European Policy Studies: www.ceps.eu/system/files/LSE_79.pdf (12/15).

¹⁰ The current border control operations coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union (Frontex) in the Mediterranean sea are ‘Triton’ and ‘Poseidon Sea’.

¹¹ Frontex was established by Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (EU). This Regulation was later amended by the Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers. It was then amended by the Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU.

¹² See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military Operation in the Southern Central Mediterranean, Official Journal (2015) L 122/31.

¹³ This support was unexpected since the UN Secretary General has often stressed the importance of focusing the European action on saving lives when dealing with migration rather on military actions. See, for instance, the speech of Ban Ki-Moon at the European Parliament in plenary session on 27 May 2015, *European Parliament News*: www.europarl.europa.eu/news/en/news-room/20150526STO59634/Ban-Ki-moon-on-migration-%E2%80%9Csaving-lives-should-be-the-top-priority%E2%80%9D (12/15).

¹⁴ See Resolution 2240 (2015), adopted by the Security Council at its 7531st meeting, on 9 October 2015, Doc. S/RES/2240 (2015).

EUNAVFOR MED-Sophia operation, outlining the three sequential phases of the first military naval mission undertaken to disrupt the business model of smuggling and trafficking networks in the Mediterranean (section 2). As the activation of the second and the third phase of the EUNAVFOR MED-Sophia operation in the territorial and internal waters of Libya requires an authorization of the UN Security Council and/or the consent of the coastal State concerned i.e., Libya, we will consider the specific conditions necessary under international law to legally exercise coercive powers against migrant smugglers and human traffickers in different jurisdictional marine areas (section 3). The European military mission will operate in a complex legal environment of overlapping rules of international refugee law, human rights law, and the law of the sea. This article discusses the relevance both of the Security Council authorization and the permission of Libya under the international law of the sea as well as under the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention against Transnational Organized Crime (the Protocol against the Smuggling of Migrants).¹⁵ We will conclude by considering the various systematic efforts to be carried out in order to effectively manage the Mediterranean migration crisis and to restore international peace and security in the region.

2. EUNAVFOR MED-Sophia and the Limited Scope of the EU Military Response

Whilst in the past immigration control programs were implemented unilaterally by the most affected Mediterranean coastal States, since 2005 an increasing role has been played by Europe, through Frontex.¹⁶ This Agency plans, coordinates, implements and evaluates joint operations conducted by European Member States' staff and equipment at the external borders (sea, land and air). The focus of the vast majority of Frontex joint operations has been border control and as a result of these operations hundreds of unauthorized migrants, while attempting to cross the European external sea border, have also been forced to return to the State from which they departed or were presumed to have

¹⁵ For references on the Protocol against the Smuggling of Migrants, see *supra* note 5.

¹⁶ On Frontex regulations, see *supra* note 11.

departed.¹⁷ While the delicate issues raised by most of Frontex missions are well-known, especially with respect to violation of the ‘*non-refoulement* principle’,¹⁸ the increasing fluxes of migrants and asylums seekers, together with the increasing number of deadly shipwrecks of the past few years proves that the European migration control practice has been ineffective. According to the International Organization for Migration, since the year 2000 close to 25,000 migrants have perished in the Mediterranean, making it the world’s deadliest border.¹⁹

Vis-à-vis such ineffectiveness and after a series of mass drownings off the Libyan coasts, the EU tried to come up with a new and more comprehensive strategy to deal with the persistent Mediterranean migration crisis.²⁰ The common denominator of several extraordinary European Councils between April and June 2015 was the possible deployment of a military mission targeting the vessels and the other assets used by smugglers and traffickers to transfer persons from the Southern to the Northern Mediterranean shores. Having regard to article 42 of the European Union Treaty and to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy, on 18 May 2015 the Council adopted Decision 2015/778 (Council Decision) approving the Crisis Management Concept for a Common Security and Defense Policy operation to identify, capture and dispose

¹⁷ On the practice of ‘push-backs’ in the Mediterranean, see S. Borelli, B. Stanford, “Troubled Waters in the *Mare Nostrum*: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights”, in *Review of International Law and Politics*, 2014, pp. 29-69.

¹⁸ On the broad interpretation of the “*non-refoulement* principle”, see the European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012. In the literature, see A. Liguori, “La Corte europea dei diritti dell’uomo condanna l’Italia per i respingimenti verso la Libia del 2009: il caso Hirsi”, in *Rivista di diritto internazionale*, 2012, p. 415 ff.

¹⁹ See IOM, *Migration Trends Across the Mediterranean: Connecting the Dots*, cit.

²⁰ In sum, on 20 April 2015 the European Commission proposed to the Council a 10-point action plan. Then, on 23 April 2015, the European Council committed, at its extraordinary meeting, to strengthen the EU’s presence at sea to fight human smugglers and traffickers, to prevent illegal migration flows and to reinforce internal solidarity and responsibility. On 13 May 2015, the Commission presented a European Agenda on Migration with both internal and external policy measures, including a possible Common Security and Defence Policy operation in the Mediterranean to dismantle traffickers’ networks and fight smuggling of people, in accordance with international law.

of vessels and other assets used or suspected of being used by migrant smugglers and/or human traffickers.²¹

The EUNAVFOR Med-Sophia operation reached its full operational capability on 25 July 2015, but its mission is intended to be conducted in three sequential phases.²² Whereas the first phase is focused on detection and monitoring of migration networks i.e., the surveillance and assessment of existing smuggling and trafficking organizations,²³ the two subsequent phases involve the exercise of direct enforcement actions against the boats carrying unauthorized migrants. More specifically, pursuant to article 2 of the Council Decision, in the second phase, the EUNAVFOR Med-Sophia naval forces may conduct ‘boarding, search, seizure and diversion on the high seas’ of suspected boats, in accordance with international law,²⁴ as well as in the territorial and internal waters of the coastal State, if a UN Security Council mandate and/or the consent of that State i.e., Libya, is obtained.²⁵ The third phase, also dependent on a UN Security Council authorization and/or Libyan consent, would enable EUNAVFOR MED-Sophia forces to “take all necessary measures” against suspected vessels, “including through disposing of them or rendering them inoperable”, in the territory of that State i.e., in territorial waters, internal waters, and also in ports and coastal areas.²⁶

In short, according to the Council Decision, which is probably inspired by ATALANTA, the first EU’s naval force operation against piracy off the Horn of Africa and in the West Indian Ocean,²⁷ a UN Security Council resolution and/or Libyan consent are necessary to launch two fundamental activities: extend enforcement actions to Libyan waters²⁸ as well as disrupt vessels and assets used or suspected

²¹ See the Council Decision, *supra* note 12, specifically article 1.

²² See Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean, Official Journal (2015) L 157/51.

²³ See article 2.2(a) of the Council Decision.

²⁴ See article 2.2(b)(i) of the Council Decision.

²⁵ See article 2.2(b)(ii) of the Council Decision.

²⁶ See article 2.2(c) of the Council Decision.

²⁷ See the EU Council, Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, 10 Nov. 2008, Official Journal (2008) L301/33.

²⁸ See article 2.2(b) of the Council Decision.

of being used by migrant smugglers and human traffickers.²⁹ Both activities are extremely important to achieve the general objective of this military mission. Notably, the first action would be clearly aimed at intercepting the vast majority of boats carrying unauthorized migrants before they depart from Libyan coasts. The second action would be similarly aimed to weaken the criminal transnational smuggling and trafficking organizations based in Libya.

In the absence of at least one of these requirements, however, EUNAVFOR MED-Sophia's objective is rather limited. Its first phase i.e., the surveillance and assessment of migrant smuggling and human trafficking networks is already possible through the European Border Surveillance System, which is specifically designated to the surveillance of the European external borders, "including the monitoring, detection, identification, tracking, prevention and interception of unauthorized border crossings for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants".³⁰ Similarly, with respect to the second and the third phase, many enforcement actions can already be unilaterally undertaken by the participating States. In this respect, and from a purely practical perspective, it seems worthy to note that, even though EUNAVFOR Med-Sophia is a European operation, military assets and personnel are provided by the twenty-two contributing States³¹ with the operational and personnel costs being met on a national basis.³²

3. The Legal Requirements to Use Enforcement Powers at Sea against Vessels Suspected of Migrant Smuggling and Human Trafficking

Following the political guidance provided by the defense and foreign affairs ministers at their informal meetings on 3 and 5 September 2015, the EU Foreign Affairs Council, within the Political and Security Committee, established that the conditions for the second phase of the EUNAVFOR MED-Sophia operation have been met but only insofar as

²⁹ See article 2.2(c) of the Council Decision.

³⁰ See Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), Official Journal (2013) L 295/11.

³¹ Contributing States are: Belgium, Bulgaria, Cyprus, Czech Republic, Spain, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Romania, Slovenia and Sweden.

³² See article 11 of the Council Decision.

actions in international waters are concerned.³³ While Libya has not given its consent to enter its territorial sea, with fourteen votes in favor and one abstention³⁴ the UN Security Council has adopted the Resolution 2240 (2015) (Security Council Resolution) to put an end to the recent “proliferation of, and endangerment of lives by the smuggling of migrants and trafficking of persons in the Mediterranean sea off the coast of Libya”.³⁵

The use of enforcement actions against certain illicit conducts at sea is regulated by specific provisions of international law. The following section assesses the legal relevance of both options: the UN Security Council Resolution, which apparently provides the EU with the requested legal guarantees to activate the second and the third phases of the EUNAVFOR MED-Sophia operation, and the consent of the coastal State, in accordance with the applicable legal framework.

3.1 Continued: The (Ordinary) Enforcement Powers granted by the UN Security Council Resolution

Acting under Chapter VII of the Charter of the United Nations (UN Charter),³⁶ the Security Council has adopted a Resolution to maintain international peace and security, condemning, in particular, “all acts of migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya, which undermine further the process of stabilization of Libya and endanger the lives of thousands of people”.³⁷

The core paragraphs of the Security Council Resolution stipulate the mandate to inspect vessels suspected to be used for migrant smuggling or human trafficking³⁸ and to seize and dispose of those vessels that are confirmed as being used for such criminal purposes.³⁹ To carry out these

³³ See the Council of the European Union, *EUNAVFOR Med: Council adopts a positive assessment on the conditions to move to the first step of phase 2 on the high seas*, Press Release No. 643/15, 14 September 2015, available at: www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor (12/15).

³⁴ Venezuela.

³⁵ *The Security Council resolution*, cit., preamble.

³⁶ The Charter of the United Nations signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

³⁷ See paragraph 1 of the Security Council Resolution.

³⁸ See paragraph 7 of the Security Council Resolution.

³⁹ See paragraph 8 of the UN Security Council Resolution.

activities, the Security Council authorizes “to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers”. These authorizations are for a period of one year from the date of the adoption.⁴⁰

At first glance, this Security Council Resolution is the legal response expected by the High Representative of the Union for Foreign Affairs and Security Policy, who had officially informed the UN Security Council of the need for the EU to work with the support of the UN Security Council in order to manage the Mediterranean migration crisis.⁴¹ Three elements indicate that the Resolution goes unequivocally in this direction. First of all, even though migrant smuggling and human trafficking are criminal phenomena challenging several geographic areas of the world, the Security Council condemns specifically “all acts of migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya”.⁴² Second, its paragraphs are expressly addressed to “Member States acting nationally or through regional organizations, including the EU”.⁴³ Third, the Security Council makes specific reference to the European Council statement of 23 April 2015, which underlined the need for effective international action to address both the immediate and long-term aspects of human trafficking towards Europe.⁴⁴

From a broader perspective, however, this Resolution is not a sufficient legal basis to activate the crucial active phases of the EUNAVFOR MED-Sophia operation. As requested by Russia at the UN Security Council’s preparatory meetings, the authorized operational area is only the high seas.⁴⁵ Consequently, under the Council Resolution, European naval forces are authorized to inspect and seize suspected vessels only in international waters off the coast of Libya, rather than in the Libyan territorial sea. Furthermore, according to the Security Council, while operating on the high seas, military units shall distinguish between flagged and stateless vessels. According to this

⁴⁰ See paragraph 7 of the Security Council Resolution.

⁴¹ See the Council Decision, preamble.

⁴² See paragraph 1 of the Security Council Resolution.

⁴³ See paragraph 2 of the Security Council Resolution.

⁴⁴ See the Security Council Resolution, preamble.

⁴⁵ See the Security Council meeting records adopted at the 7531st meeting on 9 October 2015, Doc. S/PV.7531 and the Press Release of the Security Council Resolution 2240 (2015), including Statements after action, *United Nations Meetings Coverage and Press Releases*: www.un.org/press/en/2015/sc12072.doc.htm (12/15).

distinction, in the first case, if the vessel suspected to be engaged in migrants smuggling and human trafficking is flying a flag, naval forces are authorized to inspect them but only provided that they have made good faith efforts to obtain the consent of the vessel's flag State.⁴⁶ In the opposite and more frequent case and, hence, if the ship suspected to be engaged in smuggling and trafficking is without nationality, States and the EU are invited to inspect them.⁴⁷

In other words, according to the Security Council, while acting against vessels suspected of migrant smuggling and human trafficking on the high seas, naval forces may act under the conditions provided for by the applicable international legal framework, including provisions of the international law of the sea and the Protocol against the Smuggling of Migrants.⁴⁸ As regards the law of the sea, several provisions, as reflected in customary international law and codified by the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁴⁹ are relevant in discussing questions of migration at sea.⁵⁰ In particular, in order to determine which State can exercise powers over ships found in the different areas into which the sea is divided for the purposes of international law, the traditional approach of international law of the sea revolves around the question of jurisdiction. On the high seas, ships are free to navigate and are subject to the exclusive jurisdiction of the flag State⁵¹ and no claims of sovereignty can be validly put forward by any State.⁵² Allegedly, according to these norms, the boarding of a foreign private ship can take place only in exceptional cases, and specifically, in the exceptional circumstances specified in article 110 UNCLOS.

⁴⁶ See paragraph 7 of the Security Council Resolution.

⁴⁷ See paragraph 5 of the Security Council Resolution.

⁴⁸ For references on the Protocol against the Smuggling of Migrants, see *supra* note 5.

⁴⁹ The United Nations Convention on the Law of the Sea (UNCLOS) was signed on 10 December 1982, in Montego Bay, entered into force on 16 November 1994 and was ratified by 165 States as of 19 July 2013, in *United Nations Treaty Series*, Vol. 1833, p. 3.

⁵⁰ On the rule establishing which State has jurisdiction to prosecute crimes committed on board or from a ship on the high seas, see L. Magi, "Criminal Conduct on the High Seas: Is a General Rule on Jurisdiction to Prosecute still Missing?", in *Rivista di Diritto Internazionale*, 2015, p. 79; E. Papastravidis, *The Interception of Vessels on the High Seas. Contemporary Challenges to the Legal Order of the Oceans*, Oxford and Portland, Oregon, 2013.

⁵¹ See article 92 of the UNCLOS.

⁵² See article 89 of the UNCLOS.

Included in this list of exceptional circumstances is the reasonable ground for suspecting that a ship is without nationality.⁵³

The approach taken by the UNCLOS, which is based on the freedom of navigation on the high seas and on the exclusive jurisdiction of the flag State, is not substantially changed by the more recent Protocol against the Smuggling of Migrants.⁵⁴ According to article 8 of this Protocol, on the high seas the boarding of the suspected vessel can take place only after having received authorization by the flag State, unless the vessel suspected of migrant smuggling is without nationality. Differently, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,⁵⁵ is silent on this aspect. However, it is difficult to imagine that the Security Council Resolution was adopted for the specific aim of covering this legal gap. Namely, we believe that in this latter case, the Security Council would have chosen to use a diverse and clearer wording.

From the above comparative analysis between the text of the Security Council Resolution and the provisions of applicable international law, which are expressly recalled also in the Council Decision, it is difficult to identify the legal rationale behind the adoption of the Resolution. This latter does not introduce any specific extraordinary condition to act against migrant smugglers and human traffickers in the Mediterranean, neither with respect to the high seas nor with respect to territorial waters. On the high seas the intervention of EUNAVFOR MED-Sophia forces remains restricted to the case of suspected vessels without nationality and, if there is confirmation that the vessels are being used for migrant smuggling or human trafficking, “all measures commensurate to the specific circumstances” can be used. This is not an authorization to use ‘all necessary measures’ in confronting migrant smugglers and human traffickers, which was the wording originally adopted in the initial draft of the Resolution circulated by the United Kingdom.⁵⁶ The unusual expression ultimately

⁵³ On the provisions of international law of the sea applicable to immigration in the different marine jurisdictional zones, see T. Scovazzi, “Human Rights and Immigration at Sea”, in R. Rubio-Marín (ed.), in *Human Rights and Immigration*, Oxford, 2014, p. 216.

⁵⁴ For references on the Protocol against the Smuggling of Migrants, see *supra* note 5.

⁵⁵ For references on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, see *supra* note 6.

⁵⁶ See “Vote on a Resolution on Human Trafficking and Migrant Smuggling in the Mediterranean”, in *What’s in Blue. Insights on the Work of the UN Security Council*, 8

adopted in the final version of the Resolution is the result of the amendments wanted by some Security Council States concerned that the Resolution could mean, as it namely means in the language generally used by the Security Council, a blanket mandate to the use of force. Different cases remain subject to the prior consent either of the flag State, if the suspected ship sails a flag and navigates on the high seas, or of the coastal State, if the military units intend to intervene against a suspected vessel navigating in its territorial waters. In all remaining cases, however, bearing in mind the current practice of smugglers and traffickers in the Mediterranean sea, we can presume that the flag State and the coastal State coincide and should be notably represented by Libya.

3.2 Continued: Access to Territorial Waters and the Requirement of Consent of the Coastal (Sovereign) State

As far as Libyan waters are concerned, the Security Council, aware of the reluctance of the Libyan government to authorize foreign vessels to access its waters, invites Member States and the EU to assist Libya “to secure its borders and to prevent, investigate and prosecute acts of smuggling of migrants and human trafficking through its territory and in its territorial sea”,⁵⁷ but only upon the express request of Libya.

The key legal issue revolves around the principle of territorial sovereignty. The boarding, search, seizure and diversion activities envisioned by the EUNAVOR MED-Sophia’s mandate⁵⁸ are enforcement measures that involve the potential use of coercive powers. The exercise of coercive powers by foreign authorities may interfere with the principle of territorial sovereignty. According to this customary principle codified by the UNCLOS, the authority of a coastal State is extended to its territorial and its internal waters. As known, in fact, the territory of a coastal State includes also a maritime portion. In this marine area, the coastal State enjoys the exclusive right to exercise coercive powers just like on the territory of the mainland. Accordingly,

October 2015, *What’s in Blue*: <http://www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php> (12/15).

⁵⁷ See paragraph 2 of the Security Council Resolution.

⁵⁸ See article 2 of the Council Decision.

the principle of territorial sovereignty does not allow for other States to participate in this exercise, unless expressly authorized.⁵⁹

An interesting precedent that proves the relevance of the coastal State's consent in order to exercise police powers within the territorial waters of a foreign coastal State is provided by the Exchange of Notes of 25 March 1997 between Albania and Italy.⁶⁰ In that case, Albania had expressly authorized Italian naval forces in Albanian territorial waters to intercept ships flying any flag and carrying Albanian citizens which had evaded controls exercised by Albanian authorities. Similarly, and more recently, the Transitional Federal Government (TFG) of Somalia (replaced in 2012 by the new Somali authorities) explicitly asked for international assistance to address the phenomenon of maritime piracy.⁶¹ On the basis of this request and thus with the consent of the coastal State, a number of Security Council resolutions were adopted to ensure implementation of the rules of international law concerning piracy on the high seas also in the territorial sea and even on the mainland of Somalia.⁶² Therefore, according to this State practice, the consolidated principle of territorial sovereignty may interdict the EU naval forces from exercising any enforcement powers against suspected migrant smugglers and human traffickers in the territorial sea off the coast of

⁵⁹ See T. Scovazzi, *Human Rights and Immigration at Sea*, cit., p. 213 ff. On the specific case of EUNAVFOR Med Sophia, see S. Mananashvili, "The Legal and Political Feasibility of the EU's Planned 'War on Smuggling' In Libya", in *EJIL:Talk!*, 10 June 2015, *EJIL:Talk! Blog of the European Journal of International Law*: www.ejiltalk.org/the-legal-and-political-feasibility-of-the-eus-planned-war-on-smuggling-in-libya/ (12/15).

⁶⁰ See the Exchange of Notes of 25 March 1997 between Albania and Italy, published in the Italian Official Journal No. 163, Supplement of 15 July 1997.

⁶¹ According to paragraph 9 of Resolution 1816 (2008) "the authorization set out in paragraph 7 has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG". Similar formulations, referring to further letters conveying the consent of the TFG, are in Security Council Resolutions 1846 (2008) and 1851 (2008).

⁶² On the relevance of the State's consent, see D. Wippman, "Military Intervention, Regional Organizations, and Host-State Consent", in *Duke Journal of Comparative & International Law*, 1996-1997, p. 209; with specific reference to the coastal State's consent in the context of piracy in Somalia, see T. Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", in *The European Journal of International Law*, 2009, p. 406; A. Tancredi, "Di pirati e stati 'falliti': il Consiglio di sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia", in *Rivista di diritto internazionale*, 2008, p. 937.

Libya if Libyan authorities do not expressly authorize them to exercise such powers.

At the same time, however, we consider important to analyze the principle of territorial sovereignty also from another perspective. Admittedly, State sovereignty is based on the 'effective' control of the territory. From this feature of the principle of sovereignty derives also the obligation of a State to adopt all measures necessary to prevent and repress on its territory (and on its territorial and internal waters) private conducts which may infringe the interests of other States, especially when such conducts consist of violent acts or aggressions.⁶³

As mentioned in the first section of this article, since 2014 Libya has been facing a grave political crisis and we wonder whether the 'effectiveness' of its sovereignty may be placed in doubt in light of a number of facts. Above all, the fact that in many parts of the State, Libyan authorities seem to lack the capacity to 'effectively' control the territory. *De facto* Libyan authorities are omitting to adopt measures capable to prevent and repress on its territory a wide range of serious violent threats such as, the rising trend of terrorist groups in Libya proclaiming allegiance to the Islamic State in Iraq and the Levant (also known as Da'esh) and the continued presence of other Al-Qaida-linked terrorist groups and individuals operating in Libya.⁶⁴ Also, Tripoli and its ports, from which most smugglers and traffickers depart, are subject to dangerous militias. Additional concerns regarding stability in Libya and in the Region derive from the uncontrolled proliferation of unsecured arms and ammunition. On these grounds, the Security Council has recently affirmed that "the situation in Libya constitutes a threat to international peace and security".⁶⁵

The possible lack of effective authority in Libya might lead to extreme consequences also in its territorial sea. The question, at this point, is whether the absence of authority and the consequent development of criminal transnational activities in waters near the coast of a territory without an effective government may lead to consider the

⁶³ See International Court of Justice, Corfu Channel case, Judgment of April 9th, 1949 I.C.J. Reports 1949, P. 4.

⁶⁴ On the use of force against terrorism and other violent activities of non-state actors in acquiescent States, see A. Tancredi, "Il problema della legittima difesa nei confronti di milizie non statali alla luce dell'ultima crisi tra Israele e Libano", in *Rivista di diritto internazionale*, 2007, p. 969 ff.

⁶⁵ See *Security Council Resolutions 2213 (2015) and 2238 (2015)*, cit.

external intervention of foreign naval forces as illegal. This is not simply a theoretical and hypothetical question as very recently Libya's government claimed that three Italian military vessels entered its territorial waters without permission.⁶⁶

If we assume that the legality of the intervention is a simple consequence of the fact that sovereignty over the territorial sea is dependent upon sovereignty on coastal land, and that without such sovereignty no territorial sea would exist, it may be argued that the high seas regime could extend up the coastline.⁶⁷ The high seas, indeed, include all parts of oceans and seas in which there is no effective exercise of jurisdiction by any State.⁶⁸ On the high seas, as seen above in section 3.1, the exercise of coercive powers against stateless ships may find its legal basis in article 110 UNCLOS, and in the specific case of migrant smuggling, in article 8 of the Protocol against the Smuggling of Migrants. Therefore, on the assumption that Libyan authorities are not able to exercise their sovereignty on the coastal land as well as on territorial waters, it could be argued that the consent of the coastal State, as required in the mandate of the EUNAVFOR MED-Sophia operation, is not necessary and, consequently, all EU naval forces may enter Libyan waters to counter transnational illegal activities in compliance with international law.

The extension of the high seas regime and the consequent entry of naval forces up to the coastline would determine a clear practical advantage: smugglers and traffickers would be intercepted before they depart and, in turn, before they jeopardize the lives of hundreds of persons.⁶⁹ On the other hand, however, the international community prefers to accept the idea that the Libyan government is able to effectively exercise authority on its territory and on its territorial waters in order to preserve the sovereignty of the Libyan State and the political

⁶⁶ See *Italy Denies Ships in Libyan Waters*, 2 November 2015, ANSA: www.ansa.it/english/news/politics/2015/11/02/italy-denies-ships-in-libyanwaters_15039f4f-bfc0-4b00-92dc-0ee74896aea6.html (12/15).

⁶⁷ On the extension of the high seas regime on piracy, see T. Treves, "The Fight against Piracy and the Law of the Sea", in *The Italian Yearbook of International Law*, Brill/Nijhoff, 2012, p. 23.

⁶⁸ See article 87 and 89 of the UNCLOS.

⁶⁹ On the need to have forces close to the Libyan shore, see J. Lehmann, "The Use of Force against People Smugglers: Conflicts with Refugee Law and Human Rights Law", in *EJIL:Talk!*, 22 June 2015.

equilibrium in the region.⁷⁰ Similarly in Somalia, the international community has, for numerous years, attributed effectiveness to this State even though Somalia has been traditionally defined as the *locus classicus* of a Failed State.⁷¹ And, in effect, also in the context of piracy and armed robbery in Somalia, foreign naval forces have intervened in Somali territorial waters on the basis of the consent of the TFG (and afterwards on the basis of the consent of the new Somali authorities) and various subsequent Security Council resolutions rather than on the basis of the extension of the high seas regime on piracy.⁷²

4. Critical Concluding Remarks

By implementing the EUNAVFOR Med-Sophia operation, Europe has tried to adopt a new strategy to react to the Mediterranean migration crisis. In addition to the previous border control management's operations, the EU is now committed to a military mission having the specific goal of disrupting smuggling and trafficking routes and capabilities. In effect, the transnational organizations of migrant smugglers and human traffickers play a crucial role in the current escalation of migratory movements towards Europe. In the absence of alternative legal channels to escape hunger, civil wars and other unimaginable situations in the countries of origin, they are increasing their profits day by day in parallel to the increasing number of people clamoring for an opportunity to cross the Mediterranean sea.

In order to activate the real military phases of its new strategy, however, the EU needed a Security Council mandate-and/or the consent of Libya. The notion of obtaining the support of the United Nations, in the absence of authorization by the State concerned, is in line with a consolidated State practice of past decades according to which States attempt to legitimize unilateral interventions through the label of Security Council resolutions adopted under Chapter VII of the UN

⁷⁰ See *Security Council Resolution 2213 (2015)*, cit., preamble.

⁷¹ For a reconstruction of the Somali crisis, for doctrine see G. B. Hemam, S. R. Ratner, "Saving Failed States", in *Foreign Policy*, 89, 1992-1993, pp. 3-20; M. Di Liddo, "Le incognite della transizione Somala", in *Osservatorio di politica internazionale*, 69, November 2012; G. Kreijen, *State Failure, Sovereignty And Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leiden, Boston, 2004, p. 65; for case law see European Court of Human Rights, *Sufi and Elmi vs. Regno Unito*, appeal No. 8319/07 and 11449/07, concerning the claim of two Somali citizens at risk of inhumane treatment if returned to Mogadiscio.

⁷² See T. Treves, *The Fight against Piracy and the Law of the Sea*, cit.

Charter.⁷³ Thus, like other Security Council Member States acting unilaterally in other circumstances, with the EUNAVFOR MED-Sophia operation the EU tried to legitimize its military mission against migrant smugglers and human traffickers in Libyan waters through a mandate of the United Nations.

From a different perspective, by means of the resolutions under Chapter VII of the UN Charter, the Security Council tries to maintain exclusive control of the sole cases in which the use of force is permitted by the international community. To this purpose, the Security Council uses the powers granted by articles 39 and 42 of the UN Charter which stipulates that if the Council determines the existence of a threat to peace, it may authorize the use of force to maintain or restore international peace and security.⁷⁴ With the adoption of Resolution 2240 (2015), the Security Council confirms a consolidated trend of using very wide discretionary powers to identify the situations triggering articles 39 and 42 of the UN Charter.⁷⁵ However, it seems important to stress that in previous resolutions dealing with piracy off the coast of Somalia, this phenomenon was not deemed to constitute a threat to international peace in itself. Rather, piracy was characterized as a factor exacerbating the situation in Somalia which, in turn, constituted a threat to international peace and security in the region. Differently from the resolutions concerning Somalia in the context of piracy as well as other more recent resolutions concerning Libya,⁷⁶ Resolution 2240 (2015) makes no reference to the situation in Libya as representing a threat to international peace and security.⁷⁷ Instead, it is the “recent proliferation of, and endangerment of lives by human trafficking and migrant smuggling in the Mediterranean Sea off the coast of Libya” that is regarded as the situation that needed to be addressed through the Security Council’s action under Chapter VII. Additionally, the Security Council expresses concern that the situation in Libya is being exacerbated by these transnational crimes. It is therefore the repression

⁷³ On the use of force and *erga omnes* obligations, see P. Picone, “Gli obblighi *erga omnes* tra passato e futuro”, in *Interesse collettivo e obblighi erga omnes nel diritto internazionale contemporaneo*, 2015, QIL: www.qil-qdi.org/wp-content/uploads/2015/07/Picone_Gli-obblighi-erga-omnes-tra-passato-e-futuro.pdf (12/15).

⁷⁴ See articles 39 and 42 of the UN Charter.

⁷⁵ See B. Conforti, C. Focarelli, *Nazioni Unite*, Milan, 2015.

⁷⁶ See *Security Council Resolutions 2213 (2014) and 2238 (2015)*, cit.

⁷⁷ Such a qualification was indeed deleted from a previous draft; *What’s In Blue*, cit.

of these crimes, and its impact on human lives, which seems to be used as justification for the Security Council's powers.⁷⁸ Therefore, confirming its wide discretionary powers to interpret the notion of threats to international peace, the Security Council tends to address its authorizations towards the repression of criminal activities by non-state actors, such as international terrorism,⁷⁹ piracy and armed robbery⁸⁰ and migrant smuggling and human trafficking.⁸¹

At the same time, Resolution 2240 (2015) also presents some unusual aspects that may make it ineffective. As per above, the mandate of the Security Council Resolution covers only the high seas. In this marine zone, States can already act against stateless ships of migrant smugglers and human traffickers under applicable provisions of the international law of the sea as well as under the Protocol against Smuggling. Furthermore, the Resolution does not appear to be a blanket mandate authorizing the use of force as resolutions adopted under Chapter VII usually are. Allegedly, notwithstanding the adoption of the Security Council Resolution, the essential coercive parts of EUNAVFOR Med-Sophia's mandate risks remaining unaccomplished, unless Libya decides to authorize the international fight against migrant smugglers and human traffickers. The recent UN-led formation of a government of national unity may go in this direction. In a persisting scenario of mass drownings, however, we still do not know who, at national, European or international level, is concretely going to undertake actions to prevent further loss of life at sea.

⁷⁸ See M. Bo, "Fighting Transnational Crimes at Sea under UNSC's Mandate: Piracy, Human Trafficking and Migrant Smuggling", in *EJIL:Talk!*, 30 October 2015.

⁷⁹ For recent resolutions adopted by the Security Council on threats to international peace and security caused by terrorist acts, see *Resolutions 2255 (2015)*, *2253 (2015)*, *2249 (2015)* and *2199 (2015)*, cit.

⁸⁰ For resolutions adopted by the Security Council on Somalia in the context of piracy and armed robbery, see resolution 1816 (2008), resolution 1846 (2008) and resolution 1851 (2008), cit.

⁸¹ See *Security Council Resolution 2240 (2015)*, cit.

USE OF FORCE AGAINST HUMAN TRAFFICKERS
AND MIGRANTS SMUGGLERS AT SEA AND ITS LIMITS
ACCORDING TO THE LAW OF THE SEA
AND HUMAN RIGHTS LAW

*Maria Chiara Noto**

1. Introduction

Every year hundreds of thousands of irregular migrants, including asylum seekers and refugees, cross the Mediterranean Sea to enter Europe, many of whom are victims of migrant smuggling¹ and human trafficking.² These are two different criminal phenomena, each having

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¹ Smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person across an international border, in violation of one or more countries laws, either clandestinely or through deception, such as the use of fraudulent documents. Migrant smuggling is a criminal commercial transaction between two willing parties, even if migrants are often unaware of their fate. They may in fact become victims of trafficking or other crimes. Article 3 (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air (New York, 15 November 2000 in United Nations Treaty Series, vol. 2241, p. 507) supplementing the United Nations Convention against Transnational Organized Crime, defines smuggling of migrants as: “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. See J. Gallagher, “Human rights and the new UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, in *Human rights quarterly*, 2001, p. 975 ff.; S. Burra, “Protocols against trafficking in Persons and Smuggling of Migrants: Implications for Refugee Protection”, in *ISIL Year Book of International Humanitarian and Refugee Law*, 2003, p. 163 ff.; N. Ollus, *Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime: A Tool for Criminal Justice Personnel*, Resource Material Series, 2004, p. 31 ff.; T. Obokata, “The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air”, in R. Bernard, M. Valsamis (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden, 2010, p. 181 ff.; J. Coppens, *Migrant Smuggling by Sea: Tackling Practical Problems by Applying a High-level Inter-agency Approach*, Ocean Yearbook, 2013, p. 323 ff.; J. Gallagher, “Migrant Smuggling”, in N. Boister, R. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, New York, 2015, p. 187 ff.

² Trafficking in persons can be compared to a modern day form of slavery. It involves the exploitation of people through force, coercion, threat and deception. It includes, moreover, human rights abuses such as debt bondage, deprivation of liberty, and lack of control over freedom and labour. Human trafficking is often an international crime that involves the crossing of borders. Human trafficking is defined by the Protocol

its own legal framework. The reasons for crossing the Mediterranean Sea are numerous. Some migrants are fleeing conflict and persecution; others simply seek a better life in Europe. Regardless of motivations, crossing is not without perils. The United Nations High Commissioner for Refugees (UNHCR) estimates that over 1,000,000 refugees died crossing the Mediterranean Sea in 2015.³ The International Organization for Migration (IOM) reports 1,800 deaths since the beginning of 2015, more than 800 of them during a single incident in April.⁴

Government disorder fosters smuggling and trafficking because criminal organisation can manage migrants and victims of trafficking in its territory undisturbed. The United Nations Security Council recently authorized strong measures to contrast both phenomena. Acting under Chapter VII of the UN Charter, the Council further decided, by means of Resolution 2240 (2015), to authorize Member States to use all necessary means to repress migrant smuggling or human trafficking in full compliance with international human rights law. The reference to the rules of international law and human rights protection is a formula often used when the Security Council adopts coercive measures against individuals and criminal organisations such as pirates or terrorists.

to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (New York, 15 November 2000 in *United Nations Treaty Series*, vol. 2237, p. 319), supplementing the United Nations Convention against Transnational Organized Crime. According to Article 3(a) of the mentioned Protocol, human trafficking is: "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." See J. Satvinder, "Human Trafficking, Asylum and the Problem of Protection", in J. Satvinder (ed.), *The Ashgate Companion to Migration Law, Theory and Policy*, Farnham, 2013, p. 281 ff.; A. Balch, "Assessing the International Regime against Human Trafficking", in L. Talani, S. McMahon (eds.), *Handbook of the International Political Economy of Migration*, Cheltenham, 2015, p. 98 ff.; T. Kyriazi, "Trafficking and Slavery : the Emerging European Legal Framework on Trafficking in Human Beings - Case-law of the European Court of Human Rights in Perspective", in *International Human Rights Law Review*, 2015, p. 33 ff.; T. Obokata, "Human Trafficking", in N. Boister, R. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, New York, 2015, p. 171 ff.

³ Cf the information available at www.unhcr.org/5683d0b56.html.

⁴ Cf report available at www.iom.int/news/iom-libya-aids-migrants-rescued-sea.

These measures may entail the use of force, but its limits are not specified.

This paper aims to analyse the maritime law enforcement measures applicable at sea and the limits to the use of force against human traffickers and migrants smugglers by sea, both from the law of the sea and from human rights law perspectives.

2. Enforcement jurisdiction and its limits according to the law of the sea

Vessels are subject to the jurisdiction of their flag State, whose exercise differs according to the maritime zone in which the vessel is sailing.⁵ As is well-known, the relevant maritime zones include internal waters, territorial sea, contiguous zone (CZ) and exclusive economic zones (EEZ) if declared by the coastal state and the high seas.⁶ As a ship sails away from a State's coastline, the extent of jurisdiction shifts in favor of the flag State, until it becomes exclusive on the high seas. Conversely, as the ship approaches a State's coastline, the balance shifts in favor of the coastal State.

The United Nations Convention on the Law of the Sea⁷ establishes the current subdivision in maritime zones and codifies states' jurisdiction, including the jurisdiction to enforce. Article 8 of the UNCLOS provides that a state's full sovereignty and jurisdiction extends into its inland waters, which form part of its territory. States also have full sovereignty within their territorial waters, which may extend up to 12 nautical miles from the baselines (UNCLOS, Articles 2-4).⁸ The coastal State maintains restrictions on entry and has the right to 'intercept' migrants at sea within the limits of their territorial waters or to prevent them from entering without mandatory documents. The coastal State may further exercise enforcement jurisdiction, such as taking immigration measures, within its CZ, which may not exceed 24

⁵ See H. Ringbom, *Jurisdiction over Ships: post-UNCLOS Developments in the Law of the Sea*, Leiden, 2015.

⁶ See S. Subedi, *Land and Maritime Zones of Peace in International Law*, Oxford, 1996; C. Symmons, *The Maritime Zones of Islands in International Law*, The Hague, 1979.

⁷ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, UNCLOS) *UNTS* vol. 1833, p. 3 ff.

⁸ T. Treves, "Coastal States Rights in the Maritime Areas under UNCLOS", in *Revista de Direito Internacional*, 2015, p. 40 ff.

nautical miles from the baselines (UNCLOS, Article 33).⁹ In the EEZ, which could be a maximum of 200 nautical miles from the baselines (UNCLOS, Articles 55, 56 and 57), the coastal State has functional jurisdiction over the exploration and exploitation, conservation and management of natural resources.¹⁰ In immigration and trafficking matters, the legal regime of the high seas is applicable also to the EEZ of the coastal State. The high seas are free for all States and are reserved for peaceful purposes (UNCLOS, Article 88).¹¹ The State jurisdiction applies to vessels flying their respective flags (e.i. floating state jurisdiction). However, freedom of navigation must be exercised by all States with due regard for the interests of other States in the exercise of freedom of the high seas (UNCLOS, Article 87(2)). The principle of exclusive jurisdiction of the flag State on the high seas impedes any interference with the navigation of foreign ships without the permission of their flag States.¹² However, in exceptional circumstances regulated by Article 110 of the UNCLOS, the “right to visit” may be exercised by a State over foreign vessels suspected to be involved in certain activities, namely piracy, slave trade, unauthorized broadcasting, sailing without nationality, practicing deception with regard to nationality.

With respect to the enforcement jurisdiction exercised by a State on a foreign vessel suspected of smuggling or trafficking on the high seas, the transportation of the persons in question is very often carried out using non-registered small vessels without any flag (i.e. stateless vessels). The “absence of nationality” seems to be the most relevant legal basis for intercepting vessels carrying migrants or involved in

⁹ See K. Aquilina, “Territorial Sea and the Contiguous Zone”, in D. Attard, M. Fitzmaurice, N. Gutiérrez (eds.), *The IMLI Manual on International Maritime Law*, Oxford, 2014, p. 26 ff.; J. Noyes, “The Territorial Sea and Contiguous Zone”, in D. Rothwell, A. Elferink, K. Scott, T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, The Hague, 2015, p. 91 ff.

¹⁰ See U. Leanza, M. Caracciolo, “The Exclusive Economic Zone”, in D. Attard, M. Fitzmaurice, N. Gutiérrez, *The IMLI Manual*, cit., p. 177 ff.; G. Andreone, “The Exclusive Economic Zone”, in D. Rothwell, A. Elferink, K. Scott, T. Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford, 2015, p. 218 ff.

¹¹ See D. Attard, P. Mallia, “The high seas”, in D. Attard, M. Fitzmaurice, N. Gutiérrez, *The IMLI Manual*, cit., p. 239 ff.; D. Guilfoyle, “The High Seas”, in D. Rothwell, A. Elferink, K. Scott, T. Stephens, *The Oxford Handbook* cit., p. 270 ff.

¹² On the freedom of high seas principle, see B. Conforti, *Il regime giuridico dei mari*, Napoli, 1957, p. 9 ff.; M. Giuliano, *Lo sviluppo e gli aspetti attuali del diritto del mare*, Valladolid, 1960, p. 25 ff.; D. Brown, *The International Law of the Sea*, vol. I, Aldershot, 1994, p. 51 ff.

human trafficking. According to Article 110 (1, *d*) of the UNCLOS, a vessel without nationality may be boarded by any warship.¹³ Moreover, the right of visit could apply to cases of trafficking in persons, because it is often referred to as a modern form of slavery. However, Article 110 (*b*) concerning ships engaged in slave trade has never been used to exercise a right of visit for suspected situations of human trafficking.

By virtue of the UNCLOS, there is further legal basis for interfering with migrant smuggling or human trafficking on the high seas. More specifically, Article 110 (1) contains a further exception “where acts of interference derive from powers conferred by treaty”. This means that powers of interference can be conferred by a treaty on a variety of activities, including the suppression of migrant smuggling and trafficking. States have entered into numerous multilateral and bilateral agreements that provide the right of visit in respect of irregular migration on the high seas.¹⁴ Such agreements grant interference powers to State parties on a reciprocal basis. The most important multilateral treaty providing for the right to visit on the high seas for counter-migration purposes is the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.¹⁵ According to its Article 8: “2. A State Party that has reasonable grounds to suspect that a vessel (...) flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. (...) A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.”

¹³ See U. Leanza, F. Graziani, “Poteri di ‘enforcement’ e di ‘jurisdiction’ in materia di traffico di migranti via mare: aspetti operativi nell’attività di contrasto”, in *La Comunità Internazionale*, 2014, p. 163 ff.

¹⁴ *Ibid.*

¹⁵ See F. Crépeau, “The Protocol Against the Smuggling of Migrants: the Crowning of an Intense Cooperation on Migration Containment”, in *Canadian Council for International Law, Globalism: People, Profits, and Progress: Proceedings of the 30th Annual Conference of the Canadian Council on International Law, Ottawa, October 18-20, The Hague, 2002*; X. Hinrichs, “Measures against Smuggling of Migrants at Sea : a Law of the Sea Related Perspective”, in *Revue belge de droit international*, 2003, p. 413 ff.

Unlike the Protocol against smuggling, which contemplates maritime enforcement measures, the Protocol against trafficking does not.

The flag state's consent for maritime enforcement measures on the high seas off the Libyan coasts is one of the main issues relating to the migrant smuggling and human trafficking phenomena. In order to obviate this problem, the UN Security Council issued Resolution 2240 (2015) authorising Member States, for a period of one year, to inspect vessels on the high seas off the coast of Libya if they had reasonable grounds to suspect they were being used not only for migrant smuggling, but also for human trafficking from that State. In relation to the use of force, the initial draft circulated by the UK included an authorisation to use 'all necessary measures' in confronting migrant smugglers or human traffickers.¹⁶ Some State Members wanted further guarantees that this was not a blanket mandate to use force. As a result of the Members' concerns compromise language was added to authorise member states to use "all measures commensurate to the specific circumstances" in confronting migrant smugglers and human traffickers. Resolution 2240 (2015) actually provides a formal 'UN umbrella' to the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), renamed Operation Sophia on 28 September 2015.¹⁷ This operation, which was launched in June 2015, is aimed at disrupting 'the business model' of human smuggling and trafficking networks in the Southern Central Mediterranean by making systematic efforts to identify, capture and dispose of vessels used or suspected of being used by migrant smugglers or traffickers. A subsequent phase of the operation in the territorial waters and on the shores of Libya is likely to be contingent upon the formation of a government of national accord in Libya.

Member States thus have the right to exercise control over navigation and to intercept vessels involved in smuggling and trafficking on the high seas. They also have obligations to treat smugglers and traffickers according to international norms different from those that are contained in the UNCLOS.

¹⁶ The unofficial text of the UN Security Council Resolution 2240 (2015) is available at www.un.org/press/en/2015/sc12072.doc.htm.

¹⁷ The EUNAVFOR MED was launched by European Council with the decision (CFSP) 2015/972 of 22 June 2015, in *Official Journal of the European Union* L 157/51.

3. *The UNCLOS tribunals and the application of (other) rules of international law*

The UNCLOS does not contain express provisions on the use of force in the arrest of ships nor any specification on its limits. Indications regarding the use of force are provided by Article 293 of the UNCLOS and other rules of international law that, are not incompatible with the Convention.¹⁸ The final paragraph of the UNCLOS preamble, moreover, admits the applicability of general international law, affirming “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law”.¹⁹

The practice of international tribunals has confirmed this interpretation. Two judgements appear particularly relevant to this end: the *MV Saiga No. 2* case²⁰ and the more recent *Arctic Sunrise* case settled respectively by the International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA).²¹ In the first case the ITLOS interpreted Article 293 as authorising not only the application of the UNCLOS, but also the norms of customary international law, including those relating to the use of force.²² Moreover, the CPA in the *Arctic Sunrise* arbitral award stated: “(...) some provisions of the UNCLOS directly incorporate other rules of international law”.²³

¹⁸ Article 293, paragraph 1, of the Convention stated that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”, including, of course, those relating to the use of force. See *supra*, footnote 7.

¹⁹ See, *supra* footnote 7.

²⁰ ITLOS, *MV Saiga No. 2* case, *Saint Vincent and the Grenadines v. Guinea*, judgement of 1 July 1999, in *ITLOS Reports* 1999.

²¹ Cf. Arbitral Tribunal, *Kingdom of Netherlands v. Russian Federation*, Award on the Merits no. 2014-02 of 4 August 2015, available at www.pcacases.com/web/view/21. This award is particularly important, because it is the first time that an UNCLOS tribunal has deliberated on protest acts at sea and the coastal State’s right to board the vessels of the activists. For comments, M. C. Noto, “Atti di protesta violenta in mare: pirateria, terrorismo o fattispecie autonoma?”, in *Rivista di Diritto Internazionale*, 2015, p. 1198; M. C. Noto, “The Arctic Sunrise Arbitration and Acts of Protest at sea”, in *Maritime Safety and Security Law Journal*, 2016, forthcoming.

²² According to the *MV Saiga No.2* judgement “In considering the force used by Guinea in the arrest of the Saiga No. 2, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law”. ITLOS, *MV Saiga No. 2* case cit., § 155.

²³ PCA, *The Kingdom of Netherlands v. Russian Federation* cit., § 188.

Although Article 293 permits the application of “other rules of international law” than those contained in the UNCLOS, this Article does not constitute a source of jurisdiction over claims beyond the scope of the UNCLOS.²⁴ The Tribunal in the *Arctic Sunrise* case stated that Article 293(1) of the UNCLOS does not extend its jurisdiction, but authorises the application of other rules of international law, which are integrated into the norms contained in the Convention. Although international law reformists are trying to expand the compulsory jurisdiction of international tribunals, the international legal order depends on the consent of the States. Article 288(1) limits the jurisdiction of the UNCLOS tribunals to disputes relating to the interpretation or application of the Convention, and the words “other rules of international law” in Article 293(1) can only refer to secondary rules of international law that help to interpret how to apply the UNCLOS provisions.

This approach is in conformity with Article 31 (3, *c*) of the 1969 Vienna Convention on the Law of Treaties, which provides that for the purposes of interpretation of a treaty, there shall be taken into account, together with the context, “[a]ny relevant rules of international law applicable in the relations between the parties”.²⁵

4. Limits to the maritime law enforcement measures according to (other) rules of international law

In order to identify the limits of the use of force applicable to the maritime enforcement measures, the UNCLOS tribunals have frequently applied the rules of international law different from the Convention. The CPA in the *Arctic Sunrise* case considered that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action, such as the boarding, seizure, and detention of a vessel and the arrest and detention of those on board, is reasonable and proportionate.²⁶ The ITLOS in the *Saiga No.*

²⁴ In addition, the Philippines did not seek to assert jurisdiction under Article 293(1). See PCA, *Philippines v. China*, Case No. 2013-19, Jurisdiction Hearing of 8 July 2015 Day 2, Final Transcript, p. 97. ITLOS, *MOX Plant* case, *Ireland v. United Kingdom*, Procedural Order No. 3 of 24 June 2003, § 19, in *PCA Award Series*, 2010, p. 52; ITLOS, “*ARA*” *Libertad* case, *Argentina v. Ghana*, Order No. 20 of 15 December 2012, Separate Opinion of Judges Wolfrum and Cot, § 7.

²⁵ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), *United Nations Treaty Series*, vol. 1155, p. 331.

²⁶ PCA, *The Kingdom of Netherlands v. Russian Federation* cit., § 197.

2 case instead stated “[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances”.²⁷ The use of force should be the last resource.²⁸ The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. The pursuing military vessel may, as a last resort, use force if the appropriate actions fail. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered. Firing without warning and creating danger to human life on board without proven necessity exceeds legitimate use of force.

International law requires that the use of force must be avoided as far as possible and, where unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. These principles have been followed over the years in maritime enforcement operations.²⁹ Force must be used only when strictly necessary and it must be always proportional to lawful objectives. Restraint may be exercised in the use of force, in order to minimise damages and injuries. In the exercise of the enforcement jurisdiction any warship (or any authorised ship) applies its domestic laws and national rules of engagement, which state the limits to the degree of force. The proportionality principle requires the enforcing State to balance the gravity of the offence with the value of human life. Moreover, according to the *Saiga No. 2* case “considerations of humanity must apply in the law of the sea, as they do in other areas of international law”.³⁰ This important remark of the ITLOS, rather than amounting to a rule of law,³¹ seems to be a moral

²⁷ ITLOS, *MV Saiga No. 2* case cit., §155.

²⁸ ITLOS, *MV Saiga No. 2* case cit., § 156.

²⁹ ITLOS, *S.S. “I’m Alone”* case, *Canada v. United States*, award of 30 June 1933 and 5 January 1935, in *United Nations Reports of International Arbitral Awards*, Vol. III, p. 1609; ITLOS, *The Red Crusader* case, *Commission of Enquiry, Denmark v. United Kingdom*, arbitral award 23 March 1962, in *International Law Reports*, Vol. 35, p. 485.

³⁰ ITLOS, *MV Saiga No. 2* case cit. § 155.

³¹ There is a certain amount of disagreement concerning the source, scope and function of the notion of ‘humanity’. See Carpanelli, “General Principles of

principle which should guide a State in the adoption of appropriate maritime enforcement measures. The notion of ‘humanity’ includes all common human values, such as the respect for human life and dignity, which cannot be disregarded by a State when using force to board a ship.

The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.³² Article 22, paragraph 1(f), of the Agreement states: “1. The inspecting State shall ensure that its duly authorized inspectors: ... (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances”.

The agreement contains clear limits regarding force, the use of which must take place only when the safety of inspectors is in danger or when they are obstructed in their activities in a manner proportionate to the circumstances. According to the Basic Principles on the Use of Force and Firearms, likewise, force may be used “only in self-defence or defence of others against imminent threat of death or serious injury, or to prevent a particularly serious crime that involves a grave threat to life, or to arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat, and in every case, only when less extreme measures are insufficient”.³³

International Law: Struggling with a Slippery Concept”, in *General Principles of Law – The Role of the Judiciary*, L. Pineschi (ed.), Heidelberg, 2015, p. 125 ff.

³² Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995), in *UNTS*, vol. 2167, p. 3 ff.

³³ Doc. A/CONF.144/28/Rev.1 of 7 September 1990. According to the ITLOS, “The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board. 159. For these reasons, the Tribunal finds that

Applying the above mentioned findings regarding limitations to the use of force against migrant smuggling and human trafficking, reasonable force, including the use of firearms, may be used in self-defence, defence of others, or to prevent a serious crime involving a threat to human life being committed. In other words, the intentional lethal use of force and firearms are allowed only when strictly unavoidable in order to protect human life. In cases other than those mentioned, the use of force would pose problems of necessity and reasonableness. Elementary considerations of law, humanity and practicality simply dictate that in most cases of suspected vessels, a military rescue operation will involve an unacceptable risk of death or injury to the persons on board in any firefight.

5. The application of human rights at sea: the notion of jurisdiction and control at sea

Most human rights treaties consider ‘jurisdiction’ as a parameter to define their scope of application.³⁴ The notion of jurisdiction is essentially territorial (e.i. spatial model of jurisdiction), but in exceptional cases could be extraterritorial.³⁵ The human rights law is applicable to State enforcement and control operations upon the internal waters and territorial sea of a State, when the law of the sea gives jurisdiction to States Parties or when they exercise effective control over individuals.³⁶

The human rights law applies to the maritime law enforcement operations put in place in the zones under the sovereignty of the States parties, such as ports, internal waters and territorial sea (e.i. territorial

Guinea used excessive force and endangered human life before and after boarding the Saiga”.

³⁴ For instance see Article 1 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 December 1950), in *European Treaty Series* n. 5, and Article 2.2 International Covenant on Civil and Political Rights (New York, 16 December 1966), in *United Nations Treaty Series*, vol. 999, p. 171.

³⁵ See K. Zatucki, “Extraterritorial Jurisdiction in International Law”, in *International Community Law Review*, 2015, p. 403 ff.

³⁶ J. Kapelańska-Pregowska, “Extraterritorial Jurisdiction of National Courts and Human Rights Enforcement: “quo vadis justitia”?”, in *International Community Law Review*, 2015, p. 413 ff.; E. Karska, “Introduction: Extraterritorial Scope of Human Rights”, in *International Community Law Review*, 2015, p. 395 ff.; M. Szuniewicz, “Problems and Challenges of the ECHR’s Extraterritorial Application to Law-Enforcement Operations at Sea”, in *International Community Law Review*, 2015, p. 445 ff.

jurisdiction).³⁷ Moreover, in its contiguous zone the coastal State has, under the law of the sea, functional competence in migrations matter. In its EEZ the coastal State has sovereign rights regulations in matters of management of natural resources, research and protection of marine environment, installation and the use of artificial structures (Article 58 UNCLOS). The ECtHR has interpreted these ‘sovereign rights’ to be constitutive of an exercise of jurisdiction under Article 1 of the European Convention on Human Rights and Fundamental Freedoms.³⁸ As a result the Convention is applicable to the maritime law enforcement measures conducted by the Coastal State in its EEZ. In immigration and trafficking matters, which are excluded by the functional jurisdiction exercised by the coastal State in its EEZ, the legal regime of the high seas, where the flag State exercises its exclusive jurisdiction over vessels flying its flag, is applicable. A ship on the high seas is subject to the exclusive jurisdiction of its flag State and the law of that State applies, including the rules on human rights to which it is party.

Where the law of the sea gives no jurisdiction to the States parties, human rights treaties are, *prima facie*, not applicable. However, the jurisprudence of the principal human rights organisms have recognized that, in exceptional cases, actions of the States Parties performing, or producing, effects outside their territories can constitute an exercise of jurisdiction for the purposes of human rights law, if the persons were respectively under the State’s “full and exclusive control” (e.i. personal model of jurisdiction).³⁹ As a result, the flag State shall respect the human rights – both international customary and treaties laws – of persons on board vessels flying its flag, and over individuals who are under the effective control of State agents.⁴⁰ The personal model of

³⁷ The European Commission of Human Rights (EcomHR), *Consorts D v. France*, Decision of admissibility 31 August 1994; EComHR, *Antonsen v. Norway*, Decision of admissibility 15 January 1997 and European Court of Human Rights (ECHR), *Pressos Compania Naviera SA v. Belgium*, Judgement 20 November 1995; ECHR, *Federation of Offshore Workers’ Trade Union and others v. Norway*, Decision of admissibility of 27 June 2002 and EComHR, *Edgardo Ty v. Netherlands*, Judgement 21 October 1996; ECHR, *Geert Drieman v. Norway*, Decision of admissibility of 4 May 2000.

³⁸ European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950), *European Treaty Series* n. 5.

³⁹ *Medvedyev and others v. France*, Judgement 29 March 2010, § 67.

⁴⁰ Cf. for instance ECHR, *Hirsi Jamaa v Italy*, Judgement Grand Chamber 23 February 2012, “Whenever the State through its agents operating outside its territory

jurisdiction has been conceived in order to retain control over individuals, instead of control over areas, as a founding element of a state's human rights obligations, covering the situations left without protection by the spatial model. This model has been sustained, for example, by the EcomHR in its *Lopez-Burgos* decision and, using the same wording of the EcommHR, by the ECtHR in *Issa*. Nevertheless, both these organs failed to provide general criteria for determining the extent of the control to be exercised over individuals for the purposes of human rights treaties.

Several scholars have proposed an innovative approach to the extraterritorial application of human rights, which bears in mind the distinction between positive and negative obligations. According to this doctrine, only the negative obligations ought to be always binding upon States, regardless of whether or not they exercise effective control over a territory or over individuals. In other words, States can never commit a direct violation of human rights. Some commentators, especially after *Al-Skeini*, have interpreted the personal test of jurisdiction as the 'state-agent' test.⁴¹

6. Limits and standards relevant to the use of force at sea from the perspective of human rights law

The UN Security Council in Resolution 2240 (2015) authorised Member States, acting nationally or through regional organisations, to use all measures commensurate to the specific circumstances in dealing with migrant smugglers or human traffickers. Moreover, the Security Council has recommended to provide for the safety of persons on board as an utmost priority. Migrants should be treated with humanity and their rights fully respected in conformity of international law, including international human rights law and international refugee law, as applicable. The measures authorised by the UN Security Council against

exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual". According to the General Comment 31 (U.N. Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004) of the Human Rights Committee the Covenant rights are applicable "to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained (...)".

⁴¹ See M. Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy*, Oxford, 2011, p. 67 ff.

smugglers and traffickers may entail the use of force, but the conditions and its limits have not been specified. Even though the States maintain ample discretion on the maritime enforcement measures to be taken, they must always be in conformity with international standards, especially international law and human rights protection.⁴² Moreover, the operations conducted by regional organisations, such as the EU operation EUNAVFORMED Sophia, must take rules of engagement into account as well as internationally recognised standards of human rights law.

The principal human rights bodies and mechanisms have examined several cases concerning the use of force by security officers, identifying the limits within which they may conduct maritime enforcement operations. In the *Finogenov* case, the ECtHR pointed out that it is “a duty to take specific preventive action (...) only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of individual or individuals”.⁴³ In the *Miguel Castro* case the IACoMHR established that “[t]he police and other officers in charge of enforcing the law must protect the rights to life, liberty, and security of the person, being able to employ force, only in a case of direct or imminent danger of death or injuries for the agents themselves or other people”.⁴⁴ Although States have a duty to arrest migrant smugglers or human traffickers, the use of force must be exceptional and necessary. In *Zambrano Vélasquez and others* case, the IACHR established that resorting to force on behalf of state agents must be defined ‘by exceptionality’⁴⁵ and that force or coercive means can only be used once all other methods of control have been exhausted and have failed.⁴⁶ The IACHR, in this sense, has clarified that in peacetime situations, State agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat. The use of force is admitted only against the former.⁴⁷ In the *Andronicou e Constantinou* case,⁴⁸ the

⁴² EU Council Doc. 17168/09 EXT 1 of 2 February 2010, § 1-2.

⁴³ *Ibid.*

⁴⁴ See the IACoMHR, *Miguel Castro v. Peru*, Judgment of 25 November 2006, Series C, n. 160, § 228 (d).

⁴⁵ See the IACHR, *Zambrano Vélasquez v. Ecuador*, Judgment of 4 July 2007, Series C, n. 166, § 83.

⁴⁶ *Ibid.*

⁴⁷ See *Zambrano Vélez v. Ecuador*, cit., § 85; *Miguel Castro v. Perú*, cit., § 216.

⁴⁸ See the ECtHR, case *Andronicou and Constantinou v. Cyprus*, Judgment no.

ECtHR decided that rescue operations in which persons and criminals had died had not violated the right to life of those individuals, if the enforcement officials had tried to convince them to surrender, and had intervened solely when the life of the persons on board was seriously in peril.

In the event that the use of force is necessary, planning operations must aim primarily to save persons smuggled or trafficked and secondly to arrest the smugglers or the traffickers. In this sense, principle n. 5 of the UN Basic Principles sets forth that “Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life.”⁴⁹ In *McCann*,⁵⁰ and *Andronicou and Constantinou* cases,⁵¹ the ECtHR determined that resorting to direct force against individuals should be ‘absolutely necessary’ for the purpose it is intended to fulfil.⁵² This expression indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is necessary in a democratic society. In other words, the evaluation of the necessity of the direct force by national authorities against individuals is subject to more rigorous standards than those normally used to evaluate the legitimacy of other enforcement measures. In this field, the IACHR has identified necessity as a limit to the use of force by authorities against individuals. In the *Zambrano Vélasquez* case, the Court has established that the exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is ‘absolutely necessary’ in relation to the force or

25052/94 of 9 October 1997, in *Reports of Judgments and Decisions*, 1997, p. 268, § 171 and 75.

⁴⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

⁵⁰ See *McCann and Others v. Great Britain*, cit., § 149.

⁵¹ See *Andronicou and Constantinou c. Cyprus*, cit., § 171.

⁵² *Ibidem*.

threat to be repealed.⁵³ According to the Court “when excessive force is used, any resulting deprivation of life is arbitrary”.⁵⁴ Moreover, the force must be “strictly proportionate”⁵⁵ to the aim pursued, in light of the circumstances of the case and the high value attributed to the right to life. In *Neira-Alegria and Perù* the IACHR, in addition to requiring necessity and proportionality, considered humanity as a principal guide to evaluate the conformity of conduct of police officers against their duties to protect the right to life.⁵⁶

Finally, when the use of force is inevitable, the State should adopt all possible measures to avoid any injury and suffering to the victims. Indiscriminate use of force against a group of persons smuggled or traffickers and criminals does not fit well with the aforementioned severe limits imposed by both the use of force, on the one hand, and the duty to avoid or reduce to the minimum the loss of lives, on the other. On this issue, the ECtHR has established that the massive use of indiscriminate weapons is in contrast with the aim, and cannot be considered compatible with the standard of care that is a prerequisite to an operation involving use of lethal force by state agents.⁵⁷

7. Conclusions

Resolution 2040 (2015) was adopted by UN Security Council in response to the mass migrations across the Mediterranean and the rapidly soaring number of migrants drownings at sea. Resolution 2240 (2015) does not criminalise migrants and persons trafficked or prevent them from seeking protection under international human rights law and international refugee law, but is intended to contrast smuggling and trafficking.

The UN Security Council, with Resolution 2040 (2015), has provided the possibility for Member States to conduct anti-smuggling and anti-trafficking operations in the territorial sea of Libya. However, such operations are subject to the consent of Libya, which to date has not given its authorisation to adopt maritime enforcement measures against smugglers and traffickers in its territorial sea. In order to make

⁵³ *Zambrano Vélez v. Ecuador*, cit., § 89.

⁵⁴ See *Zambrano Vélez v. Ecuador*, cit., § 68-69.

⁵⁵ See *McCann and Others v. Great Britain*, cit., § 149 and *Andronicou and Constantinou v. Cyprus*, cit., § 171.

⁵⁶ See *Zambrano Vélez v. Ecuador*, cit., § 85.

⁵⁷ See *Isayeva v. Russia*, cit., § 191.

Resolution 2240 (2015) effective, Libya may allow ships that are part of operation EUNAVFOR MED Sophia or military vessels belonging to other States to patrol its territorial waters. The Resolution simply serves to remind Member States of their obligations to repress smuggling migrants and human trafficking, without granting them any additional power.

In maritime zones not subject to the jurisdiction of any State, such as the high seas, the principle of exclusive jurisdiction of the flag State applies. Apart from cases where smuggling and trafficking are carried out by vessels without any flag, Article 110 of the UNCLOS refers to the exceptions provided in other treaties. The smuggling Protocol provides law enforcement measures against a vessel suspected to be involved in migrant smuggling, but they are subordinated to the consent of its flag State. The trafficking Protocol instead does not contain maritime enforcement measures, but Resolution 2240 (2015) authorises the arrest of vessels suspected of trafficking on the high seas. This Resolution represents a legal basis to exercise enforcement jurisdiction against vessels involved in smuggling and trafficking. However, as the consent of the flag State is required, the UN Security Council does not introduce any new exceptions to the law of the sea.

Resolution 2240 (2015) contemplates the possibility of adopting maritime enforcement measures, which can include the use of force, in order to board and seize vessels used by migrant smugglers or human traffickers and arrest them. These measures were adopted with a view to saving the threatened lives of migrants and victims of human trafficking on board such vessels as mentioned above. Migrants cannot be targeted by measures of law enforcement, but should be treated according to international human rights law and international refugee law, as applicable.

Identifying the limits under which to adopt maritime enforcement measures is complicated because it is necessary to apply laws and standards belonging to different sectors, both the law of the sea and human rights law. The jurisprudence of the UNCLOS tribunals and the practice of judicial and non-judicial control mechanisms to protect human rights have contributed to identifying the limits to the use of force. The UNCLOS tribunals have applied not only the norms of the Convention, but also 'other rules of international law', which according to the common interpretation are used as secondary rules of international law to assist in interpreting how to apply the UNCLOS

provisions. This approach is in conformity with Article 31 (3, *c*) of the 1969 Vienna Convention on the Law of Treaties, which provides that for the purposes of the interpretation of a treaty there shall be taken into account, together with the context, any relevant rules of international law applicable in relations between the parties.

The jurisprudence of the primary control mechanisms to protect human rights have identified several limits to the use of force. According to that jurisprudence, the use of force must be avoided as far as possible. It is admissible in the case of real and immediate risk to the life, liberty or security of agents or other persons. However, the force used must not go beyond what is necessary and proportional in relation to the circumstances. Those limits are often mentioned in the decisions of the human rights control mechanisms. Moreover, they were endorsed by UNCLOS tribunals in a jurisprudence which is now constant. Such standards of protection of human rights are applicable during the arrest of migrants smugglers and human traffickers, safeguarding not only the human rights of the migrants and victims of trafficking, but also of the criminals.

II PART

*Migrants' Rights in the Mediterranean: a Cultural, Political,
Historical and Sociological Overview*

MIGRATION FLOWS IN THE MEDITERRANEAN AND THE ITALIAN CROSSROAD

*Enrico Pugliese**

1. Premise

Italy is today – and has been in various historical periods of the past – a cross-road for migration movements of various origin and nature in and out of the country [Corti, Sanfilippo 2009]. This essay analyses the Italian situation in the context of migration movements in the Mediterranean with reference to the conditions and role of the immigrants in the Italian economy and society. The policies of access and frontier control, as well as the welfare policies for immigrants, shall also be discussed. Finally the integration processes of the immigrants and asylum seekers shall be taken into account.

The essay moves from the issue of geographic location of the country at the center of the Mediterranean basin and its proximity to areas with high demographic pressure to the strong attraction it exerts on the population and the labor supply of the southern shore.

In this premise it is also necessary to mention two further points. The first is that the Italian migration space – that is the geographic area where the migration dynamics affecting Italy take place – is much larger than the countries of the Mediterranean basin because the pull factors, the migration channels and the connecting agencies are able to lead towards the country also immigrants from very distant areas. The second – which is particularly relevant in some specific moments such as the present one – is Italy's role as a country of transit for people who do not necessarily intend to settle in the country or who plan to move on to other well identified destinations. And this latter factor concerns both the traditional international labor migrants as well as the people who are on the move trying to escape from wars and individual or collective persecution.

A further consideration to keep in mind when analyzing the role of the country in the international migration scene is that Italy has always been a sending as well as a receiving country: the former role undeniably prevailing in the last two centuries (Bonifazi 2013). Today, after several decades of relevance and great expansion of immigration a

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new, and for some aspects unexpected, trend is emerging: a resumption of Italian emigration towards European and other destination.

This last phenomenon – the coexistence of emigration and immigration – concerns all countries of the Mediterranean northern shore. And it is no coincidence that Italy, Spain, Greece and Portugal have many characteristics in common as far as migration is concerned. From the second half of the seventies onwards they all began to develop into countries of immigration while they were still countries of emigration, though with a substantial reduction in emigration flows (King, Black 1997). In general, over the past few decades they have undergone significant changes in their demographic composition.

Their economic, demographic and social structure have significant analogies and determine particular aspects of the labour demand that also explain the composition of the immigrant flows (Ponzini 2008). On the basis of these considerations the essay puts forward the hypothesis that it is possible to claim the existence of a Mediterranean model of international migration or – perhaps even better – of a Southern European model for immigration and immigration policies concerning all countries of the ‘Southern Europe’.

The paper begins with a presentation of this model and of its main features, proceeding to a more detailed analysis of the Italian position and role. It concludes with some comments on the transformation induced by the economic crisis and recession and the implications of the so called refugee crisis.

2. What do we mean when we say “Mediterranean”

Although it may seem obvious, a clarification is needed concerning the space we are referring to when studying Mediterranean migration. What exactly do we mean by Mediterranean? Just as the current south-north flow is not the only relevant one because sending countries are located in a much larger area and the routes are many and varied, in the past also the areas considered part of the Mediterranean were much more extensive than those located along its shores (Calvanese 1992).

On this issue it is important to consider the Braudelian innovation (Braudel 1977) which consists, amongst other things, in seeing the Mediterranean not as a simple geographical space but also as a specific and autonomous entity: a complex of phenomena and processes, with tensions that, on a spatial level, continue to shift borders and central

gravity points with an impressive continuity that can be explained only through the *long durée* approach.

From the perspective of space and borders, as far as migration is concerned, only 40 years ago, as noted by Aymard (2003), there was an important border (*limes*) within Europe between South and North (not incidentally almost cutting Italy in half) (Aymard 2003) and it was very difficult to imagine a different one at that time. Now the new border is the sea. It is a border dangerous to cross as those coming from the southern shore (or from countries even more to the south) have experienced in attempting to enter Europe seeking work. At the beginning of the new migration wave of the late 20th century (the one that has seen the countries of the northern shore as receiving countries) the primary migration flow was the one linking the northern shore to the southern one. This flow was specifically directed toward Italy and Spain while Greece attracted immigrants coming from different places and through different routes.

International literature on migration of the time described the Mediterranean as the space of south-north migration. For example, Baldwin-Edwards (1994), his own understanding of Mediterranean migration, providing also an empirical basis using the data available in the 1980s, on the impact that immigration from the Maghreb had on each southern European country. Baldwin-Edwards' analysis was not incorrect for that period and to a certain extent the data presented, the situation as it actually was at the time. What was missing was the fact that this was a situation soon to be changed by the reduction in incidence of the Maghreb component, as proven later by Mattia Vitiello using the same statistical sources.

Such a reduction accelerated with new arrivals from the Eastern countries. In effect, what was missing in the Baldwin-Edwards analysis (and other similar ones) was the fact that the presence and the escalation of the intra-Mediterranean flows were the product of a temporary situation. In other words, such studies did not consider the continuities and discontinuities that suddenly take place in the Mediterranean migratory space, amplifying and making it more complex. From the beginning of the 90's onwards new immigrants from Eastern European countries that had not taken part in the early immigration flows arrived in Western Europe, including the Mediterranean countries. The immigrant workers from the East now represent the largest component

of the incoming flows. Hence the current Mediterranean migratory space is now larger and has with new focal points.

Some fundamental aspects of the incorporation process of immigrants in countries of the northern shore can be traced back to the 'Mediterranean' character of the history, culture and institutions of these countries, and this allows us to talk of a Mediterranean model.

3. The Mediterranean migration model and its characteristics

A Mediterranean model for a phenomenon such as immigration implies singling out aspects and characteristics of immigration that can be found in all Mediterranean countries of the northern shore. Aspects that are specific to those countries and that do not undergo any meaningful changes over time.

On the basis of such a definition, a temporal aspect must be introduced. We are talking about countries of 'new immigration' in the sense that the immigration phenomenon on a vast scale began roughly in the past forty years. And, as already mentioned, we are talking about countries that, until very recently, were emigration countries.

Immigration in these countries happens in the post-fordist phase of economic development, characterised by significant processes of 'tertiarisation' of the economy, amongst others. Countries with an historic immigration tradition are also involved in these same processes. There is also the fact that the new immigrants (and a large part of the old ones) have changed occupational location and placed themselves in the tertiary sector. While Mediterranean Europe has been witness only to the new post-industrial immigration, other countries have experienced intra-European migrations furthered by industrial development.

Other characteristics of the model primarily concern aspects of employment, especially employment in agriculture, which was rather exceptional in the old intra-European migration of the fordist age. We must also note the existence of other variables, such as demographic composition, with a female presence that is higher than elsewhere, even during this phase.

Finally, there is the time factor. Mediterranean immigration is taking place in an age in which borders are closed and legal immigration on a vast scale is limited. This has significant implications both on the situation of the immigrants (very often illegal) and the way in which migration policies are developed and applied. The presence of a high quota of clandestine (and, in general, irregular) immigrants and the

practice of amnesty laws for illegal immigrants is a common feature of all Mediterranean immigration countries.

Not all the variables that are taken into consideration to define the model must be exclusive. Neither are they all present in the same way in all the countries. What is important is that they are predominantly present and that they tend to characterise the model in a more stable manner.

Let us now consider the characteristics of Mediterranean immigration in more detail. We must reiterate that, first, we are talking about countries where, starting from the 70's, immigration has progressively replaced emigration without their, ceasing to be countries of emigration. This is due both to the presence of large communities of citizens resident abroad and to the constancy of outgoing flows which, even though equal in number to incoming ones, still show a strong population turnover. If we take the case of Italian emigration to Germany, starting in 1973 we the total number of departing and incoming individuals (officially re-entered people) to be at least two million. That was the time of the Anwerbenstop, which usually indicates the end of the great inter European mass migration phase. And this shows how much a Mediterranean country like Italy continues to be a crossway of great movements of arrivals and departures (Carchedi, Pugliese 2007).

Second, in all the Mediterranean countries, especially in the initial phases of the immigration experience, an important employment opportunity for immigrants is represented by seasonal agricultural labour. Agriculture had not been effected, or only marginally so, by immigration during the great inter European migrations of the preceding decades. Seasonal agricultural immigration, that not infrequently evolves into a definitive immigration, has analogies with other experiences such as the Mexican immigration into California. The opportunities offered by seasonal work, with frequent returns to their homelands, was initially favoured by a lax control of the borders and, in general, by more permissive admission policies. This was particularly significant in those regions not unlike southern Italy where agricultural work, especially during the harvest season, required male immigration. The same holds also true for the building trade, a typical occupational landing ground for male immigrants, but which tends more and more to become a definitive location. In the agricultural and building industries, the so called informal work (or undeclared employment) tends to be

predominant in all countries. Contrary to what happened during the post war decades of economic expansion, the labour demand in the industrial sector is not as strong. At that time, international migrations were encouraged by the industrial development. Such a development was also characterised by steady employment and long term employment contracts (often in large enterprises). These are characteristics that are seldom encountered in the Mediterranean immigration model (Vitiello 2008).

Third, in all Mediterranean European countries such irregular working conditions, at least in the initial phase, are strictly linked to the forced status of illegal immigrant. The issue of the high incidence of illegal workers must be linked to the initial absence of rules regulating immigration and the more recent enactment of rather restrictive laws concerning immigration and admission policies. There is a certain similarity in the migratory policy experience of Mediterranean countries: they have all experienced a shift in border policy (or rather, a non-policy) previously more aligned with the European Union orientation of closed borders which we will discuss later. This explains the condition of prevalent illegality typical of the model.

Fourth, still from a labour market perspective, the characterising element of Mediterranean immigration is the concentration of immigrants in the tertiary sector. As previously stated, although this can hold true for countries, including those of long time immigration, this sector (particularly domestic work but also and mainly care of the elderly and home services of various kinds) is especially characteristic of the Mediterranean. This means that the immigrant workforce in the Mediterranean countries also fills the deficiencies in those countries' welfare systems. In fact, their activities (as private jobs) fulfil needs and a demand for services that would otherwise be met by the welfare state, especially in the realm of childcare and, increasingly so, in caring for the elderly. Finally, one must not forget that the presence of immigrants is particularly noticeable in regions characterised by a low rate of unemployment and strong labour demand and in regions (such as the Italian south) with a high unemployment rate related to a weak local economic structure. This feature leads to a complex interpretation of the role of immigrants in the labour market, so much so as to overtake the traditional dichotomy between immigration led by labour demand or by labour supply.

The segmentation of the labour market explains the paradox of the co-existence of immigration and unemployment, particularly evident in agricultural regions where the immigrant workforce plays an increasingly significant role.

Five, composition on the basis of gender and the significant presence of women in some of the principal immigrant groups (those placed in the sphere of the domestic work or linked to similar activities) is very peculiar and sometimes overriding. Such a phenomenon began with the arrival of immigrant women to work as cleaners and domestic helpers. Now, their presence has become far more evident and on a mass level in the realm of elderly care. We can say that it is one of the principle novelties of Italian immigration starting from the second half of the last decade. It is a novelty that reflects relevant social and demographic transformations within Italian society (as far as Italy is concerned), but this is also true for other countries. Initially the renewed diffusion of full time domestic workers (living in the houses of their masters 24 hours a day) in the 70's and 80's in middle class homes, seemed to be due to traditional social relations. But things seem to have changed with time. Female immigration, especially from the Eastern Countries, is destined to work in the field of elderly care (Bettio, Simonazzi, Villa).

As previously mentioned, the presence and the development of such immigration must be understood within the framework of the transformations and crisis of the Mediterranean family. But the crisis of the traditional family, hence the difficulty/impossibility of caring for the elderly within the family itself, does not mean the overcoming of traditional Mediterranean familism. The contradiction is that the elderly in need keep relying on the family in any case, in the absence of other supports. But the family is no longer able to care for their elderly members directly. Hence the need for commodified domestic help paid by the family but indirectly by the state (mainly or in part) through pensions and subsidies. And this is a very interesting aspect of the Mediterranean welfare mix.

A final characteristic of immigration in Mediterranean countries, though related to the above, concerns the still scarce access to social benefits by immigrants, not only due to the inadequate policies and their actual implementation but also because of the more complex nature and the instability of immigration nowadays. The implementation deficits, represent one of the main problems of the Italian immigrant policy, that is of the social policies for immigrants (Morris 2003, 2006). But these

implementation deficits also concern border control policies, with the resulting mass entrances by clandestine immigrants and the consequent need for amnesty laws and mass regularisation. In addition, the costs for border control and to combat illegal immigrants in Italy are much higher than those for social policies for the immigrants.

Another closely connected aspect that characterises immigration in the above mentioned countries is the fact that it is taking place in a period of closed borders (for non-Eu citizens). It is a known fact that, to a greater or lesser extent, immigration comes to pass in any case. Those who enter illegally go through an extended phase of illegality, followed by an amnesty which, at least temporarily, rectifies the situation. It is no coincidence that in Italy the amnesty norms are called 'sanatorie', a term which implies healing. In sum, in Italy, as well as in other countries of the northern shore, there is a border policy that is strict on paper but quite lax in reality. And social policies legislation for immigrants are rather advanced but generally not applied.

Recently an element of complication emerged that contradicts some of the aforementioned aspects of the model, such as the prevalence of non-legal entry of immigrants: it is the growing importance of a new component which is legal by definition because composed of EU citizens. Until the admission of Romania and other Eastern countries to the EU immigrants from that area did not normally have a legal status at least in the first period of their immigration experience. As EU citizens they can now enter other countries without a visa and are therefore in a privileged situation compared to other older components coming from non-EU countries. On the other hand, they do not seem to be able to enjoy the privileges they are entitled to as far as their condition in the labour market and access to welfare benefits are concerned.

To conclude with the Mediterranean model and its features we must underline that the factors of attraction are determined by a labour demand that reflects not only the characteristics of the economy but also the characteristics of the local society. The employment of immigrants in the agricultural or building sector is the expression of the first feature, while work in the service sector (in particular elderly assistance) is the expression of the second.

Finally, the role of geographic proximity must be mentioned again. The ties between the southern and northern shores have varied in the course of time as have the south-north flows. In general from the early 90's onwards these flows had been overtaken by incoming flows from

Eastern countries such as Albania. In very recent years, the flow coming from Eastern Europe has escalated, including not only the Balkans but also other nations such as countries of the former Soviet Union, especially the Ukraine that are very relevant now with Greece and the Balkan countries as areas of transit.

The ties between the northern and the southern shores are stronger when push factors of an economic nature are added to the social political ones: in particular, the effects of wars and persecutions in the countries of origin, such as (once) the wars in the former Yugoslavia and (now) the Syrian and the Libyan wars. And this holds true also for the east-west flows.

The situation has become increasingly complex in the past few years, starting with the period of the Arab Spring and with an acceleration of the changes following the Libyan and the Syrian crisis. The re-activation of the Mediterranean flows after 2012 was not triggered as much by 'economic immigrants', that is by people in search of work, as it was by the great number of people seeking asylum. At any rate the Mediterranean route is the same for 'economic' and 'political' immigrants – assuming that a clear cut distinction between the two might be possible.

As far as Italy is concerned, at the time of the 'Arab Spring' the official forecast – announced by the Italian Ministry of the Interior of the time – of a large number of immigrants from the southern shore expected to land in Italy proved to be highly exaggerated. The greater possibility to leave Tunisia or Egypt or Libya – well consolidated sending or transit countries given the loss of legitimacy of the local rulers and their reduced ability to exert control on the borders – did not imply any 'invasion' as predicted or threatened by many. But more recently the relevant inflow through the Balkan route, effect of the Syrian crisis, has become one of the main problems in countries of the Mediterranean Europe and one of the main points of the political agenda of the EU. The former have always played the role of transit area for migrants since the beginning of the 'new migration'.

Both economic immigrants and refugees have often landed on Mediterranean shores with the intent of continuing their travel towards other European destinations. A very representative case is that of the Turkish Kurds mostly directed to Germany who landed in Italy following a migration chain made more difficult by the restriction to mobility introduced by the EU countries. This was a minor issue until

recently. Quite the contrary now, for the refugee crisis represents not only an important issue but also a great paradox: Italy as well as Greece – the two countries most effected by the flows of migrants escaping from wars and persecution – are not the desired destination for these migrants, for they plan to reach those places where their relatives and acquaintances are already living.

4. Italy as a country of immigration

All the principal dimensions of the Mediterranean model apply very well to Italy, in particular the coexistence of emigration and immigration flows that allows us to characterise Italy a migration crossroad. In fact, contrary to the widespread belief “Italy, a former country of emigration, has become a country of immigration” it is important to underline that over the past decades Italy has continued to be a country of emigration. And now, because of the crisis, we are witnessing a reduction in the immigration flow, at least as far as labour migration is concerned, and a relevant increase in the emigration flows. The slowing down of labour immigration does not signify a reverse trend in Italian immigration. The characteristics of the labour demand and the demographic structure have not changed in the past few years and a pull effect is still relevant although weaker than before. Apart from this the total number of foreign residents in the country has kept growing, mostly because of the process of family reunion and, in much more limited numbers, the arrival refugees and asylum seekers.

But let us go back to the beginning of Italian immigration and its evolution, providing some basic information on its nature and composition. The first arrivals – as already mentioned – took place in the second half of ‘70s while Italy was still an important country of emigration (Pugliese 2006, Bonifazi 2013). It is interesting to note that the first immigrants came in large part – but not predominantly – from the southern Mediterranean shore. In fact they came from many distant areas, such as Latin America and the Philippines, but also from East African countries that were once, Italian colonies. This implies that the majority did not come to Italy for reasons of geographic proximity. There were two main components in this flow: a) female component from Catholic countries (or belonging to Christian minorities in non-Christian countries), mostly to be employed in domestic work, b) a male component, mostly from Islamic countries (Mediterranean and not) to be employed as daily workers in agriculture,

as construction workers or as street peddlers (the majority coming from Senegal or Morocco).

The second phase – the nineties – starts with the ‘fall of the Berlin wall’. The first mass arrivals are from Albania, but in the following years other nationalities from the former socialist bloc appear on the scene. The Chinese component also becomes important in these years. A process that deserves to be mentioned as far as this stage is concerned is a change in the occupational composition of male immigrants: many of them start working in industry and this phenomenon can be considered a very positive step in the process of integration.

The third stage – that is the stage of consolidation – starts at the beginning of the century and also includes the present situation, apart from some specific phenomena resulting from the crisis. In terms of national composition and resident foreign population, the Eastern European component becomes more and more predominant. Today, with more than one million residents the Romanians are the largest group in Italy, followed by the Albanians. The Moroccan component that for almost thirty years had been the largest group, is now only the third largest. The Chinese, whose presence has grown moderately but steadily are in fourth place, followed by the Ukrainians. The demographic composition in terms of gender has not changed much in the course of the time: women have always made up 50% (or slightly less) of the total foreign population. And this has to do with the labor demand that comes not only from the enterprises but, as far as the female labor force is concerned, from the families. What has changed is the specific task of women working for Italian families. Originally they were employed as cleaners and in general as family helpers while the majority now work as care givers for the elderly.

The other relevant demographic aspect is the large and increasing component of minors, both as family members and as unaccompanied minors, arriving from many places in search of asylum, work, or simply independence: a very composite group from all points of view. While the early groups of immigrants were young adults, male or female, only exceptionally accompanied by family members or dependents, we are now witnessing the effects of family reunion allowed since 1998. Immigrant families with children at school are not an exception as they were thirty year ago but a very common reality in Italian cities.

The various waves of immigrants and their insertion in the Italian society and economy have been regulated not only by the labor

demand but of course also by Italian immigration policies in its broadest sense. More precisely, one should speak of 'immigration policies' and of 'immigrant policies' as a separate and distinct matter. While the first include issues of admittance, border control, quota systems, amnesties, access to permanent status and finally access to citizenship, immigrant policies (that is social policies for the immigrants) include welfare provisions (school, housing, social security), labor protection and regulation, antidiscrimination policies, protection of immigrants, minors etc.

For these reasons a very short digression on the Italian immigration legislation and policies is necessary. Italian legislation – like the legislation of other Southern European countries – has been formally very restrictive in terms of legal admission. But this has not reduced the inflow to any significant extent with the effect of causing illegal (or a-legal) mass immigration, which in turn implied frequent 'amnesty' policies. These have given regular status to immigrants (already present in the country) so that it can be said that in almost every immigrant family in Italy at least one member has experienced non-legal entry, followed by the acquisition of a regular status through the amnesties.

These paradoxes can be explained in a different way. First of all, the lack of experience and tradition of Italian institutions in this area. Not having a relevant immigration tradition in modern times, Italy did not have a tradition of immigration policy. This also explains why at the very beginning this country, as well as other European Mediterranean countries, was very attractive to potential immigrants from the South of the World at a time when traditional European immigration countries were introducing restrictive measures. This may help to understand various aspects of the immigrants' conditions: for example, the vast presence of non-legal immigrants forcefully employed in the informal (market) economy.

Italian legislation is very progressive in general terms, at least as far as social policies are concerned. Various laws have been introduced in the past decades all of which include issues of immigrant policy and of immigration policy. The early legislation introduced equal treatment for national and foreign workers on labor issues and a first amnesty was intended to regularize the status of irregular immigrants (Law n. 943 1987), early partial norms concerning refugees, new and more comprehensive amnesty measures, early welfare measures for immigrants but at the same time the first border restrictions and

introduction of the requirement for a visa for those arriving from non EU countries (Law n. 39 1990).

At this time the immigration policy in Italy is based on the principles and orientation of Law n. 40 (1998), known as ‘Legge Turco Napolitano’ which is the basis for the *Testo Unico (TU)*, the Consolidated Act for immigration of the Italian Republic. Law n. 40 is the most important legislative act concerning immigration, and is very comprehensive as it includes restrictive measures as far as admittance policy and border control are concerned (with the institution of detention centers for non legal immigrants), as well as progressive ones such as measures for family reunion or larger welfare provisions and humanitarian measures. All the more recent acts aimed at modifying the *Testo Unico* consist of important or minor amendments that have certainly worsened the general structure of the TU (as is the case of the so-called Bossi-Fini Law) – making the situation of the immigrant more difficult – but have not been able to disrupt it.

5. The Italian crossroad in times of crisis and the economic recession

The recent decade has witnessed a normalization of Italian immigration from a social, economic and demographic perspective. But at the same time new phenomena of marginality and the failure of many individual projects of the immigrants have occurred because of the crisis and the recession. On the other hand, these have been difficult times for Italians also, especially in the South, with an increase in unemployment and in relative and absolute poverty. These phenomena have caused a decrease in the immigration inflows but have also stimulated a reactivation of Italian emigration.

With reference to the first point, normalization, one of the characteristics of Italian and Mediterranean immigration noted by researchers at the early stage of the phenomenon was a high job-sex segregation whereby some occupations were almost entirely taken only by males and others almost exclusively by females. Segregation on the basis of gender also reflected an ethnical and/or national segregation. In this framework the high female presence meant an autonomous migratory experience, and sometimes a leading role of the women in the migration chain. The other, less surprising, aspect, specific to the Mediterranean model, was the highly precarious employment and ‘post industrial’ occupational collocation with a presence in the informal

economy, in an environment of high instability. With the passing of time, these aspects, together with initial demographic characteristics (young adult males and females from different countries) of the immigrant population changed significantly: the job sex segregation persisted but the number of women arriving as dependents (wives or daughters) increased. As mentioned, the starting point for this new pattern dates to the arrival of the Albanians (often in family groups) in the early nineties, while its institutionalization came later with the family reunions made possible by Law n. 40, and the increasing importance of the second and now third generation. As far as the male component is concerned the areas of employment expanded and many were also able to obtain more stable jobs, especially in the regions of the North. These processes of normalization and stabilization have been permitted by the integration policies carried out at the institutional level but are primarily the result of the efforts and initiatives of the immigrants themselves. This does not imply a widespread, fully successful process of integration for all but certainly means a lower degree of precariousness and uncertainty. In particular, the policies concerning family reunions – carried out by the Mediterranean countries, although with a series of limitations – have strongly influenced this trend. The presence of immigrant families is no longer an exception as it once was in the past.

On the other hand the crisis has introduced new trends and, for some aspects, unexpected events. First of all the industrial crisis has led to loss of jobs for many immigrants occupied in the industrial sector. The immigrant component still has the highest union density in the Italian labour force. And this is a clear example of successful stabilization. On the other hand the processes of upward and geographic mobility from precarious employment in agriculture and construction to steady and protected jobs in industry, from the South to the North, are much more limited. On the contrary, as far as some migrants are concerned there is now a reverse trend: from the North to the South, from industry to precarious employment.

But the new relevant phenomenon concerning Italy, a new demonstration of its nature as a migration crossroad, is the reactivation of Italian emigration abroad. In fact there has been a steady increase in departures from the country throughout the decade but in the past few years there has also been an acceleration which implied greater attention by the Italian public. The main destinations are the western and northern

European countries where the effects of the crisis have been less devastating and where the recovery has been going on for several years. A recent analysis by Istat (the National Institute for Statistics) indicates the dimensions of the flows, the main directions and their composition. An unexpected result was the presence of a very traditional 'proletarian' component. In fact the distribution of the emigrant population by level of education indicates that one third has a high school or college degree, one third has completed basic education and one third lacks even a junior high school degree. This shows that it is not a matter of brain drain or of international circulation of cultural and professional elites but simply a renewed push effect caused by the crisis.

6. The "refugee crisis": Italy and the Mediterranean

In this complex and contradictory frame of migration movements concerning Italy a new element has emerged over the past few years: a new role of the Mediterranean with the re-activation of south-north paths in the direction of Hispanic or more frequently Italian shores: a path which is mostly followed by migrants seeking asylum.

The expected invasion from countries of the Southern shore in 2011 proved to be the effect of an alarmist policy: only a few tens of thousands of immigrants arrived at the time of 'Arab Springs' from Egypt or Tunisia. But a relevant flow of migrants leaving from the southern Mediterranean shores and other areas reached the Italian coasts after 2012, strongly escalating in the following two years.

A simple analysis of the social and national composition of this movement proves that it originates mostly in areas of war and political and military crisis and that the class composition of the migrants is not that of the traditional labor migration, while the percentage of minors is quite impressive. Given the dangerous conditions of the journey, and in the absence of any form of protection, these migrants have been in the hands of smugglers and traffickers and risked losing their life in a shipwreck because of the inadequate conditions. On the other hand no help could be expected from Frontex, the agency whose institutional mission is border control and not protection of the migrants' life.

However, after a tragedy resulting in the death of several hundred migrants caused by the sinking of a ship, the Italian government, on the basis of the positive emotional reaction of the population and with a widespread sense of compassion and solidarity, launched the 'Mare Nostrum' operation aimed at rescuing migrants in difficulties. As

known, 'Mare Nostrum' saved thousands of lives but lasted only one year having been canceled by the Renzi government under the pressure of the Ministry of the Interior. High costs paid only by the Italian state and an active xenophobic propaganda caused the elimination of the program and its substitution with the Triton operation which follows the rules of Frontex.

Another widespread critique of the Mare Nostrum operation was based on its supposed 'calling effect', that is, the fact that the safer travel conditions made possible by the Italian rescue operation, would have attracted new economic migrants and asylum seekers. This thesis did not take into serious consideration the determination of the new inflows and the fact that people escaping from wars and persecution do not have the possibility of choosing – which path they should follow. The activation of the south-north Mediterranean path was not caused by the existence of Mare Nostrum but by the war in Syria and the persecutions in Eritrea or the crisis in Libya. The flows started before 'Mare Nostrum' and continued after it was canceled.

As mentioned in the previous part of this essay, the social processes that take place in the Mediterranean have different focal points and origins. With the exacerbation of the crisis in the Middle East – not only in Syria but also in Iraq with the expansion of the so called 'Islamic State' – massive outflows of the population have taken place, with people escaping not only from Daesh but also from bombing, repression and the devastation of the local economy. This new migration followed another much more relevant route crossing the Mediterranean: no longer from south to north but from east to west. And in this case the role of first safe haven has been Greece rather than Italy.

What is common to these two countries, as far as the so called refugee crisis is concerned, is that neither is the desired destination of these new Mediterranean flows. Asylum seekers are obliged to apply for refugee *status* in these countries because of the norms of the Dublin 2 agreements. This imposition is at the basis of the migrants' tendency to avoid registration, and consequent application for the *status* of refugee in Italy in order to continue their journey towards other countries. The attitude of the Italian government in this matter has been very permissive, which is positive from a humanitarian point of view but at the same time very opportunistic and incorrect, and not only for formal reasons. In fact, these migrants, forced to an informal presence, are abandoned to themselves or to the solidarity of volunteer organizations.

Over the past few years their presence has become much more important than in the past and it is no coincidence that the Italian basic legislation did not pay much attention to this issue. Now not only is the number of asylum seekers sizeable but their importance in the Italian discourse on immigration has become central.

Labor migration and ‘political migration’ are strictly interwoven. And both types of migrants deserve solidarity. On the one hand, with Mare Nostrum, Italy has been able to provide a positive response to the migrants’ drama. But the social policies for immigrants in general and for asylum seekers in particular are still insufficient, badly managed and ineffectively implemented. On the other hand, a kind of syndrome of invasion is affecting Europe, including Italy making it makes difficult to develop more advanced policies.

Finally, as Catherine Wihtol de Wenden (2013) puts it, in the last century people have obtained the right to emigrate (though not everywhere) but they are still far from obtaining the right to immigrate. And this is at the basis of the conditions according to which international migrations are taking place today.

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COLONIAL OBJECTS, POSTCOLONIAL SUBJECTS,
MIGRATING MODERNITIES

*Iain Chambers**

In the montage of intersecting temporalities and territories that come together in considering migration, modernity and the Mediterranean we need to remember that contemporary Mediterranean crossings constitute only a moderate percentage of the so-called illegal immigration into present-day Italy. Increasingly it is composed of refugees fleeing war zones in Syria, Afghanistan and sub-Saharan Africa (particularly Eritrea and Somalia). Most of the migrants, particularly those fleeing war zones do not arrive in Europe at all. The biggest concentration of such displaced persons are to be found in Pakistan, Iran, Jordan, Lebanon, Kenya and Turkey.¹ European media and political attention is of course fuelled by the drama of the mounting figures of drownings and death at sea. Behind these representations of dark, often Muslim, bodies, there exists another narrative that is rather less about the contemporary and planetary significance of modern migration, and altogether more to do with the construction and defence of local, national, European and Occidental framings of the world. So, what does present-day migration say about our understanding of modernity and ourselves? To answer this suggests that we think not so much *of* migration as *with* migration, as the latter becomes a critical instrument and interrogation. This leads into a deeper and altogether more extensive history of our time.

The contemporary figure of the migrant and refugee does not simply represent a juridical and socio-economical figure, often destitute and temporarily stateless. She carries within herself a series of historical and cultural interrogations that invest modern forms of belonging: from the nation state and citizenship to what we understand when we speak of democracy and rights. These are questions sustained within a modernity that seemingly awards the mobility of capital, labour and production, and therefore inevitably, even if it is ideologically reluctant to do so, the migration of bodies, histories and cultures...

Inscribed on the body of the modern migrant is not simply the power of European law regulating her situation, and frequently transforming

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¹ UNHCR figures for mid-2013, reported in *The Guardian*, 10 June 2014. If the figures are now clearly out of date the tendencies remain in place.

her subjectivity into an 'illegal' objectivity, but also the indelible watermark of a colonial past. Here the altogether more preponderant, systematic and violent migration of Europeans towards the rest of the planet in the course of several centuries, invariably forgotten and repressed, is re-ignited in the clandestine histories of today's migrants who return to shadow the complex coordinates of the modern world. Here we confront the intricate making of a constellation called modernity in which the past does not simply pass away. Here, migration as a central element in the making of the West renders unstable, even unsustainable, the linear explanation that would consign the colonial migrations of Europe – realised through the racial and racist subordination of the rest of the world to its economical, political, religious and cultural will – to a closed and obsolete chapter in the narrative of its 'progress'. To re-open these histories, allowing them to spill into the present, means to propose profound interrogations of the historical and political nature of the modern nation state, its modalities of democracy and government, and the pretensions of its juridical premises and practices. For migrant bodies, invariably considered 'out of place', put in question the very sense of place and belonging upon which these definitions depend: in the ongoing processes of globalisation who has the right to define and direct this 'place'?

To consider contemporary migration, and the racism that invariably accompanies it, as being woven into the web of Western democracy, is to consider far more than a set of emergencies. With death spilling out of the headlines – from drownings in the Mediterranean to shootings in America's inner cities and the violent surveillance of territories and lives in Palestine – the limits and hypocrisies of the moral economy of the Occident are continually exposed. These are the limits of a precise history and its structures of power. They speak of the critical and political responsibilities for those processes that have brought us to where we are today. This means to understand the present movement of migration from the multiple souths of the planet, or the consistency of racism, as a historical condition, not as an simply as an 'emergency' that require exceptional measures.

For these are not temporary phenomena or accidental pathologies; they are structured, historical processes. If these processes are hidden in the fetish of global commodification they nevertheless consistently ghost the making of the modern world. The spectral presence of invisible lives and anonymous labour in the global logistics of capital is both

there in yesterday's slave ships plying the Atlantic and in today's overcrowded boats crossing the Mediterranean. Insisting that such questions are central, and not peripheral, brings us to confront the very mechanisms of knowledge and power that legitimate the present state of affairs. The presumptions that surround and sustain such concepts as the 'individual', 'citizenship', 'democracy' and 'freedom' are themselves the products of such mechanisms. While they continue to be presented as neutral ideals and universal values, their practices tell us a very different story. Precisely here, the figure of the migrant exposes the present to unauthorised questions and opens up another archive. This produces a radically diverse critical horizon.

What is repressed in the representation points us to other maps and temporalities in a planetary modernity that is never merely 'ours' to define. If the politics of explaining and managing the modern world can only be sustained through maintaining unequal relations of power and the negation of other voices and histories, then we should ask ourselves in what precisely does this universality and its modernity consist of? All of this implies extracting the discussion and understanding of contemporary migrations from its more predictable coordinates. This means to insist, against prevailing representations, that migration is neither merely a marginal socio-economical phenomenon nor a social 'problem' or political 'emergency'. On the contrary, migration is one of the constitutive processes in the making of modernity, both in its Occidental inception and its subsequent planetary realisation. The centrality, and not marginalisation, of migration to the making of the modern world was already passionately argued for more than 40 years ago by John Berger in *A Seventh Man*.

As a structural and historical condition, intrinsic to the political economy of the modern world and its violent cartographies, migration needs to be considered in terms of a cultural, historical and epistemological challenge. In other words, the modern migrant with her history, culture and life actively questions the citizenship, national belonging and understandings of the European polity in a manner that invites us to consider their colonial fashioning and postcolonial configurations. Such considerations open up deeper historical temporalities and altogether more extensive and unstable archives than those associated with the homogenous time of national belonging. Clearly all of this cuts into and interrogates our very understanding of the present, forcing us to register the limits of a certain European and Occidental exercise of modernity.

At this point, and thinking *with* migration, we can begin to elaborate a different critical key with which to open and interpret the archives of modernity. This is an invitation to reconsider the temporal-spatial coordinates of modernity and to consider the rhythms and configurations that resist and persist in the folds of deep historical time. Here migration turns out to be the very motor of modernity itself. Given that the West insists on globalisation and its wording of the world in order to achieve its aims then points of origin and ownership begin to evaporate. Or, rather, there opens up an epoch characterised by the explicit struggle for its definition and management. All of this suggests the necessity of recognising different languages and adopting a diverse critical compass with which to navigate these emerging questions. Giving attention to subordinated, subaltern and subjugated memories we confront a politics and poetics that exceeds our reasoning and the presumption that we are always able to render the world transparent to our premises, needs, knowledge and power.

It is precisely in this context, as is illustrated in the essays by Celeste Ianniciello and Annalisa Piccirillo, that it becomes pertinent to propose certain contemporary art practices in terms of a critical activity. Involving historical and cultural research, secured in an incisive postcolonial re-narration of modernity, this art deliberately pursues a significant political mandate. Challenging the existing geography of powers leads to the dissemination of a semantics, with its sentiments and affects, that escapes the mechanisms of institutional narration to propose other flows of understanding, other maps of knowing, other ways of seeing. With this in mind it becomes possible to repeat the dominant narration of the nation in an altogether more critical key.

The radical revaluation, sustained in the theme of migration, exposes the institutional tale to those histories and cultures that have been structurally excluded and negated, reduced exclusively to objects of our knowing gaze. The exhibition of our 'progress' and the power of our modernity to reduce the world to a series of objects that reconfirm the centrality of our subjectivity – continually on display in national museums and history text books – is now intercepted by a series of unauthorised questions that persist and resist. The questions that emerge from these unregistered and unrecognised archives are destined to arrive from a truly postcolonial future.

In the intersection of broken territories and bleeding wounds, the Mediterranean itself proposes a seascape that is itself the ultimate ar-

chive (I draw this suggestion from the Libanese artist Akraam Zaatari). How do we critically cross this space and associated temporalities? To cross and conceive them requires the dis-assembling of a belonging guaranteed by a fixed, stable and rooted identity. We are pushed into a journey in a mobile geography, composed of movement, slippages and interruptions: both space and time become discontinuous, cut up by the heterogeneity of conflicting forces and desires. Moving between the representations of such spaces and the repression that shadows the act of being represented we find in postcolonial art an anthropology of the present. Clearly, such art does not provide us with a stable object to analyse and explain according to the abstract logic of artistic canons – the institution of aesthetics, the history of art – but rather proposes a critical means with which to think and live and thereby interrogate the discursive order – aesthetics, art history – that believes itself capable of explaining the art object.

In this situation the past, with its memories and archives, proposes a diverse archaeology and a different manner of comprehending its presence in the present. The isolated and authentic object no longer exists, nor does a definitive explanation of the past. In the counter-histories and counter-memories that inhabit the image we now register that the image itself contains more time and horizons of meaning than any one of us can ever absorb or understand (Didi-Huberman 2000). Here we pass from a formal archaeology of objects to an ongoing genealogy composed of relations, ruptures and discontinuities, where the past works up new critical configurations of the present. For what counts is not so much an object discovered as the processes exposed in the excavation.

The frontiers, borders and confines registered in steel walls, barbed wire, documents and bureaucracy, produce a wound, a scar that will never heal and is destined to remain open as an interrogation. Here we register the necropolitics that directs the brutal confines of Occidental humanism and what Frantz Fanon continually labelled as its hypocrisies (Mbembe 2001). Here we also touch the epistemological limits of an idea of citizenship and belonging articulated exclusively in the terms of the nation state which, and not by chance, is also the privileged place holder of modern historiography. The art that is discussed in the following pages narrates a very different critical landscape. The echoes and spectres sustained in these works cut up time and refuse the simple linearity of 'progress' and the unilateral beat of the Occident. Here we find ourselves insisting, in the wake of Walter Benjamin, that historical time

does not pass but rather accumulates. The past insists in the present in the form of ruins. Our silence in their presence is a hole in time. Here there emerge other histories and other lives, the others. The dissolution of institutional time into multiple rhythms and accents sustains critical spaces that lie at our side: frequently unregistered and unrecognised. These are the heterotopias that a postcolonial art practices and promises. They propose a folding of time, its simultaneous deepening and extension to render proximate other places and bodies in a cartography that exceeds the more predictable maps of modernity. Here, in the interruption and discontinuity of a uniform temporality and space, the syntax of art announces the ethics of a world yet to come.

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HOSPITALITY, ALTERITY AND FEMININITY

*Silvana Carotenuto**

After Iain Chamber's intense postcolonial framing of the contemporary question of migration, my intervention would like to emphasise what form of 'hospitality' we should all offer to l'arrivant. I will here briefly introduce my reasoning: the world today – and Europe in particular – even more critically now, only a few months after the conference, is debating the forms of acceptance, restriction and/or refusal of the fluxes of migrants who reach the coast of Southern Italy or of Greece, who cross the Easter sides of Fortress Europe, in order to progress towards the northern lands of promise and progress. The debate mainly refers to the different and optional legislations meant to employ, guard, secure, protect, resist; its normative languages speak of restrictions, identifications, quotes of acceptance, barriers around the perimeter of Hungary, the 'crime' of hospitality, the economic resources of the Syrians in Germany...

The horizon is complex, and it certainly constructs a perimeter of epochal change: in populations, cultures, economies, survivals – the future. Against this complex socio-political background, exposed to the destinies of thousand people/s who insist, persist and resist, on their own sides, the limits of European security and its embedded politics of seclusion and refusal, also encouraged by the grassroots' demonstrations of general solidarity and friendship. In what follows I would like to bring back to memory some of the critical interventions of the most radical critical thought of contemporaneity, Deconstruction, through the signature of its inventor, Jacques Derrida, who, at the end of last century, proclaimed the precious puissance of the hidden unconscious of the migratory phenomena: 'unconditional hospitality', the archaic Law of welcoming as an ethos, a culture, and an ethics, the ancient sensibility that, nowadays more than ever, needs to be restored at the core of all necessary legislations meant to respect and welcome the other.

My short paper will share this appeal, trying to remind the PhD students of this interesting teaching week, of the Law without the force of law, that opens the doors of the house to the guest without any economy of exchange, the principle and the praxis of ethical

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*responsibility towards the other, the militant excess and exception of unconditional hospitality from the enforced laws of pragmatic, dogmatic and interested security. Mine will be a sort of reminder of what some years ago deconstructive critical thought already indicated as a priority of action, thinking and sentiment, at the same time proving the point in the political intervention-invention of a system of cities which would provide refuge and shelter to the endangered writers among the fluxes of migrants, asylum seekers, sans papers, the masses of humans who, by necessity or choice, thread the difficult roads of exile, displacement, and abandonment. Why the writers? Why should we care about writing, showing concern for what is, generally, considered ineffective, fictional, abstract, secondary if and when compared to the impossible conditions of life and death affecting the survival of children, women, old people, men who encounter so many menacing forms of horror in their migratory routes? Derrida enters the scene once again, with a text *The University without Conditions*, where he not only suggests the necessary belief into the unconditionality of the academia, but also and mainly explains the intervening strength of the unconditionality of literature, the last resort for a freedom that needs to be supported and traced along in all possible militant ways. Literature, writing, reading, the first and most sensitive spaces for the welcoming of the other, the lucky chance – even in conditions of seclusion and apartheid, violent displacement and utter confinement – of vindicating creation, inscription and expression.*

Any kind of literature? All forms of creative utterance? Yes, in principle, praxis and human love. Yes, writing – oral, vocal, gestural, visual, pictorial... I will briefly conclude here with a reference to my own understanding of the kind of literature that I teach and try to convey to my students: if today we need to claim the Law of unconditional hospitality, if, in times proving resistant to the excess of such Law, we still find a possible place for its articulation in the unconditional freedom of literature and writing, I will maintain that it is female literature, female writing, female creativity, that offers the most acute and precious opening to the arrival of the other, without conditions but proving another economy, the (un)management of the house or home that women extend to the whole universe: aware of their own alterity, women (de)construct here the creative space where the encounter with the other is allowed and permitted, enjoyed and appreciated, as an event of complexity, difference and dialogue...

At the end of this short introduction, I would like to apologise for the velocity and the eclectic approach of the notes that will follow. The argument would indeed need long pages of articulation, intense readings of texts, deep heterogeneity of critical references and theoretical interpretations. I can only have faith in the fact that the deconstructive appeal to unconditional hospitality will remind my readers of the archaic aspect of its law; that they will practice their specific literatures in the present of their researches as the difficult but rewarding unconditionality of others' and their own writings; that my final reference to the literature of women will open, for the ones who have never crossed its doors, a universe of novelty and transformation, and for the ones who already enjoy the opening of female maisons of creative writing, the confirmation that the archaic embedded in the unconditional hospitality will necessarily enter the doors of the future – if not to change the world, certainly to provide refuge and peace for the ones who still believe in the survival of life against all horrors of death.

Dedicated to

... the ones who, by boarding on the coasts in Calabria or Puglia, or by climbing mountains, thus crossing the *imaginary frontiers* that separate the south from the north, the east from the west, neither simulate a right they know not to have, nor dissimulate, not even honestly, a condition that should be hidden. They enunciate in clear letters their clandestinely as an ethos, that is, a way of inhabiting the world, which precedes or proceeds the norm they should elude or fight against...

Collective 33, "Nostra compagna clandestina"

In the notes that follow, I will try to show how and why the female *oikos* – here identified with the place of femininity, female literature, the home of creativity, innovation and change – can be interpreted as the 'opening' from where to offer unconditional hospitality to the other, to absolute alterity. In this sense, I will refer to the relationship between Deconstruction and hospitality, the deconstruction of hospitality and the hospitality of deconstruction.

Two texts are remarkable to my question, and they are both signed by the father of Deconstruction, the French-Algerian philosopher Jacques Derrida: *Annie Dufourmantelle invite Jacques Derrida, à répondre "De l'hospitalité"* (Derrida Dufourmantelle 1997); and

Cosmopolites de tous les pays, encore un effort! (Derrida 1997b). The first text is the editorial choice of two fragments (“Question d’étranger: venue de l’étranger”: quatrième séance, le 10 Janvier; “Pas d’hospitalité” cinquième séance le 17 janvier) of the seminar given by Derrida in 1996 at L’Ecole des Hautes Etudes en Science Social; the other text is the opening speech to the first conference of the ‘refuge-cities’ at the Council of Europe in Strasburg in the same year, as an initiative of the International Parliament of Writers.

Of Hospitality – in this text, Derrida brings the political-philosophical thought back to the relation of difference between the ‘Law’ and the ‘laws’ of hospitality: the laws on hospitality are those which I imagine the students here gathered have investigated for the whole teaching week; very rarely, however, will they hear of the appeal to the Law of unconditional hospitality.¹ One possible reason for such generalised omission is that the generalised emphasis on the legislation – rather than on the universal – of hospitality is specifically linked to the ‘scandal’ that the Law of unconditional hospitality brings along with itself. It, indeed, is destined to offer hospitality to the one who arrives without asking for his/her name, without posing the question on his/her identity; it is hospitality offered to the anonymous other, without patronymic or social status, beyond any pact or contract provided and enforced by the laws of hospitality. The Law of Hospitality breaks with the name, the family, the generation, the genealogy, placing itself beyond any right of nationality or citizenship by rule of birth, soil and blood, beyond any reciprocity.

It is an archaic law, which is absolute, which does not force, which is culture, ethos, and ethics:

...entre, entre sans attendre, fais halte chez nous sans attendre, hâte-toi d’entrer, ‘viens au-dedans’, ‘viens en moi’, non seulement vers moi, mais en moi: occupe-moi, prend place en moi, ce qui signifie, du même coup, prend aussi ma place, ne te contente pas de venir à ma rencontre ou ‘chez moi’. Passer le seuil, c’est entrer et non seulement approcher ou venir...(Derrida 1997, 109)

¹ Derrida explains that the Law of hospitality is absolute, unconditional, hyperbolic, unlimited, without imperative, order or constrictio, without reserve, a law without law; on the other hand, the laws of hospitality deal with legislations, politics, conditions, norms and exceptions, pacts and contracts, rights and obligations

The Law of unconditional hospitality is rarely – it could even be said, never – evoked, remembered, or simply recalled. Indeed, Derrida thinks that, even if the two laws are different, contradictory, and antonymic, they are also, at the same time, inseparable and indissociable: without a specific legislation, the Law of absolute hospitality would turn ‘abstract’; without the Law, the laws would not be perfectible, that is, they would not be historical and thus transformable. The philosopher writes *Cosmopolitans of all countries, still an effort* as a proof of such indissociability: by appealing to the law of absolute hospitality, the creation of the refuge-cities critically enters into the actual crisis of the nation-state and its sovereignty, asking for the renovation of international right, or/and for the invention of a new cosmopolitanism. Indeed, the creation of a system of refuge-cities is an experiment which marks an exception and an excess compared to the norm, in a present when, with increased insistence, every politics stays within the *logos* of the *paterfamilias*, the *potestas* and the possession of the guest, in his/her identity, generation and genealogy. *Ipse, potis, potens – le maître de maison* chooses, filters, and selects the guest, giving and/or negating the right to visit. This is what characterizes our present: the violence or the force of laws remains on one side of power; absolute hospitality stays hidden on the ‘other’ side of life. Everything is ruled and thrust to the becoming-right of justice. We even reach the condition in which what is called ‘a geography of absolute proximity’ within the law of absolute hospitality, transforms itself, through the enforcement of the laws, into the ‘crime of hospitality’.

A specific question thus arises: where can we still find a space for the ‘scandal’ of unconditional hospitality? The question of the place, soil, home, utopia as *topos*, is an integral part of the question of hospitality (the two interventions after me will deal with creative ‘cartographies’). Where is it still possible to find hospitality offered to *l’arrivant* before any anticipation or/and identification, to the one who arrives as a human being, an animal or a divine creature, alive or dead, male or female, to whom to thrust everything of oneself, all my proper, our whole proper, without asking for his/her name, expecting no counter-gift, without or beyond condition? Once again, it is Jacques Derrida who offers a possible answer in a text that, already in its title, evokes the unconditionality of hospitality: *L’université sans condition* (Derrida 2001). I have no time here to articulate the unconditionality of the university in general, if not to say that, in his reasoning, Derrida

believes that, even if the university is certainly not unconditional, we must do ‘as if’ it were unconditional. ‘As if’/‘comme si’: it is the power of literature, its profession of belief, the power of new and contemporary humanistic studies able to debate everything, the horizon of truth and the proper of man, proving a critical resistance to all powers of dogmatic and unjust appropriation, determined to create all possible public spaces for the “performative discourses that produce the event of which they speak” (Derrida 2001, 20). It is the essential modality of the creative experience: writing, together with reading, is the first form of hospitality, the form of literature which, in principle and in its letters, types, alphabet and imaginary, has the power of saying and inventing everything and the contrary of everything. Fiction and fictionality testify the overcoming of all frontiers, the absolute and unconditional opening to the other, the law as the text of the other,² the space of the ‘yes’ to the other, his or her affirmation in “the precise, fragile itinerary, which is life”(Elalami 2015, 16 my translation).

I should now tell you of female literature, female writing, female fiction. Time is indeed tyrannical; I can only remind you of some of the female thinkers and writers who, in contemporary times, have offered their ‘as if’ to the unconditional hospitality of the other. I would like to remember the philosopher Hannah Arendt in her important *The Origin of Totalitarianism* (1951); on the plane of theory, I would like to read with you the militant insights that Judith Butler offers in her *Antigone’s Claim. Kinship between Life and Death* (2002); in the realm of literature, I would like to turn to the works by Assia Djebar and Fatima Mernissi.³ Let me, indeed, end with a quotation by the French-Algerian writer who, in my intellectual and teaching experience, embodies the most intense female deconstruction of hospitality, Hélène Cixous. I will quote a sentence that explains why and how femininity can be interpreted as the absolute space of unconditional hospitality in itself, for itself and for the other.⁴ Cixous here speaks of a different economy, which refuses to essentialise but, by returning to women,

² Cfr J. Derrida, D. Attridge, *Acts of Literature*, New York & London, 1992.

³ See in particular, A. Djebar, *So Vast the Prison: A Novel*, 2001 (Premio della pace 2000), F. Mernissi, *Karavan. Dal deserto al Web*, Firenze Milano, 2004.

⁴ Some students of “L’Orientale”, under my supervision, translated into Italian this essay some years ago: Hélène Cixous, “Il riso della Medusa”, *In Tempi d’Es-tensione*. Collettivo di scrittura ‘L’altra altra’, Napoli, 2012.

unconditionally opens the doors of their home – *oikos* – to the arrival of absolute other:

“If there is a ‘propriety of woman’ it is paradoxically her capacity to deappropriate unselfishly: body without end, without appendage, without principal ‘parts’. If she is a whole, it’s a whole composed of parts that are wholes, not simple partial objects but a moving, limitlessly changing ensemble, a cosmos tirelessly traversed by Eros, an immense astral space not organized around any one sun that’s any more of a star than the others”. (...)

Her libido is cosmic just as her unconscious is worldwide. Her writing can only keep going, without ever inscribing or discerning contours, daring to make these vertiginous crossings of the other(s) ephemeral and passionate sojourns in him, her, them, whom she inhabits long enough to look at from the point closest to their unconscious from the moment they awaken, to love them at the point closest to their drives; and then further, impregnated through and through with these brief, identificatory embraces, she goes and passes into infinity. She alone dares and wishes to know from within, where she, the outcast, has never ceased to hear the resonance of fore-language. She lets the other language speak – the language of 1,000 tongues which knows neither enclosure nor death... she doesn’t defend herself against these unknown women whom she’s surprised at becoming, but derives pleasure from this gift of alterability. I am spacious, singing flesh, on which is grafted no one knows which I, more or less human, but alive because of transformation. (Cixous 1976, 889)

Does the quotation speak for itself? Does it prove the female capacity, in her fictional or autobiographical creation, to offer another form of unconditional hospitality to alterity? I imagine this affirmation would need long pages of critical articulation; I am glad, however, that the two essays that follow my notes will testify to the art and critical positions (dis/location, dis/placement, re-mapping, re-rooting) of women desiring to express their other sense of being in the world, their different legacy to change, welcoming and survival.

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CHANGING BORDERS, DISORIENTING MAPS:
MONA HATOUM'S ART OF DISPLACEMENT
*Celeste Ianniciello**

The production of borders and the obsession for what we could define as a 'geography of fortifications' has dominated Europe's political agenda for decades, and can now be also considered a global phenomenon. As Wendy Brown points out, the border has become the material institution through which the declining power of the nation-state seeks to defend its presumed integrity against what are perceived as external menaces coming from contemporary reality: terrorists, poverty, epidemic viruses and, above all, poor migrants (Brown 2010). In an age where the global fluxes of migration have gained the strongest intensification ever, borderlands are paradoxically turned into spaces of containment, regimes of arrest and immobility. The Italian critic Sandro Mezzadra defines today's borderland as the space of bio-power and 'thanatopolitics', a space where State power exercises control over migrants through a capitalist dynamics of inclusion/exclusion based on the erection and patrolling of frontiers that often cause death (Mezzadra 2008). The concept of 'thanatopolitics' and the way it is exerted is strictly connected to colonial power and the concept of 'necropolitics' elaborated by Achille Mbembe. It highlights the fundamental racist trait and the lethal domain over bodies inscribed in that politics (Mbembe 2008). This is what happens in the Mediterranean Sea, in the desert borderlands between Mexico and the United States or in the Palestinian Occupied Territories, just to name three of the most obvious examples.

In this neoliberal and colonial logic a subject such as a poor migrant woman represents a body over which to exercise the power of selection or, in Mezzadra's words, the power of 'differential inclusion'. From the point of view of cultural representation, the migrant woman is configured as a foreign body to be repulsed, or else tolerated and hypothetically integrated into the social tissue. Beyond this logic she is considered as a subject out-of-place. But, is it possible to think of the border(land) as other than the place where people are instrumentalised or die, where life is mortified and arrested? Is it possible to undermine and rewrite this deadening cartography of limits drawn by, and drawing on, Western power? I wish to argue that some artistic productions and processes, where it seems impossible to separate space from time,

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geography from history, present from past, here from elsewhere, may represent an affirmative answer, proposing alternative cartographies of memory and belonging. In this spirit, I will consider some artworks by the Beirut-born, Palestinian, London-based artist Mona Hatoum in terms of the living archives of migrant memories and associated border-crossing geographies.

In Hatoum's aesthetics the exploration of the relation between place, space, identity, memory are profoundly informed by the experiences of exile, displacement, and the multiple languages and cultures to which the artist herself is differently related. Far from promoting itself as representative of a people, a land, a history, Hatoum's art evokes the heterogeneous, differential, vertiginously ambiguous nature of an identitarian in-betweenness, that can clearly be referred to the artist's lived experiences, but it also concerns life experience as such. Hence, Hatoum's art, simultaneously, evokes the risk of being too strongly rooted in our 'home', reminding us of Edward Said's observation that "borders and barriers, which enclose us within the safety of our familiar territory, can also become prisons" (Said 2000).

The culture and geopolitics of closure, confinement, and walls, is impiously questioned by Hatoum's aesthetics of border-crossing. This is particularly evident in the different maps the artist has produced, of both Palestine and the world. Here she blurs any distinction between closeness and distance, familiarity and strangeness. The memory of a 'double vision', of simultaneous dimensions and overlapping territories is imprinted in Hatoum's cartography. Time and space become inseparable, as in *Present Tense* (1996) that reproduces a map of the occupied territories to be returned to the Palestinians, drawn up at the Oslo Peace Agreement of 1993. Exhibited at the Anadiel Gallery, East Jerusalem, it consists of a grid of soap blocks, placed on the floor, like a carpet, on whose surface small red glass beads are impressed, like drops of blood, to delineate the land borders, and an immobile present with them.



Present Tense

Installation Anadiel Gallery, Jerusalem, 1996

Soap and glass beads

1 3/4 x 94 7/8 x 117 3/4 in. (4.5 x 241 x 299 cm)

Courtesy White Cube and Anadiel Gallery, Jerusalem

The process of restitution has never taken place, Yasser Arafat having refused to sign the agreement whose map he was not allowed to see. In the secret, unilateral maps and projects of Israel and the United

States is inscribed an imperialist desire of exclusive decision-making and possession that affirms the constant nexus between cartography, the constitution of property and colonial power. This is how Irit Rogoff (2000) puts it:

“Maps make property – they do so through ... laws, contracts, treaties, indices, covenants as well as plain old deals. Following on this same logic maps produce the ‘Law’ ... through the establishment of such parameters as ‘the border’ which sustains division between those privileged with rights and those outside of them” (Rogoff 2000, 75).

Hatoum draws maps too, but nothing in them responds to a colonial logic of division and control; rather they recall the dangerous desire of free movement. Significantly, the soap functioning as a map in *Present Tense* is a traditional artisanal product of Nablus, whose fabrication has never halted, even in wartime. For this, and also for its provisional materiality, it functions as a symbol of resistance against the barriers of power: the soap is destined to dissolve, washing away those bloody borderlines encapsulated in an eternal present.

Hatoum’s predilection for evanescent and slippery materials with which to draw maps is emblematic. Her *Map* (1998) consists of a big glass carpet, made of small clear marbles delineating the world map. But the high fidelity of the reproduction is under constant threat. A false step, a light touch, even the most imperceptible vibration of the floor is sufficient to decompose the territorial coordinates. This is a map with unstable borders, yet insidious, as the possibility of losing balance and falling down can hardly be avoided. The idea of the decomposition of borders as an effect of movement is also what seems to emerge from the installation *Continental Drift* (2000). Here the fragile stability of the terrestrial surface, once again made of glass, is constantly menaced by the sea, consisting of thin layer of iron filings, ruffled by a rotating magnetic arm placed below the work’s circular structure. The viewer has the sense that the iron wave could shatter the continental borders, thus irremediably altering the world’s physiognomy. Hatoum’s land is constantly adrift, under the inevitable erosive action of fluxes and movements, and their unpredictable effects. This artwork, like the more recent *Shift* (2012), evokes Jean Baudrillard’s observation that “There is nothing left but shifting movements that provoke very powerful, raw events. Events can no longer be seen as revolutions, or effects of the

superstructure, but as underground effects of skidding, fractal zones in which things happen. Between the plates, continents do not quite fit together, they slip under and over each other. there is no more system of reference to tell us what happened to the geography of things. We can only take a geoseismic view” (Baudrillard and Lotringer 1986, 141).



Shift 2012, Wool 59 1/16 x 102 3/8 in. (150 x 260 cm)
Photo: Murat Germen Courtesy ARTER, Istanbul and White Cube

Hatoum inaugurates a new system of reference that questions the solidity of the land beneath our feet, where it seems impossible to plant and cultivate the roots of belonging. This ‘new geography of things’ is rhizomatic, to use a metaphor dear to Deleuze and Guattari: it crosses borders, tears out the roots, stirs up the codes, being simultaneously composed of spaces of dispersion and convergence, deterritorialization and territorialization; that is, of folds, fluxes, currents, vapours (Deleuze and Guattari, 1987).

Rather than relying on fixed points, beyond any logic of precision and ‘established’ coordinates, Hatoum’s maps display what is rendered invisible by official cartography: the experience of geography, the personal geography of a life-path exposing the precariousness of borders and the decomposition of spaces. This is a ‘subversive’ route that leads to the threshold between the known and the unknown, the familiar and the untimely, the proper and the improper. It exceeds any clear

correspondence between territorial delimitation and identitarian identification. Such a relation between geography and biography is often, emblematically, recurrent in Hatoum's art.



Projection, 2006, Cotton and abaca 35 1/16 x 55 1/8 in. (89 x 140 cm)

Photo: Ela Bialkowska Courtesy Galleria Continua, San Gimignano - Beijing and White Cube

The map *Projection* (2006) reproduces in two different kinds of paper pulp the perimeters of the continents according to the cartographic projections elaborated by the German historian Arno Peters in 1973. It reconfigures, for the first time, the Mercatorian cartography, which dates back to the Renaissance period, that is, the official map of the world that mirrors the colonial and imperial perspective. In the Peters projections the South is much more extensive than its traditional image, and underlines how our image of the world corresponds to a distorted vision of its real proportions. Today's world's map imposed by the colonial West countries remains the political and economic image that endorses the North and its privileged point of view.

Yet, it is precisely when the artist seeks to establish a just order of things that she paradoxically takes distance from any attempt to precision. In Hatoum's artwork the earth becomes visible through the different nuances created by the different qualities of the paper pulp used – thin and transparent Manila hemp forming the recessed

continents and thick white cotton for the surrounding areas: nothing but a shadow, a quite insubstantial shape, a hardly perceptible drawing, a light mould of an absent body, of a migrant. A connection between geography and biography opens up here: the historical and ideological marginalization of the South of the world is interlaced with the processes of migration and the bodies of the migrants themselves. Projection, for instance, is reminiscent of some previous artworks where the Hatoum 'projects' herself through the traces of her body: in *Skin, Nail and Hair* (2003), *Hair Drawing* (2003), *Blood Drawing* (2003), the artist impresses her skin, blood, hair, nails into the paper pulp of what can be considered self-portraits. She announces in a way the aesthetics and technique of her maps, unfolding through fullness and voids, the rough materiality and the fragile indeterminacy of the trace, as a presence that affirms herself defiantly through her losses, her remains, her imprecise identity. Recalling the feminist politics of location and the observations of the Palestinian philosopher Elias Sanbar, it is possible to think of both Hatoum's maps and self-portraits as figures of a situated, material, yet becoming identity, where a political and existential agency, a form of resistance against the threat of appropriation, erasure and absence is inscribed (Sanbar 2004). Here any pretention of neatly defining the borders of both the self and the world, any attempt to possess them, is destined to succumb to the limits of the recognizable and appropriable.

What Hatoum seems to propose is an 'uprooted geography' (Chambers 2008) whose disorienting maps can also be considered as 'acts of memory' (Bal, Crewe, Spitzer 1999). They directly recall the existing maps of knowledge and power established by the cultural and political economy of both past and present Occidental colonialisms. They question the violent maintenance of 'center' and 'peripheries', hegemonic and subaltern areas, 'First' and 'Third' worlds. Hatoum produces a counter-geography of estrangement that undoes and continually re-defines this persisting cartography of power. Another example working bluntly across and along the 'struggle over geography' and its contested territories is the installation *3-D Cities* (2008-2009), where printed maps of cities present geometrical cuts forming paper depressions and elevations, similar to roses or cones. But any association with beauty, choreography or playfulness results inappropriate, even disquieting, when, at a closer look, it is possible to

see that the maps refer to Beirut, Kabul and Baghdad. Those cuts are more likely signs left by war, signs of violence.



3-D Cities
2008-2009

Printed maps and wood - Dimensions variable
Photo: Kleinefenn - Courtesy Galerie Chantal Crousel,
Paris and White Cube

Against the modern cartography of differentiated powers, and in harmony with a feminist 'politics of location' (Rich 1984), it is possible to consider Hatoum's maps as figures of a becoming yet positioned, immanent, material identity. An existential and political agency is inscribed, as a form of resistance against the threat of appropriation, cancellation, and absence. The artist creates zones of ontological slippage, time-space interlacements, bonds between distance and proximity, personal and collective memories. Interrogating our position, our established procedures of recognition and definitions, the artist draws us into an alternative critical heterotopic space (Foucault 1986) made up of the migrations of bodies and senses. Here, overcoming barriers, borders, enclosures, divisions in favour of traces, signs, folds,

and unpredictable currents, we are propelled into the emergence of another challenging configuration.

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FEMALE CORPO-GRAPHIES IN THE MEDITERRANEAN
PERFORMANCE ZONE

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Trespassing into the Mediterranean cartography, through the critical map of Mona Hatoum drawn by Celeste Ianniciello, I would like to propose further configurations of female artistic practices and poetics, with the aim of offering a personal response to the themes of migration in the contemporary Mediterranean. I will then briefly discuss the performative experimentations carried out by some female artists who move, write and dance inside and outside the aesthetical and political borders of the Mediterranean Sea. In this sense, I will highlight the bodily tension of their languages, their compositional desire of re-mapping and re-imagining new corporeal geographies, proposing alternative sensorial and identitarian modes of inhabiting the Euro-Mediterranean space.

The material and symbolic construction of the Mediterranean as a borderland, among which, the institutional politics of management of migration, and the subalterns' strategies of adaptation, contestation and subversion of 'Fortress Europe', enable the space of its sea to become a potential imaginary zone of performance for the activism and the experimentation of different art practitioners. As the French feminist writer Catherine Clément reminds us, "... somewhere, every culture has an imaginary zone for what is excluded, and it is that zone we must try to remember today" (Clément and Cixous 1986, 6). To echo this, I explore the Mediterranean as the methodological resource for alternative gender-critical investigations, envisioning its performance zone as the imaginary-actual-virtual space that serves to retrieve back excluded bodies, forgotten voices, hidden movements, and negated traces of otherness. In my interpretation, this marks the emergence, out of the sea's liquidity, of unfixated and fluid forms of female agency, the choreo-politics of bodily location-affirmation that interrupt and interrogate the history of Mediterranean modernity (Chambers 2008).

Against the backdrop of this, the female body – rather than being considered as a surface of inscription, an 'object' ruled by migration policies and restrained by measures of controlled mobility – becomes a

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transversal ‘subjectivity’ that inscribes and invents new ways of existing, moving and surviving through-and-as-performance. I will present the *corpo-graphies* of two Mediterranean video-performance artists: Nisrine Boukhari who lives and works between Syria and Austria, and Filomena Rusciano who began her artistic career in the city of Naples, after completing her degree in African Studies at the University “L’Orientale”. Their choreographic digital interventions offer the instances of a rethinking of the contemporary ‘politics of location’ that they conceive as the poetical-political positioning of a body inside/outside a national geography, a cultural space and a temporal juncture commencing from their – and, at the same time, our – corporeal territory.

Differed and dislocated in time and space, Boukhari and Rusciano’s aesthetical examples dialogue across the spectre of their differences, thanks to the liquid space of digitality the artists both share and inhabit. Located in Damascus and in Naples, crossing the Mediterranean Sea, their *corpo-graphies* engage with the language of *choreo-graphy* so as to be able to compose dancing counter-narratives which respond to the European technocratic ‘utopias’ of controlling mobility, their pretention to manage the established borders and their rigid limits to hospitality.

By the term *corpografia*, Sara Marinelli means the symbolic and tangible act of ‘writing with the body’, also suggesting this body should be conceived as a territory, the map where to inscribe and locate the individual memory of women in a precise configuration of historical time and geographical space (Marinelli 2004, 15). The scholar, in particular, explores the inadequacy of European national mapping in hosting identities always in transit, in movement, ‘out of place’, and which, consequently, cannot be ‘contained’ within any constructed *corpo-geographical* frontier.

By taking up Marinelli’s reasoning, my question would then be: which specific geography might incorporate and situate a body that is ‘out of place’? What happens when we explore the critical intersection between the bodies of the migrants, excluded and rejected by the Euro-Mediterranean politics of containment, and those female subjectivities marked as ‘indomitable’ and ‘uncontainable’ within the patriarchal geography – the system, the law – which still endures across cultural and national borders? The ‘migrant’ body and the ‘female’ body are mapped as entities on the edge, as ‘abject’ bodies. The post-structuralist Julia Kristeva, in *Powers of Horror*, describes the ‘abject body’ as the

object of ‘primal repression’, referring to the moment in our psychosexual development when we establish a border or a separation between the human and the animal, culture and what precedes it (Kristeva 1982). Kristeva maintains that, on the level of our individual development, the ‘abject’ marks the instance when we begin to recognize a boundary between ‘me’ and the ‘other’, between ‘me’ and the ‘(m)other’. This, specifically concerns those bodies epitomised today as anti-social, anti-national, that material and bodily substance that “disturbs identity, system, order. What does not respect borders, positions, rules...” (Kristeva 1982, 4).

The abject of the feminine and the monstrous body of the migrant, indeed, resist and react against national, sexual and gender confinements through ‘writing’. The most influential critical proposal in this sense comes from Hélène Cixous, who advances *l’écriture féminine* as a model of feminine desire, the language of body writing that reconstitutes her expression as a revolutionary movement against the male rhetorical ruling language. Cixous invites women “to write. An act which will give her access to her native strength, it will give her back her goods, her pleasures, her organs, her immense bodily *territories* which have been kept under seal...” (Cixous 1976, 880).

An alternative female corpo-graphy – which asks for a more conscious politics of location and body affirmation – is drawn by the feminist American poet Adrienne Rich who, in an excerpt of her “Notes Towards a Politics of Location”, writes:

“I need to understand how a place on the map is also a place in history within which as a woman, a Jew, a lesbian, a feminist I am created and trying to create. Begin though, not with a continent or a country or a house, but with the geography closest in-the body”. (Rich 212)

If the closest geography is ‘in-the’ body, these theoretical and critical thoughts – glimpsed here in the form of fragmented traces or as steps for an imaginary map – can be absorbed into the feminine gestures of the choreographies created by Boukhari and Rusciano. Here the ‘choreographic’, meant as the intertwining of body movement and writing par excellence, proves a conceptual and corporeal practice that re-orientates the established and normative relationship to space and language, to the ethics of what is identified as ‘out-of-place’ (Joy 2014).

Boukhari and Rusciano's inventive choreographic languages seek to place, on the creative scene, first and foremost, one subject in relation to another, allowing the dancing body movements, and their boundless gestures, to mark the emphatic contact between corporealities and narratives, even when they are involved across geographical distances (Foster 2011). It is a choreographic critical force that takes particular relevance in the Mediterranean performance zone, where dance extends beyond aesthetics into the social realm, exposing both a geographical specificity – Syria and Italy – and a wider geo-political horizon – the Global South.

In *The Veil*, Nisrine Boukhari signs the im-materiality of the digital screen with a corporeal matter emerging from the light surface of a red veil.¹ Behind this fabric dances an un-discernible figure, choreographing ephemeral gestures to the rhythms of fractal sonorous vibes. Jacques Derrida would say that what emerges here is “an a-physical body, that could be called... a technical body or an institutional body”, but which has no materiality (Derrida 1994, 127). The viewer can perceive with her eyes, the traces left by the body when it pushes, weighs, crushes, squeezes, slips, grabs and stretches, appearing and disappearing, a spectre inside/outside the monochromatic texture.

It is a corpo-graphy that aligns to the multitude of disembodied spectres – or ‘no-bodies’ – of the anonymous corpses dispersed in the necropolis of the Mediterranean today. Nevertheless, as if in an imaginary dialogue, the ghostly female body connects with the not-yet-born, the corporealities of the ones who have survived the transit, and who are now looking for possibilities of existence and dignity in the new geography of arrival. In this sense, it becomes a metamorphic body whose incompleteness offers its potential for the transformation of national, identitarian and sexual specificity. It is like a silkworm in *véraison*, that is, “in the moment of ripening and the moment of maturation” (Derrida 2001, 91); an identity emerging in new forms of in-corporation, whose fluxes push towards the future. The inspiration for such *à-venir* might come from the imaginary encounter between Boukhari's dancing hands and Jean-Luc Nancy's thinking body, when it casts the idea of dance as an instance of birth: “... the detachment of the body from the plane of the ground through its multiple unfoldings that open up toward the world” (Nancy 2000). Behind and beyond the veil of

¹ Nisrine Boukhari, *The Veil*, 2007. Link to the video: <https://vimeo.com/11463913>.

The Veil, the perception of the eye across the malleability of Boukhari's corpo-graphy, allows for the becoming of a new, potential and eventual Syrian identity – out-of-place, boundless, extended in her transit, a body wanting to escape, gesturing towards a form of refuge and hospitality within the Euro-Mediterranean geographical and aesthetical borders. In conclusion, indeed, Boukhari displaces the tactile weight of her *corpo*-graphy onto the liquid-digital *milieu*, here, in this space of free movement, she entrusts the resistance of her poetical-political image to the public eventfulness of her work – beyond the corporeal frontiers of her established Syrian identity and belonging.

On a different shore of the Mediterranean performance zone, the Neapolitan coast, Filomena Rusciano choreographs her *Liquid Path*.² Referring to this video-dance piece, she writes:

“I embodied the migrant's courage, as I wore her clothes, her hope, floating in the sea, unsettled as a message stored in a bottle...I travel towards uncertain paths”. (Rusciano 2013).

Fig. 1 Filomena Rusciano, *Liquid Path*, 2013
Video-choreography, video stills. Courtesy of the artist

These words affirm the urgency of another perspective, the necessity to consult a different map that would mark irregular routes and unusual trajectories. Through the experimental dissimulation of her bodily gestures into the watercolour technique, Rusciano dilutes abstract movements, symbolic images, and maritime rhythms on the digital screen. Unsettling the corporeal paths behind and beyond, inside and outside a glass bottle, her body turns liquid, blurred, opaque, fragmented and, eventually, boundless; the in-definite contours of her corporeality make her subjectivity indomitable, and ungraspable. Nobody can control, define or categorize the malleable shapes of her dancing body.

Fig. 2 Filomena Rusciano, *Liquid Path*, 2013
Video-choreography, video stills. Courtesy of the artist

Rusciano commences by composing from her body, from the tragic geography and the historical contingency she experiences, confronting

² Filomena Rusciano, *Liquid Path*, 2013 – link to the video (short version): <https://vimeo.com/74490969>.

her ability, as a European-body, to provide a personal and political reaction to what she sees and in-corporates. Indeed, this peace is her recalling of the collective and traumatic memory of those who experience the tragic crossings, and of those who witness the event from the other side of the divide, placed in the archive of migration into Fortress Europe World, exposed to the news and the images of thousand migrants drowning on flimsy boats or washing up, dead or alive, along the shores of the sea... Looking at her African or Syrian sisters crossing the Mediterranean, Rusciano composes an ‘empathic’ geography that embodies the kinaesthetic journey of the other, hopefully giving, at least in the imaginary geography of her-self, a sense of female agency and new hospitality.

Evocated in fragmented memories, the two female corpo-graphies here briefly presented, bear witness and re-perform the recent history of the Mediterranean. The being-body-identity, located behind and beyond *The Veil* by Boukhari, re-enacts the survival ‘movement’ of Syrian refugees, who, escaping the deadly tangles of war, are seeking freedom; on the other hand, the asylum requested by the infinite fluxes of exiled people arriving in Lampedusa, is embodied by the corporeal *Liquid Path* created by Rusciano. Both the works offer the performative locus for the thinking of a more dignified – cultural and artistic – hospitality to those ‘others’ who hopefully land on the Mediterranean shore.

In times of traumatic emergency such as ours, these interpretative considerations, in truth, constitute my own personal and political responsibility – at least in the research practice realm – in assuming the not-yet-elaborated trauma experienced today by European and, specifically, Italian memory. It is high time that we Italians experienced a historical and political *corpo*-graphy hosting the lost memories and subjectivities from our colonial past, which still cross and configure the modernity of our present. This is to invoke the necessity to re-route the Mediterranean region towards a future-*to-come*, where and when new corporealities might be located, respected and finally saved ‘otherwise’.

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MIGRATION AND MEMORY: DISPLACEMENT NARRATIVES
OF SYRIAN WOMEN REFUGEES ON STAGE

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“Hecuba is just like me. She was the wife of the King of Troy. Then she lost everything she owned. She lost loved ones and family. It’s like us, she was a queen in her home. Hecuba said: I used to run this place but now I am nothing. That’s us now”¹. Fatima is the Syrian woman who has pronounced these words during the drama therapy workshop² *Syria Trojan Women Project*.³ In this paper I will examine two drama therapy workshops that has given contributors – mainly Syrian refugee women –, the chance to tell their stories more widely and help alleviate their trauma. The two theatrical experiences are: the above mentioned *Syria Trojan Women Project* that began by creating drama workshops in Jordan in autumn 2013 with a group of Syrian women, all of whom were refugees living in Amman; and *Antigone of Syria*,⁴ a drama workshop with Syrian women living in the Sabra, Shatila, and Bourj el-Barajneh refugee camps in Lebanon. Syrian stage director Omar Abusaada and his team supervised both performances.⁵

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¹ From *Queens of Syria*, a film by Y. Fedda, www.syriatrojanwomen.org/documentary---queens-of-syria.html (07/2015).

² The contemporary practice of drama therapy claims its roots in western forms of psychoanalysis (R. Landy, *The Couch and the Stage: Integrating Words and Action in Psychotherapy*, Lanham, MD, 2008; id., “Drama as a Means of Preventing Post-Traumatic Stress Following Trauma Within a Community”, in *Journal of Applied Arts and Health*, n. 1, 2010, pp. 7-18), psychodrama (J. Levi Moreno, *Psychodrama*, New York, 1946), and educational drama (see P. Jones, *Drama as Therapy. Theory, Practice and Research*, London, 2007).

³ www.syriatrojanwomen.org (07/2015).

⁴ www.apertaproductions.org/current-project/ (07/2015).

⁵ Omar Abusaada completed his theatrical studies at the High Institute of Dramatic Arts in Damascus. He started his career working as a playwright and later he devoted himself to stage direction. He is the co-founder of The Studio Theatre Company and for years worked in remote villages in Syria establishing interactive workshops. In 2004 he directed *Insomnia*, his first performance and went on to direct *Afish* and *Forgiveness*, an improvisation work with a group of boys in a juvenile prison. Then he worked in prisons and refugee camps in Egypt, Yemen, Iraq and Jordan, and took part to Arab and European festivals. In 2012 he directed *Could You Please Look into the Camera?*, written by Syrian playwright Mohammad al-Attar, www.apertaproductions.org/team/ (07/2015).

According to Douglas Robinson, displacement is a “social phenomenon that disrupts people’s lives and identities”.⁶ The central issue of this paper is to examine how displacement narratives of Syrian refugee women can be transformed into art practices in order to re-arrange migrants lives and identities in the host countries. Secondly, this paper will draw attention to the growing importance of memory, real-life testimonials and subjective experiences “in a particular style of Arab theatre that is becoming very common these days, with its heavy infusion of meta-commentary, autobiographical experiences, and scrutiny of the medium, society, and the self, and in which fact and fiction bleed together”.⁷ Through re-enactments of migration memories, these performances intended to give a response to the current events in Syria, through a kind of artistic experience that has been “an important space for documenting past wrongs and imagining the future”.⁸

These theatrical practices can be explored through different approaches:

- The challenges that Syrian refugees are currently facing;
- The role of the artistic and theatrical experience as a resilient response to migration and displacement;
- The power of “digging up” stories⁹ that become crucial to the processes that we are discussing, as well as the importance of (re)memory and (re)enact stories of migration;
- How theatre has become an important means of articulating the problems of contemporary Arab world in a post-dramatic perspective.

The *Syria Trojan Women Project* began by holding a 6-week drama therapy workshop in Amman in autumn 2013, with a group of fifty Syrian women, none of whom had never acted before, to perform their own adaptation of Euripides’ anti-war play. The *Syria Trojan Women*, produced by the Syrian filmmaker Itab Azzam and the American actor Hal Scardino and directed by Omar Abusaada, was premiered in

⁶ D. Robinson. *Displacement and the Somatics of Postcolonial Culture*, Columbus, 2013, p. xx.

⁷ Y. al-Saadi, “Experiencing the Tragedy of ‘Antigone’ Through the Eyes of Syrian Women”, in *Al-Akhbar English*, December 16, 2014, <http://english.al-akhbar.com/node/22917> (04/2015).

⁸ E. Ziter, *Political Performance in Syria from the Six-Day War to the Syrian Uprising*, London, 2015, p. 193.

⁹ J. Thompson, *Digging up Stories: Applied Theatre, Performance and War*, Manchester, 2006, p. 5.

December 2013, in Amman's National Theatre.¹⁰ The filmmaker Yasmin Fedda documented the process and the women's experience in the documentary film *Malikàt Suriyya* (Queens of Syria), that has been premiered at the Abu Dhabi film festival in 2014 and has been awarded a SANAD grant for post production.¹¹

With the help of Charlotte Eagar and William Stirling, both filmmakers, and Georgina Paget, the team has also produced *We Are All Refugees*, an audiodrama series about Syrian refugees in Jordan, supported by the UNHCR, to be broadcast on SouriaLi radio and on the internet.¹² This series highlights and explores issues facing refugees and the Jordanian host community. Written, directed and produced by a team of Jordanian and Syrian refugees the drama explores and explains issues arising from the Syrian refugee crisis on both sides of the line through dramatic story lines and well drawn characters. According to the producers "The theme *We are all refugees* reflects the fact that 75% of Jordanians have refugee origins from Palestine, Iraq and Syria".¹³

Itab Azzam and Hal Scardino, with the help of the Syrian playwright Mohammad al-Attar,¹⁴ the Syrian actress Hala Omran, and the direction

¹⁰ The first performances met a great success and were widely covered in international media. The original play and Syrian refugee cast performed at CERN, in Geneva, Switzerland, in October 2014, courtesy of the Talberg Institute. Where a tour was not possible, the play virtually toured the US with two live-link events at Georgetown University, Washington DC, and at Columbia University, New York, in September 2014, www.syriatrojanwomen.org/about-us.html (07/2015).

¹¹ SANAD is the Development and Post-Production Abu Dhabi Film Festival Fund of "twofour54", providing talented Arab filmmakers with meaningful support towards the development or completion of their narrative and documentary feature-length films.

¹² C. Eagar, "Life in a Jordanian Refugee Camp Inspires Soap Opera", in *Newsweek*, 6/12/2014, www.newsweek.com/2014/12/12/life-jordanian-refugee-camp-inspires-soap-opera-289079.html (11/2015).

¹³ www.syriatrojanwomen.org/about-us.html (07/2015).

¹⁴ Acclaimed Syrian playwright Mohammed al-Attar graduated with a degree in English Literature and Theatrical Studies from Damascus, then he received his Masters in Applied Drama from Goldsmiths, London. He lives in Beirut. His work explores social relations, personal conflicts and everyday life. He wrote *Withdrawal*, his first work after graduating in 2007. His most recent works include *Online*, *Look at the street... this is what hope looks like*, *Could You Please Look into the Camera?*, *A Chance Encounter*, *Intimacy* and focus on the political situation in his home country. They have been performed in Damascus, London, New York, Seoul, Berlin, Brussels, Edinburgh, Glasgow, Seoul, Tunis, Athens, Beirut, and elsewhere, www.apertaproductions.org/the-team/ (07/2015).

of Omar Abusaada, also produced *Antigone of Syria*. Just like *Syria Trojan Women Project*, *Antigone*'s idea was "to run an open workshop where Syrian women refugees [could] have a safe place to express their bodies and their minds".¹⁵ The final result was a 21st century Syrian adaptation of Sophocles' tragic tale. The work culminated in three performances presented at the al-Madina Theatre of Beirut in December 2014.

In both cases the women who participated in the project engaged "with one another in many ways, including by recounting their personal stories from Syria", while the playwright's and director's rule was to work together "to blend some of these stories into the ancient Greek text".¹⁶

The staging of both the *Syria Trojan Women* and *Antigone of Syria* is very similar. On a very minimalist stage, the women are dressed in black and white *abayas* in *Syria Trojan Women* and black and red in *Antigone of Syria*. One at a time, each of them tells her own story, which are mainly "stories of the dispossessed", recreating the experience of trauma, while audience is asked to consider their relation to that text and the subjects within.¹⁷ These personal recounts are combined with the original Greek texts in a form of monologue. At the centre of the stage the rest of the cast sits in a row of chairs, playing the role of the Greek chorus. Behind the women, a screen projects videos, texts, and images in the background.¹⁸

These theatrical experiences represent one of the different forms of challenges that Syrian civil society is currently facing since the beginning of the uprising in 2011. As Edward Ziter affirms, early in the Syrian uprising, "performance played a significant role in galvanizing resistance".¹⁹ The workshops held in Jordan and Lebanon represent a political, social and artistic response to the increasingly difficult circumstances in the country, and the constantly growing number of Syrian refugees in the neighbouring countries of the region. Lebanon has received, according to UNHCR, over 1.1 million registered Syrian

¹⁵ www.apertaproductions.org/current-project/ (07/2015).

¹⁶ Ibidem.

¹⁷ K. M. Powell, *Identity and Power in Narratives of Displacement*, Routledge (Routledge Studies in Rhetoric and Communication), London, 2015, p. 9.

¹⁸ Y. al-Saadi, *Experiencing the Tragedy of 'Antigone'*, cit.

¹⁹ E. Ziter, *Political Performance in Syria*, cit., p. 193.

refugees at the start of 2015.²⁰ Jordan, where Syrian refugees number more than 600,000 in March 2015, has granted them access to services, such as health and education, in host communities.²¹

The producers of the two workshops and the director Abusaada have defined the several objectives of the projects as follows:

1. The primary aim was to produce a piece of theatre that could speak to the world on behalf of Syrian women, giving “these women the opportunity to speak their mind and express themselves in a way they never thought possible”.²²

2. Preservation of memory: the play will survive as a film and as a written text, preserving for posterity the memory of what is happening to women during the Syrian conflict.

3. The process aims to empower women refugees intellectually and psychologically.

4. The project will build community and support networks for those taking part.

By socializing and working with the same group of women every day, the participants will gain a sense of community in the midst of dislocation. They are currently in a foreign place with little opportunity to integrate into society. The same is true for their children. This project will offer the women and children a sense of belonging. This is a community project in the broadest sense; yes, we are directly working with Syrian refugees from the camps, but by performing in the biggest and most popular theatre in Beirut we are inviting the Lebanese community to be a part of the experience. The idea here is that, by exposing locals and expatriates to the plight of these women, we are attempting to integrate worlds that have until now been divided.²³

²⁰ In Lebanon there are 1,172,753 registered refugees, <http://data.unhcr.org/syrianrefugees/country.php?id=122> (07/2015). On the impact of the Syrian crisis on Lebanon see www.unhcr.org/pages/49e486676.html (07/2015).

²¹ In Jordan there are 629,128 Syrian registered refugees, <http://data.unhcr.org/syrianrefugees/country.php?id=107> (07/2015). The Syrian refugee camps of Azraq and Zaatari were built on land provided by the authorities where they also ensure security, www.unhcr.org/pages/49e486566.html (07/2015).

²² www.apertaproductions.org/project-objectives/ (07/2015).

²³ Ibidem.

5. The projects intend to leave behind a legacy of artistic development in the women who participate in the performance.

6. The producers aim for this project and the performances to draw attention to the reality of life for Syrian women refugees in mainstream international media.²⁴

These Syrian modern versions of two Greek tragedies represent, as Rebecca Schneider affirms, “a critical mode of remaining, as well as a mode of remaining critical”,²⁵ and a resilient response to the violence of war through a process of archiving and re-enacting refugee women’s real stories and traumas. In both performances, through a process of self-narration or re-narration of the self,²⁶ each personal story is juxtaposed with lines from the original Greek story. The concept of *story* is crucial in these performances. More specifically, the power of ‘digging up’ stories, to borrow an expression used by James Thompson in his study on the problems of theatre practice in communities affected by war and exclusion.²⁷ *The Trojan Women* is set at the fall of Troy, and it is about the fate of the defeated and exiled. There are enormous parallels between the fate of refugees from Syria today – who still carry inside them the danger they have experienced –²⁸ and that of the women of Troy. As one of the non-professional actresses of *The Trojan Women* states: “We left our home town. There was a lot of shelling. I wanted to find a better life for my children. The play talks about something real to us. It’s old, but history repeats itself”.²⁹

²⁴ Ibidem.

²⁵ R. Schneider, *Performing Remains: Art and War in Times of Theatrical Reenactment*, London, 2011, p. 7.

²⁶ P. J. Eakin, “Breaking Rules: the Consequences of Self-Narration”, in *Biography*, XXIV, 1, 2001, pp. 113-127.

²⁷ J. Thompson, *Digging up Stories*, cit., p. 5.

²⁸ “The general problems are anxiety, Post Traumatic Stress Disorder and depression. Despite the fact that they have moved away from danger, they still carry that danger inside them i.e. the fears that they had when they fled. And one of the main triggers of their fears is uncertainty about the future. This is all tied into the loss they have suffered in the process of experiencing revolution, war and displacement. With this they are dealing with the loss they have suffered- loss of relatives, friends and loved ones, loss of their homes, jobs, communities and all that goes into making a normal life”. See *12/12/13 Psychologist’s Story*, www.syriatrojanwomen.org/blog.html (04/2015).

²⁹ www.syriatrojanwomen.org/documentary---queens-of-syria.html (07/2015).

However, this experience helped those women in becoming aware of their situation and of the Syrian refugee crisis and, on the other hand, helped refugees and their host communities to understand each other. Interpreting their own stories, each one of those women learnt about the life of the others, developing a strong female solidarity.³⁰ Fatima, the woman who played the role of Hecuba in *The Trojan Women* adds: “My participation in this play has revitalized me, it gave me a sense of responsibility. ... Since I started this project my life has been renewed”.³¹ Suad, a mother in her twenties, lived in Damascus, in Sayyda Zaynab district, an area being destroyed by the fighting. Her husband was a soldier in the Syrian army who decided to desert. Suad and her husband left Damascus for Deraa, and then came across the border into Jordan. They went first to the Zaatari Camp, the main Syrian refugee camp for Syrians in Jordan, then they settled in Amman. Concerning her participation in the project Suaad affirms:

“When Hecuba turns to have a last look at Troy she makes a speech about never seeing her country ever again, and I cry when I read it, because when we were at the border about to cross into Jordan my husband told me to look back at Syria for one last time, because we might never see it again. That for me is the most heart wrenching part of the play”.³²

So, through repeating, revisiting, re-enacting the memory of their past, these women witness their situation and participate in understanding their present to build their future, putting into practice what Rebecca Schneider’s statement: “re-enactment is a battle concerning the future of the past”.³³

As for *Antigone of Syria*, one of the most powerful stories of the play is the one narrated by 28-year-old Mona, whose son died of cancer at the age of 5. On the stage she explains the audience how she risked her

³⁰ On the link between narration and feminist movements Rebecca Schneider affirms that “the important recuperation of ‘lost histories’ has gone on in the name of feminism”. See R. Schneider, *Performing Remains*, cit., p. 99.

³¹ www.syriatrojanwomen.org/documentary---queens-of-syria.html (07/2015).

³² See “Suad’s Story”, 12/08/2013, www.syriatrojanwomen.org/blog.html (11/2015).

³³ R. Schneider, *Performing Remains*, cit., p. 4.

own life to bury her son in an unmarked grave in war-racked Syria.³⁴ Like Antigone, many of the refugees have lost brothers: “During the play one of the actresses told of her brother's disappearance and how she desperately – though futilely – tried to find him at a government prison, a base for the rebel Free Syrian Army and even al-Qaeda’s Syria wing, the Nusra Front”.³⁵ For the Syrian refugee women participating in the project, *Antigone* is a way to inform the world about their condition, as Rasha, 22 years old, states:

“I want our voices to be heard. That people hear our stories and know that we were oppressed in our country and we are oppressed here. We live in sadness and how long the sadness will last I don’t know. We’re not happy. In Syria we were afraid of the bombings and shootings, we came here and we’re oppressed. We’re not comfortable in any way”.³⁶

The project represents for those refugee women a way to express the trauma of forced migration and displacement: “When we came here I didn’t like it, Wala affirms. We experience racism, people don’t like us but being involved in this project I feel like I have returned to Syria because we are all together sharing stories”.³⁷

It is interesting to observe how Greek tragedies have become a means of articulating the problems of contemporary Arab world in a new post-dramatic perspective.³⁸ In the history of contemporary Arab culture, Greek tragedy has obviously retained a great deal of resonance to audiences, even in translation.³⁹ Taha Husayn translated all

³⁴ I. Stoughton, “Drama Therapy Workshop in Lebanon Helps Heal Wounds for Displaced Syrians”, in *The National*, March 23, 2015, <http://www.thenational.ae/arts-lifestyle/on-stage/drama-therapy-workshop-in-lebanon-helps-heal-wounds-for-displaced-syrians> (07/2015).

³⁵ O. Holmes, “Syrian Refugees Tell Their Stories of Loss Through Ancient Greek Play”, in *Reuters*, December 12, 2014, www.reuters.com/article/2014/12/12/us-mideast-crisis-syria-play-idUSKBN0JQ16I20141212 (04/2015).

³⁶ www.apertaproductions.org/meet-the-actresses (11/2015).

³⁷ *Ibidem*.

³⁸ P. A. Campbell, “Postdramatic Greek Tragedy”, in *Journal of Dramatic Theory and Criticism*, XXV, 1, 2010, p. 56.

³⁹ A. Etman, “Translation at the Intersection of Tradition: The Arab Reception of the Classics”, in L. Hardwick, C. Stray Malden (eds.), *A Companion to Classical*

Sophocles' plays⁴⁰ except one, after having studied Greek and Latin in Paris, as "classical subjects enjoyed some fame and favour in the late 1890s and 1930s and 1940s".⁴¹ Furthermore, we know many Arab plays based on the Oedipus legend,⁴² which in Egypt has known four important versions between the 1950s and the 1970s,⁴³ as well as different versions of Lysistrata.⁴⁴ Lebanese-Canadian playwright, director and actor Wajdi Mouawad presented in the late Nineties his version of *King Oedipus* and *The Trojan Women* and, more recently the trilogy *Des Femmes* (2011) which contains *Antigone*, *The Women of Trachis*, and *Electra*.⁴⁵ We also have several versions of *Antigone*: in Egypt the Brecht's *Antigone* has been represented in 1965, followed by the production of Anouilh's version in 1978. In 2002 Frank Bradley set the play *Antigone in Ramallah... Antigone in Beirut* in modern Palestine, and in 2003 the play *Once Upon a Time* staged a fictional meeting between Scheherazade of the *Arabian Nights* and *Antigone* that investigated patriarchy.⁴⁶ In Syria, the well-known star of film and

Receptions, Oxford, 2008, pp. 141-152, cit. in M. Almohanna, "The Ichneutai in Modern Arabic World", in *New Voices in Classical Reception Studies*, V, 2010, pp. 1-14, www2.open.ac.uk/newvoices (11/2015).

⁴⁰ P. E. Pormann, "The Arab 'Cultural Awakening (Nahda)', 1870-1950, and the Classical Tradition", in *International Journal of the Classical Tradition*, XIII, 1, 2006, p. 10.

⁴¹ *Ibidem*, p. 12.

⁴² A conference was held in Ghent, on December 2003, dealing with "Tragedy as a literary genre within Western and Arabic drama: Reading *Oedipus* as an example of cultural differential thinking". See F. Decreus, M. Kolk, "Rereading Classics in 'East' and 'West': Post-colonial Perspectives on the Tragic", in *Documenta*, XXII, 4, 2004, and, in particular, A. Etman, "The Greek Concept of Tragedy in the Arab Culture: How to Deal with an Islamic *Oedipus*", pp. 281-299; and M. Carlson, "Egyptian Oedipuses: Comedies or Tragedies?", pp. 368-375.

⁴³ M. Carlson, "The Arab Oedipus: Four Plays", Martin E. Segal Theatre Center Publ., New York, 2006; S. M. Mahfouz, "The Arab Oedipus: Oriental Perspectives on the Myth", in *Modern Drama*, vol. 55, n. 2, 2012, pp. 171-196.

⁴⁴ M. Kotzamani, "Lysistrata on the Arabic Stage", in *PAJ: A Journal of Performance and Art*, XXVIII, 2, 2006, pp. 13-18.

⁴⁵ See A. Rodighiero, "La promessa del sangue: motivi edipici in *Incendies* di Wajdi Mouawad", in F. Citti, A. Iannucci (eds.), *Edipo classico e contemporaneo*, Hildesheim/New York, 2012, pp. 359-384.

⁴⁶ H. Hassan, "The Influences of Ancient Greek Drama on Modern Egyptian Theatre", in P. N. Šipová, A. Sarkissian (eds.), *Staging of Classical Drama Around*

television, Jihad Saad, staged *Antigone's Emigration* in 2006.⁴⁷ As Helene Foley suggests in her *Female Acts in Greek Tragedy*: “The gendering of ethical positions permits the public exploration of moral complexities that would not otherwise have been possible”.⁴⁸ Arab playwrights and directors have shown a deep interest towards Sophocles’ *Antigone* probably because she offers an alternative mode of ethical reasoning to that adopted by Creon.

In the case of the performances we are examining, the original Greek texts have been adapted, remade, remixed with the refugees’ testimonies in order to analyse the Syrian situation in its complexity and its effects on women. According to director Omar Abusaada, the *Syria Trojan Women Project* and *Antigone of Syria* represent two different stages of the conflict:

“There are many differences between the two texts, and actually Antigone feels more relevant to the Syrian context in many ways. Firstly, the wars they talk about are different. In *The Trojan Women*, the war is coming from outside – the Greeks invaded Troy. But in *Antigone*, the war is coming from within, between two brothers. Secondly, *The Trojan Women* takes place after the war has happened, the women’s destiny and fate is decided and they have no agency, no decisions to take. *Antigone* is not like this. ... *Antigone* is more complex. Creon has some right on his side too – he can be seen as trying to protect the city. This is more similar to the Syrian situation, especially now that it has started to be more complicated. It is hard to follow one course of action and be sure it is the right one.”⁴⁹

2000, Newcastle, 2007, pp. 102-121; N. Selaiha, “Antigone in Egypt”, in E. B. Mee, H. P. Foley (eds.), *Antigone on the Contemporary World Stage*, Oxford, 2011, pp. 343-372.

⁴⁷ The play – which literally depicts a woman persecuted and forced into flight by war between two brothers – was performed in a city reeling from an influx of Iraqi refugees as the result of violence between Sunni and Shi’a Muslims. See E. Ziter, “No Grave in the Earth: Antigone’s Emigration and Arab Circulations”, in E. B. Mee, H. P. Foley (eds.), *Antigone on the Contemporary World Stage*, cit., pp. 289-306.

⁴⁸ H. P. Foley, *Female Acts in Greek Tragedy*, Princeton/Oxford, 2001, p. 172.

⁴⁹ T. Ross, *Interview with Omar Abusaada, Antigone Director*, 4 October 2014, www.apertaproductions.org/news/2014/11/5/interview-with-omar-abu-saada-antigone-director (07/2015).

The main theme of *Antigone* is, according to Omar Abusaada, *tamarrud* – insurgency, rebellion, and disobedience – because Antigone defies Creon, who is a man. This, as Abusaada observes, “was one of the most important things in the Syrian revolution at the beginning ...”⁵⁰

As emphasized by John Dillon and S.E. Wilmer in their study on *Rebel Women. Staging Ancient Greek Drama Today*, “modern production [of Greek tragedies] have often exploited these dramas to serve female ends”⁵¹. The plays directed by Omar Abusaada break the silence also on the situation of the Syrian women during the conflict. Sexual violence and other forms of violence and crimes against women and girls, used by both pro-regime and opposition armed forces, have progressively intensified since the beginning of Syrian uprising and after the development of the crisis into an internal armed conflict.⁵² In this situation “Re-vision – the act of looking back, of seeing with fresh eyes, of entering an old text from a new critical direction – is for women more than a chapter in cultural history; it is an act of survival”.⁵³ As well as Antigone or Hecuba, the Syrian refugee women can insert themselves “into history in order to rescript it, and in order to enact new histories”.⁵⁴ In Abusaada’s plays, the non-professional actresses – like Greek heroines – “take their fate into their own hands and plot a reversal in their fortune or in the fortune of others”.⁵⁵

⁵⁰ Ibidem.

⁵¹ J. Dillon, S. E. Wilmer (eds.), *Rebel Women. Staging Ancient Greek Drama Today*, London/New York, 2005, p. xiv.

⁵² In December 2012, the International Federation for Human Rights (FIDH), in collaboration with the Arab Women Organisation (AWO), sent an international fact-finding mission to meet with Syrian women who had fled the crisis to seek refuge in Jordan. The mission focussed on the impact of the ongoing conflict on women and sought to document specific forms of violence targeting women. The FIDH delegation visited three refugee camps, al-Zaatari, King Abdullah Park and Cyber City and held meetings with 80 refugees living outside “official” camps in Amman, Rusaiifa, Dhleil and Sama Sarhan (Zarqa Governorate). See *Violence Against Women in Syria: Breaking the Silence. Briefing Paper on a Fidh Assessment Mission in Jordan in December 2012*, April 2013, n. 606a, p. 6.

⁵³ R. Schneider, *Performing Remains*, cit., p. 6.

⁵⁴ S. Bemba, “Black Wedding Candles for Blessed Antigone”, in E. B. Mee, H. P. Foley (eds.), *Antigone on the Contemporary World Stage*, cit., p. 31.

⁵⁵ J. Dillon, S. E. Wilmer (eds.), *Rebel Women*, cit., p. xiv.

Therefore, the stories narrated on the stage during these performances express an alternative representation of the “History” outside of political propaganda. As Paul Ricoeur observed in his *Memory, History, Forgetting*, the personal narratives can produce a “sense of history”⁵⁶ (sense de l’histoire) or, moreover, these lived experiences can even “make history”⁵⁷ (faire histoire). So, it seems – as Ricoeur suggests – that memory and history are now “condemned to a forced cohabitation”.⁵⁸ This is particularly true if we consider that, not exclusively but particularly in the Arab world, “the primary reference of historical memory continues to be the nation”.⁵⁹ Nevertheless, the proliferation of memory in stories and interpretations be that in literature, theatre,⁶⁰ film or other art forms, magazines, blogs,⁶¹ graffiti or intellectual debates, is a crucial phenomenon in the more or less recent history of Arab culture.⁶²

⁵⁶ P. Ricoeur, *Memory, History, Forgetting*, Chicago, 2004, p. 398.

⁵⁷ *Ibidem*, p. 259.

⁵⁸ Concerning the relationship between ‘history’ and ‘memory’, Ricoeur formulates the question “Has history finally melted into memory? And has memory broadened itself to the scale of historical memory?”, see P. Ricoeur, *Memory, History, Forgetting*, cit., pp. 397.

⁵⁹ *Ibidem*, p. 396.

⁶⁰ Focusing on the theatrical production from the middle of the 20th century onwards, many historical events, such as the anti colonialist struggles in the Maghreb, the *Nakba* and the following Palestine-Israel conflicts, the Lebanese Civil war, the Iraq crisis etc. have inspired a rich amount of texts and performances based on memory accounts. Among them *Haflat Samar min al 5 haziran* by Saadallah Wannus; the workshops by Arna Meir and Juliano Mer Khamis in Palestine; *Majdalun* and *Fatima* by Roger Assaf; and Rabih Mroue’s performances about the Lebanese civil war. See J. Alam, “Real Archive, Contested Memory, Fake History: Transnational Representations of Trauma by Lebanese War Generation Artists”, in D. Dean, Y. Meerzon, K. Prince (eds.), *History, Memory, Performance*, London, 2014, pp. 169-186.

⁶¹ The potential of blog as alternative narrative has been examined in C. N. Fadda-Conrey, “Writing Memories of the Present: Alternatives Narratives about the 2006 Israeli War on Lebanon”, in *College Literature*, XXXVII, 1, 2010, pp. 159-173. See also the unusually chronicles of the 2011 Egyptian Revolution written by Y. Rakha in his blog and published in the volume *Revolution for Real*, London, 2013.

⁶² In Syria some activists established a website called *Creative Memory Project*. This project “aims to archive all the intellectual and artistic expressions in the age of revolution; it is writing, recording, and collecting stories of the Syrian people, and those experiences through which they have regained meaning of their social, political and cultural lives. ... The promoters of this project believe that it participates in the documentation of contemporary history, so it is crucial that the revolution and its

Concerning nowadays Syria, the cultural urge to document the situation in the country since 2011 has produced many performances based on true stories.⁶³ Syrian playwright Mohammad al-Attar and Omar Abusaada, besides *The Trojan Women* and *Antigone in Syria*, have produced two interesting plays in 2012: *Look at the street...this is what hope looks like*, and *Could You Please Look into the Camera?*⁶⁴ The former was based on a collage of Facebook entries of Syrian revolutionary activists and excerpts of articles from the Egyptian novelist and journalist Ahdaf Soueif, who reported on the events on Cairo's Tahrir Square for the *Guardian*. The second production *Could You Please Look into the Camera?* was based on "interviews with arbitrarily detained and sometimes tortured victims of the Syrian security forces".⁶⁵ Al-Attar dramatized them in the fictional story of a

realities are explicitly described, for both contemporaries and makers of the revolution, for the coming generations, for the whole world. It is an archive of national legacies; to protect it is to preserve the Syrian memory, a duty because of its total consideration of historical accounts of all Syrian people", www.creativememory.org/?lang=en (07/2015). A similar project has been conceived by Malu Halasa, Zaher Omareen and Nawara Mahfoudh, who edited the volume *Syria Speaks*, a celebration of the work of over fifty artists and writers who, through their literature, poems, songs, cartoons, document the political situation in Syria. See M. Halasa, Z. Omareen, N. Mahfoudh (eds.), *Syria Speaks*, London, 2014.

⁶³ Lebanese playwrights and directors also drew their attention to the Syrian conflict. In *The Pixelated Revolution*, Rabih Mroué investigates about videos of civil victims of the current conflict in Syria. See M. Ruocco, "*al-Tawrah al-mubaksalah / The Pixelated Revolution: punto di arrivo del postdramatic theatre di Rabih Mroué*", in *La rivista di Arablit*, II, 4, 2012, pp. 5-18, www.arablit.it/rivista_arablit/numero4_2012/1_ruocco.pdf (01/2016). Lucien Bourjeily's *66 Minutes in Damascus* (2012), is conceived as an 'interactive theatre' performance where the audience is plunged into a recreation of what it might be like to be detained in Syria, www.theguardian.com/stage/theatreblog/2012/jul/12/theatre1 (07/2015). Zeina Daccache, founder of the NGO *Catharsis* and the pioneer of drama therapy in Lebanon organized, since April 2014, weekly workshops for a mixed group of Syrian and Lebanese women. I. Stoughton, *Drama Therapy Workshop in Lebanon Helps Heal Wounds for Displaced Syrians*, cit.

⁶⁴ E. Ziter, M. Al Attar, L. Wedeen, "Could You Please Look into the Camera?", in *TDR The Drama Review*, 58, 3, 2014, pp. 124-155.

⁶⁵ "I was interested in writing a piece about the current detention that is happening in Syria" – says al-Attar – "I was haunted by this idea mainly because I have many friends who were detained during the uprising". See J. Nathan, "A Flood of Plays by Middle-Eastern Writers are Revealing the Dark Side of the Arab Spring", *The Independent*, April 14, 2015, www.independent.co.uk/arts-entertainment/theatre-

female Syrian documentary maker who is trying to make a film on the basis of corresponding victims' stories.⁶⁶

Syrian stage director Waël Ali, who fled from Syria and now lives and works in exile in France and Germany, presented his theatrical performance entitled *You Know I Do Not Remember* at the Maxim Gorki Theater in 2015.⁶⁷ The theatrical performance is based on revisiting the story of the musician Hassan Abd al-Rahman, a Syrian political prisoner imprisoned for eight years during the 80s in the notorious Sidnaya prison in Damascus. Through the lens of personal recollection and interpretation, the play questions the issue of personal memory and its relation with collective memory at a critical stage in Syrian history. This personal narrative takes place in nowadays time, when the country is shocked by the violent political upheavals. Thus the narrator, the witness, tries to reconstruct his memories and his life story in a ceaselessly destroyed and dismantled geographical, political, social context.

To sum up, since 2011 in Middle East we assist to the proliferation of a huge number of plays that re-enact different forms of 'exception' violence.⁶⁸ In Syria people have been living a constant state of crisis and emergency long before the 2011 uprising. However, since 2011 displacement and forced migrations are a result of enduring endemic violence and human rights violations. Also thanks to those theatrical

dance/features/a-flood-of-plays-by-middleeastern-writers-are-revealing-the-dark-side-of-the-arab-spring-7711834.html (07/2015).

⁶⁶ The play had its premiere in April 2012 in Seoul, South Korea.

⁶⁷ Together with actor Ayham Majid Agha, the protagonist recounts not only the brutality and violence that defined his life, but also the attempted resistance in prison. Excerpts from the video interviews that director Wael Ali conducted with Hassan 'Abd al-Rahman in 2013 are shown, questioned and re-evaluated. The play has been produced in cooperation with YAF Young Arabe Theatre Fund, British Council, Freemuse, Citizens Artists Association und Culture Resource, <http://english.gorki.de/programme/you-know-i-do-not-remember/> (07/2015).

⁶⁸ See G. Potter, "Foreign Texts and Domestic Politics: Making Torture Public in Contemporary Egyptian Drama," in R. Shimko, S. Freeman (eds.), *Public Theatres and Theatre Publics*, Cambridge, 2012, p. 136; A. Serlenga, *Testimonianza ed evasione: stato d'eccezione e creazione performativa. Il teatro contemporaneo tunisino all'epoca della "transizione democratica"*, Ph.D. Thesis, Studi Culturali Europei (XXIV ciclo), Università degli Studi di Palermo, 2013. The concept of "permanent states of exception" as a normal mode of operation even for democratic nation State has been borrowed by Giorgio Agamben. See G. Agamben, *State of Exception*, Chicago, 2008.

experiences I tried to describe in this paper, the stories of refugee about their forced migration and displacement, violence, torture, and violation of human rights echoed outside the country. Now these stories ‘belong to the stage’⁶⁹ beginning a process – as Edward Ziter affirms – of ‘imagining a different Syria’.⁷⁰

⁶⁹ R. Schneider, *Performing Remains*, cit., p. 43.

⁷⁰ E. Ziter, *Political Performance in Syria*, cit., p. 236.

GUESS WHO'S COMING TO DINNER.
REPRESENTATIONS OF AFRICA AND IMMIGRATION POLICIES
IN POST-COLONIAL ITALY

*Silvana Palma**

Bonjour, je m'appelle Adou.

According to press reports, these are the words little Adou uttered to stunned border guards on May 7, as he crawled out of the wheeled suitcase where he was hiding, after a baggage check had revealed his unexpected presence. The security x-ray image taken at the border checkpoint in Ceuta – a Spanish enclave in Morocco – made the front page of major news outlets all over the world. It showed eight-year-old Ivorian Adou Ouattara curled up in a fetal position, his legs tight against his chest in a makeshift plastic womb, waiting to be re-born in Europe. The reddish silhouette of that little person, almost reminiscent of an alien, wrapped in an unlikely cocoon, was shown across all media. No other image could better convey the struggle of our contemporary age: the hope of millions for a new life and a viable future, almost a rebirth.

The picture is all the more effective because rather than calling to mind the recurring tropes of 'migrant onslaught and invasion' the media have flooded us with over the last few years, it portrays instead a lonely and silent attempt at defying fate on tiptoe from within an ingenious and desperate shell.

Other children – and men and women of all ages – have tried before him: entrusting their lives and their fortunes to the bottom of a lorry, perching perilously on its axle a few inches from the ground; or crammed into trucks, in the hold of a cargo ship, under dashboards, in the rotten unseaworthy boats that almost daily brave the sea. They walked across the deserts, climbed mountains and risked the dangerous sea crossings, their journeys often lasting years and taking an enormous toll on their lives, their health and their savings. They landed in a Europe that, lacking both firm roots and historical memory, responds by surrounding itself with walls and Frisian horses and resorts to barbed wire, baton-wielding police and tear gas or, as is the case with Britain, even calls to 'send in the Gurkhas'.

The same Europe that celebrated itself, the idea of a common area and a world of shared peace at the fall of the Berlin Wall, now

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frantically excels at the construction of barriers, protection systems and shields around its small spaces of privilege and comfort.

For reasons of geographical proximity, most immigrants to Italy come from Africa, driven by political, economic, social or religious turbulence, war and totalitarian regimes.

Notwithstanding the extraordinary rescue efforts carried out over the years by both the Coast Guard and Sicilian fishermen, and especially by the residents of Lampedusa, our country is divided between the (rare) welcoming embrace to migrants and those who urge the use of gunboats. Yet, in the midst of such alarming prospects, migrants have become the source of a profitable business for many: from the diversified chain of ‘brokers’ who organize departures and arrivals in an economic and human exploitation of migrants, to managers of ‘Reception’ centres who profit from, and sometimes misappropriate, allocated funds. And for politicians as well, who fuel the public’s ‘fear of invasion’ as they jostle for votes, some conjuring up an ‘Africanization’¹ of Italy (thus inadvertently evoking fears of hybridity, miscegenation and attacks on racial purity that are reminiscent of fascist rhetoric) or even the ‘genocide’ of Italians² (thereby revealing their lexical inadequacy and ignorance of history). Finally, migrants contribute to the economic growth of the country, and this is especially true for those towns that were most affected by recession and now host Reception Centres in their territories.³

For years, the media have been describing the migrants’ arrival with an increasingly worrisome and anxiety-inducing vocabulary to convey the feeling of being under siege, often resorting to animal-related images and metaphors: ‘overflow’ and ‘flood’ are commonly used collocations, so are ‘human tsunami’, ‘swarms’, and ‘herds’. In the past few years the word ‘emergency’ has been used almost daily, and even the category ‘race’ has been resurrected. It is no wonder, then, that online blogs or newspaper reader comments offer suggestions such as the enforcement of birth control in Africa⁴ or invitations – such as this one from an Angela Nastasi-University of Milan – to “sink all the

¹ www.secoloditalia.it/2015/06/zaia-libero/ (08/15).

² www.ilgiornale.it/news/politica/salvini-attacca-ancora-genocidio-italiani-i-vescovi-non-romp-1160721.html (08/15).

³ www.internazionale.it/notizie/2015/07/14/migranti-accoglienza-economia (07/15).

⁴ www.ilfattoquotidiano.it/2015/05/19/spagna-il-bimbo-ivoriano-nascosto-nel-trolley-ritrova-la-mamma-a-ceuta/1697475/ (07/15)

suitcases”.⁵ More radical solutions are also being proposed, such as forced sterilization of Africans, and, at least as regards immigrants, they have some success with European right-wing parties and even obtain official endorsement. Last May, Olli Sademies – a City of Helsinki, Finland, deputy councillor and member of the True Finns Party - wrote on his Facebook page that African immigrants should be sterilized because “they have too many children”.⁶

Less threatening but equally eloquent approaches promoting racial safeguard and cultural identity have been emerging in countries like France, where racism was institutionalized with the creation of a Ministry for Immigration and National Identity (2007) and the presence of immigrants is explicitly associated with a challenge to national identity. In the picture that emerges, Italy and Europe appear barricaded and unwelcoming in their closed-minded fears.

The image of Africa

‘Africanity’ is some sort of label imposed upon migrants when they arrive to Europe with which they learn to associate themselves. In their homeland, states Njubi Nesbitt, the majority of the population, mostly peasants who live in rural areas, normally think of themselves in ethnic terms, and only those with a higher level of education and living in urban areas may see themselves as members of a nation. In practice, it is in the West that an Acholi from Uganda or a Masai from Kenya loses his original identity to become, more generally but irrevocably, an ‘African’.⁷

In a recent interview, Ugandan writer Moses Isegawa gave a very effective rendition of this feeling:

⁵ www.huffingtonpost.it/2015/05/08/abou-nascosto-valigia-ceuta_n_724_0002.html (08/15).

⁶ it.sputniknews.com/mondo/20150528/456106.html#ixzz3hMaYfm5D (08/15). Yet, this procedure is not unheard of in the West. Between 1984 and 1991, three sensational and highly publicized mass rescue operations, akin to a ‘return to the Promised Land’, transferred *Bēta-Esrā’ēl* (Ethiopian Jews, better known as Falashas) to Israel. Ethiopian female immigrants were sterilized against their will or through deception. Israeli newspaper Haaretz first reported the news: cf. www.haaretz.com/opinion/an-inconceivable-crime.premium-1.484110 (08/15). The first experiments in mass sterilization were carried out in Georgia between 1967 and 1978. Even then the procedure was tested on black women.

⁷ F. N. Nesbitt, “African Intellectuals in the Belly of the Beast: Migration, Identity, and the Politics of Exile”, in *African Issues*, 1, 2002, pp.70-75.

“When you first leave Uganda for Europe you think, “At last, I’m free to do what I want” But when you arrive there, you become an African for the first time, in a sense.

Because you are responsible for Somalia! They call you up and say, “What do you think about Somalia?” And you can’t say, “I’m Ugandan, I have nothing to say about Somalia”.

You have this big, huge chunk of experience to defend-and you will defend it, because nobody else is defending it.

You become some sort of an ambassador and for the first time you become conscious of what Africa means”.⁸

On the contrary, when referring to other diasporas from Europe or Asia we normally talk about Italian, German, Irish, Chinese or Indian immigration. Moreover, the entire African continent, despite its vast complexity and environmental, political, social and cultural diversity, is usually presented by the media, and conceived by the public opinion, like an undifferentiated and indistinct whole. Notwithstanding its numerous ‘tribes’,⁹ their representation of Africa features a homogeneous social, political and economic background, essentially made of backwardness-conflict-corruption-primitiveness. In the eyes of the West, Africa is above all a continent out of time (the extraordinary beauty of its scenery certainly plays a role), whose rare contacts with modernity are the result of interactions with the ‘benevolent’ west, and a land marked by an archaic religiosity, linked to immutable traditions and whose cultural and intellectual potential doesn’t go much beyond singing, music and dance.¹⁰

It’s an image that comes from far away, the result of the crystallization of stereotypes and prejudices that governed the discourse on Africa especially during the colonial period – with its ‘rewriting’ of

⁸ M. Colin Vasquez, “Hearts in Exile: A Conversation with Moses Isagewa and Mahmood Mamdani”, in *Transition. An International Review*, n. 2, pp. 126-150.

⁹ The same word *tribù* (tribe) – or its derivatives *tribalismo* (tribalism) and *tribale* (tribal) – are used in the media to indicate in a pejorative sense those who are different from Westerners, basically ‘primitive’ backward people. Postcolonial African governments often denounce and dismiss the constant use of such disparaging terms.

¹⁰ According to Mbembe, in France this stereotype is reinforced by the way black men are projected on screen, as they are usually relegated to music and sports shows (as for movies, black men usually appear in American movies, not in the French ones). Things are a little better in the sports field, where blacks are seen as an updated version of the *tirailleurs*, whose bodies and physical prowess are devoted to the country.

the world and hierarchy of cultures – and that nowadays still governs, almost unchanged, the way we perceive Africa's otherness. Today, as yesterday, the image of Blackness is a hotchpotch of the same stereotypes that in colonial times justified subjugation by Whites in the name of a supposed civilizing mission. Laziness, poverty – as if this, and nakedness in the colonial era, were a 'genetic' given – infantilism, polygamy, sexual licentiousness, lack of initiative and entrepreneurship are just a few examples. Savagery and barbarism are, however, the dominating stigma deployed for years by the media, which associate migrants from Africa to news-stories of prostitution and rape, infibulation, AIDS, witchcraft, murder rituals and drug dealing. When it comes to Africa, the narrative feeds on itself.

No longer populated by 'headless beings', Lotus Eaters, 'cephi' with 'backward legs and front hands' and incestuous women who only give birth to quintuplets,¹¹ Africa – however – keeps generating an updated version of its unusuality and being the land of oddities, mysteries and *monstra*. Paradoxically, the full knowledge of what was once referred to as *terra incognita*, the subject of the most imaginative fabrications, has not done much to change the way Africa is narrated and experienced: it's still the land of oddities, wonders and mysteries. The African continent is still a prisoner of darkness.

In the press, too often the adjective 'black', today as in centuries past, continues to indicate, more than the sub-Saharan part of the continent, its impenetrability, its primitiveness and the surrounding darkness, making Fanon's reflection more relevant than ever, even after fifty years: "we wear our exclusion on our skin".¹²

In the 90's, anthropologist Paola Tabet collected more than seven thousand primary school essays for a research on racist thinking, which was markedly on the rise with the increase in immigration from Africa.

The essays revealed how deeply rooted and widespread the negative image of Blacks is in Italian collective representations. "What if your parents were black?" was the title of the assignment. "I would teach them about life among human beings", wrote a fifth-grade student from Arezzo.¹³

¹¹ G. Benzoni, "L'Africa affabulata", in G. Benzoni et al. (eds), *Africa. Storie di viaggiatori italiani*, Milano, 1986, p. 95.

¹² F. Fanon, *Black skin, white masks*, New York, 1952.

¹³ P. Tabet, *La pelle giusta*, Torino, 1997.

Between exoticism, repulsion and inferiorization, today, as in the past, the prevailing belief seems to be that the white man, and his civilizing mission at best, always take centre stage, even in young children's mental images. Exclusion, refusal of any possible exchange and hybridization between different worlds, and unsurmountable boundaries are the hallmarks of what Ugandan writer Sinan B. Wasswa, aptly defined the "white circus of the Knights of the Round Table":

"[...] I see it as some sort of circus where the rule of the strongest prevails, as thin as an elastic band on top of which you have to walk in line with the circus' needs. The white circus of Knights of the Round Table, the lineage from which came a noble people, of transparent heart and spirit pure as snow. You get to join only when you become a full-fledged member of the clan in every little detail. No one has ever yet gotten a foot in from the outside. What we're living today is coming from there".¹⁴

The *Extracircolari* (outside the club/circus), as Wasswa defines Africans – in Italy they are commonly referred to as *extracomunitari* (outside the European Union) – feel a sense of exclusion while their representation always implies marginality and negativity. Africa's social transformations, scientific advances and literature remain unknown (the works of African scholars and writers are rarely translated into Italian, unless they win a Nobel Prize). As for the media, Africa is newsworthy only when disaster strikes, wars of vast dimensions break out or particularly gruesome or bizarre events happen. A few examples: fifteen women burned to death in Kenya on charges of witchcraft (*La Stampa*);¹⁵ the King of Swaziland chooses his wives among hundreds of parading virgins (*il Giornale*);¹⁶ human flesh served in a Nigerian restaurant (*Il Messaggero*).¹⁷ All without checking and referencing

¹⁴ S. B. Wasswa, "La mia tradizione in valigia", in A. Ramberti, R. Sangiorgi (eds), *Memorie in valigia*, Santarcangelo di Romagna, 1996, p. 179.

¹⁵ <http://www1.lastampa.it/redazione/cmsSezioni/esteri/200805articoli/33007girata.asp> (08/15).

¹⁶ www.ilgiornale.it/news/mswati-re-dalle-dieci-mogli-che-fa-sfilare-vergini-piazza.html (08/15).

¹⁷ www.ilmessaggero.it/primopiano/esteri/nigeria_ristorante_carne_uman_a_arresti_notizie/524573.shtml (08/15). See also: S. Ragusa, "La rappresentazione delle realtà da cui provengono i migranti – dalla versione integrata della Linee Guida Carta di Roma", www.cartadiroma.org/news/la-rappresentazione-delle-realta-da-cui-provengono-i-

sources or any attempt at analysis and contextualization, eventually reinforcing in the reader's mind the idea that African immigrants occupy a lower rung of the human ladder. In his provoking article-manifesto, Kenyan writer and journalist Binyavanga Wainaina offers advice on *How to Write about Africa*,

“Always use the word ‘Africa’ or ‘Darkness’ or ‘Safari’ in your title. Subtitles may include the words ‘Zanzibar’, ‘Masai’, ‘Zulu’, ‘Zambezi’, ‘Congo’, ‘Nile’, ‘Big’, ‘Sky’, ‘Shadow’, ‘Drum’, ‘Sun’ or ‘Bygone’. Also useful are words such as ‘Guerrillas’, ‘Timeless’, ‘Primordial’ and ‘Tribal’.

Never have a picture of a well-adjusted African on the cover of your book, or in it, unless that African has won the Nobel Prize. Prominent ribs, naked breasts: use these. If you must include an African, make sure you get one in Masai or Zulu or Dogon dress [...]”¹⁸

effectively dissecting, confronting and summing up the outdated Western clichés and representations of Africa.

The creative, enchanted storytelling of the Middle Ages, when all that was known about Africa was its geographic shape, has been replaced by shoddy and often grotesque caricatures – loaded with contempt and arrogance but still rife with ignorance of places, institutions and history.

By virtue of their inescapable membership of the mythological African or Black ‘race’ born from colonialist imagination, the Acholi, the Mende or the Igbo who arrive in our country take on a collective identity that speaks of barbarity, poverty, war, disease, corruption and hunger.

Among the many untruths about Africa, spread by the media to feed the public opinion, are its supposed propensity for conflict (in actual fact, Asia has the highest rate); the role of ‘tribalism’ as the root of all conflicts (thereby nullifying their significance and all political, economic, social and ideological explanations); and informal economy as the only viable economic development model in a continent that is

migranti-dalla-versio ne-integrata-della-linee-guida-carta-di-roma/ (09/15); R. van Dijk, “‘Voodoo’ on the doorstep: young Nigerian prostitutes and magic policing in the Netherlands”, in *Africa*, 71(4), 2001, pp. 373-90.

¹⁸ B. Wainaina, “Come scrivere d’Africa”, in *Internazionale*, 24/02/2006.

characterized by archaic farming methods, where modernity needs to be imposed or taught.

Again, according to the media, Africa is an overpopulated continent or at least the most populous one. In fact, its population is slightly higher than Europe's¹⁹ (and on balance there are more whites in Africa than Africans in Europe). *Last but not least*, there is the alleged invasion of Italy and Europe by African migrants, while all data so far show that most African migrations (93%) are directed towards other Third World countries, Asia, and the Gulf countries.²⁰ Alongside this idea, we find the supposed burden that immigrants place on European State budgets, and Italy's in particular – which concerns us more closely. On balance, Italy earns instead a substantial profit thanks to immigrants. Not only does it withhold some of the funds allocated for them (on top of EU funding), but it also enjoys legal immigrants' significant contribution to the nation's GDP (nearly 9%).²¹

One of the most common clichés is that African migrants - regardless of the reasons for their expatriation or escape – come from their country's poorest ranks²² and are the least educated among all migrants arriving in Europe. This belief is unfounded. Official data for Ghana, for instance, reveal that 70% of doctors, 45% of pharmacists and 20% of nurses trained between 1995 and 2002 reportedly left the country for the United Kingdom or the United States in particular.²³

The African diaspora (generally speaking, at least three need to be considered: the trans-Mediterranean, the transatlantic and the one towards the Indian Ocean, in addition to internal migration across the continent) is a complex phenomenon. So complex indeed that the study of its historical, geographical and intellectual itineraries (as well as

¹⁹ African population is projected to reach 17% of world population in 2025, the same percentage it had at the beginning of the 17th century, before the slave trade and the ensuing demographic stagnation. Cf. G. Courade (ed), *L'Afrique des idées reçues*, Paris, Berlin, 2006.

²⁰ For further analysis of these themes see G. Courade (ed), *L'Afrique des idées reçues*, cit.

²¹ Fondazione Leone Moressa, *Il valore dell'immigrazione*, Milano, 2015, whose intent is to debunk some of the stereotypes related to the economic burden of immigrants and show they are actually a resource for our country.

²² C. Follana, "Ce sont les Africains les plus pauvres qui migrent vers l'Europe", in G. Courade (ed.), *L'Afrique des idées reçues*, cit., pp.84-89.

²³ *The State of the Ghanaian Economy*, University of Ghana, Institute of Statistical, Social and Economic Research (ISSER), Accra, 2003.

political-economic, given that diaspora remittances are reportedly estimated between 50 and 150 billion USD), led to the creation of study centres and programs, magazines and special book series (that our country seems to ignore).

Poor, violent, illiterate and primitive: African migrants arriving in our country are preceded and marked by this stigma. Among the many barriers against the alleged invasion, ignorance and the prejudices we inherited from our colonial past are the most powerful, and our hospitality standards follow accordingly.

African immigrants are welfare-charitable recipients at best, and at worst they become targets for ferocious racist attacks, not only verbal. They are exemplary figures who embody the defining features of the stranger, the unwelcome, and the enemy. For years the media have been reinforcing this image, portraying them as a threat (to our way of life, well-being and access to employment), selecting and emphasizing news of criminal acts or repeatedly using a series of images, words and expressions that turn immigrant landings into dangerous invasions.

An analysis of the discourse on migration conveyed over the years by *Corriere della Sera*, not a tabloid but an establishment newspaper, reveals its dramatic contribution to the reinforcement of decidedly racist feelings of alarm and rejections among Italians in the period 1992-2009, not only because of its articles style but for their particular lexicon. The repetitive use of words like ‘die’, ‘massacre’, ‘missing’, ‘wreck’, ‘sink’, ‘tragedy’, ‘drowning’, ‘victim’, ‘horror’, as well as descriptions of human trafficking (e.g., ‘traffickers’, ‘smugglers’) with respect to immigrant landings, without any insight into the reason for the exile, the pitfalls and dangers of the journey, or the reality of their countries of origin, ended up reinforcing the belief of a threat from illegal immigration and generating hostile feelings. The parallel use of a judiciary lexicon (e.g., ‘blitz’, ‘arrest’, ‘denounce’, ‘trials’, ‘judge’ or ‘expelled’, ‘expulsion’, ‘hunting’, ‘controls’) connoted the issue as a problem of public order and security, justifying repressive actions without regard to their arbitrariness.²⁴

Government decisions were consistent with this framework: stepped-up security measures and surveillance systems, simplified detention and

²⁴ L. Montali et al., “The representation of migrants in the Italian press. A study on the *Corriere della Sera* (1992–2009)”, in *Journal of Language and Politics* 12, 2, 2013, pp. 226-249.

custody procedures, special detention camps, and the reactivation of old practices of racial separation.

The distorted representation of Africa – made of caricatures and partial or simply grotesque but decidedly racist images – conveyed by the media and now part of the collective imagination, while masking the complex realities of the continent from which migrants originate, also unmasks fears, fantasies and ignorance of our country and of Europe in general.

The existence of conflicts, failures and deep social, political and economic crisis in Africa cannot be denied. But it is this blending of myth and reality where everything becomes a commonplace, and mostly the lack of depth and the absence – the exclusion – of African voices, that actually prevents us from focusing on reality, and this is not without consequences on the political or economic choices and on international cooperation.

The case of Eritrea

Over the last three years, Eritreans reportedly formed the largest group of refugees to Italy: in 2014, they accounted for 27% of total arrivals.²⁵

Yet, it is curious to note that Eritrea appears to have met UN's health-related Millennium Development Goals (MDGs), introduced in 2000, and to be on track to achieve others such as Food Security, Gender Equality and Empowering Women, and Universal Primary Education.

Hence, the UN considers countries such as Eritrea a development model. Nevertheless, every year thousands of people flee the country. UNHCR data reveal that 350,000 Eritreans altogether have obtained refugee status in various parts of the world. However, this figure, while certainly remarkable for a country with a population of just over five million, does not disclose how many young Eritreans actually left, especially in light of the number of those who have followed other paths – not always related to a request for refugee status – or, above all, did not survive a journey fraught with endless pitfalls.²⁶

²⁵ www.UNHCR.CR/ARRIVALS/italy (08/15). However, ours is not among the destination countries in their migration project: data confirm that countries in Central and Northern Europe, e.g., Germany and Sweden, receive a higher number of asylum applications (UNHCR global trend).

²⁶ UNHCR Statistical Yearbook 2013: www.unhcr.org/54cf9bd69.html (07/15).

Just a little over twenty years ago, the picture was very different: thousands of Eritreans were returning home to support the reconstruction of the country, finally independent after the thirty-year-long war of liberation against Ethiopia (1961-1991). But the conclusion of that conflict did not return a lasting peace to the country, whose troubled history has enjoyed only brief periods of respite in the postcolonial period. The disastrous outcome of the 1998-2000 border war against Ethiopia erased hopes for a future of peace, stability and development. At the same time, the illiberal and repressive regime's increasing rigidity turned the dream of independence into a progressive restriction on freedoms of press, expression, association and religion, along with a strengthening of what many call a permanent, albeit unofficial, state of emergency.

According to A. Poole, a 'culture of fear' reigns in Eritrea, where rumours can sometimes constitute the sole basis for an arrest.²⁷

The country's extraordinary militarization, denounced by scholars, international organizations and exiles, is the most obvious feature of the security policy established by the regime and of the illiberal decline experienced by the country. Its defence system requires all citizens between the age of 18 (recently lowered to 16) and 50 (40 for women) to serve in the *Eritrean Defence Force* and the *National Service* – War of Independence veterans and the physically and mentally disabled are exempted.²⁸

Established in 1995 (see National Service Proclamation 82/1995), the National Service consists of six months of military training²⁹ and twelve months of work aimed mainly at the reconstruction of the war-

²⁷ A. Poole, "Ransoms, Remittances, and Refugees: The Gatekeeper State in Eritrea", in *Africa Today*, 60 (2), 2014, p. 77.

²⁸ Human Rights Watch, *Service for life. State repression and indefinite conscription in Eritrea*, 2009; T. Redeker Hepner, D. O'Kane (eds), *Biopolitics, militarism and development. Eritrea in Twenty-First Century*, New York-Oxford, 2011, "Introduction".

²⁹ During this period, the conscripts also receive political-ideological training aimed at fostering the sharing of the following values: the liberation fight, obedience to authorities, patriotism and sacrifice for the nation. The added goal is a shared identity based on clerical and patriotic principles that may go beyond any of the country's religious or ethnic differences. As noted by G. Kibreab, Eritrea does not have military service, but *hagerawi agelglot* (the national service), far more ambitious and wider in scope: G. Kibreab, *The Open-Ended Eritrean National Service: The Driver of Forced Migration*, Paper for the European Asylum Support Office Practical Cooperation Meeting on Eritrea 15-16 October 2014, La Valletta, Malta.

torn country. However, after the 1998-2000 border war, few of those enrolled were discharged and since then, conscripts have been forced to serve almost indefinitely.³⁰ Most of the recruits fear being detained for life³¹ and see their underpaid work, which includes building roads, dams, schools, hospitals, plants and infrastructures, as forced labour.³² Their extremely low monthly wages, called by the Government ‘pocket money’, range from 10 to 25 USD, depending on whether the conscripts live within the barracks or in their own homes. Conscripted labour was introduced in 2002 with the Warsai-Yikealo Development Campaign, “literally, the campaign (or collective works) of the heirs (*warsay*) of the braves (*yka□a. lo*). The braves are freedom fighters, of whom conscripts are heirs, according to the official credo”.³³

Students are not exempted: since 2003, at the end of their 11th grade year, all students are transferred to the Warsai Ykealo School in Sawa – a militarized school – where they must complete their final 12th grade year and get their military training. Since its foundation in 2003, the school has hosted 170,000 students.³⁴

Reports on living and working conditions at the school and elsewhere in the country from *Human Rights Watch* and *Amnesty International*³⁵ have been denouncing for years the systematic violation of human rights and the brutal repression of dissent with the use of punishment, torture and imprisonment without process.

In light of this reality, escape and exile remain the most significant option for any young Eritrean in search of a viable future. Many are fleeing not the national service in itself, but its duration and degrading

³⁰ Human Rights Watch, *Service for Life: State Repression and Indefinite conscription in Eritrea*, April 16, 2009, p. 83. Available at: www.hrw.org/reports/2009/04/16/service-life-0 (10/14).

³¹ D. M. Bozzini, “Low-Tech Surveillance and the Despotism State in Eritrea”, in *Surveillance and Society*, 9, 2011, pp. 93–113; G. Kibreab, *Eritrea: A Dream Deferred*, London, 2009; D. O’Kane, T. Redeker Hepner, *Biopolitics, Militarism, Development: Eritrea in the 21st Century*, cit.; R. Reid, “The Politics of Silence: Interpreting Stasis in Eritrea”, in *Review of African Political Economy*, 120, 2009, pp. 209-21.

³² G. Kibreab, “Forced Labour in Eritrea”, in *Journal of Modern African Studies*, 47(1), 2009, pp.41-72.

³³ D. M. Bozzini, “The Catch-22 of Resistance: Jokes and the Political Imagination of Eritrean Conscripts”, in *Africa Today*, 60 (2), 2014, p. 59, n. 5.

³⁴ Eritrea Ministry of Information www.shabait.com/news/local-news/195-08-warsai-yikalo-secondary-school-in-sawa-concludes-20142015-academic-year-08/15.

³⁵ www.hrw.org/world-report/2015/country-chapters/eritrea (08/15).

conditions,³⁶ which often require them to interrupt their studies and survive on almost no income, unable to raise a family or be of help to their parents. In this condition of servitude many report having been “frequently humiliated, sexually abused if women, and brutally punished at the slightest hint of criticism or doubt”.³⁷

Unable to openly express their opinions, Eritreans vent their frustration and criticism through underground dissent, conveyed through jokes, political satire and bitter stories and, knowing the risk involved, secretly circulate them among trustworthy people only. These are formidable indicators of the loss of legitimacy of the State and its President:

“It’s a very hot day in paradise. In one of the offices of the divine administration, an official is doing the inventory of a collection of clocks. Every clock represents a president in power on earth. Every time one of them commits a crime, the hand of the clock advances by a minute. This is how God keeps track of presidential misdeeds. All the clocks are there except for Isayas’s. The official searches and then panics because he can’t find it anywhere. Finally, he decides to report the disappearance to God personally. Surprised by the well-working air conditioning in God’s office, our official reconsiders his actions and excuses himself for having bothered God for nothing.

Isayas’s clock was in fact standing on the divine desk, with its minute hand nicely ventilating the office”.³⁸

Another joke says:

“God surveys the world one day, seeing the mountains, valleys, seas, and all there is. Suddenly, God stops and exclaims: “Why is Eritrea so green? I specifically made that country dry and yellow!” The angel Gabriel leans over and whispers: “My Lord, those are army uniforms”.³⁹

³⁶ D. Connell, “Escaping Eritrea Why They Flee and What They Face”, in *Middle East Report*, 264, FALL 2012, p.3.

³⁷ *Ivi.*

³⁸ D. M. Bozzini, “The Catch-22 of Resistance: Jokes and the Political Imagination of Eritrean Conscripts”, cit, p.47.

³⁹J. Kimball, *In Eritrea, Youth Say Frustrated by Long Service*, Reuters, 17 July 2008 www.reuters.com/article/2008/07/18/us-eritrea-military-idUSL1412475520080718 (10/14).

Not surprisingly, Eritrea is one of the world's top refugee-producing countries. According to estimates from Human Right Watch, approximately 4,000 Eritreans flee the country each month and more than 313,000 – more than 5% of the population – have left since the middle of 2014.⁴⁰ Those who escape are mainly young, male and fairly educated. According to B. Conrad, the fact that it is the younger and better educated who choose the exile path has resulted in depriving the Eritrean cause of the influential voice of those who might be agents of change in the country, inadvertently strengthening the regime also through cash remittances from abroad.⁴¹ Even Mussie Zerai – an Eritrean priest and founder of the NGO Habeshia who's committed to defending the rights and the lives of asylum seekers and migrants – believes that the flight of so many young people may actually result in a gain for the regime and

“be indeed used as an outlet to avoid a potential for social unrest. Keeping the youth at home, with no prospects for change, would probably put the country at risk, similarly to what happened in North Africa with the Arab Spring”⁴².

His opinion is quite convincing, especially in light of the fact that the July 2001 regime crackdown was triggered by youth-led dissent: a student leader at the University of Asmara was arrested after publicly criticizing the oppressive conditions of national service.

For its part, the government is able to profit from both those who flee the country and those who stay, and even from those who leave the country for work reasons, such as athletes. On December 13, 2009 the national football team's escape caused a sensation. In fact, the twelve players who sought refuge in Kenya were not the only ones who took advantage of a trip abroad to take flight. Between 2006 and 2012, 58% of Eritrean athletes reportedly went missing, despite the 2007 imposition of a deposit of 100,000 nakfa (about US \$ 6,700) required from all

⁴⁰ Human Right Watch - World Report 2015: Eritrea www.hrw.org/world-report/2015/country-chapters/eritrea (08/15).

⁴¹ B. Conrad, “‘We Are the Prisoners of Our Dreams’: Exit, Voice, and Loyalty in the Eritrean Diaspora in Germany”, in *Eritrean Studies Review* 4(2), 2005, p. 255.

⁴² “Eritrea: Inferno Sinai – Dossier”, *Rivista Missioni Consolata*, marzo 2013: www.rivistamissioniconsolata.it/new/articolo.php (08/15).

athletes leaving the country to participate in international competitions.⁴³

The Eritrean diaspora is the major source of foreign currency for the government.

For years, analysts have been scrambling to explain the system put in place by the Eritrean government. Some have been referring to the theory of ‘bifurcated state’, as developed by Mamdani;⁴⁴ others seem to believe that Cooper’s analysis⁴⁵ and the concept of ‘gatekeeper state’ better explain the Eritrean policy and provide the best framework for understanding resource co-optation; others instead quote Aihwa Ong’s ‘graduated sovereignty’.⁴⁶

Still, its distinctive trait is the Eritrean government’s ability to secure economic resources expanding its sovereignty over the territorial boundaries of the state.

The government is primarily committed to tapping into the diaspora’s resources, encouraging and channelling its loyalty to the country.

Indeed, a significant part of the State revenue derives from the ‘diaspora tax’, introduced in 1995 (Diaspora Income Tax, Law n. 67) at the time of reconstruction after the Thirty Years War against Ethiopia, and calling on all expatriates to pour into state coffers 2% of their annual income. The tax, in fact, had its roots in the financial support provided by the diaspora during the war. During the 1998-2000 conflict, this source of revenue and currency became increasingly necessary for the country’s economy. Since then, demands have increased and the conditions imposed on immigrants – although the tax is technically voluntary – have tightened to the point of denying non-compliant expatriates the possibility of renewing travel documents, buying and selling real estate at home, sending money to family members or even returning home (Switzerland just opened criminal proceedings against the Eritrean consulate in Geneva for the alleged ‘extortion’ on Eritrean expats). Thanks to the profits from the diaspora tax, Eritrea reportedly

⁴³ A. Welde Giorgis, *Eritrea at a Crossroads: A Narrative of Triumph, Betrayal and Hope*, Houston, 2014, p. 265.

⁴⁴ M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton, 1996.

⁴⁵ F. Cooper, *Africa Since 1940: The Past of the Present*, Cambridge, 2002.

⁴⁶ A. Ong, *Flexible Citizenship: The Cultural Logics of Transnationality*, Durham, 1999.

ranks fifth in Africa in remittances received per capita and first in proportion of remittances in relation to GDP.⁴⁷

But the state, as has been said, can also profit from those who flee the country through reprisals on their families, including financial penalties.⁴⁸

This system would eventually result in a policy of ‘graduated citizenship’, according to which Eritrean expatriates who have paid all fees related to the diaspora tax eventually enjoy full rights that are denied to Eritreans who stayed in the country, whose only opportunity to enjoy the same rights lies in completing their national service whose duration is, however, indefinite.⁴⁹

In this situation, leaving the country illegally seems to be the only available option, though the risks involved are enormous for both the fugitives and their families.

The journey to Italy is a long and painful odyssey. Libya is 3,500 kilometres away, and before facing the last leg in the open sea on ramshackle boats – frequently with tragic implications – Eritreans often have to endure months, if not years, of harassment in Libya, where they are exploited, imprisoned, blackmailed, raped, bought and sold by police and local criminals. They are often deported back to Eritrea, and Italy, having entrusted Libya with the task of putting a stop to immigration, is indirectly responsible.⁵⁰ Many Eritreans, in fact, were forced to return to their country because of the Italian-Libyan Treaty of Friendship, Cooperation and Partnership, signed in 2008 between Berlusconi’s government and Libya’s Qaddafi.

The collaboration between the two countries followed Italy’s official ‘apology’ for its colonial past, definitely instrumental in entrusting Libya with the control of migratory flows in the Mediterranean and with the wicked rejection policy. Thousands of migrants, many of whom

⁴⁷ A. Poole, “Ransoms, Remittances, and Refugees: The Gatekeeper State in Eritrea”, cit., p. 74.

⁴⁸ D. Styan, “The Evolution, Uses, and Abuses of Remittances in the Eritrean Economy”, in *Eritrea’s Economic Survival: Summary Record of a Conference Held on 20 April 2007*, Chatham House, The Royal Institute of International Affairs, London, 2007, pp.13-22.

⁴⁹ David M. Bozzini, “Low-Tech Surveillance and the Despotism State in Eritrea”, in *Surveillance and Society*, 9, 2011, pp. 93–113; G. Kibreab, *Eritrea: A Dream Deferred*, cit.

⁵⁰ Cfr. the documentary directed by A. Segre, D. Yimer, R. Biadene, *Come un uomo sulla terra*, 2008.

come from former Italian colonies in the Horn of Africa, have paid the price for this.

An alternative to the Libyan route, though equally dangerous, is provided by Israeli one, via Egypt and the Sinai, where there the risk of being kidnapped by Rashaida criminal organizations or other Berber groups involved in human and organ trafficking in Sudan is very high.⁵¹ For years, Sinai has been the scene of the most tragic human trafficking practices and, according to UN reports, the involvement of senior officers in the Asmara regime cannot be excluded.⁵² Despite the death of nearly a quarter of those who end up in torture camps, annual estimated revenue is over \$ 600 million.

These events are now in the public domain, and they are frequently investigated in documentaries broadcasted by BBC and CNN and in reports from the more qualified press outlets. Hence, Europe's and Italy's silence and inaction leave us stunned. The report on international human trafficking drafted by Dutch researchers (see footnote 51) was presented on 11 December 2013 at a conference hosted by Italy's Chamber of Deputies (and a few days earlier by the European Parliament).

A new disconcerting agreement was instead signed during the Italian Presidency of the Council of the European Union.

The crisis in Libya has led our country to shift its migration containment system and externalize the European Union's southern border towards other countries: Tunisia, Egypt and Sudan, where migrants from the Horn of Africa usually transit. The agreement, known as the 'Khartoum Process', signed on 28 November 2014 in Rome between the EU member countries and countries of origin and transit of migrants,⁵³ provides for the control of migration flows through partnerships with the same countries from which migrants, especially Eritreans, are fleeing. Among its provisions are the strengthening of border and national police forces, and the establishment of reception centres in transit countries. As an added measure against human

⁵¹ Cfr. the book-report by A. Fessaha, *Occhi nel deserto*, Prato, 2014, and the report by M. van Reisen, M. Estefanos, C. Rijken, *Human trafficking in the Sinai: refugees between life and death*, Oisterwijk, 2012 e Id., *The Human trafficking cycle: Sinai and beyond*, Oisterwijk, 2014.

⁵² *La Repubblica*, 12 novembre 2014.

⁵³ www.corrieredellemigrazioni.it/2015/03/24/processo-di-khartoum-sape-te-cose/ (08/15).

trafficking, Sub-Saharan countries are also required to welcome back their citizens.

The Khartoum Process also provides funding of nearly 300 million Euros for Eritrea from the European Commission. Eritrea will also receive other funds directly from the Italian government for development projects to be announced.⁵⁴

The agreements between Italy and Libya have essentially resulted in migrants having to endure abuse, torture and extortion just to come out alive from the detention centres that Libya tries to pass off as reception camps.

It is then difficult to understand how anyone could now possibly believe that migrants' human rights – and Eritreans' more specifically – will be guaranteed by their countries of origins. Moreover, Eritrea has been for years the subject of UN investigations, and charges were pressed by international organizations for its violation of human rights. It is hard not to see in the obligation to welcome returning migrants – as underlined in the Agreement – a dramatic incitement to deportation practices. As emphasized by A. Morone,

“the great hypocrisy of the Italian and European politics is to say they will stop thousands of fleeing people, especially from the Horn of Africa, for their own good and to shield them from human traffickers while, in the name of that same rhetoric, they are supporting autocratic regimes charged with violating human rights”.⁵⁵

Conclusion

Refugees, asylum seekers and migrants from Africa, whose only fault is to strive for a better life when they arrive in our country, chasing a dream built on a precise idea of the West⁵⁶ and high expectations, are the tragic heroes of the new millennium.

Their hopes are shattered and disappointed by Italy, where the government's welcome, featuring the absence of any plans whatsoever, services outsourced to private contractors and a scourge of mob

⁵⁴ www.nigrizia.it/notizia/roma-khartoum-accordi-sui-migranti (08/15).

⁵⁵ A. Morone, *Il processo di Khartoum: l'Italia e l'Europa contro le migrazioni*, Ispi-Analysis N. 286, June 2015, p. 7.

⁵⁶ A. Appadurai, *Il futuro come fatto culturale. Saggi sulla condizione globale*, Milano, 2014.

infiltrations, has only recently started being reported – and also as a result of strict investigation abroad.⁵⁷

Compared to other migrants, those who arrive in Italy from Eritrea have an unhappy privilege: the humanitarian residence permit, valid for one year. Actually, it's the only thing being granted. The wait can last indefinitely. Refugees and asylum seekers turn into ghosts without any rights, certainties and identities: no housing, no real support, no assistance aimed at gaining social inclusion or entering the workforce are provided. Thus, they end up occupying abandoned buildings or living a miserable homeless life. Their only alternative is to be placed, depending on availability, in one of the of so-called 'reception' centres (while having different purposes and functions, whether they are called CDA, CIE or CARA they do not differ as to the treatment of those who are locked up. The CARA – reception centres for asylum seekers – are governed by the same rules drafted in 2004 for CIEs, the centres for identification and expulsion). These are essentially structures where all rights are temporarily suspended. Despite the reassuring word 'reception' in their name, they are "spaces of indistinct juridical jurisdiction", as G. Agamben calls them,⁵⁸ where migrants become "bare life in front of the sovereign power"⁵⁹ (after all, even Nazi concentration camps were established as a form of *Schutzhaft*, or "preventive custody").

Repressive, discriminatory and segregationist measures govern Italian migration policies. The Italian reception, deportation, and 'containment' policies, first with Libya and now with the Khartoum process, reveal both the focus on security and the bio-political dimension in managing migrations from Africa. These are the same racial body politics that were most pronounced in the colonial apartheid system and in the racist shift experienced by Italy in Africa. The removal of the Colonial page from the nation's autobiography led many to forget that Italy was the first country to re-establish its legal and institutional system by basing it on 'race', racializing social relationships and public spaces to better manage them, while separating,

⁵⁷ See the investigation by two German lawyers, D. Bender and M. Bethke, and the related scandal-provoking report published in 2011, proving the absolute "lack of human dignity guarantees" for refugees in Italy www.proasyl.de/fileadmin/fm-dam/q_PUBLIKATIONEN/2011/Italienbe_richt_FINAL_15MAERZ2011.pdf (08/15).

⁵⁸ G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita*, Torino, 1995, pp. 189-191.

⁵⁹ B. Gaggia, "Non più cittadini ma solo nuda vita", *Il Manifesto*, 24 ottobre 1998, interview with G. Agamben.

moving away, segregating. Back then, this was (also) done in the name of its civilizing mission, now it's the humanitarian principles. As for its domestic policy, Italy has not shown to be able to implement past integration or current reception policies. Tens of thousands of immigrants, working mainly in farming and construction, are exploited under slave-like conditions. Immigrant women are sexually exploited. Not only are schools not integrated, it has actually been suggested that separate classrooms for immigrants should be arranged. It is extremely difficult, if not outright impossible for Italian-born children of immigrant parents to obtain citizenship, and outrageous red tape is not the only barrier.

Has anything really changed since the colonial era?

IMMIGRANT ENTREPRENEURSHIP IN ITALY

*Immacolata Vellecco**

1. Introduction

Over the past decade in Europe, focus on immigrant entrepreneurship has progressively increased. Immigrant entrepreneurs contribute to economic growth and employment, often recovering craft and commercial activities that have fallen into disuse, and provide goods and services that add value. Frequently the result of stabilization, immigrant entrepreneurship reinforces processes of integration and supports immigrants in reaching their social and economic goals by: developing 'successful' social models within an ethnic community; strengthening identity and visibility; creating conditions for greater immigrant participation in institutional processes (Zhou, Cho, 2010). In addition to these benefits, which are mainly non-economic in nature, immigrant entrepreneurship also serves as a major link to global markets and is thus essential for the integration of immigrants within the labor market, insofar as immigrant entrepreneurs create jobs not only for themselves but also, increasingly, for the rest of the immigrant and native populations.

As a point in fact, immigrant entrepreneurs help create commercial opportunities for their host countries by reducing the costs of commercial transactions with their countries of origin by deploying their networks and knowledge of these countries' markets. Immigrants can play an important role in stimulating foreign trade by reducing implied barriers between the host and origin nations. This type of entrepreneurship can, therefore, create jobs in countries of origin and produce advantages in terms of the integration of immigrants and the development of international commerce.

However, the economic activities of immigrant businesses seem to have slower growth rates than their counterparts in native economies (Chaganti R., Greene PG, 2002) for the following reasons:

- immigrant entrepreneurs operate in areas in which barriers to entry are not present and as a result, they are subject to strong competition, low profit margins and limited cash flows;
- market demand is a demand for niche, or not overly important, products;

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- the purchase of resources depends on relations with the ethnic community, which often offers some resources but impedes the availability of others needed for growth.

The authors point out that it is mainly the lack of financial resources that prevent ethnic businesses from growing at the same rates as native ones.

A research project conducted in Canada (Brenner et al., 2010) also found that:

- the characteristics of entrepreneurs vary according to group and location;
- immigrant businesses require the same support / incentives as small native businesses;
- the main challenges for immigrant entrepreneurs lie in understanding the local community and integrating with it;
- the use of capital varies according to ethnic group.

The immigrant contribution to an economy through the direct creation of new jobs is an issue that has received limited attention. Moreover, it is difficult to compare EU countries in terms of the contribution of immigrants to entrepreneurship and job creation due to the heterogeneity of available data sources for the single countries and the lack of an internationally agreed-upon definition of ‘immigrant entrepreneur’.

The phenomenon has developed significantly in Italy in recent years. Indeed, until 1990, immigrants could become entrepreneurs only if they hailed from countries bound to Italy by reciprocal self-employment agreements. Italian Law 39/1990 mandated that immigrants could benefit from self-employed status regardless of the existence of bilateral agreements. Subsequently, Law 40/1998 definitively liberalized immigrant access to self-employment.

This article will first illustrate some theoretical issues regarding immigrant entrepreneurship. It will then focus on the phenomenon in Italy and evaluate its size and distribution, mainly through data and statistics. Finally, it will describe and discuss some initiatives undertaken to support immigrant entrepreneurs. Concluding remarks offer some insights for further research.

2. Immigrant entrepreneurship: definitions and theories

The study of immigrant entrepreneurship is a recent field of research in Italy. On the contrary, international research has long demonstrated

great interest in the issue; the debate is so open and varied that some authors have underscored the difficulty in reaching generalizable results (E. Razin, A., Langlois, 1996; Masurel et al., 2002).

In order to better understand the topic, it is useful to point out (Drori et al., 2009) the differences between international entrepreneurs, ethnic entrepreneurs, business owners who have returned to their countries of origin, and transnational entrepreneurs.

International entrepreneurs create and manage business activities that extend beyond the borders of their countries of origin and are particularly geared towards exporting manufactured goods to international markets. Ethnic entrepreneurs are those who, in their countries of destination, begin freelance work in formal, informal or illegal ways, and for whom there is a strong cultural characterization due to their ethnic origins. In particular, ethnic entrepreneurship lies in the exploitation of intangible assets (such as language, network and skills) by the entrepreneur who seeks to commercialize his/her products both within an ethnic community as well as in the indigenous community, maintaining his/her ethnic identity; this becomes a strong point in their business strategies (Drori et al., 2009).

Entrepreneurs who have returned to their countries of origin are those who, after a given amount of time in their destination nations, start up a new business in their native countries. The most interesting characteristic of this type of business is the process of creating the new economic entity. Research can adopt two perspectives on the issue: the first refers to the importance of social and human capital that entrepreneurs acquire during their stays in their adoptive countries and if/how/how much it affects new business forms. The second regards the benefits that these entrepreneurs bring to their countries of origin.

Transnational entrepreneurs conduct business in different countries. The most interesting aspect of this case lies in understanding how such subjects discover and exploit business opportunities that arise in different contexts.

Most of the studies conducted internationally investigate the determining factors in the entrepreneurial phenomenon among immigrants and formulate different theories.

According to 'disadvantage' and 'blocked mobility' theories, businesses are started up because of the difficulties immigrants face in entering the labor market. The theory of disadvantage stresses self-employment as an alternative to extreme unemployment, whereas

'blocked mobility' focuses on entrepreneurship as an attempt to escape discrimination in career development when subjects are employed in other organizations: it is therefore a step towards independence and higher earnings, and has a positive correlation with education and experience.

A different theory, proposed by Bonacich (1973; Bonacich, Modell, 1980), takes into account the social role of the immigrant as intermediary between producer and consumer, elites and popular classes in some societies. This theory places greater focus on the structural elements of the economy and society.

The idea of immigration as a temporary choice favours a high degree of internal solidarity with the formation of organized communities that are very resistant to assimilation; such groups maintain their distinctive cultural traits (often including a religion that is different from the majority of the population) and ensure the efficient allocation of resources (including labour) as well as the control of competition within the group.

Studies by Portes et al. (Wilson and Portes, 1980; Portes and Stepick, 1985; Portes and Sensenbrenner, 1993; Portes and Manning 2005) have furthered the analysis of enclave economies or areas in which there is great concentration of businesses founded and run by immigrants. A basic element of the enclave is the fact that a significant proportion of the immigrant workforce is employed in businesses owned by other immigrants designed to first serve their specific market, (especially specific and difficult-to-find products) and then the general population.

One explanation placing greater emphasis on structural factors regards 'ecological succession' (Aldrich and Reiss, 1976; Aldrich et al., 1985) is the withdrawal of native operators from some market segments that are less attractive; they tend to move to safer and more profitable assets thus leaving space for new operators and new national groups.

Institutional factors can also inhibit or facilitate the creation of small businesses in general and, more specifically, immigrant entrepreneurship. In this framework, the transformation of the economies of host societies plays a role in immigrant self-employment. The interpretative model explicitly emphasizes the 'opportunity structure' that works against immigrants as well as the distribution of resources and how they are made available to ethnic minorities. Therefore, immigrant economic activity is "the result of the pursuit of interactive opportunities through a mobilization of resources mediated

by ethnic networks in unique historical conditions” (Waldinger et al., 1990). The informal resources of an ethnic group are of paramount importance in ensuring survival and competitiveness.

Immigrant entrepreneurs are facilitated in the recruitment of labor and the formation of human capital because they can tap into the network of their own groups, more easily establish relationships of mutual loyalty and trust, obtain commitment and flexibility from co-national workers while delivering substandard working conditions, as compared to those determined by contracts or corresponding lifestyles commonly accepted in Western societies.

Kloosterman (2010), in another recent attempt to integrate the explanations based on supply with a careful analysis of both the demand side and the institutional environment, proposed a theory regarding the mixed embeddedness of immigrant entrepreneurship. This author sought to move beyond the study of the incorporation of economic networks of interpersonal relationships mediated by common ethnic origin to consider the more abstract and general process of business creation within larger social systems and include the demand side and market functioning.

The model presented expanded on the one proposed by Waldinger, McEvoy, and Aldrich (1990) by distinguishing between dead-end and promising sectors and by taking into account the role of highly-skilled immigrant entrepreneurs.

3. Immigrant entrepreneurship in Italy

Italian studies have examined various immigrant communities in different geographical areas. A sociological perspective (Ambrosini, 1994; Palidda, 2000) adds the territorial one, obviously investigating areas in which the phenomenon is more significant or is in its initial stages: Lombardy (Chiesi and Zucchetti, 2003), Piedmont (Luciano, 1995), Tuscany (Savino, Valzania, Brusaglioni, 2005).

Immigrant groups from specific nations have also been explored: Senegal (Riccio, 2002), Romania (Cingolani and Piperno, 2005), Egypt (Ceschi, Coslovi, Mora, 2005), China (Ceccagno, 2003).

The phenomenon is also of interest to Immigration Observatories on the regional and provincial levels. More recently, however, the horizon expanded to the national scale in an attempt to quantify the phenomenon and monitor its evolution from a macro-economic perspective

(Fondazione Ethnoland, 2009; CNEL, 2011) which should be considered the background for further investigation.

Different surveys agree upon the high growth rates of the number of businesses but the determining factors regarding start-ups have not been sufficiently investigated.

The latest Annual Report on Migrant Workers (2015) carried out by the Italian Ministry of Labor and Social Policies offers updated information, avoiding the overlap of entrepreneurship and other types of self-employment.

In 2014, the report counted 335,452 businesses owned by foreign entrepreneurs born in non-EU countries, mainly located in the Northern and Central regions: Lombardia (18,7%), Tuscany (10%), Emilia Romagna (9,1%), Lazio (11,4%).

Non-EU, sole ownership enterprises grew by 6,2% (an increase of approximately twenty thousand units) between 2013 and 2014, mainly in Lazio and Campania; they represent 10.3% of sole-ownership firms in Italy.

Non-EU entrepreneurs work in the wholesale, retail or in motor vehicle repair sectors (44,9%), as well as in construction (22,3%); other important industries are manufacturing (8,5%), hospitality and restaurants (5,3%), freight, travel agencies, business support (5,7%).

A gender approach reveals that female entrepreneurship is higher for Ukrainians (56,7%) Nigerians (46,2%) and Chinese.

The Report also highlights other forms of self-employment: artisans, traders, independent agricultural workers, co-workers and free-lance workers, referring to data from the National Pension Fund.

Non-EU artisans number 125,590 (6.6% of the national total) and are increasing. They are younger than national counterparts, with half under the age of 40. These workers are mainly from Albania (26.1%), China (13.8%), and Morocco (10.26%).

Shop owners born in non-EU countries number 193,033 and are 7.7% of total trade workers in Italy. They mainly work in the Northern Regions. Among them, 46.9% hail from Morocco and China.

Analyses of other categories are also interesting: independent agricultural workers number 1,614 (0.4% of the national total) and reside mainly in Tuscany and Piedmont; non-EU co-workers and free-lancers number about seventeen thousand and represent 2.1% of the total number of workers in these categories. Only 6% of co-workers and

freelancers reside in the Southern Regions; women represent 38% of the total.

4. Services and projects supporting business start-ups

Despite the growth of immigrant entrepreneurship, there may be further impediments for immigrants to setting up business or growing existing ones. Such impediments relate both to internal and external factors. On the one hand, immigrants more likely lack human, financial or social resources. On the other, they may experience greater barriers and constraints within the institutional environment, the political and economic context of the receiving society.

The Italian national plan for integration, *Identity and encounter*, seeks to define the main lines of action to promote effective processes of immigrant integration; it reiterates its support for business creation, calling upon banking, insurance and business associations to devote specific attention to immigrant entrepreneurial initiatives including those aimed at supporting entrepreneurship in their countries of origin which allow decisions to prevent migration or facilitate repatriation.

European Union policies (European Commission, 2005; European Economic and Social Committee, 2012) also booster ethnic entrepreneurship and recognize the need to provide legal support, facilitate bureaucracy and loans, and strengthen managerial skills, keeping in mind the cultural characteristics of potential users. European policy also recommends expanding both the range of services provided as well as the number of operators involved. However, major integration and coordination efforts are recommended in order to avoid excessive fragmentation of supply and related facilities.

Some European projects have sought to adapt the incubator service model, originally geared to high-tech industries, to support immigrant entrepreneurship.

Traditionally, in fact, incubators offer multi-purpose facilities located in contexts of high knowledge intensity (typically Science-Parks, Universities, etc.): bridging institutions seeking to encourage technology transfer by creating businesses spin-offs relating to the industrialization and commercialization of innovation deriving from applied research.

Access to an incubator is usually 'regulated' and subject to a selection process based on the presentation of a business plan and the assessment of the personal attributes of the aspiring entrepreneur, and tend to favour initiatives with the highest probability of success. New

businesses are hosted, guided and assisted for a pre-determined period of time:

- in terms of management, thanks to service management training, market research, legal and tax assistance provided by the incubator to all new / emerging companies that are located in it;
- in terms of technology, by means of physical proximity or continued contact with sources of innovation, such as universities, possibilities for adapting to the market or the needs of specific customers/users can be studied together.

The first such experience in Italy was in Turin in 2000 where the National Confederation of Crafts and Small and Medium Enterprises (CNA) launched *Project Daedalus: intercultural mediation for the creation and development of businesses* with economic support from the Piedmont Region and the Province of Turin. The Daedalus Project offered completely free consultancy support to entrepreneurs from non-EU countries, assisting them in drawing up business plans, evaluating the economic sustainability of their ideas, starting up the company and training them to manage them. As a result, in four years time, the structure assisted 965 aspiring entrepreneurs (370 women and 586 men) and established 146 companies, which included 86 in construction, 13 in trade, 6 in food services.

A permanent service organization was later established with the name CNA World-Dedalo, broadening the range of services offered to immigrants and entrepreneurs.

Another national initiative involved 10 Chambers of Commerce, coordinated by Unioncamere. It was funded by the Ministry of Labor and Social Policy. The project *Start-it-up* began in 2012 and sought to empower 400 non-EU immigrants in Italy for business creation or self-employment. The action was carried out over 18 months, delivering guidance, info-training and assistance to the business plans. Entrepreneurial skills and orientation to business risk were tested and scored. Services were delivered to individuals and groups and differentiated according to specific needs.

As a result, the project created self-employment or micro-businesses in traditional sectors.

5. Concluding remarks

Immigrant entrepreneurship has been the subject of a large area of research for many years especially in countries in which immigration is

more advanced like the United States, Canada and Australia. Studies have investigated a number of aspects, such as the role of the family and the ethnic enclave in business creation, the role of cultural factors in some ethnic groups, in particular the psychological, religious, professional, socio-cultural background that would make them more inclined to business creation and self-employment in general. The role of the business opportunities that present themselves to immigrants in destination countries due to the transformation of the socio-economic structure is very important and investigated.

In Italy, different surveys concur when they show high growth rates of the number of businesses but the determining factors in business start-ups have not been sufficiently investigated.

The evolution of the phenomenon may be due to increasing difficulties in accessing the labor market. Entrepreneurship also depends upon the individual will of immigrants to overcome the constraints of an employment context that, at best, offers the possibility of finding formal employment only on the lower rungs of the social ladder (Palidda, 1992; Fondazione Ethnoland, 2009).

Furthermore, business creation may be a way to mitigate the effects of legislation on the deadlines of residence permits (CNEL, 2011), according to which, after a year of job loss, the immigrant falls into a state of irremediable non-compliance.

Further investigation of the data should lead to deeper understanding of the degree of 'ethnicization' of certain components of the manufacturing base (Unioncamere, 2014) and/or the role ethnic entrepreneurship plays in the Italian manufacturing and service system. Immigrant entrepreneurship might find opportunities in a 'vacancy chain' (CNEL, 2011), filling market niches that are no longer attractive to indigenous businesses. It could also function as a small business subcontractor, pursuing flexibility and cost savings for the larger umbrella enterprises (Baptiste, Zucchetti, 1994).

Initiatives to support immigrant entrepreneurship, while laudably attempting to stimulate the phenomenon, have developed small-scale projects through traditional logic-based consulting and training but are poorly equipped to furnish significant breakthroughs for the businesses created.

There is a need for further insight into immigrant entrepreneurship. Research might deepen understanding of the nature of the relations between immigrant workers and the opportunity structure, combining

the micro-level of the individual entrepreneur (with his or her resources) with the meso-level of the local opportunity structure, linking the latter, in a looser way, to the macro-institutional framework.

Furthermore, although the more commonplace immigrant profile is that of an individual lacking financial capital and education, a new type of immigrant entrepreneur is emerging in advanced economies, especially in the United States. Despite their origins in less developed countries, they are highly qualified. With the growth of global economic integration, this phenomenon will intensify. We may inquire as to what extent this trend is manifesting itself in Italy and/or the rest of Europe.

Broader and deeper knowledge is also required to establish policy measures that can activate immigrants' social and cultural capital, channeling it toward initiatives that produce greater economic and social impacts. Immigrants, in fact, play an important role in integrating newcomers; they can collaborate with institutions and host communities to deliver services or facilitate existing ones. Finally, their experiences and networks in destination nations might support economic and social initiatives in their countries of origin.

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THE IMPORTANCE OF MIGRANTS' FINANCIAL INCLUSION
AS PART OF THE INTEGRATION PROCESS

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Financial inclusion refers to that part of the integration process that allows access and use of any product or service available on the market in order to respond to financial needs and accomplish a proper social and economic life.¹ Financial inclusion therefore addresses those activities developed to foster an efficient access and use of financial services by persons and organizations not yet entirely included in the formal financial system. These services include: financial credit, savings, insurance, payment, funds' transfer and remittances, programs for financial education and branch reception, along with small business start-ups.²

Defining financial inclusion implies that financial exclusion also exists. When persons, enterprises and organizations cannot easily and freely access and employ financial products or services, it means they are – deliberately or not – impeded and excluded from the formal financial system. Three dimensions of inclusion can be identified (Barry, 1998; Ebersold, 1998):³

- Economic dimension, as participation to the production and consumption process;
- Political dimension, concerning the level of political participation;
- Social/relational dimension, concerning social relations and networks.

Financial inclusion represents an increasingly significant component for individuals/organizations to be entitled and able to participate to the economic system (production and consumption) and the social sphere. In the past decades and in western societies, access to basic financial

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¹ Financial Services Provision And Prevention Of Financial Exclusion, European Commission, March 2008.

² National Observatory for Financial Inclusion of migrants in Italy, *Good Practices for Financial Inclusion*, June 2013, www.migrantiefinanza.it.

³ M. Barry, "Social Exclusion and Social Work: An Introduction", in M. Barry, C. Hallet (eds), *Social Exclusion and Social Work: Issues of Theory, Policy and Practice*, London, 1988, pp. 1-12; S. Ebersold, *Exclusion and Disability*, OECD (Centre for Educational Research and Innovation), 1998 www.oecd.org/els/edu/ceri/conf220299.htm.

services has gradually been recognized as precondition to participate to the economic and social life, including managing current expenses; access to goods and services; access to welfare tools (social card, public benefits to support unemployment) and job market.

Financial exclusion can affect foreign and indigenous populations, but migrants are normally subject to greater socio-economic vulnerability and risks due to the higher social costs of the hosting country. Deprived of credit and financial history and capitals, weak in terms of language skills and cultural habits pertaining to western financial systems, housing and occupational stability, migrants can more easily exit – or fail to access – the formal financial system. Financial inclusion reduces the risk of social and economic vulnerability, in terms of a stronger saving capacity and distance from the informal financial system.

An additional central aspect for migrants' financial inclusion is represented by remittances connected to the process of savings allocation in the transnational sphere. Currently the main challenge for any financial system is to intercept and contribute to the channeling of these flows (in terms of boosting formal channels and leveraging productive investments).

Finally, we underline the importance of financial education in the process of financial inclusion, as a way to prevent the risk of exclusion. Financial education refers to the knowledge and consequent awareness to take efficient and informed decisions and to the ability to manage resources and use products according to the proper needs and aims. Due to recent technological progress, financial innovations and market developments, individuals have to take decisions by handling complex and diversified information they can only assess with great difficulty.

The process of financial inclusion is therefore a multidimensional phenomenon, involving the economic and regulatory sphere, market access and functionality, cultural and religious spheres, transparency and consumer protection, education and public policies.



The outcome in terms of financial inclusion or exclusion in the country of immigration is influenced by a wide range factors. From the point of view of the ‘individual/migrant’: previous familiarity with financial institutions and tools; length of residence abroad (the more migrants live abroad, the more their financial needs increase); level of education; work/occupation, especially in the formal labour market; gender (generally, women tend to be more easily excluded from the labour market and financial inclusion); general income; house ownership and cultural elements. Nationality is an irrelevant factor in respect of impacting financial inclusion). From the perspective country framework of residency: characteristics of the local and economic context; development of the financial system; regulatory framework; nature of existing public polices; level of competition among market operators including transparency, accessibility to information and costs. For these reasons, a more openly directed attention to financial inclusion issues should become part of any integration policy.

1. The institutional scenario

According to The World Bank estimates, more than half the adult world population – approximately 2.5 billion people and 450 million businesses – is not using official financial products because financially excluded.⁴ According to the Eurobarometer (2012),⁵ 16% of the EU

⁴ Global Partnership for Financial Inclusion, *Report to the Leaders*, G20 Leaders Summit, Cannes, 5th of November 2011.

population and 25% of the Italian population does not have access to a current account at a regular financial institution.

Financial inclusion has become part of the international agenda since 2009, when the G20 countries in Pittsburgh stated:

“We commit to improving access to financial services for the poor. We have agreed to support the safe and sound spread of new modes of financial service delivery capable of reaching the poor and, building on the example of micro finance, will scale up the successful models of small and medium-sized enterprise (SME) financing”.

The guidelines for the G20 Financial Inclusion Action Plan were announced, leading to the Principles for Innovative Financial Inclusion – later adopted during the Toronto Summit in June 2010 – and to the Global Partnership for Financial Inclusion (GPFI), advocating implementation of the agenda for financial inclusion and tangible enforcement of its principles.

In recent years the European Union started to address the financial inclusion issue on retail payment services, providing a detailed outlook of the phenomenon⁶ and offering different recommendations⁷ on access to a basic payment account. This led to a specific Directive “On the comparability of fees related to payment accounts, payment accounts switching and access to payment accounts with basic features”, approved by the Parliament the 15th of April 2014.⁸ The Directive introduced new rules intended to ensure adequate transparency and comparability of costs related to payment services, ensuring full consumers’ mobility between payment services (and current account) providers within the Union and establishing the right to a basic payment account for all European citizens, regardless of their nationality, residency and economic-financial situation. It is worth noting that the European Council identified as priorities the support and initiatives of

⁵ Special Eurobarometer 373, Retail Financial Services Report, April 2012, http://ec.europa.eu/internal_market/finservicesretail/docs/policy/eb_special_373-report_en.pdf

⁶ Ibidem (or Special Eurobarometer 373, cit.)

⁷ Recommendations 2011/442/UE from the Commission, 18th of July 2011.

⁸ Anticipated in Italy in the D.L. 6 December 2011 n. 201, converted into law n. 214, 22nd of December 2011 that states the necessity to have a basic bank account for any person in Italy.

Member States aimed at “pursuing active integration policies which foster social cohesion and economic dynamism”.⁹

In 2012 in Italy, a public-private agreement was reached by the Ministry of Economy and Finance, the Bank of Italy, the Association of Italian Banks (ABI), the Italian Postal system and the Italian Association of Electronic Money and Payment Institutes. All parties to the agreement committed to offering a basic bank account (referring to the individual’s right to a bank account) as a tool to support open and effective participation to the market and to sustain full social inclusion of any person.

2. The National Observatory for Financial Inclusion of Migrants in Italy

In 2011 the National Observatory for Financial Inclusion of Migrants was launched in Italy, managed by CeSPI and financially sustained by the Ministry of the Interior and the European Fund for Integration. The Observatory undertook different agreements with the main Italian operators such as: ABI, ANIA (Insurance Companies Association), ASSOFIN (Italian Association for Estate and Consumers’ Credit), and Banco Posta in order to elaborate annual data reports on the financial inclusion process.

This represents a unique experience in Europe, responding to the objective of increasing knowledge and sensitivity towards financial inclusion of migrants among the main stakeholders, the civic society and migrants themselves, through concrete initiatives and a stable research/data documentation. In particular, four quantitative and qualitative yearly Reports on the Financial Inclusion of Migrants in Italy were published (from 2011-2015) regarding:

- The offer of banking and financial services for migrants, in collaboration with ABI and Banco Posta, analyzing savings, credit, money transfer services and microfinance information. All this helped to formulate an annual index of banking services.

- The demand of banking and financial services from the point of view of migrants. This research relies on a statistically significant survey sampling (1.212 migrants) and includes qualitative research tools (focus groups) involving 180 migrants.¹⁰

⁹ Conclusions of the European Council, 26-27th of June 2014.

¹⁰ This information refer to the latest survey of the Observatory on Financial Inclusion of Migrants in Italy, 2015, www.migrantiefinanza.it.

- Entrepreneurship: analysis to identify migrant entrepreneurship models, financial behaviors and needs and relations with Italian banks. In three years, more than 150 immigrant entrepreneurs were interviewed.

- In depth analysis also focusing on other financial intermediators such as insurance companies, payment services etc.

As for other activities, a group of experts has been established as an opportunity for debate and interaction, including representatives from the Ministry of Interior, Ministry of Foreign Affairs, Ministry of Labour and Welfare, Ministry of Economy and Finance, Bank of Italy, ABI, ANIA, Assofin, Banco Posta, Unioncamere and CRIF. In 2015, two territorial laboratories for the migrants' financial inclusion were launched in Rome and Milan to identify and eventually test local policies to be replicated on a national level.

In this article we present results and data from the various Reports of the Observatory on the Financial Inclusion of Migrants in Italy, from 2011 to 2015.¹¹

3. Profiling the migrant population in Italy in terms of financial needs and integration process

Italy continues to be a destination country for current migratory flows (+12% in 2013 and 3% in 2014, ISTAT), but the phenomenon is also gradually modifying, with a more stable migrant population living in Italy for the long term. Evidence is provided by family reunifications representing the most significant quota in recent flows (44% of new arrivals in 2009-2012). The number of residency years in Italy is gradually increasing (10,8 years according to the sample of the Observatory survey in 2014) and data related to minors (almost a million, accounting for the 15% of newborns in Italy) give evidence of a settling population. Moreover, the percentage of house owners from 2009 to 2011 increased from 14% to 23%.¹² Immigrant entrepreneurship represents 8.6% of total enterprises (2014), contributing with 5.5% of the GDP (2013).

¹¹ All reports, data and information here mentioned are available online: www.migrantiefinanza.it.

¹² C. Daminat, N. Kulic, "Living Inequality and differences", in Chiara Saraceno, Nicola Sartor and Giuseppe Sciortino (eds), *Foreigners and inequalities. The inequalities in the rights and living conditions of immigrants*, Bologna, 2013.

Although reality is obviously more complex and articulated, the following scheme exemplifies the relationship between the migration-integration stage in Italy (being new arrivals; settling down; fully integrated) – and the financial needs expressed.

The arrival stage is mainly characterized by the regularization process/need and linguistic and socio-cultural integration. The migrant community/family represents the main reference and source of information and financial support. From a financial aspect, this stage is characterized by high fragility and vulnerability and risks connected to reliance on informal circuits. Financial needs are limited, consisting mostly of accessing the payment system and saving services and remittances.

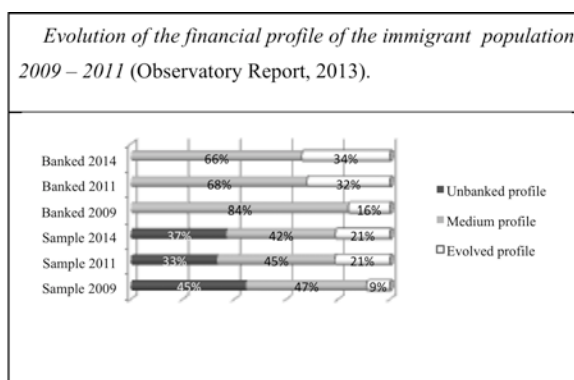
The settlement stage marks the beginning of the process of integration. Job stability is the main trigger. Financial needs change along with the individual and family life, with the predominance of the credit and savings components. The relationship with the country of origin in terms of remittances continues. Financial inclusion becomes a crucial tool to support and accelerate the ongoing process and to avoid the social exclusion phenomenon.

Finally, the integration stage highlights the decision of the migrant family to plan its life in the hosting country in the long term. Buying a house, allocating and managing capitals for the future (i.e. pension funds). As confirmation, 30% of migrants declared they were planning to buy a house in Italy within the following years (Observatory Report, 2015). Migrant and indigenous clients are alike in terms of financial needs and behavior, with the exception of remittances that can sometimes turn into investment opportunities in the country of origin.

Underlying a distinction among the migration-integration stages is significant in order to identify and address appropriate strategies and policies. Upon arrival, financial inclusion policies will support access to basic services at reduced cost (i.e. first entry bank account). For the settlement phase, the interaction between public policies and operators' strategies can help support credit access (i.e. with a guarantee of funds or private-public initiatives to provide credit to families). For the integration stage, the market can play a predominant role. Recognizing the different migrant profiles/stages helps in identifying the most effective policies and strategies to support financial and social inclusion with the proper instruments.

In line with the integration-financial inclusion relationship analyzed above, some profiles of migrant bank clients were identified¹³ through different indicators, measuring the “familiarity with the banking system” and the “use of the financial products and services”.

One of the most important results is the evolution of these profiles in recent years, with the growing presence of a “financially evolved” migrant type: someone with high familiarity with the banking sector that employs at least six banking products. This profile rapidly grew due to job stability, income brackets, increased financial inclusion and bank strategies.



4. Measuring Financial inclusion

The banking services index is an important indicator in defining the “financial inclusion level”, measuring access to banking services through ownership of a bank account.¹⁴ This is widely considered as the entry point for financial inclusion, one that can only increase with further access and use to more articulated services and products.

The table below shows the recent evolution of this index among migrants¹⁵ in relation to the 21 examined nationalities, representing the 88% of the foreign resident population in Italy. The number of current accounts of migrants in Italian banks and Banco Posta is 2.510.927 (national data). Additionally, the number of prepaid cards (with an IBAN) and PostePay cards¹⁶ owned by migrants is 1.102.133.

¹³ Since the first survey of the Observatory in 2011, on a representative sample.

¹⁴ The index is calculated as follows: number of migrants account holders/ number of adult migrants formally registered.

¹⁵ Considering residents formally registered in Italy from non-OCSE countries (data: 31st of December 2013).

¹⁶ Offered by BancoPosta - limited to clients without a current account.

<i>Synthetic data National Observatory for the Financial Inclusion of Migrants 2010 – 2013</i> (Observatory Report, 2015)					
Representativeness of the sample on the offer side	61% of the branches and 74% of the total current assets of banks BancoPosta				
Representativeness of immigrant sample	21 nationalities, equal to 88% of the total immigrants (non OCSE) formally resident in Italy				
	2010	2011	2012	2013	2014
Number of CA owned by migrants ¹	1,782,426	1,919,628	2,439,411	2,510,927	2,426,413
Consumer segment	1,709,370	1,837,945	2,338,473	2,406,032	n.a.
Small businesses segment	74,237	83,954	101,852	105,454	n.a.
Bank Services Index	61.2%	72.4%	83.0%	75,0%	n.a.
Number of cards with an IBAN + Poste Pay	n.a.	706,671	884,716	1,087,756	1,167,954
<i>Consumer Segment</i>					
% CA older than 5 years	21.9%	35.4%	38.9%	35,3%	35,5%
Number of shared CA (two owners)	247,256	227,257	249,403	259,251	<i>n.a.</i>
% shared CA on consumer total	19.2%	18.7%	18.0%	17.5%	<i>n.a.</i>

¹ The overall number might not exactly correspond to the sum of two components (consumer segment and small business segment) due to the statistical inference process.

Data indicates that the financial inclusion process is constantly and rapidly growing – with the index increasing from 61% in 2010 to 75% in 2013.¹⁷ This was confirmed by two indicators:

- The number of current account holders significantly increased from 2009 and 2013, although data tends to slightly overestimate the phenomenon, due to the possibility of multi-ownership of an account in different banks (different bank groups or BancoPosta).¹⁸ Also, the number of pre-paid cards with IBAN (that can partly substitute the traditional bank account) increased by 19%.
- The increasing percentage of clients with a long-term affiliation to the same bank (more than 5 years). Data show a constant growth in the percentage of those account holders keeping the same account for more than 5 years. This is an important indication of a financial inclusion profile, expressing an increasing trust with the bank institute and a sign of stability for the settlement process in Italy.

A general difference has to be highlighted in geographical terms: the index varies in Italy between the North (92%); the Center (85%) and the South (40%) (Observatory Report, 2015).

In terms of perception, it is important to note that in the Observatory survey of 2009, the bank was primarily considered a safe place to save money and obtain credit. In more recent times, the bank is largely perceived as a consultant-advisor for managing and investing resources (Observatory Report, 2014).

Overall, migrants show a better saving capacity¹⁹ compared to Italians.²⁰ The Observatory Report (2015) indicates that 68.8% of migrant savings are destined to remain in Italy, and the rest (31.2%) to be sent to the country of origin (including remittances; solidarity projects or investments). Considering the medium income of migrant respondents (11.475 Euros), 70% is employed to cover expenses in Italy, 16% is directed to savings in Italy and 14% goes to the country of origin (remittances/investments) (Observatory Report, 2015).

¹⁷ The number of bank accounts slightly decreased from 2012 to 2013 – perhaps as a consequence of the economic recession affecting employment conditions – but it had been largely compensated by the increased number of prepaid cards (with IBAN). Still, if we consider the evolution of data, as of 2009 the overall trend is extremely positive.

¹⁸ Although an estimate from the Observatory (2011) assumed the presence of only 3.5% owners of multi-current accounts in different banks.

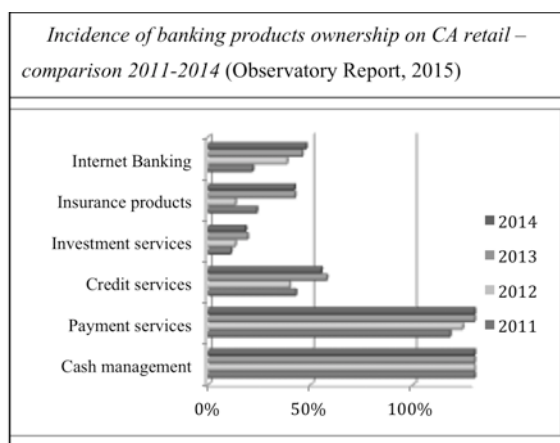
¹⁹ Between 15-18% of the income (Observatory Report, 2013).

²⁰ Between 8% (according to ISTAT, 2012) and 12% (according to GFK Eurisko Prometeia, 2012).

Analyzing the behavior of migrant account holders in terms of credit, 26% of the account holders have a loan in a bank or Banco Posta (Observatory Report, 2013). This trend suffered the consequences of the economic recession (with a severe downsizing between 2011-2012), but a recent positive dynamism is emerging.

Regarding the use of financial products and services, internet banking increased from 22% in 2010 to 48% in 2014 (Observatory Report, 2015).

Considering migrant entrepreneurs, we can highlight the evolution of the *small business* segment in the banks' portfolio (registering an average annual growth rate of 10.1% from 2009 to 2014, representing 4.5% of all small business bank accounts).



5. Indications for policy dimensions

Thanks to the Observatory reports since 2011, different areas of interventions to support and strengthen the migrants' financial inclusion process had been identified for national and local policies. All in all, migrants appear to be the most vulnerable group with higher risks of economic, financial and consequently social exclusion. It is therefore evident that any initiative directed at supporting migrants' financial inclusion is welcomed and necessary in the short and the long term. Moreover, financial inclusion will be recognized as a constituent element and instrument to grant a fully comprehensive economic citizenship to migrants but also to Italians. In a changing perspective, financial inclusion initiatives will not only be associated to market

operators and private sector projects, but will also be incorporated into migration and social welfare/integration policies.

Following are a few indications of specific thematic areas for possible policy interventions.

- A general need to better study and recognize all ongoing processes – in terms of financial inclusion and behavior and the integration process – and to correctly identify relevant targets, through analysis and monitoring of activities at local and national level. In Italy, the opportunity offered by the Observatory provides updated information and analysis that can be of help in planning any public and/or private initiative.

- As long as migrants integrate, it is important to sustain the process of savings' accumulation and protection, in order to consolidate and reinforce the achieved results with more flexible and better designed products.

- The economic recession had severe impact on Italians and migrants, in terms of augmented risks of social and economic exclusion and vulnerability. The social costs and consequences of being excluded from the financial system would be very high. Credit access assumes a crucial value in supporting the integration process and in overcoming temporary income shortages. All in all, the integration of migrants will be pursued not only for its positive impact in terms of social cohesion and multicultural living, but also for its economic potential through financial inclusion in terms of contribution to the local/national productive system; ethnic entrepreneurship; further availability of savings and monetary resources to be intercepted and valued by financial operators.

- The banking system plays a crucial role within the process of migrant financial inclusion. Still, the different migrant profiles cannot easily find on the market specific products and services according to their migration-integration stage and needs. Large room for joint public-private initiatives could provide significant results.

- Financial education – targeting the financial and integration needs and profiles would be a much more useful instrument – addressing not only migrants, but also Italians.

- Migrant entrepreneurship is increasingly emerging and playing a role in contributing to the Italian economic system. It is important to further sustain it with scouting, start-up, training, tutoring activities, but also from the financial aspect – with products and services relating

specifically to credit access. Microcredit initiatives can also offer significant possibilities for the migrant segment.

- The integration process of migrants takes place predominantly at the local/territorial level. Indications to experiment territorial and local policies on migration financial inclusion emerged, probably with more effective results at local-city level than at nation one.

III PART

The Stakeholders Point of View

OPERATION MARE NOSTRUM:
CAUSES AND DEVELOPMENT

Gianvittorio Ciolli and Francesco Ruggiero***

This operation was a tangible example of the commitment, dedication, humanity and professionalism of the Italian Navy and its crews in managing migratory flows.

The purpose of this paper is to illustrate the work accomplished by the Italian Navy during the 378 days of Operation Mare Nostrum (from 18 October 2013 to 31 October 2014) and the commitments it has undertaken for the future, describing all that has occurred in the past months, and that is still taking place, and attempt to put into words emotions that no amount of words could possibly express.

The movement of an entire people toward a new land is a phenomenon that has existed for millennia but one that has yet to find a solution.

Unfortunately, the phenomenon of migration is complex and exists in numerous and heterogeneous regions of global relevance.

The factors described below will surely not be new to many readers and have already been the subject of thorough analyses and lengthy debate. But at this moment they have reached the apex of their development and have led to an incredible upsurge, an exponential growth of certain phenomena, among which the issue of migration emerges as one of the most significant.

First, there is the problem of growing international conflicts. We have reached a point in the area of an expanded Mediterranean in which a number of questions are beginning to increasingly overlap and feed off each other; consider the civil war in Syria, in Libya, the instability in the sub Saharan countries, the Israeli-Palestinian conflict, the forceful affirmation of the Islamic caliphate, the collapse of the Iraqi regime.

There is an increase in religious conflicts not only among Muslims and Christians but, in a very violent manner, also in an inter faith environment, such as in the Muslim world, between Sunnis and Shiite.

Also important is the basic weakening of International Organizations, something that had not seemed possible but that has, in fact, taken place; in this context the international community has become the spectator and at the same time actor in the weakening of

* Lt. Italian Navy.

** Lt. Italian Navy.

various international organizations that in attempting to limit the decision making autonomy of individual States are being increasingly opposed and contested.

Finally, the power of the media has the ability of drawing the attention of the world only toward events the media itself considers of interest, overshadowing others that, if dealt with in a timely manner, would not degenerate into more serious situations.

Today, the ease with which information is sent by rapid and widespread means of communication, such as the web and its social networks, apparently without the need to confirm sources and ignoring any code of ethics, with the conviction that the information issuing from the source, from the field, or even from a single individual, is factual and true, amplifies and often influences in a distorted manner the management of crises, modifying their natural course.

In addition, there are other elements that certainly cannot be disregarded and in respect of which we can do very little as individual nations, such as climate change, the disproportionate population growth and medical emergencies, of which Ebola is only the most recent example.

Our planet is changing. Climate changes are producing extreme meteorological phenomena with an increasing frequency even in areas not previously subject to disastrous events. We need only recall such normally innocuous names, generally female, attributable to meteorological events that have brought death and destruction to coastal areas in different parts of the world (in 2012 there were 905 catastrophic events, 93% of which are attributable to meteorological phenomena. From 1980 to the present natural disasters have more than doubled and this tendency is increasing).¹

If we then add the fact that the world population (about 7 billion according to UN sources) will increase by one billion over the next 12 years, and that about the 80 % of world population lives in an area 200 km from the coastline, it's easy to see that in the near future many inhabitants of coastal areas and the hinterland will be at risk.

The greatest demographic growth is taking place in emerging countries, where living conditions are more difficult and the level of healthcare lower compared to the standards of industrial powers.

¹ Worldwatch institute-petra low, natural catastrophes in 2012 dominated by u.s. Wheatherextremes – 29 May 2013.

Today we are witnessing a growth in the outbreak of epidemics that are spreading from remote areas of a continent to other areas of the world with a rapidity rivaling the duration of a transoceanic flight!

The global problems just described will intensify the phenomenon of migration in the coming years. The World Migration Report (2010) highlights that if migratory flows continue to increase as they have over the past twenty years, by 2050 we will reach 405 million and the need to guarantee the human rights of migrants will become a high priority much like the issue of protecting illegal immigrants.

Focusing on the scenario that particularly affects our own nation and natural interests, we see that it is composed of the Mediterranean area and its wider dimension: the Black Sea, the Middle East, the Red Sea, the Persian Gulf, the Horn of Africa, the Indian Ocean and the Gulf of Guinea.

This wide region of strategic interest is the common ground and also the cause of friction among the different realities of politics, economy, wealth, culture, religion, ethnicity and language. Within the enlarged Mediterranean therefore there are numerous destabilizing phenomena.

In the eastern Mediterranean, civil war in Syria seems to be without end and is generating consequences that extend across national borders and spread into a Middle East that is already characterized by historical religious and ethnical conflicts.

The recent deterioration of the Israeli-Palestinian crisis has only served to increase instability and lack of security, heavily involving the civilian population, and the confrontation between the different ethnic-religious 'souls' of Iraq are worsening the living conditions of the local populations and increasing the persecution of minorities.

The central Mediterranean is also destabilized by ethnic phenomena that do not allow Libya to attain a political balance to restore normalcy to an area toward which illegal migration is directed and where they find criminal organizations conducting human trafficking. It is obvious that domestic or international conflicts lead inevitably to the deterioration of social problems, such as the mass emigration of people in distress.

It is specifically in this part of the world that a number of issues are concentrated, including that of illegal immigration that over the last year has been transformed from a persisting phenomenon to a veritable mass phenomenon of significantly larger dimensions.

The flows start from as far away as Eritrea, from which the highest percentage of migrants comes, to Mali. Basically the entire sub-Saharan

area is undergoing a social dismantling, a strong migration that is added to the problems of Syria and of Iraq.

With specific reference to the flow coming from the eastern Mediterranean (Medor) and from Libya, we note that criminal organizations are making frequent use of 'mother ships'.

The area where migrants were transferred from the mother ship to a towed ship is about 350 miles from Italy. Here the towed ship full of immigrants is abandoned, while the smugglers, usually about fifteen, leave with the tugboat.

The Navy has been present in the Strait of Sicily since 1959. As part of its legally assigned institutional role, the Navy monitors fishing activities, in particular in the area used for replenishment of fish stock, commonly known as the 'Hillock' (*Mammellone*). In this portion of the international sea, unilaterally declared as an exclusive exploitation zone by Tunisia, various attempts were made in the past to confiscate national fishing boats and migration from Africa to Italy has intensified over the years.

In addition, since 2004 the Italian Navy has taken part in Operation Constant Vigilance, monitoring flows in the Strait of Sicily. This operation was then superimposed by the activities conducted by Frontex, the European agency for border control tasked with patrol activities.

The perception that has existed from the beginning is that Mare Nostrum has encouraged the influx of illegal immigrants to Italy. But in fact, according to the official data of institutional bodies, the rate of migrants arriving in Italy prior to Oct. 1, 2013 is higher than that following the activation of Mare Nostrum and thus the increase in migration is not linked to the presence of units at sea, but to the catastrophic situation of the many countries from which these poor migrants depart.

The significant increase in the flow of migrants recorded especially in the second half of 2013 had already indicated the need to reinforce military air and naval surveillance to monitor migration flows. This increase in illegal immigration culminated, as we know, in the tragic events of October 3, 2013.

On the night between 3 and 4 October 2013, 366 people died just two miles away from Lampedusa island. This was the drama that led to the activation of Mare Nostrum and that thanks to the media brought

what was happening to the attention of all Italian citizens. Making it important, and unavoidable, to intervene.

Why was command of Mare Nostrum assigned to the Italian Navy? Because it is an extensive operation, conducted on the high seas, and the Navy is the armed force with the greatest command and control capability of air and naval forces on land and at sea. On land because the operations center of the High Command is equipped with all the instruments required to control and coordinate all other forces, agencies and organizations operating at sea; at sea, because each vessel is a self-propelled operations center connected via satellite with the national communications network and represent highly important command and control nodes.

Added to this is the fact that men of the Navy are trained to operate at sea for long periods, without any ground support; they can operate under adverse weather conditions thanks to the size of the ships and the training of personnel; and because our old ships, though primarily conceived for military operations, have dual capabilities. For example, amphibious ships designed to land Marines on the beaches at the same time are also the most suitable means to undertake rescue at sea because they have an inner basin that allows boats or vessels to moor in the belly of the ship. They also have a large flight deck that can be used to transport the injured and large operating rooms to care for the wounded in the event of a landing.

Last but not least, because the Navy it carries out police functions on the high seas where no national sovereignty is recognized, in accordance with international law.

The goal of the operation is to provide increased monitoring of the main routes, from Egypt but also from Libya, used by criminal organizations engaged in illegal immigration using a wide variety of boats. As we have seen, including from the images of the mass – media, the means used are extremely varied. Starting with inflatable rafts made in China, typical of the ‘Garbuli’ area of Libya, which can carry up to 100 people but have very low resilience and thus can easily break down; followed by barges, very familiar to us, that are increasingly retrieved by fishing vessels to be used again to transport migrants; and larger mother ships (at least as large as fishing boat) that release small boats that are towed when nearing Italian waters.

Identifying boats filled with migrants as soon as possible is crucial to prevent dangerous situations for people at sea and at the same time obtain information the information required to prosecute traffickers.

Geographically most of the migrants come from Eritrea, Syria and then Mali, Nigeria, Somalia, Pakistan, Senegal, Egypt and Tunisia.

One of the most positive effects of Mare Nostrum has also been the increased cooperation with other ministries, most notably the Ministry of Health, the Italian Red Cross, Volunteers of the Order of Malta and the Rava Foundation.

On board the ships there is a group of workers of different backgrounds who have achieved extraordinary results.

Since the start of Mare Nostrum several non-governmental organizations and international bodies of private law have provided specialized staff, especially doctors and nurses, to assist rescued migrants on board Italian Navy ships. This cooperation was recently extended to include operators from the Ministry of Health and the Italian Red Cross military and volunteer corps. Indeed a specific cooperation agreement between the Ministry of Defense and the Ministry of Health was signed on June 18, 2014.

Since the beginning of this fruitful cooperation, on June 21, 2014, fourteen doctors from the Ministry of Health – USMAF have served on board ships assigned to Operation Mare Nostrum.

Together with military physicians they perform a preliminary epidemiological screening of migrants, identifying and isolating anyone suspected of infectious diseases, thus safeguarding the health of the crew and the entire national population.

The activities of the USMAF doctors allow for the timely transfer of any individuals suspected of suffering from a disease to appropriate medical facilities, consequently streamlining bureaucratic procedures concerning the migrants' arrival in the port of reception.

Since the beginning of their activities, physicians from the Ministry of Health have checked more than 15,000 migrants rescued at sea by Navy ships.

The cooperation agreement between the Navy and the USMAF has extended its benefits to other areas such as the ongoing briefing/training sessions for crews of the vessels engaged in operation Mare Nostrum.

A protocol with the Ministry of Health has also been signed for the installation on board of stretchers that can be used in extreme cases,

such as a situation involving Ebola, and de-pressurization chambers to allow for medical examinations even in cases of suspected infectivity.

On 21 November 2014 a Memorandum of Understanding between the Ministries of Health, Defense and Interior was signed. This protocol provides for the parties' commitment to

“cooperate in the activities of migrant assistance in order to strengthen actions and measures of health protection also against the risk of importation of infectious and contagious diseases, through health checks to be carried out directly on the ships and landing locations or in their vicinity”.

A further agreement was signed with Save the Children, in Rome, on October 7, 2014, allowing for the presence of staff on board Navy ships to provide:

- Direction;
- Legal information;
- Foreign Minors Cultural mediation.

Other important aspects to be analyzed are related to the activities of the Police of the high seas, especially, in the event of illegal immigration, the crucial collection of evidence.

If the vessel has not been identified as the mother ship, it is accompanied toward the Italian contiguous zone where it is delivered to units of the border police.

If there are indications that the boat is involved in human trafficking activities or weapons smuggling, the competent prosecutor's office is immediately informed and, when evidence collection is complete, the boat is stopped, boarded and inspected in accordance with the UN Convention on the Law of the Sea and the implementing procedures provided for by national legislation.

If/when the office of the prosecutor orders the seizure of the vessel, the crew is arrested and the ship is secured and routed toward a national port by security forces.

Regarding police activities on the high seas, this begins with the acquisition of evidence, such as photographs taken from a patrol plane even 700 miles from Italy or from the periscope of a submarine following a mother ship with its towed boat full of desperate migrants. Thanks to these proofs and to the authorization issued by a judge, the Navy has captured traffickers present on the mother ship by

implementing the right to visit applicable in such cases, boarding the vessel while the mother ship desperately tries to evade capture through evasive maneuvers.

The seizure of mother ships and human traffickers is carried out by exercising the role of police of the high seas, assigned by international law and Italian law to Italian naval vessels. Operations are coordinated with the Public Prosecutors and submarines and air and naval assets collect supporting evidence also. In this manner Mare Nostrum has reduced lawlessness on the high seas, reduced the number of arrivals to our shores and allowed for improved reception.

The increased naval presence has also improved the ability to alert by identifying boats before their approach toward national coasts. One direct consequence of the seizure of such ships has put an end to the route from Egypt.

The increase in the number of migrants on boats has confirmed the need to use of large ships that can effectively operate even under adverse weather conditions.

The drastic reduction in the number of migrants arriving on our shores without first being detected and controlled, has allowed the Navy to perform a health screening on board Navy ships prior to their arrival to Italy.

Migrants have been distributed and sent to different locations, thus avoiding the collapse of reception centers due to overcrowding (ex. Lampedusa Pre-Operation Mare Nostrum).

Unfortunately, the geopolitical context does not allow us to foresee a lessening of migration towards Europe, on the contrary there will probably be an increase in the number of persons attempting to escape war, persecution and hunger. These people must be helped, but the process must be adjusted if we are to prevent the Mediterranean from becoming a sea of death.

Faced with this ongoing tragedy Italy could not remain inert. The Mare Nostrum's operation was inevitable for a civilized country.

In the meantime we must contain losses and limit the arrival of migrants to our shores, provide for medical examination of refugees, offer asylum to those entitled and prevent the unlawful use of the sea. Because of these actions, refugees view Italy as a civilized country that has not shied away from its responsibilities.

The Commanders of Navy ships have intervened to seize the 'mother ship' and stop human trafficking by exercising specific police powers

on the high seas conferred upon them by international law and the laws of the State.

The presence of a significant part of the fleet, with officials of the Interior Ministry on board, has assured careful surveillance to check for possible infiltration of terrorist/subversive cells that could take advantage of the massive flows of immigrants as a means to enter European countries.

Doctors of the Health Ministry and volunteer organizations embarked on Navy ships have provided on site examinations of migrants and, if necessary, initiated the appropriate care before the ship reaches land, identifying those to be sent to specialized hospitals for further care.

On the 31st October 2014 the Government decreed the end of Operation Mare Nostrum. In 379 days of activity, this operation assisted 156,362 individuals in 439 SAR (Search and Rescue) missions, with peaks of about 9,300 migrants a week. The alleged smugglers, arrested and handed over to judicial authorities, thanks also to the cooperation with local prosecutors, numbered 366. Five ‘mother ships’ were also seized. Submarines, covertly documenting criminal activities, effectively collected supporting evidence.

The purpose of the operation was to:

- Increase the global framework of maritime security, contrasting illegal activities in the central Mediterranean, with special emphasis on human trafficking;
- Respond to the emergency in progress in the central Mediterranean, providing a “continuing naval presence on the high seas to protect life at sea and provide humanitarian assistance”;
- Provide an advanced health checkpoint to examine migrants before reaching Italian shores.

The technical and logistical capabilities of Italian Navy ships – including health/medical services – made it possible to deal with a humanitarian emergency and to provide assistance to a large number of people.

This activity continued even after conclusion of the Mare Nostrum mission. With the exacerbation of the terrorist threat, it became necessary to reinforce the number of naval and air assets deployed to the central Mediterranean, in order to protect the many national interests that are currently susceptible to a growing risk determined by the

presence of extremist entities and to ensure consistent levels of safety at sea.

On 1 November the European Union launched TRITON, the multinational border police operation to prevent and combat illegal migration, replacing the FRONTEX operations (Hermes and Aeneas) active in the central Mediterranean since 2010. The Italian Navy took part in operation TRITON up to March 24, with a high seas patrol vessel and an average of 4 patrol boats.

At the same time, in order to maintain an adequate presence in the central Mediterranean and the Straits of Sicily, a Naval Surveillance and Maritime Security (DNSSM) mission was activated. This remained operational from 1 November to 31 December 2014 in order to allow operation TRITON to reach full operational effectiveness.

The mission remained operational for 61 days, assisting 13,668 migrants in the course of 38 SAR actions.

On February 15, 2015, at the conclusion of a rescue operation involving a boat carrying 247 migrants, a small fast boat approached the Coast Guard unit CP 319 with armed people on board. They ordered the ship to move away from the now empty boat and opened fire about 20 meters from the rescue vessel. The traffickers then proceeded to recover the boat used by the migrants. As a consequence of this event it became necessary to provide security to national assets engaged in SAR activities.

On March 12, 2015, air naval assets were deployed and tasked, in accordance with national legislation and international agreements in force, with providing maritime surveillance and security in the central Mediterranean.

The operation uses only Italian Navy assets and is called *Mare Sicuro*.

The ships of *Mare Sicuro* operate in an area of about 160,000 square kilometers, in the central Mediterranean and off the Libyan coast. This mission is basically a sea version of operations performed on land by national armed forces called *Strade Sicure*.

Because of the worsening crisis in Libya, as of 12 March 2015 sea air and naval assets of *Mare Sicuro* were deployed to the central Mediterranean to carry out surveillance and security activities, in accordance with national legislation and international agreements, in order to protect national interests by:

- Exercising oversight functions and protection of oil platforms located near the Libyan coast, in international waters;
- Protecting national resources, especially Coast Guard Units performing SAR activities from the actions of criminal organizations;
- Discouraging and combating the work of organized crime groups involved in illegal trafficking and preventing the re- use of vessels used for these activities.

During operation *Mare Sicuro* several significant events took place:

On 13 April 2015, at the conclusion of a SAR event, a rigid hull boat, flying the Libyan flag, with people in uniform on board, approached the barge subject of the rescue operation conducted by M/N Asso 21 (Italian flag), claiming to belong to the Libyan coast guard. In the final phase of the rescue operation, the Libyan vessel fired a few shots into the air, forcing the M/N Asso 21 to move away. The Libyan vessel then took possession of the empty barge. The SAR operation also included the TYR, an Icelandic Coast Guard unit (mission TRITON-FRONTEx), which at the time was near Asso 21.

The ship 'Bergamini' immediately intervened, using its own helicopter to restore safety.

On 17 April 2015, the Italian fishing boat 'Airone', (department of Mazzara del Vallo), sailing inside the Fisheries Protection Zone unilaterally proclaimed by Libya and approximately 20 nautical miles from the external border of Libyan territorial waters, was confiscated by the armed tug 'Al Mergheb', a Libyan Coast Guard vessel.

The Commander of the Naval Group, Adm. Ribuffo, ordered the 'Bergamini' to intervene and, in coordination with the Prosecutor of Catania, acquired control of the vessel using a team of Navy commandos.

On the night between 18 and 19 April, during rescue operations conducted by M/V 'King Jacob' (flag Portugal), a boat full of migrants sank. The 'Orion' intervened, as did SAR helicopters, while the ships 'San Giusto' and 'Bergamini' threw life rafts overboard and searched for the castaways. All Italian fishing boats in the areas were also called in to assist. They rescued 28 castaways and retrieved 24 bodies.

On May 4 the 'Bettica' foiled an attempt by the Libyan tug 'Al Mergheb', to seize the Italian ship 'Regina'.

On 7 May, at the request of the Prosecutor of Catania, an Italian Navy Minesweeper (the 'Gaeta' – with its underwater vehicle 'Gigas') located the wreckage that sank during the night of 18 and 19 April at a

depth of about 370 meters. Judicial authorities to reconstruct the event are currently examining the films.

On Sunday, June 21, The M/V 'Dignity 1' (ship of 'Doctors Without Borders' organization) rescued two dinghies carrying migrants near Libyan territorial waters off the coast of Zuwarah. They found one migrant killed and another wounded by gunfire.

The killing and injuring allegedly occurred the night before when a group of facilitators engaged in smuggling migrants supposedly came to the site of embarkation demanding additional money before the migrants would be allowed to leave. When the migrants refused the facilitators fired a few shots.

As the 'Dignity 1' was completing its rescue of the migrants on the first dinghy a fast vessel claiming to belong to the Libyan police approached the site and took possession of the dinghy.

At the request of the 'Dignity 1', a helicopter from the 'Bettica' present as part of operation *Mare Sicuro*, intervened by taking the wounded migrant and evacuating him to Lampedusa.

Operation *Mare Sicuro* uses an average of 4/5 vessels. Since the beginnings of the operation there have been 166 SAR missions, during which 23,018 migrants have been rescued, 72 smugglers arrested and one 'mother ship' seized.

In addition to Operation Triton, the recent activation of the European Union naval operation EUNAVFORMED (June 22, 2015) attests the renewed attention of Member States to the serious situation that is taking place in the Mediterranean. Countries like Germany and the United Kingdom have provided ships, and other states have sent specialized staff and will be sending additional air and naval assets as soon as they attain political authorization. At this time the Operation is tasked with monitoring and gathering information on the illegal activities of traffickers (Phase 1). The mission will perform a more incisive role as soon as the United Nations issues a specific mandate.

THE EVOLUTION OF ENFORCEMENT POWERS ON THE HIGH SEAS THROUGH THE AIR-NAVAL OPERATIONS OF THE *GUARDIA DI FINANZA* AGAINST THE SMUGGLERS OF MIGRANTS IN THE MEDITERRANEAN SEA

*Amedeo Antonucci, Marco Fantinato, Pasquale Caiazza**

1. Introduction

The *Guardia di Finanza* is a special law enforcement corps which has a military organisational structure and reports directly to the Ministry of Economy and Finance. The *Guardia di Finanza* (hereinafter referred to as the GdF) cooperates with Armed and Police Forces throughout the Italian territory and its main competences are established by Legislative Decree no. 68/2001.¹ In addition to its traditional activities as criminal and financial police, the GdF institutional tasks also include, *inter alia*, border control, maritime patrolling and the countering of illicit trafficking by sea. According to the Italian legal framework, the GdF has an exclusive competence in terms of criminal and financial police at sea and, in order to perform these duties, has the largest naval fleet of all other Police Forces in Italy. These specific competences allow the GdF to coordinate air-naval operations at sea in cooperation with its territorial units and land patrols.

Additionally, the GdF is responsible for the surveillance of the European Union borders in international waters and for this reason has been chosen as the point of contact for all international operations carried out in cooperation with various international Organisations and under the aegis of the European Agency Frontex. In fact, since 2006 the GdF has been coordinating as well as actively participating in Joint Operations under the overall technical coordination of Frontex (i.e. operations NAUTILUS, HERA, POSEIDON, INDALO, HERMES,

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¹ Decreto Legislativo n. 68/2001 *Adeguamento dei compiti del Corpo della Guardia di Finanza, a norma dell'articolo 4 della Legge n. 78/2000.*

AENEAS, TRITON, etc.).² In particular, as far as Joint Operations AENEAS, HERMES and TRITON are concerned, the GdF is in charge of managing these activities under the supervision the International Coordination Centre (ICC) located at the Air-naval Operational Command (*Comando Operativo Aeronavale*) in Pratica di Mare, and by the Local Coordination Centres (LCCs) of the Air-naval Groups (*Gruppo Aeronavale*) of Taranto, Messina and Lampedusa.

2. Rules of engagement at sea followed by the Guardia di Finanza

In accordance with the corps' institutional tasks, the operational approach of the GdF regarding the migration phenomenon in the Mediterranean Sea has always been characterised by the need to ensure and balance whenever and wherever possible:

- the safety of life at sea of the migrants;
- the arrest of the smugglers;
- collecting and gathering evidence for ensuing and connected criminal investigations, with possible insights into the economic and financial aspects related to the transnational nature of illicit trafficking and of the criminal organisations involved.

However, the operational need to use law enforcement powers outside territorial waters, interfering with the freedom of navigation on the high seas, depends on the possibility of exercising Italian criminal jurisdiction international waters. Ever since, the GdF began to intercept people smugglers in these extraterritorial maritime zones, transnational criminal organisations have responded to the techniques and procedures used by the GdF by changing their criminal behavior and perpetrating such offences in what they believe to be areas of impunity. For this particular reason, in order to deal with the threats posed by these illicit cross-border activities, and as the GdF attempts early interception on the high seas, jurists have begun to acknowledge this operational approach by extending the application of Italian jurisdiction to international waters (creeping jurisdiction). In fact, it should be noted that some of the GdF law enforcement operations at sea have fostered the development of best practices, leading to an evolution of the legal instruments provided by the international law.

For instance, it is worth mentioning the case of the fishing boat CEMIL PAMUK, used as a mother boat without nationality for the

² Description of these Joint Operations is available at www.frontex.europa.eu.

transportation of immigrants from Turkey and intercepted by the GdF about 150 nautical miles off the coasts of Calabria in August 2001. Given the relevance of this operation, several jurists and scholars analysed the case, considering it to be a milestone in this field. As a result, the sentence³ condemning the Turkish smugglers was used as reference in the guidelines recently published by the National Anti-Mafia Bureau (*Direzione Nazionale Antimafia*, hereinafter referred to as the DNA), “Criminal organisations facilitating irregular immigration. Ships used for the transportation of migrants in international waters. Operational proposals for the solution of issues related to the Italian jurisdiction and possibility of intervention”.⁴ On this particular occasion, the issue of exercising law enforcement powers on the high seas came to light. Police officers and judicial authorities needed appropriate legal instruments in order to apprehend the smugglers who tried to escape after the transshipment of migrants in international waters. Basically, they needed to bridge a gap in the national legislation framework and devise a legal fiction, based on the principles provided by the international Law of the Sea, which allowed them to legitimately extend Italian jurisdiction over the high seas.

In light of such an operational scenario, in the following paragraphs we will describe some law enforcement operations coordinated by the GdF in the Mediterranean Sea, in order to highlight the relevant legal and operational aspects of these activities. Recently, the operational approach used by the GdF at sea has been supported also by the Court of Cassation’s sentences. An analysis of these judgments offers food for thought for scholars and jurists in terms of the evolution of available norms, both at national and international level, to secure the arrest of migrant smugglers. These sentences specifically focus on the possibility of recognising Italian jurisdiction over international waters pursuant to the principles enshrined in the international Law of the Sea.

³ Tribunal of Crotona, 27th September 2001, *Pamuk and others*, Published in the *International Law Journal*, 2001, Italian jurisprudence provided by Professor Tullio Scovazzi.

⁴ The document published by the National Anti-Mafia Direction is available on open sources on the web. Unofficial translation. For a comparative analysis of the text, please refer to “Associazioni per delinquere dedite al favoreggiamento dell’immigrazione clandestina. Navigli usati per il trasporto di migranti con attraversamento di acque internazionali. Proposte operative per la soluzione dei problemi di giurisdizione penale nazionale e possibilità di intervento”.

3. Case study: Operation “ZORA”. Ships flying flags of convenience

On July 6, 2011, during a nighttime surveillance mission within the framework of the Joint Operation AENEAS 2011,⁵ an Icelandic aircraft detected a suspicious sailboat approximately 63 nautical miles south-east of Santa Maria di Leuca. At first, the Icelandic crew reported that the name of the sailboat was ZORA and that it was flying a Croatian flag. However, after a closer look at the radars, the crew promptly added that the sailboat was heading towards Italian coasts with migrants on board. On the basis of these inputs, a law enforcement operation was launched and the sailboat was monitored by the air-naval assets of the GdF. The following day, at about 26 miles south-west of Santa Maria di Leuca, 18 nautical miles beyond the baseline that identifies the historic bay of the Gulf of Taranto, within the contiguous zone (Fig. 1), a GdF helicopter reported that the sailboat had stopped the engines and halted abruptly while several migrants crowded the upper deck signaling for help. The ship had been abandoned by the smugglers and left adrift, thus imperiling the lives of the migrants.

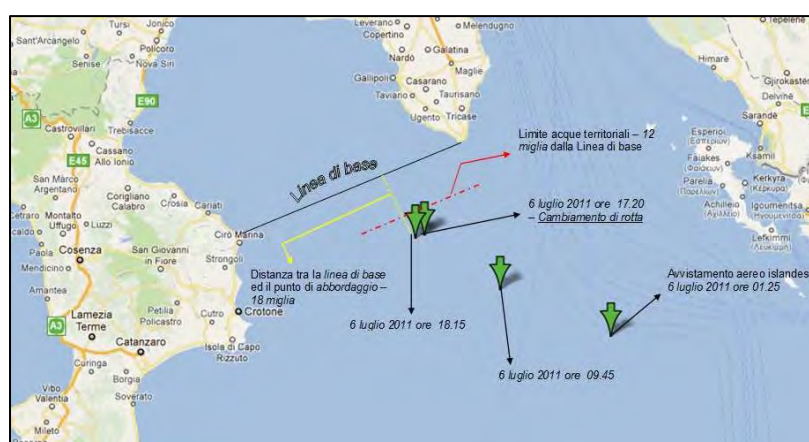


Fig. 1 - Progressive positions of the boat ZORA sailing towards the Gulf of Taranto

⁵ The Joint Operation AENEAS was promoted by the European Agency Frontex in order to tackle the irregular immigration flows from North Africa, Greece and Turkey. The operational activities in the Ionian and Adriatic Sea were locally coordinated by the *Guardia di Finanza* of the Air-naval Group of Taranto.

At this point the GdF vessels intercepted the yacht with the migrants on board and the smugglers were stopped in the vicinity of the sailboat while trying to escape in a rubber boat. When the rescue operations were terminated, 89 migrants were saved, 3 Ukrainian smugglers were arrested and charged with “facilitating irregular immigration” pursuant to Article 12 of Legislative Decree no. 286/1998⁶ and the sailboat ZORA was seized (Fig. 2 and 3). The ensuing investigation confirmed suspicions regarding nationality. During the search of the sailboat, police officers discovered papers related to a Ukrainian vessel named ANIKA-52 while no documents were found to prove Croatian registration. Subsequently, it was ascertained that during their voyage towards Italy, the crew had changed the sailboat’s name, along with the flag, in the Ionian Sea in order to avoid suspicion and prevent identification by the Italian authorities.

⁶ Articolo 12 del Decreto Legislativo 286/1998, *Favoreggiamento dell’immigrazione clandestina*: “Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l’ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da cinque a quindici anni e con la multa di 15.000 euro per ogni persona nel caso in cui:

- a) il fatto riguarda l’ingresso o la permanenza illegale nel territorio dello Stato di cinque o più persone;
- b) la persona trasportata è stata esposta a pericolo per la sua vita o per la sua incolumità per procurarne l’ingresso o la permanenza illegale;
- c) la persona trasportata è stata sottoposta a trattamento inumano o degradante per procurarne l’ingresso o la permanenza illegale;
- d) il fatto è commesso da tre o più persone in concorso tra loro o utilizzando servizi internazionali di trasporto ovvero documenti contraffatti o alterati o comunque illegalmente ottenuti;
- e) gli autori del fatto hanno la disponibilità di armi o materie esplosive.”.



Fig. 2 – Migrants aboard the sailboat ZORA during rescue operations conducted by the GdF



Fig. 3 –The sailboat ZORA flying the flag of convenience and displaying the false name

Several other air-naval operations have demonstrated that using flags of convenience is a frequent practice which is regularly adopted by transnational criminal organisations involved in the smuggling of migrants by sea. In this peculiar case, taking into account the evidence collected by the GdF, this *modus operandi* was considered to be particularly relevant from an operational and judicial standpoint, both at national and international level. In fact, the nationality of a ship

constitutes a genuine link with the legal system of the State of registration and grants exclusive jurisdiction of the flag State regardless of the location of the ship.

However, international law provides that States are free to determine the procedures to grant their nationality as established by Article 91⁷ of the United Nations Convention on the Law of the Sea⁸ (hereinafter referred to as UNCLOS), ratified by Italy in 1994.

Normally, a State grants its nationality by registering the ship in the public registry. This procedure authorises the ship to fly the State's flag, and at the same time, permits the flag State to exercise criminal and civil jurisdiction over that ship. The flag State must effectively exercise its jurisdiction and control over administrative, technical and social matters for ships flying its flag, and take appropriate measures as established by paragraph 4 of Article 94 ("Duties of the flag State") of the UNCLOS. In particular, these measures envisage, *inter alia*:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

In addition, in accordance with the provisions of Article 92 ("Status of ships") of the UNCLOS, a ship sailing on the high seas shall be subject to the exclusive jurisdiction of the flag State. A ship may not change its flag during a voyage except in the case of a real transfer of

⁷ Article 91 ("Nationality of ships") provides that: "...ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect".

⁸ Legge n. 689/1994, *Ratifica ed esecuzione della Convenzione delle Nazioni Unite sul diritto del mare*, firmata a Montego Bay il 10 dicembre 1982.

ownership or change of registry. Furthermore, as can be easily inferred from the second paragraph of the article, “a ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality”. In fact, an internationally recognised principle of customary law provides that vessels without nationality cannot invoke the protection of any flag State and can be subjected to the jurisdiction of any State. Under such circumstances, ships on government service can exercise the “right of visit” (Article 110 of the UNCLOS), board and search the vessel, and if any suspicion remains with regard to the real nationality of the intercepted vessel, escort it to the nearest port for further examination and take appropriate actions in accordance with international law. The adoption of these measures is justified both by the lack of jurisdiction of any flag State and by the fact that the authorities intercepting the vessel have a specific interest in preventing infringement of their domestic laws.

This operational approach is further confirmed by the provision included in the additional Protocol of the United Nations Convention on Transnational Organized Crime (hereinafter referred to as UNTOC).⁹ In particular, Article 8 (“Measures against the smuggling of migrants by sea”),¹⁰ paragraph 7, states that:

“A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law”.

Pursuant to international legislation, the sailboat ZORA/ANIKA-52 sailing on the high seas was assimilated to a stateless ship and police officers took all the appropriate measures with particular regard to the boarding, searching and seizure of the vessel according to the legal provisions set forth in Article 110 paragraph 1 (d) of the UNCLOS. In

⁹ Annex III Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime ratified by Law 146/2006.

¹⁰ See full text of the article 8 of the UNTOC.

fact, although the sailboat was intercepted in international waters, Italian criminal law is fully applicable also by virtue of the provisions of Article 7 of the Italian Penal Code (“Offences committed abroad”), which expressly provide that: “Any Italian citizen or a foreigner who commits in a foreign territory one of the offences listed below is punishable under the Italian law... any other offence for which the applicability of the Italian criminal law has been established according to special laws or international conventions”.¹¹ The three Ukrainian smugglers were thus subject to detention measures in accordance with both domestic and international norms, using the legal instruments contemplated for “ships flying flags of convenience”.



4. Case study: Operation NEVER MORE. Stateless ships

On the 12th of October, 2013, during a patrolling mission over international waters, a Portuguese aircraft deployed to the Joint

Operation AENEAS 2013¹² detected a mother boat towing a smaller and empty fishing boat (Fig. 4). Pursuant to a *modus operandi*

¹¹ Unofficial translation. For a comparative analysis of the text, please refer to Articolo 7 (“Reati commessi all’estero”): “E’ punito secondo la legge italiana il cittadino o lo straniero che commette in territorio estero...ogni altro reato per il quale speciali disposizioni di legge o convenzioni internazionali stabiliscono l’applicabilità delle legge penale italiana”.

¹² The Joint Operation “AENEAS 2013” was carried out under the coordination of the European Agency Frontex in order to tackle the irregular immigration in the Ionian Sea and it was locally coordinated by the *Guardia di Finanza* of the Air-naval Group of Taranto.

previously adopted on several other occasions by transnational criminal organisations involved in the smuggling of migrants, the fishing vessel used as a mother boat did not fly any flag nor show any distinctive external mark to indicate its nationality, with the express purpose of avoiding any identification by air-naval assets.



Fig. 4 and 5 – Smugglers towing an empty wooden boat and transferring the migrants from the mother boat

At approximately 250 miles off the coast of Calabria (Fig. 6), traffickers began to transfer the migrants from the fishing vessel used as a mother boat to the smaller vessel, with the Portuguese aircraft recording the activity through the optical sensors installed on board. When the transshipment operations were terminated, the mother boat started heading towards North African coasts while the fishing vessel with the migrants onboard proceeded towards Italian shores. Although lacking any basic maritime knowledge and seamanship to sail safely towards the coasts, the migrants manoeuvred the smaller vessel and started heading toward Italy. For this reason, a law enforcement operation was launched, the fishing vessel with the migrants on board was stopped at 178 nautical miles from Capo Spartivento, while the offshore patrol vessel (hereinafter referred to as OPV) “PV. 03 Denaro” of the Air-naval Group (*Gruppo Aeronavale*) of Taranto intercepted the mother boat at about 233 nautical miles (Fig. 7). Considering the

collective evidence of the criminal acts committed in international waters¹³ and the fact that the mother boat was allegedly without nationality, the captain of the OPV ordered the boarding of the ship on the high seas pursuant to the legal provisions set forth in Article 110 (“Right of visit”), paragraph 1 (d) of the UNCLOS.

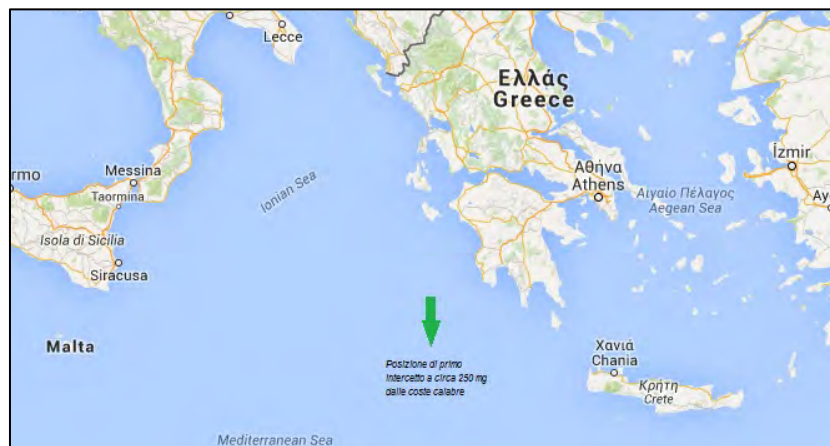


Fig. 6 – The detection of the mother boat at about 250 nautical miles from the Italian coasts

The police officers did not find any documentation proving the nationality, registration nor the name of the vessel, thus the vessel was treated as a stateless ship and the mother boat was seized. At the end of the law enforcement operation, 17 alleged Egyptian traffickers were taken into custody and later arrested upon arrival at the port of Reggio Calabria, charged with “facilitating irregular immigration”. Meanwhile, also in international waters, other naval assets of the GdF intercepted the fishing boat which the migrants had been forced to board and 226 Syrian immigrants were rescued (Fig. 8).

¹³ The transfer operations in the high seas, which constituted the genuine link to the Italian territory, were recorded by the Portuguese aircraft.



Fig. 7 – The OPV “PV.03 Denaro” intercepting the mother boat



Fig. 8 – GdF naval assets rescuing the migrants

As far as the sentence issued by the Court of Reggio Calabria is concerned, the judge who examined the case was confronted with several legal challenges. However, when faced with the question of “whether the Italian authorities could legally exercise their enforcement

powers in the high seas”,¹⁴ the judge confirmed the legitimacy of the police officers’ intervention in international waters with respect to the mother boat without nationality and sentenced the smugglers to prison. Also in this case, and similar to Operation ZORA, in view of Article 91 (“Nationality of ships”) of the UNCLOS and Article 8 (“Measures against the smuggling of migrants by sea”) of the additional Protocol of the UNTOC,¹⁵ the judge affirmed that:

“In this particular event, the principle of territoriality¹⁶ is fully applicable without any limitation in accordance with the national legal provisions regarding the cases which deal with stateless ships. The exercise of enforcement powers at sea with particular regard to the boarding, searching and seizure of the ship can be considered as legitimate acts when performed by those States Parties who have an interest in preventing the infringement of their domestic laws”.¹⁷

The judge also acknowledged the application of national legislation by virtue of the legal provisions included in Article 7 of the Italian Penal Code (“Offences committed abroad”).¹⁸ The judge also held that pursuant to this article, in order to recognise Italian criminal jurisdiction, it is sufficient that the preparatory acts of “facilitating irregular immigration” be committed abroad for the sole purpose of perpetrating the offence in Italian territory. The preparatory acts of the crime are also referred to in Article 12 of Legislative Decree no. 286/1998¹⁹ in which they are expressly considered to be punishable also pursuant to this norm. Furthermore, regarding the crime of “facilitating irregular immigration”, it should be noted that:

¹⁴ Unofficial translation of an extract of the sentence.

¹⁵ *Supra* note 9.

¹⁶ The “principle of territoriality” (*principio di territorialità*) in the Italian legal framework is defined by the article 6 of the Italian Penal Code (unofficial translation). See Articolo 6: “Reati commessi nel territorio dello Stato”) - “Chiunque commette un reato nel territorio dello Stato è punito secondo la legge italiana. Il reato si considera commesso nel territorio dello Stato, quando l’azione o l’omissione, che lo costituisce, è ivi avvenuta in tutto o in parte, ovvero si è ivi verificato l’evento che è la conseguenza dell’azione od omissione”.

¹⁷ *Supra* note 14.

¹⁸ *Supra* note 11.

¹⁹ *Supra* note 6.

(a) the conduct listed in Article 12 of Legislative Decree no. 286/1998 is deemed criminal even without any actual harm to the migrants being done (*reato di pericolo*), provided that the harm would have occurred if the authorities had not intercepted the vessel in distress and rescued the migrants on board;

(b) the norm refers to a generic conduct (*reato a condotta libera*) without specifying any particular type of criminal behaviour (e.g. preparatory acts of the crime or those which Article 12 refers to as *altri atti diretti a procurarne l'ingresso*);

(c) the crime can be committed regardless of whether the illegal entry of the migrants into Italian territory actually occurs (*reato a commissione anticipata*);

(d) the attempt to commit such offence (*delitto tentato*) cannot be contemplated because the norm provides that only preparatory acts of the crime can be prosecuted.

As a result, the judge assimilated the organisation of the voyage (both by land and sea) along with the transportation of the 226 migrants to preparatory acts of the offence aimed at facilitating the illegal entry into the Italian territory, and although these acts were committed in extraterritorial areas, he confirmed that the conduct of the smugglers was indeed punishable under Italian law.²⁰

5. Case study: Operation “Deep Sea”. The ‘essential fragment’ of the crime of facilitating irregular immigration

Pursuant to another *modus operandi* frequently adopted by the criminal organisations operating in Libya, on 22 April, 2015, the Maritime Rescue Coordination Centre in Rome received two distress calls via satellite phone from two different rubber boats that had departed from Tripoli heading for Italian coasts and were allegedly carrying migrants on board. Both rubber boats were intercepted in international waters (Fig. 9 and 10) and 220 migrants were rescued at a distance of about 20 nautical miles from Libyan shores (Fig. 11).

²⁰ Unofficial translation. For a comparative analysis of the text, please refer to Sentenza n. 27106 del 16 giugno 2011 e sentenza n. 38159 del 23 settembre 2008 della Corte di Cassazione, secondo cui: “... il delitto consistente nel compiere atti diretti a procurare l’ingresso illegale di una persona in altro Stato ha natura di reato di pericolo o a consumazione anticipata e si perfeziona per il solo fatto che siano compiuti atti diretti a favorire l’ingresso, a prescindere dall’effettività, durata e finalità dell’ingresso medesimo, in quest’ultima incluso il mero transito con destinazione finale il Paese di origine della persona stessa”.



Fig. 9 and 10 – The GdF OPV “PV. 03 Denaro” rescuing migrants from both rubber boats

In both cases, the operations aboard the two rubber boats were filmed by the police officers on the scene and these recordings, along with the ensuing investigation, proved to be fundamental in identifying the smugglers who were trying to hide among the immigrants. The migrants were then transferred on board the GdF OPV “PV. 03 Denaro” and escorted to the port of Catania (Fig. 12) while the smugglers were arrested.



Fig. 11 – Positions of the rubber boats intercepted at 20 nautical miles from Libya



Fig. 12 – The “P.V. 03 Denaro” escorting the migrants to the port of Catania

In this instance, the case also raises the question as to whether the judge can extend Italian criminal jurisdiction over international waters,

prosecuting the smugglers apprehended so far away from the Italian coasts. In this regard, using an innovative approach, the judge established that:

“Italian jurisdiction shall be recognised in international waters when the smugglers leave the migrants adrift onboard unseaworthy boats in order to trigger a SAR event. This *modus operandi* is pursued by the smugglers in order to oblige the rescuers to transport the migrants into the Italian territory. The rescuers facilitate the illegal entry into the State by escorting the migrants towards the coasts, however, they operate under the “state of necessity”.²¹

Nevertheless, since the ‘state of necessity’ is caused by premeditated acts committed by the smugglers with the aim of endangering the lives of the migrants, the offence is indeed directly linked to the smugglers. In fact, although the preparatory acts to facilitate the illegal entry are committed abroad (both in Libya and in international waters), they can be prosecuted pursuant to the cases contemplated by Article 7 (“Offences committed abroad”) of the Italian Penal Code.²²

On the one hand, according to Article 54 (“state of necessity”) of the Italian Penal Code, the rescuers who allowed the migrants to reach the Italian territory by facilitating their illegal entry into the State are deemed as indirect perpetrators²³ operating under the international obligation of the “duty to render assistance”.²⁴ On the other hand, the smugglers who deliberately caused and artfully instrumentalised the

²¹ The “state of necessity” (*stato di necessità*) in the Italian legal framework is defined by Article 54 of the Italian Penal Code: “The dispositions described in the first part of this article shall apply even if the state of necessity is determined by a threat from a third party. In this case, those causing the person to commit the offense, shall be held responsible for the consequences on their behalf” (unofficial translation). For a comparative analysis of the text, please refer to Articolo 54 (“Stato di necessità”) comma 3 del Codice Penale: “La disposizione della prima parte di questo articolo si applica anche se lo stato di necessità è determinato dall’altrui minaccia; ma in tal caso, del fatto commesso della persona risponde chi l’ha costretta a commetterlo”.

²² In particular, the part that reads as follows: “...an offence is considered to be committed within the territory of the State when the action or omission that constitutes the conduct is wholly or partly committed within its territory...” (unofficial translation). *Supra* note 16.

²³ In the Italian legal framework the indirect perpetrator is referred to as “autore mediato”.

²⁴ Article 98 of the UNCLOS and SAR Convention.

‘state of necessity’ in order to oblige the rescuers to commit the offence are considered to be the direct perpetrators. As a result, although the preparatory acts of the crime were committed abroad, the conduct of the smugglers is punishable under the Italian law.²⁵

Such an operational approach was also confirmed by the Court of Cassation’s judge who stated that in this case the ‘state of necessity’, which is strictly linked to the “duty to render assistance”, was knowingly caused in order to promote the illegal entry into the State under the international protection provided by the SAR intervention. In accordance with this view, judicial authorities began to consider the distress call performed on international waters as an ‘essential fragment’ of the facilitators’ criminal conduct that allows the judges to extend Italian jurisdiction to the high seas.²⁶ This judicial interpretation was further supported by the recent guidelines published by the DNA which ruled that the law enforcement intervention on the high seas is deemed to be legitimate in those specific cases where the facilitators try to exploit the “duty to render assistance” as a means to perpetrate the offence of illegal entry of migrants into Italian territory. Furthermore, the Court of Cassation confirmed this point of law by clarifying that, regardless of where the offence has been committed, under these particular circumstances, the rescuing of migrants serves as an instrument to pursue the facilitators’ ultimate goal. Such an act, which is deliberately caused by the smugglers in order to trigger the coastal State’s SAR intervention, represents the last fragment of their intended criminal design. Therefore, the Court of Cassation, recognising criminal jurisdiction beyond territorial waters, concluded that the criminal conduct of the facilitators in international waters is indeed liable to prosecution under Italian jurisdiction.²⁷

6. Operational challenges: the contiguous zone

The challenges that have emerged over the years during air-naval operations against irregular immigration by sea emphasise the need to understand the enforcement powers that can be legitimately exercised by the Italian State in the contiguous zone. Notably, Article 33 (“Contiguous zone”) of the UNCLOS reads as follows:

²⁵ Unofficial translation. For a comparative analysis of the text, please refer to sentence n. 14510/14 of the Italian Court of Cassation.

²⁶ Sentence n. 3345/15 of the Italian Court of Cassation.

²⁷ Sentence n. 14510/14 of the Italian Court of Cassation.

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Despite the fact that the legal provisions included in this article attribute to the coastal State the control necessary to ‘prevent’ the violation of its domestic laws, it should be noted that the measures contemplated by customary international law entail both preventive and repressive powers.

Arguably, the thesis that such law enforcement measures should be limited merely to preventive powers appears rather contradictory and has been disproved by international practice. It would be illogical to affirm that a State Party, after having gathered and collected the evidence of offences committed in the contiguous zone during the boarding and searching of a ship, should release such vessel and wait for its entry into territorial waters before exercising repressive powers.²⁸ Therefore, it is fair to assume that the expression ‘prevent’ is used in its wider meaning, for the purpose of indicating all those activities that are necessary to exercise these powers comprehensively, including repressive measures when needed. These norms on the powers of intervention in international waters were borrowed from the provisions set forth in the UNCLOS and have been effectively implemented in all Frontex Operational Plans. These documents establish the rules of engagement with which Member States must comply within the framework of international Joint Operations in the Mediterranean Sea carried out under the coordination of the European Agency. These rules also apply to the Joint Operation TRITON 2015, for which the Air-Naval Group (“Gruppo Aeronavale”) of Taranto acts as the Local Coordination Centre (LCC) for the air-naval assets of the participating Member States.

On the other hand, as far as domestic laws are concerned, it is worth mentioning the relevant national legislation and sentences pertaining to

²⁸ See B. Conforti, *Diritto internazionale*, VIII Edition, Editoriale scientifica, Napoli, 2010.

the application of immigration laws, with particular focus on the contiguous zone:

a. Article 12 “Measures against the smuggling of migrants by sea”, paragraphs 9 *bis* and 9 *quater* of Legislative Decree no. 286/1998.²⁹ Specifically, in terms of law enforcement powers that police forces can legitimately exercise in the territorial waters and the contiguous zone, paragraph 9 *bis* clarifies that:

If an Italian police force ship has reasonable grounds to believe that a vessel sailing in the territorial waters or the contiguous zone is engaged in the smuggling of migrants by sea, it may stop, board and search the vessel. If elements confirming the involvement in the smuggling of migrants are found, it shall seize and escort the vessel to a port of the State.³⁰

In addition, paragraph 9 *quater* points out in which cases the above mentioned enforcement powers can be specifically exercised when the ship is outside territorial waters:

The powers referred to in paragraph 9 *bis* can be exercised outside the territorial waters by the ships of the Italian Navy as well as by ships of Police Forces, according to the limits set out by domestic law, international law or multilateral/bilateral agreements, if the vessel is flying a national flag or another State’s flag, or the vessel is without nationality or is flying a flag of convenience.³¹

b. Interministerial Decree of 14th July 2003 “Measures against irregular immigration”, Article 6 (“Activities in the territorial waters and the contiguous zone”). In particular, as far as internal and territorial waters are concerned, paragraph 2 reads as follows:

²⁹ These two paragraphs were introduced by the article 11 paragraph 1 (d) of the Law 189/2002.

³⁰ Unofficial translation. For a comparative analysis of the text, please refer to Articolo 12 comma 9 bis: “La nave italiana in servizio di polizia, che incontra nel mare territoriale o nella zona contigua, una nave, di cui si ha fondato motivo di ritenere che sia adibita o coinvolta nel trasporto illecito di migranti, può fermarla, sottoporla ad ispezione e, se vengono rinvenuti elementi che confermino il coinvolgimento della nave in un traffico di migranti, sequestrarla conducendo la stessa in un porto dello Stato”.

³¹ Unofficial translation. For a comparative analysis of the text, please refer to Articolo 12 comma 9 quater: “I poteri di cui al comma 9-bis possono essere esercitati al di fuori delle acque territoriali, oltre che da parte delle navi della Marina militare, anche da parte delle navi in servizio di polizia, nei limiti consentiti dalla legge, dal diritto internazionale o da accordi bilaterali o multilaterali, se la nave batte la bandiera nazionale o anche quella di altro Stato, ovvero si tratti di una nave senza bandiera o con bandiera di convenienza”.

For the purpose of expediting the intervention of Police Forces in territorial waters, an area of coordination that extends to the limit of the zone internationally recognised as ‘contiguous zone’ is established. In these waters, if there are various assets belonging to different corps, the coordination of naval activities related to combating irregular immigration is entrusted to the *Guardia di Finanza*.³²

As mentioned in the previous paragraph, in 2002 Law no. 189/2002³³ introduced specific measures to counter irregular immigration by sea in the contiguous zone. This norm can be considered as the only domestic law that makes a clear reference to the contiguous zone and affirms its existence. Nevertheless, jurists and scholars have long debated whether this law reflected the original intent of the Italian legislator and whether this provision was sufficient to establish a contiguous zone recognised by all the State Parties of the UNCLOS. However, it shall be noted that the UNCLOS does not clarify any legal instrument nor specify any particular procedure through which a State Party should implement the introduction of the contiguous zone. Thus, considering that this legal provision constitutes a clear manifestation of the will to establish this area, Police Forces operating at sea have invariably exercised the enforcement powers provided by this law where applicable.

For this reason, if a State Party can stop, board and search a vessel allegedly involved in the smuggling of migrants in the contiguous zone (regardless of its nationality) and when evidence is found it can seize and escort such vessel to a port of the State, it might as well take appropriate measures against the smugglers of migrants long before they enter territorial waters. In fact, recent decisions have confirmed this point of law by acknowledging the operational approach of the GdF during air-naval operations at sea. Evidently, the *locus commissi delicti* (whether the offence occurs in territorial or extraterritorial areas) in which the crime of ‘facilitating the irregular immigration’ has been committed is no longer relevant in terms of the qualification of such criminal conduct. In fact, several jurists have clarified that this specific

³² Unofficial translation. For a comparative analysis of the text, please refer to Articolo 6 comma 2: “Al fine di rendere più efficace l’intervento delle Forze di polizia nelle acque territoriali è stabilita una fascia di coordinamento che si estende fino al limite dell’area di mare internazionalmente definita come «zona contigua» nelle cui acque il coordinamento delle attività navali connesse al contrasto dell’immigrazione clandestina, in presenza di mezzi appartenenti a diverse amministrazioni, è affidato al Corpo della guardia di Finanza”.

³³ Supra note 29.

offence has already been committed before the migrants reach territorial waters.³⁴

Conversely, since the contiguous zone is not a maritime zone where coastal States can exercise their full sovereignty, in this area it is not possible to prosecute migrants pursuant to the offence of “illegal entry and sojourn in the territory of the State”, as defined by Article 10 *bis* of the Legislative Decree no. 286/1998.³⁵ Rather, the contiguous zone represents a functional area established for the purpose of allowing Police Forces to prevent only those offences perpetrated against the coastal State.³⁶ As a result, with the contiguous zone being an area over which the coastal State cannot exercise its full sovereignty as established for the territorial sea, this maritime space does not need to be delimited by boundaries. In fact, it can be extended up to the limits set by the UNCLOS (24 nautical miles) and can even overlap with any adjacent areas of neighbouring coastal States. Notably, jurists have always been cautious in this field, and in fact, there are very few cases where the intervention of criminal police in the contiguous zone has been confirmed by judicial authorities. However, these few operations have been carried out by air-naval assets of the GdF.

c. Sentence no. 42/2012 issued on June 7, 2012, by the Justice of Peace of Alessano.

This case deals with the interception of a small boat with seven migrants (including 2 minors) in the contiguous zone (about 14 nautical miles from Santa Maria di Leuca) on May 4, 2012. The migrants were brought before the judicial authorities in Lecce for the offence of Article 10 *bis* of Legislative Decree no. 286/1998.³⁷ In his ruling, the judge stated as follows:

(1) despite the fact that the intervention of the GdF was triggered by a SAR event, police officers also acted in accordance with Article 12, paragraph 9 *bis* and *quater* of Legislative Decree no. 286/1998. These

³⁴ *Supra* note 20.

³⁵ Unofficial translation. For a comparative analysis of the text, please refer to Articolo 10-bis (“Ingresso e soggiorno illegale nel territorio dello Stato”): “Salvo che il fatto costituisca più grave reato, lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni del presente testo unico nonché di quelle di cui all’articolo 1 della legge 28 maggio 2007, n. 68, è punito con l’ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l’articolo 162 del codice penale”.

³⁶ These powers are those referred to in the article 33 of the UNCLOS.

³⁷ *Supra* note 35.

provisions establish that the Italian authorities shall prevent the illegal entry of migrants into the Italian territory, both in the territorial waters and contiguous zone, and that these powers must be exercised within the limits set out by international law;³⁸

(2) as far as the exercise of law enforcement powers in the contiguous zone is concerned, the intervention of the GdF can be considered as legitimate. Despite the fact that there is no explicit proclamation of the contiguous zone in the Italian legal framework, its existence is confirmed by Article 12 of Legislative Decree no. 286/1998, limited to the exercise of the powers relating to the prevention of irregular immigration. These provisions are deemed sufficient to recognise Italian jurisdiction over this area and to acknowledge the exercise of enforcement powers to suppress a violation committed in the contiguous zone also in accordance with the Article 33 of the UNCLOS;

(3) the existence of a contiguous zone for the purpose of preventing the infringement of its immigration laws complies with the provisions set forth by international law, thus the criminal jurisdiction was legitimately exercised against the migrants who were heading towards Italian shores with the intent of entering the territory of the State irregularly;

d. Sentence no. 32960/2010 of the Court of Cassation, on the seizure of a Turkish ship named CENGIZKAN.

This case differs from those described above as the Court of Cassation did not raise the issue of whether a contiguous zone had or had not been established. This judgement deals with the case of a Turkish vessel and a boat acting in conjunction with a ship captured by a GdF patrol vessel in international waters. The boat had been launched from the vessel for the transportation of irregular migrants. After being intercepted in international waters, there followed a hot pursuit, commencing within the contiguous zone. In the first instance, the Tribunal of Locri, applying Articles 33 (“Contiguous zone”) and 111 (“Hot pursuit”)³⁹ of the UNCLOS, confirmed the arrest of the Turkish smugglers and the seizure of the ship. However, the Court of Cassation did not recognise Italian jurisdiction, stating that the contiguous zone could not be invoked because Turkey did not ratify the UNCLOS. Such a decision caused a heated debate among scholars and jurists and the

³⁸ *Supra* notes 31 and 32.

³⁹ Article 111 (“Right of hot pursuit”) of the UNCLOS.

Turkish smugglers were acquitted. However, in the context of law enforcement operations at sea, supporting such a controversial argument, would lead to the assumption that Italy could not exercise its full sovereignty over the Gulf of Taranto (Fig. 13), which is internationally regarded as an ‘historic bay’, because the flag State of a ship in transit has not ratified the Convention and does not recognise the coastal State’s jurisdiction in those areas.



Fig. 13 – Italian baselines and the Gulf of Taranto

7. Concluding Remarks. Effective measures to prevent the smuggling of migrants

The above mentioned operations are just a few of the numerous and complex missions carried out by the *Guardia di Finanza* whilst countering irregular smuggling by sea. All these air-naval operations were performed using a bold and innovative approach and exploiting all the instruments provided by the international Law of the Sea. Following the success of some of these law enforcement operations, the most recent judgements of the Court of Cassation in this matter have shown that there is a progressive tendency to acknowledge the extension of Italian jurisdiction over international waters (creeping jurisdiction). On the one hand, this operational approach stems from the need to ensure

the safety of life and the protection of migrants' rights at sea, while on the other it is also aimed at prosecuting smugglers as well as identifying transnational criminal organisations that promote irregular immigration.

At the same time, the need to enforce these measures farther away from national coasts calls for a maritime legislation reform in order to confer stricter powers upon law enforcement authorities operating in international waters. In fact, the international law framework and the legal instruments currently available now appear rather obsolete in comparison with the globalisation of illicit trafficking by sea. Evidently, the legal provisions established by international conventions are insufficient to assist law enforcement personnel operating at sea, and for this reason, these rigid norms are often overcome by bold judicial interpretations of the Court of Cassation. Apparently, under some circumstances, police officers find it hard to secure the arrest of smugglers at sea without the endorsement of a clear and unequivocal set of norms establishing the application of criminal law on the high seas.

It is essential for Italy that the existence of a contiguous zone be explicitly and legally established in order to authorise law enforcement personnel to apprehend smugglers within such an area. In addition, the harmonisation of domestic law with the international legal framework, with particular regard to irregular immigration, should also be encouraged at the European level. Special legislation for the closed and semi-closed seas granting coastal States greater powers to exercise their jurisdiction in international waters could certainly strengthen the role of police forces operating at sea, and support the work of judicial authorities. In conclusion, such proposals could potentially enhance the possibility of countering irregular immigration effectively, with the aim of combating the criminal networks that organise, fund and promote people smuggling whilst also safeguarding the lives of migrants at sea.

MIGRATION BY SEA: A “SEARCH AND RESCUE”
EMERGENCY AND A BIG CHALLENGE
FOR THE ITALIAN COAST GUARD
*Paolo Cafaro**

The huge migration flows that are currently taking place in the Mediterranean have assumed dimensions never before seen in all of human history, in any corner of the world. These migrations lead to highly dangerous situations for the vast number of people who are sent out to sea on board overcrowded boats that are totally unsafe and lacking in the most elementary means of life saving. Under such conditions these desperate people can have only one destination: the bottom of the sea. It is difficult to believe in a criminal intent so appalling that it can conceive of sending tens of thousands of human beings to certain death simply for money. Saving them is the biggest challenge the Italian Coast Guard is facing right now. But before examining in detail the involvement of the Coast Guard in migration flow management, let's take a quick look at its organization and principal missions.

Although the Italian Coast Guard is a branch of the Navy the majority of its tasks are performed for government organizations other than the Ministry of Defense as all Ministries are responsible for various sectors of maritime affairs and civil uses of the sea and each uses the Coast Guard to manage these different sectors. For example, the Ministry of Infrastructures and Transportation has the political responsibility of safety at sea and the organization of search and rescue operations. It is also responsible for the administrative functions inherent to maritime navigation, seafarers' training and administration, public ownership of merchant, leisure and fishing vessels, and much more. All these tasks are performed by the Coast Guard. The Ministry of the Environment relies upon the Coast Guard to protect the sea environment. The Ministry of Agriculture and Forestry uses the Coast Guard to supervise fisheries policies. The Coast Guard also works with the police forces of the Ministry of the Interior to combat illegal activities at sea and with the Civil Defense Department in the event of natural disasters such as floods, volcanic eruptions, tsunamis, etc. while the Ministry of Historical, Archeological and Cultural Heritage calls on the Coast Guard to protect submerged archeological and historical

* *Capt. Coast Guard.*

artifacts. Coast Guard personnel are also linked with the Justice Department as they are considered as police officers and with the Ministry of Labor concerning the employment of seafarers.

In brief, the principal duties of the Coast Guard are the following:

- Search and rescue at sea
- Maritime safety and port and ship security
- Protection of fishery resources and pollution prevention
- Administrative functions relating to maritime navigation, fisheries, ownership of vessels, seafarers' training and employment.

In order to carry out the above missions successfully the Coast Guard relies on a robust structure that extends from one end of the national coastline to the other, composed of 250 maritime offices. The organization consists of 15 maritime directorates, 55 maritime compartments, 51 maritime district offices and 128 local offices. All the officers in charge of these commands are harbor masters as well. According to 1979 Hamburg Convention and consequent national laws, a specific organization dedicated to Search and Rescue (SAR) of human life in distress at sea has been inserted into the above described structure of the Italian Coast Guard. The national maritime SAR organization is composed of the IMRCC (Italian Maritime Rescue Coordination Center), responsible for organizing SAR operations and establishing and maintaining contact with foreign SAR organizations. The IMRCC cooperates with the Italian Coast Guard Headquarters in Rome and is composed of 15 Maritime Rescue Sub Centers (MRSC), one for each Maritime Directorate, and 101 Coast Guard Units (CGU) distributed among the other territorial maritime offices. They are charged with handling all levels of SAR events.

The Mediterranean Sea has over 46,000 km of coastline bordering 22 States. With its 8,000 km of coastline Italy alone represents 16% of the entire Mediterranean coastline. In addition, Italy is centrally located and its SAR region covers about 500,000 square miles compared to the 630,000 sq. km of the Maltese and North African SAR regions. Considering that the IMRCC is constantly on call to coordinate SAR operations connected to migration flows the Italian Coast Guard undertakes extraordinary efforts in the performance of its missions.

For SAR purposes it can rely upon its own air assets, such as the long range maritime patrol airplanes "ATR42 – MANTA", the medium range "P180 – ORCA" or its newest "AW139 – NEMO" helicopters used for rescue and medical evacuation operations, deployed between

MIGRANTS RESCUED AT SEA – YEAR 2014		
MIGRANTS RESCUED BY:	Units	Persons
ITALIAN NAVY	459	82.952
ITALIAN COAST GUARD	243	38.047
MERCHANT SHIPS	254	42.061
ITALIAN CUSTOM POLICE	27	1.601
OTHERS	15	1.709
TOTAL	982*	166.370
Migrants arrived directly on the Italian shore		3.473
<small>*Some boats have been rescued by units of the Italian Coast Guard together with other Military/Force of Police.</small>		

MIGRANTS RESCUED AT SEA – YEAR 2015		
FROM 01 ST JANUARY TO 14 TH JULY 2015		
MIGRANTS RESCUED BY:	Units	Persons
ITALIAN NAVY	82	14.720
ITALIAN COAST GUARD	133	19.146
MERCHANT SHIPS	122	13.618
ITALIAN CUSTOM POLICE	47	5.010
FRONTEX (NOT ITALIAN UNITS)	44	7.881
N.G.O.	36	6.276
Other FOREIGN MILITARY UNITS	67	11.918
TOTAL	510*	78.569
Migrants arrived on they own on the Italian shore		1126
<small>*Some boats have been rescued by units of the Italian Coast Guard together with other Military/Force of Police.</small>		

Let's examine and analyze the figures of the migration flows.

ANALYSIS OF MIGRATION FLOWS - YEAR 2014



The largest migratory flow is from Libya, with a total of 141,484 people rescued at sea in 2014. Traffickers use rubber and wooden boats, overloading them to the point of extreme danger. Rubber boats meet no safety requirements and consist of long tubular sections that can easily deflate, causing the boat to sink, something that happens all too frequently. The wooden boats have a more solid structure but are unstable given the excessive number of people embarked, many of whom are jammed into the lower areas of the boat, whose movements can make the boat capsize, especially when a rescue vessel is in sight, causing numerous deaths. The majority of these rubber or wooden boats depart from the western Libyan ports of Tripoli, Zuwarah and Gasr Garabulli.

Up to the first half of last year many of the wooden boats departed from eastern Libya, specifically from Benghazi, but this flow is now over, probably because of the disorders affecting that part of Libya.

There is currently a significant flow from Egypt using fishing vessels with the same problems described above: 15,283 migrants involved in this flow were rescued last year, while an additional 11,699 migrants from Turkey and Greece arrived on sail boats and motor boats in 2014. These are quite difficult to detect as they only carry a limited number of people on board who do not ask for help and can easily be mistaken for leisure boats. Most of the time the migrants are intercepted after they

have already reached Apulia, on the south-eastern coast of Italy or the Ionian coast of Calabria. Smaller groups of migrants leave Tunisia directed toward the island of Pantelleria or leave Algeria heading toward western Sardinia.

Although merchant ships or military ships sometimes are the first to detect boats carrying migrants and notify the IMRCC so that it can initiate SAR operations, most often it is the migrants themselves who contact the IMRCC by satellite phones provided to them by the traffickers, along with the appropriate phone numbers to call. Other times the IMRCC is contacted by migrants' relatives or friends or from NGOs when they receive information. When sat phone calls are received directly from migrants' boats, it's much easier to get their position through the company operating the sat service. Sometimes the migrants can read their position on their sat phone display but often their English is too poor to provide the coordinates. When it is not possible to detect the position of a call for distress it is very difficult to manage a SAR operation and it may take days to locate the boat, using planes, helicopters and ships. They are not always successful.

Why is the Italian Coast Guard so directly involved in rescue operations so far from the national SAR region and so close to the Libyan coast? The answer is simple: because IMRCC is almost always the first rescue center to receive distress calls from boats that are even 15 or 20 miles out from the Libyan coast, IMRCC is obliged by the SAR convention and IAMSAR manual to intervene, communicating the information to the MRCC responsible for the region. However it is not possible to do this in respect of Libya for reasons that are easily understood. Thus the IMRCC must coordinate SAR operations, diverting any merchant vessels in the vicinity, employing Navy or FRONTEX resources and sending Coast Guard assets. This is not only a legal obligation but also an ethical and humane one. But in order to provide help and assistance to boats so far from Italy (160-180 nautical miles), the IMRCC must be constantly aware of the maritime situation throughout a large part of the Mediterranean. To help them achieve this goal, the IMRCC has radio and satellite systems available to provide the position of all ships in a given area and constantly updated information such as their last port of call, port of destination, type of cargo on board, etc. All these systems allow them to monitor ship traffic and identify anyone in distress in a specific area.

There was, however, one type of migration event that differed from

those examined above and that did not involve the IMRCC. Last year, on September 28th, an old merchant ship, 56 m long, with no crew on board but occupied by 364 migrants, called the IMRCC for help as it entered the Italian SAR region. The people on board were rescued and the ship was towed to the harbor of Crotona, in Calabria. Since then, 14 other similar cases have occurred, 2 of which were managed by Greek and Turkish authorities. These vessels, in port waiting to be dismantled, were hired by the migrants and departed illegally from Turkish ports.

As the vessels entered the Italian SAR region, the IMRCC received a sat phone call requesting rescue while the traffickers left the ship adrift or blocked the steering wheel and controls on a course toward the Italian coast at a speed of about 10 knots. These were highly dangerous situations and in order to avoid a disaster the Italian Coast Guard had to deploy special teams on board helicopters to board and get control of the ship. So far they have always succeeded except for one case when they only managed to unblock the wheel and change course as the ship was just a couple of miles off the southern coast of Apulia. The ship was 75 m long and we can easily imagine what would have happened if it hadn't been diverted in time! The involvement of Turkish authorities demanded by Italy and strict controls of the Turkish Coast Guard seem to have stopped this kind of traffic, proving that international cooperation can achieve important results in avoiding casualties. The figures below, relative to migration flows during the first half of the current year, demonstrate that they are not decreasing at all and their characteristics remain basically the same:

DEPARTED FROM	year 2014 (until July, 14th)		year 2015 (until July, 14th)		Increase %
	events	persons	events	persons	
LIBYA	361	66.145	471	73.210	11%
GREECE	22	636	11	663	4%
TURKEY	7	378	10	1.749	363%
EGYPT	20	4.875	11	2.808	-42%
TUNISIA	23	333	6	119	-64%
ALGERIA	2	23	1	20	-13%
other flows	1	61	0	0	
<i>total</i>	<i>436</i>	<i>72.451</i>	<i>510</i>	<i>78.569</i>	

What is probably changing is Europe's awareness that a stronger collaborative effort must be made to avoid so many deaths at sea. That is why the IMRCC can now rely upon more governmental vessels flying

the flag of various EU countries to rescue migrants and more effective cooperation. Of course this is not the solution to migration problems, but it is an acceptable response to the request that the safety of migrants' lives at sea must be felt as a strong commitment not only by the Italian Coast Guard and Navy and by ship-owners, but also by the entire international community.

ANNEX

The Stakeholders “Naples Charter” – From Mare Nostrum to Triton and the Way Forward to Deal with Migration in the Mediterranean Sea

LA CARTA DI NAPOLI

“Proposte per Affrontare le Migrazioni nel Mare Mediterraneo”

MARSAFENET - il Network di esperti sugli aspetti giuridici della sicurezza in mare - e **JMCE Migranti** - il Centro di Eccellenza *Jean Monnet* sui diritti dei migranti nel Mediterraneo - entrambi aventi l'obiettivo di migliorare lo scambio di informazioni e di buone pratiche sulle migrazioni nel Mediterraneo tra tutte le parti interessate e di promuovere altresì l'elaborazione e l'adozione di idonee e concrete soluzioni,

Considerando il dibattito svoltosi nel corso dello *Stakeholder Workshop* dal titolo *From Mare Nostrum to Triton and the Way Forward to Deal with Migration in the Mediterranean Sea*, che ha avuto luogo lo scorso 15 maggio 2015 presso l'Università degli Studi di Napoli "L'Orientale", in Italia, (d'ora in avanti "lo *Stakeholder Workshop*"),

Esprimendo il proprio apprezzamento per l'intervento durante lo *Stakeholder Workshop* dei rappresentanti dell'Organizzazione internazionale per le migrazioni (IOM); dell'Alto Commissariato ONU per i Rifugiati - Agenzia ONU per i Rifugiati (UNHCHR); dell'Agenzia europea per la gestione della cooperazione internazionale alle frontiere esterne degli Stati membri dell'Unione Europea (FRONTEX); del *Defence College* della NATO; dell'Associazione italiana di studi giuridici (ASGI); del Consiglio Italiano per i Rifugiati (CIR); della Cooperativa sociale Dedalus; dell'Associazione Lotta all'Esclusione Sociale per lo Sviluppo del Mezzogiorno d'Italia (LESS), del *Migrant Offshore Aid Station* (MOAS); dell'Unione Forense per la Tutela dei Diritti Umani (UFTDU), ed esprimendo soddisfazione per gli sforzi compiuti da tali enti per affrontare il fenomeno delle migrazioni nel Mediterraneo,

Esprimendo il proprio apprezzamento per l'intervento, nel corso dello *Stakeholder Workshop*, dei rappresentanti della Guardia Costiera italiana e della Marina Militare Italiana, e prendendo atto dei dati illustrati riguardo alle operazioni di ricerca e soccorso dei migranti in mare,

Ringraziando il Presidente di *Augusta Offshore Spa* per l'intervento nel corso dello *Stakeholder Workshop* e sottolineando l'importante ruolo svolto dalle compagnie di navigazione, che spesso si trovano ad assistere in mare le persone in pericolo,

Ringraziando, per il loro contributo, gli esperti e gli studiosi della materia intervenuti durante lo *Stakeholder Workshop*,

Avendo preso in considerazione il quadro giuridico internazionale (convenzioni, risoluzioni e principi guida) applicabile al fenomeno in esame, i recenti risultati emersi dalle conclusioni del Consiglio europeo del 23 aprile 2015 e dalla risoluzione del Parlamento Europeo del 29 aprile 2015, nonché le ultime proposte per l'Agenda Europea sulle Migrazioni presentate dalla Commissione europea il 15 maggio 2015,

Esprimendo profonda preoccupazione per il crescente numero di migranti deceduti o scomparsi nel tentativo di attraversare il Mediterraneo mentre cercavano di raggiungere un luogo sicuro in Europa,

Prendendo atto dei risultati derivanti dallo "*Stakeholder Questionnaires – Migration at Sea: A comprehensive Approach*" che ha raccolto e analizzato i dati e le informazioni forniti da diverse categorie di *stakeholder* relativamente al controllo delle frontiere e alla sorveglianza marittima, da un lato, e alla protezione delle vite dei migranti in mare, dall'altro lato, e tenendo conto in modo specifico dei seguenti risultati:

- a) Il quadro normativo internazionale in materia è inadeguato poiché è stato adottato con lo scopo di disciplinare situazioni di pericolo diverse dal fenomeno attuale di massicci flussi migratori nel Mediterraneo. È necessario dunque uno sforzo finalizzato al rispetto in buona fede non solo degli obblighi che discendono dalle norme di Diritto del mare, ma anche di quelli che derivano dalle norme poste a protezione dei rifugiati e da quelle poste a salvaguardia dei diritti dell'uomo,
- b) Il quadro normativo nazionale è nella maggior parte dei casi poco chiaro e ambiguo; inoltre diverse disposizioni interne rischiano di criminalizzare l'assistenza umanitaria fornita ai migranti in difficoltà,
- c) È necessario che siano riveduti i criteri utilizzati per valutare le nozioni di "luogo sicuro" e di "pericolo" in modo da renderle conformi con gli standard derivanti dalle norme sui rifugiati e sui diritti dell'uomo ed evitare, quindi, il fenomeno dei respingimenti in mare e altre serie violazioni di tali norme,
- d) Sebbene la società civile svolga un ruolo fondamentale e particolarmente apprezzabile, il suo intervento deve essere previsto per far fronte solo a situazioni temporanee ed emergenziali, e non come soluzione permanente al problema. Agli Stati è richiesto di investire le risorse necessarie per predisporre servizi di ricerca e soccorso efficaci e sufficienti, e ciò in linea con quanto sancito dagli obblighi internazionali in materia.

Tutto ciò premesso, proponiamo alle istituzioni attive sia a livello nazionale sia a livello internazionale di:

1. Considerare la dimensione attuale del fenomeno migratorio nel Mare Mediterraneo come un fenomeno globale che, come tale, richiede un approccio comprensivo e sforzi condivisi tra gli Stati.

2. Rivalutare le operazioni di controllo delle frontiere alla luce dell'imponente fenomeno di migrazioni irregolari nel Mediterraneo. In particolare:

- L'Unione Europea dovrebbe predisporre nel Mediterraneo un'operazione di ricerca e salvataggio credibile ed efficace, sul modello di *Mare Nostrum*,
- Frontex dovrebbe svolgere in modo effettivo il suo duplice ruolo di coordinamento del sostegno operativo alle frontiere agli Stati membri che si trovano sotto la pressione dei flussi migratori e di ausilio nella protezione della vita dei migranti in mare;

3. Contrastare in modo più efficace il contrabbando e il traffico di migranti attraverso:

- Un'efficace cooperazione regionale ed internazionale tra gli Stati e attraverso misure effettive per prevenire il traffico di migranti nei Paesi di origine ed in quelli di transito;
- Una maggiore cooperazione tra gli Stati al fine di armonizzare le procedure giudiziarie contro i trafficanti;
- Una maggiore cooperazione finalizzata a favorire la più ampia ed efficace applicazione possibile delle norme internazionali sul di traffico di migranti.

4. Incoraggiare l'adozione di norme internazionali che fissino chiari criteri per determinare il concetto di "luogo sicuro" presso cui sbarcare i migranti, e ciò al fine di garantire l'effettiva tutela dei diritti umani, il rispetto del principio di *non-refoulement*, e una distribuzione più equa degli sforzi degli Stati membri di ospitare i sopravvissuti e soddisfarne diritti e bisogni;

5. Migliorare ed allargare i canali di accesso legale all'Europa, attraverso una revisione del Sistema di Dublino, nel pieno rispetto del diritto d'asilo, così come sancito nell'articolo 18 della Carta dei diritti fondamentali dell'Unione Europea, al fine di garantire il diritto dei rifugiati alla libertà di circolazione in Europa e quello al ricongiungimento familiare, favorendo, nel contempo, la creazione di canali alternativi di accesso sicuro e regolare tramite visti umanitari, semplificazione degli spostamenti e dei

ricongiungimenti familiari, allargamento dei programmi di lavoro, di ricerca e di studio;

6. Sostenere le compagnie di navigazione nei loro sforzi per salvare vite umane, attraverso chiare e sicure procedure di sbarco e il rapido coordinamento delle operazioni di soccorso, in modo da ridurre al minimo i danni economici e le perdite finanziarie cui esse possano andare incontro per ottemperare all'obbligo di salvare i migranti in mare.

Napoli, 20 giugno 2015



Chair
Dr. Gemma Andreone



Chair
Prof. Giuseppe Cataldi

THE CHARTER OF NAPLES

“The Way Forward to Deal with Migration in the Mediterranean Sea”

MARSAFENET - a network of experts on the legal aspects of maritime safety and security - and the **JMCE Migrants** - the Jean Monnet Centre of Excellence on Migrants’ Rights in the Mediterranean - which aim both to foster the exchange of information and practices among stakeholders and promote the adoption of feasible and suitable solutions,

Taking into account the discussion held at the Stakeholders Workshop *From Mare Nostrum to Triton and the Way Forward to Deal with Migration in the Mediterranean Sea*, which took place at the University of Naples “L’Orientale”, Italy, on the 15th of May 2015 (hereinafter the Stakeholder Workshop),

Acknowledging the intervention at the Stakeholder Workshop of the representatives of the IOM - the International Organisation for Migration -, UNHCR - the UN Refugee Agency -, Frontex - the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union -, the NATO Defence College, ASGI - the Italian Association for Juridical Studies, CIR - the Italian Council for Refugees -, *Dedalus Cooperativa Sociale*, LESS - *Lotta all’Esclusione Sociale per lo Sviluppo del Mezzogiorno d’Italia* -, MOAS - the Migrant Offshore Aid Station -, the *Unione Forense per la Tutela dei Diritti Umani*, and encouraging their work to deal with the phenomenon of migrations in the Mediterranean,

Acknowledging the contribution at the Stakeholder Workshop of the representatives of the Italian Coast Guard and the Italian Navy, and taking note of the data illustrated, concerning search and rescue operations of migrants at sea,

Grateful for the intervention at the Stakeholder Workshop of the President of Augusta Offshore S.p.a. and stressing the importance of shipping companies, which have assisted people in distress at sea,

Grateful for the contribution of the scholars who intervened at the Stakeholders Workshop,

Considering the applicable international legal framework, including conventions, resolutions and principles, and the recent outcomes of the European Council Conclusions of 23 April 2015, the Resolution of the European Parliament of 29 April 2015 and the latest proposals for the European Agenda on Migration presented by the European Commission on 15 May 2015,

Expressing concern regarding the recent increasing number of migrants who have died or have gone missing in the attempt to cross the Mediterranean Sea in order to reach a safe place in Europe,

Acknowledging the results obtained from the initiative “Stakeholder Questionnaires – Migration at Sea: A comprehensive Approach”, which assessed data and information provided by distinct categories of stakeholders on the two interrelated aspects of border control and maritime surveillance on the one hand and the saving and protection of migrants’ lives at sea on the other, and taking into specific account the following outcomes:

- a) The international maritime legal framework is inadequate as it was adopted to regulate situations of distress different from the current massive phenomenon of migration in the Mediterranean Sea. An effort is necessary for good faith compliance not only with Law of the Sea obligations, but also with those arising from complementary sources of refugee and human rights law,
- b) Most of the national legal framework is unclear, ambiguous and several internal provisions are likely to criminalize the humanitarian assistance provided by civil society to migrants in distress,
- c) It is necessary to review the criteria used to assess the place of safety and the notion of distress in line with refugee and human rights law standards, to avoid instances of *non-refoulement* and other serious harm,
- d) The role of civil society in the field of migration by sea is recognized and appreciated. Currently it is capable of responding to a temporary situation of emergency, but it cannot manage a permanent one. States need to invest the necessary resources to run effective and sufficient search and rescue

services, in line with the search and rescue obligations under international law.

To national and international policy makers we propose to:

Consider the current dimension of the phenomenon of migration in the Mediterranean Sea as a global phenomenon requiring a comprehensive approach and shared efforts among States.

Reassess border control operations in view of the current massive phenomenon of irregular migration in the Mediterranean Sea. In particular:

- The EU should promote a credible search and rescue operation in the Mediterranean, on the model of *Mare Nostrum*,
- Frontex should effectively fulfill its dual role of coordinating operational border support to Member States under pressure and helping to save the lives of migrants at sea;

Combat criminal smuggling and trafficking more efficiently through:

- Regional and international cooperation among States and through effective measures to prevent smuggling in the migrants' lands of origin and in transit States;
- Additional cooperation in the field of harmonization of judicial actions against smugglers and traffickers
- Additional cooperation to promote a wider and more effective application of the existing international provisions on Smuggling.

Encourage the adoption of international provisions including clear criteria to determine the place of safety to disembark migrants, in order to guarantee effective protection of human rights, compliance with the principle of *non-refoulement*, and a more equitable sharing of efforts among EU States to host survivors and meet their needs and legal entitlements;

Improve and expand legal channels of access to Europe, through a revision of the Dublin System, in full compliance with the right of asylum as recognized in Article 18 of the EU Charter of Fundamental Rights, in order to ensure the refugees' right to freedom of movement within Europe and the right to family reunification, encouraging the

creation of alternative channels of safe and regular access, *via* humanitarian visas, resettlement, easier family reunion, expansion of work, research and study programs;

Support shipping companies in their efforts to save lives, through clear docking schemes, disembarkation options, and rapid coordination of rescue operations, so as to minimize any economic damages and financial losses that they may incur in complying with their duty to rescue migrants at sea.

Naples, 20 June 2015



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Finito di stampare presso la *Grafica Elettronica* (Na)
nel mese di maggio 2016

