



Consiglio Nazionale delle Ricerche

Migration Issues before International Courts and Tribunals

Edited by Giovanni Carlo Bruno
Fulvio Maria Palombino
Adriana Di Stefano



CNR edizioni 2019



National Research Council of Italy
Institute for Research on Innovation
and Services for Development



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TABLE OF CONTENTS

Giovanni Carlo Bruno, Fulvio Maria Palombino, Adriana Di Stefano
Preface p. xi

Carola Lingaas

**1. Judicial Responses to the Migration Crisis: The Role of Courts in the
Creation of a European Identity** p. 1

1. Introduction.
2. Approaches, Hypotheses and Choice of Method.
3. Checks and Balances.
4. Fundamental Rights and Freedoms in the Case-law of the European
Courts.
5. Immigration, Borders, and Human Rights.
6. Migration, Human Rights, and Values.
7. Constructing a European Identity: ‘Otherness’ in the Case-law of the
ECtHR.
8. Migration, Expatriation, Globalisation.
9. Conclusion.

Fulvia Staiano

2. Questions of Jurisdiction and Attribution in the Context of Multi-Actor Operations in the Mediterranean p. 25

1. Introduction.
2. The Application before the ECtHR.
3. Extraterritorial Jurisdiction and the Concept of ‘Overall Effective Control’ on the High Seas.
4. Attribution of Conduct and the Allocation of Responsibility for Internationally Wrongful Acts.
5. Concluding Remarks.

Ruben Wissing

3. Allocating Responsibility for Refugee Protection to States: Actual and Potential Criteria in International (Case) Law p. 45

1. Introduction.
2. Refugee Protection and State Responsibility.
3. Territorial Jurisdiction and Externalisation.
4. First Mechanism: Attribution on the Basis of Extraterritorial Jurisdiction.
 - 4.1 European Case-law: Control, Authority, Effect.
 - 4.2 International Law and Decisions: Control, Relationship, Effect.
 - 4.3 Potential of Extraterritorial Jurisdiction for Refugee Protection: Impact, Instructions, Assistance.
 - 4.4 Beyond Jurisdiction: Alternative Allocation Mechanisms in International (Case) Law.
5. Second Mechanism: Allocation on the Basis of the Principles of Cooperation and Solidarity.
 - 5.1 International Law Concepts.
 - 5.2 Responsibility-sharing in International Refugee Law.
 - 5.3 Responsibility-sharing in Human Rights Law.
 - 5.3.1 *Erga Omnes* Obligation of Cooperation to Protect Peremptory Norms.
 - 5.3.2 Global Climate Policy and Human Rights.
 - 5.4 Solidarity in a Regional Context: EU Migration Law.
 - 5.4.1 Internal Dimension.

- 5.4.2 External Dimension
- 5.5 The Potential of Cooperation and Solidarity for Refugee Protection.
- 6. Third Mechanism: Allocation on the Basis of the Responsibility to Protect.
 - 6.1 The RtoP-doctrine in International Law.
 - 6.2 The Potential of the RtoP-doctrine for Refugee Protection.
- 7. Conclusion.

Edoardo Stoppioni

4. Les réfugiés en mer devant les juridictions internationales : vers la protection d'un droit international de l'hospitalité ? p. 91

- 1. Introduction.
 - 1.1 Un problème lié à la fragmentation du droit international.
 - 1.2 Un problème d'accès à la justice.
 - 1.3 Un problème philosophique.
- 2. Les discours juridictionnels sur l'applicabilité du principe de non-refoulement.
 - 2.1 Le rejet du découpage territorial de zones de non-droit.
 - 2.2 La condamnation de la non-applicabilité extraterritoriale du principe.
- 3. Les discours juridictionnels sur l'impact des droits de l'homme.
 - 3.1 Les garanties procédurales au cœur du régime de protection.
 - 3.2 Les conditions de traitement : l'approche de vulnérabilité.
- 4. Le silence juridictionnel sur l'étendue de l'obligation de secours en mer.
 - 4.1 Un droit individuel au secours en mer ?
 - 4.2 Les contours incertains de l'obligation de secours en mer
- 5. Conclusion.

Francesco Luigi Gatta

5. The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights p. 119

1. Introduction.
2. The Expulsion of Aliens as the Paradigm of the Tension between State Sovereignty and Migration.
 - 2.1 The Extended Protection against Expulsion through the Dynamic Interpretation of the ECHR: the Prohibition of Torture and the Principle of *non-refoulement*.
 - 2.2 Further Extensions of Migrants' Protection under Article 3 ECHR: the Indirect Refoulement and the 'Dublin Cases'.
3. The Prohibition of Collective Expulsion of Aliens.
 - 3.1 Personal Scope of Application.
 - 3.2 Territorial Applicability and Jurisdiction.
 - 3.3 The Notion of Expulsion.
 - 3.4 The Collective Character of the Expulsion.
 - 3.4.1 The Size of the Group of Aliens.
 - 3.4.2 The Circumstances Surrounding the Adoption and the Implementation of the Expulsion Order.
 - 3.4.3 The Discriminatory Character of the Expulsion.
4. Concluding Remarks.

Maria Sole Continiello Neri

6. The Russian Law on Refugees through the lens of the European Court of Human Rights p. 147

1. Introduction.
2. The principle of *non-refoulement*: the International and Regional Framework.
 - 2.1 Extending the Boundaries of the Risk Assessment Test
3. The Russian Law on Refugees.
4. Expulsion and Extradition in Russia.
5. Strasbourg Criticism to the Russian Federal Law on Refugees and its Implementation.

6. Bypassing the Interim Measures: Abductions and Irregular Transfers in Russia.
7. Conclusion.

Patrizia Rinaldi

7. *Refoulement* at the Border Undermines the Best Interest of the Child:

Preliminary Remarks p. 179

1. Introduction.
2. Setting the Context.
3. Protecting Borders across Europe.
4. The Border Blackout.
 - 4.1 *N.D. and N.T. v. Spain*.
 - 4.1.1 Spanish Legislative Framework.
 - 4.2 *Sharifi and Others v. Italy and Greece*.
 - 4.2.1 Italian Legislative Framework.
5. Analytical Findings.
6. Conclusion.

Encarnación La Spina

8. The Protection of the Migrant Parent-Child Relationship in Spanish and Supranational Jurisprudence: a Sensitive or a Sensible Approach?

p. 201

1. Introduction.
2. The Shift from a Sensible to a Sensitive Approach to the Situation of Migrant Families in Strasbourg Case-law.
 - 2.1 A Preliminary Version of the ‘Sensible Approach’ in Case-law of the ECtHR.
 - 2.2 A Turning Point in the Protection of the Right to Family Life in Favour of Relations between Parents and Minor Children in *Difficult v. Exceptional Circumstances*.
 - 2.3 A Singular Regression to a Sensible Approach: Parent-Child Relationship in Adult Ages.
3. A Two-Speed Approach to Family Life in the Case-law of the CJEU.

- 3.1 The Right to Family Life of Third-Country Nationals who are Relatives of EU Citizens: Supporting the ‘Sensitive Approach’.
- 3.2 The Special Protection of Family Life for EU Citizen Minor Children and Third-Country National Parents: the ‘Sensitive Approach’ Used in the *Rendón* case.
4. The Minimal Impact of a Rights-Protective Approach to Family Life in the Case-law of the Spanish *Tribunal Constitucional*.
 - 4.1 The Shift from a Sensible to a Sensitive Approach in the Case-law of the Spanish *Tribunal Constitucional*: a Regressive Paradigm.
 - 4.2 The Impact of Judgment 186/2013 of the *Tribunal Constitucional*: an Unexpectedly ‘Sensitive Approach’.
5. Final Remarks.

Luca Paladini, Nicolás Carrillo Santarelli

9. Migration Issues in the Inter-American System of Human Rights: the Development of an increasingly Humane *Jus Migrandi* p. 223

1. Preliminary Remarks.
2. Migration Issues before the Inter-American Commission on Human Rights and Other OAS Bodies.
3. The IACtHR Case-law on Migration: General Aspects.
 - 3.1 A Focus on More Vulnerable Migrants: Irregular Migrant Workers and Children.
 - 3.2 Migration and Nationality.
 - 3.3 The *non-refoulement* Principle.
 - 3.4 Asylum and Refugees.
 - 3.5 Mass Deportations.
 - 3.6 The Contributions of the IACtHR to the Delineation of the Duty of States to Protect Migrants from non-State Abuses.
 - 3.7 A Tension between Sovereignty and Limits on State Action in Relation to Migration Aspects?
4. Final Remarks: Distilling the Essence of the IACtHR Case-law on Migrants.

Spyridoula Katsoni

10. Gender Perspectives in the Application of Existing International Rules and Standards of Refugee Law p. 275

1. Introduction.
2. Jurisprudence as the Ideal Means of Gender Sensitive Application of Rules and Standards of International Refugee Law.
3. A Gender Sensitive Interpretation of International Refugee Law Treaties.
 - 3.1 . The Interpretative Rule of VCLT Article 31.
 - 3.1.1 The Interpretative Means of VCLT Article 31(1).
 - 3.1.2 The Interpretative Means of VCLT Article 31(3).
 - 3.2 The Interpretative Rule of VCLT Article 32.
4. International Jurisprudence and the Principle of Systemic Integration.
5. Epilogue.

Sara De Vido

11. Escaping Violence: the Istanbul Convention and Violence against Women as a Form of Persecution p. 301

1. Introduction and Scope of the Analysis.
2. The Silence of the UN Convention on Refugee Status on Gender-Based Violence as Ground to Recognise Refugee Status.
3. Is Violence against Women a Form of Persecution? From the UN Guidelines to the Council of Europe Istanbul Convention.
4. Violence *Because* They are Women or *As* They are Women. The Case of Female Genital Mutilation and Domestic Violence in the Jurisprudence of the European Court of Human Rights.
5. How to Assess Violence against Women as a Form of Persecution? Issues of Credibility and the Situation in the Country of Origin.
6. States' Due Diligence Obligations in Protecting Women from Violence: Setting a Higher Standard of Protection in Refugee Law in Light of the Istanbul Convention.
7. Conclusions.

Maria Manuela Pappalardo

12. Framing the ‘Risk Assessment’ Test in Women’s Asylum Claims: A Critical Analysis of Domestic Jurisprudence vs. the European Court of Human Rights’ Approaches p. 331

1. Introduction.
2. The ‘Risk Assessment’ Paradigm in International-Protection Claims: a Proposal.
3. Testing the Risk Paradigm: the Real Risk of Being Trafficked for Sexual Exploitation.
 - 3.1 The Persecution.
 - 3.2 The Present Threat and Risk Factors.
 - 3.3 The IPA Test.
4. Sketching the Risk Assessment in the Case-law of ECtHR
5. Conclusions.

Chiara Tea Antoniazzi

13. A Tale of Two Courts: The EU-Turkey Statement before the Court of Justice of The European Union and the European Court of Human Rights p. 355

1. Introduction.
2. Prologue: Facts and Figures of the EU-Turkey Statement.
3. Act I: The Court of Justice of the European Union and the Legal Nature of the Statement.
4. Act II: The European Court of Human Rights and the Compliance of the Statement with Human Rights.
5. Is This the End of the Story? The Future of the EU-Turkey Statement before the Two Courts.
6. Beyond the EU-Turkey Statement: Other Arrangements in the Field of Migration.

Giuseppe Morgese

14. The Dublin System vis-à-vis EU Solidarity before the European Court of Justice: The Law, The Whole Law, and Nothing But The Law! p. 381

1. Introduction.
2. The Legal Framework: The Dublin System and EU Solidarity Provisions in Asylum Matters.
3. A Pragmatic-But-Not-Bold Approach by the ECJ.
 - 3.1 The Limited Role of Article 80 in Itself in Disputes before the ECJ Involving the EU Institutions...
 - 3.2 ... and the Member States.
 - 3.3 The Full Effectiveness of Solidarity-Based Measures Provided for in the EU Secondary Law.
4. Concluding Remarks

Vassilis Pergantis

15. The ‘Sovereignty Clause’ of the Dublin Regulations in the Case-law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence?

p. 409

1. Introduction.
2. The Scope of the ECtHR’s Powers of Review Regarding the Dublin System.
3. Setting the Stage for the Dialogue between the ECtHR and the CJEU on the ‘Sovereignty Clause’: the *M.S.S.* Case.
4. The CJEU’s Response and the Ensuing Dialogue: The *N.S./M.E.* Case and Beyond.
 - 4.1 The Dublin System under the Influence of the Systemic Deficiencies Saga: The Factual Contours of the Sovereignty Clause.
 - 4.1.1 The Conundrum between Systemic Deficiencies and Individualized Risk.
 - 4.1.2 Can the Presumption of Safety Be Rebutted in Situations not Involving a Risk of Inhuman or Degrading Treatment?
 - 4.2 From Discretion to Obligation and Back: The Legal Contours of the ‘Sovereignty Clause’

- 4.2.1 The Scope of the Obligation to Assess the Risk.
 - 4.2.2 Between the Obligation to Prevent the Return of the Asylum Seeker and the Discretion to Examine His/Her Application: The Ambiguities of the Dublin Regime.
5. Conclusion.

Tamás Molnár

16. The Case-Law of the EU Court of Justice on the Return Directive and the Role of International Human Rights Law: ‘With or Without You’?

p. 435

- 1. Introduction and Scope of Scrutiny.
- 2. The *Völkerrechtsfreundlichkeit* of the Return Directive.
- 3. . The CJEU Jurisprudence on the Return Directive and International Human Rights Law.
- 4. Reasons behind the CJEU’s Distancing from International Human Rights Law.
- 5. Concluding Remarks.

Abstracts p. 461

Authors’ and Editors’ Bios p. 471

PREFACE

Migration is of course one of those issues in respect of which international courts and tribunals increasingly exercise their jurisdiction. Still how they perceive this task is not altogether clear, going so far as to switch between judicial passivism and activism.

In detail, according to a more orthodox approach, which considers the judge to be a mere executor of the law, the main or exclusive function of a tribunal lies in deciding a given case in accordance with the law (judicial passivism). This kind of approach may be observed in a series of judgments passed by the EU Court of Justice such as that on the 2016 EU-Turkey Statement (see Chapter No. 13 – Antoniazzi). And indeed, in this case, moving from the assumption whereby the Statement would be a measure adopted by EU member States and could not be regarded as an act of a European Institution (in line with Art. 263 of the TFEU), the Court declared its lack of jurisdiction and accordingly refrained from ascertaining whether the Statement had a mere political nature or, quite the opposite, was a veritable treaty producing as such binding legal effects.

From a different perspective, the judge is not meant to limit him/herself to the settlement of the dispute in hand but should, where possible, identify the issues of particular interest, and in this regard make “general pronouncements [...] that may enrich [...] the law”.¹ This is the way the so-called judicial activism may be carried

¹ See GERALD FITZMAURICE, “Hersch Lauterpacht – The Scholar as Judge”, *British Yearbook of International Law*, 1961, p. 14 ff., p. 15.

out and thereby promote the progressive development of law (both domestic and international). In the field of migration law, a clear manifestation of this activism can be found in the case-law of the European Court of Human Rights, i.e. in its attitude both to identify some fundamental general principles, like that of *non-refoulement* (see Chapters Nos. 5 – Gatta – and 7 - Rinaldi), or to resort to evolutionary interpretation, for example with the view to using a gender perspective in the application of pre-existing international rules and standards of refugee law (see Chapter No. 10 - Katsoni).

Yet if one accepts a broad notion of judicial activism, it will manifest not only in the case where some issues are decided using general solutions that go beyond the dispute, but also where some issues are not decided at all. In this sense also the decision on the EU-Turkey Statement might be regarded as symptomatic of judicial activism, viz. as the Court of Justice's desire "to accommodate itself to political reality and the Member States' intentions, without having to rule on their compliance with EU law".²

All these manifold expressions of judicial activism are taken into account in the present volume, whose ultimate aim is to provide a comprehensive review of the international judge's role as to the development and/or application of migration law; and in that respect to foster a critical debate among experts, scholars and policy makers.

A Reader's guide

This volume is intended to collect selected contributions on the role of international Courts and Tri-bunals in the development and/or application of migration law, fostering a dialogical approach among scholars, experts and policy makers in addressing relevant issues of judicial practice in the field.

It provides a comprehensive critical review of international case-law on both general and specific questions arising in specific domains of international law related to human migration, such as the contours of international responsibility for refugee pro-

² See GOLDNER LANG, "Towards 'Judicial Passivism' in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference", *EU Immigration and Asylum Law and Policy*, 24 January 2018, available at: <<http://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/>>.

tection, migrants' human rights at sea, judicial standards on the protection of vulnerable groups.

A key aim of the collection is to contribute to the assessment of the extent to which international judges have played or could play a law-making role in the field of international migration law: the authors use the analysis of international judicial practice as a perspective from which to engage in the evaluation of current migration law challenges taking into account crosscutting matters on dialogues, consistencies or clashes among international (and supranational) jurisdictions and supervisory bodies, as well as normative interactions with rules of both international human rights law and other fields of international law.

In this context, each essay's scope covers specific issues elaborating in depth upon questions arising within its main focus: a variety of views and approaches emerges from the arguments raised by different authors engaged with selected topics of migration law before international courts and tribunals.

Special attention is paid throughout the volume to issues of human rights, given their centrality in international adjudication on migration and refugee law in times of crisis (suffice it to mention massive movements of people at sea, as well as de facto or de iure emergency situations in Europe and beyond).

The volume is opened by a chapter (Lingaas) on the role of courts in the creation of a European identity. The author observes the jurisprudential attitudes on migration issues of the ECtHR and the CJEU in a wider perspective, questioning if and how the European regional courts contribute to the construction of a (perceived) Europeaness, based on shared European values.

The following pair of chapters (Staiano and Wissing) tackle general questions of international law, respectively going into the problems of jurisdiction and attribution in the context of multi-actor operations and analyzing the case-law on refugee protection through the responsibility lens.

Stoppioni's chapter highlights the limits, potentials and paradoxes of fragmented legal regimes regulating transnational maritime migrations: drawing on Balibar's "droit international de l'hospitalité" in light of traditional theoretical approaches, he critically addresses normative and philosophical questions on migrants' effective standards of protection as developed by international jurisdictions.

The successive bunch of chapters pertains to the case-law of the European Court of Human Rights (ECtHR) on specific migration issues (Gatta, on collective expulsions of aliens; Continiello Neri, with a thorough perusal of Strasbourg Case-law on

the Russian Law on migration) and its interactions with other regional and supranational counterparts, taken from the European Union legal order (Rinaldi, Antoniazzi, Pergantis).

The contributors grapple with much-disputed topics in international and European Laws of migration (such as the non-refoulement), providing a thorough analysis of recent developments in international and national jurisprudence.

The protection of refugees, asylum-seekers and migrants forms an integral part of international law, and both States and the EU have clear obligations to protect any person fleeing persecution or serious risks, to rescue people in distress and to ensure that their rights - including the right to life and to protection from refoulement - are upheld. Nevertheless, in recent years certain European States have extensively adopted restrictive attitudes towards refugees and migrants. Investigating national and supranational courts case-law clearly shows that judicial approaches have consolidated these legal obligations. Whilst States undoubtedly have the right to control their borders and ensure security, they also have the duty to effectively protect the rights enshrined in human rights, migration and refugee law, whether at an international or European level.

A picture of the Inter-American judicial approaches is drawn in a specific chapter (Paladini and Carrillo Santarelli), to show the 'essence' of the contribution of the Inter-American system of human rights to protect human rights of migrants.

Several reading paths can be followed by the readers of this book, due to the variety of the issues covered by the authors. The first and most comprehensive one goes into the case-law of the European international and supranational courts, the ECtHR and the Court of Justice of the European Union (CJEU), at times compared each other or to national courts approaches. This allows the reader to detect the ways through which a European approach to these problems can be built, also confronting it with the strategies and views elaborated in other regional contexts.

This path goes from general issues to special and particular ones: a focus is devoted to judicial practices on vulnerability and migration, also explored under gender-sensitive approaches (Katsoni, De Vido). The volume includes contributions on women and children rights in migratory contexts (Rinaldi, La Spina, Pappalardo) aiming at detecting tailored standards in refugee protection. This track begins with Rinaldi, exploring the case-law of the ECtHR to better understand the role of the best interest of the child as a pivotal tool in judging cases where migrant minors are in-

volved, whereas La Spina elaborates on the distinction between a “sensitive approach” and a “sensible approach” in the evolution of international judicial practice concerning law stories dealing with parental relations. Katsoni looks into the ways existing rules of international refugee law could amount to acceptable standards of female refugees’ and asylum seekers’ protection; De Vido investigates on how and to what extent the notion of gender-based violence, as defined by the 2011 Istanbul Convention, can be equated to persecution as defined in the 1951 Geneva Convention. Pappalardo offers an insight of selected national and international case-law on migrant women sketching from judicial approaches a risk assessment frame to be tested when examining asylum seekers’ cases.

Further relevant issues on the understanding of Common European Asylum System at courts are thoroughly investigated by Antoniazzi, Morgese, Pergantis, Molnar. Their reflections on CJEU’s approaches on migration and refugee law suggest some provocative critiques of the application of the Dublin system, as exemplified by the EU Turkey statement before European courts (Antoniazzi), the ambiguities of the solidarity rationale laying behind the overall EU model (Morgese), the paradoxes of the ‘sovereignty clause’ in the field (Pergantis) and the conundrums raised by the Return directive (Molnar).

Going through the pages of this book will show how challenging and multifaceted is the analysis of international courts’ approaches to these issues and offer a vivid picture of their contribution to the definition of a transnational judge-made legal regime.

Eventually, at least another reading path can be traced from these collected essays and it is precisely the one inspired by what is common use to define as a transnational law driven perspective. As a matter of fact, all the judicial materials, attitudes and trends commented below amount to a comprehensive approach to migration issues which is ultimately not just international nor national, but rather transnational. In other words, the reflections gathered can also be read, even if they were not intended to be, as essays in transnational law: their narratives and legal reviews show, in a thought-provoking manner, the pivotal role of judicial actors and judicial law-making in the reassessment of inherited legal regimes towards a transnational *ius migrandi*.

The volume *Migration Issues before International Courts and Tribunals* stems from the cooperation between the Department of Law of the University of Naples Federico II and the Institute for Research on Innovation and Services for Development (IRISS) of the National Research Council of Italy on studies on Migration and Development.

We would like to thank the colleagues who enthusiastically replied to the call for papers and made the publication of this volume actually possible.

We are particularly grateful to Giovanna Adinolfi, Francesca Capone, Federico Casolari, Valeria Di Comite, Francesca Ippolito, Francesca Martines, Emanuela Pistoia, Flavia Rolando, Stefano Saluzzo, Alessandra Viviani, reviewers of the draft contributions.

We would like to thank also Angela Petrillo and Stefano Carotenuto, for the graphic project of the cover and the assistance in the preparation of camera-ready file, respectively.

Napoli, 27 December 2019

Giovanni Carlo Bruno
Fulvio Maria Palombino
Adriana Di Stefano

1. JUDICIAL RESPONSES TO THE MIGRATION CRISIS: THE ROLE OF COURTS IN THE CREATION OF A EUROPEAN IDENTITY

*Carola Lingaas**

SUMMARY: 1. Introduction – 2. Approaches, Hypotheses and Choice of Method – 3. Checks and Balances – 4. Fundamental Rights and Freedoms in the Case-law of the European Courts – 5. Immigration, Borders, and Human Rights – 6. Migration, Human Rights, and Values – 7. Constructing a European Identity: ‘Otherness’ in the Case-law of the ECtHR – 8. Migration, Expatriation, Globalisation – 9. Conclusion

1. – Introduction

Europe has been struck by what is commonly described as a ‘migration crisis’.¹ The crisis has resulted in the upsurge of far-right and nationalist parties, supported by their voters’ fear and resentment of migrants.² However, in the assessment of migration and the perception thereof, the jurisprudential pillar is commonly overlooked.

* The author would like to thank Armin Khoshnewiszadeh for his research assistance.

¹ CARDWELL, “Tackling Europe’s Migration ‘Crisis’ Through Law and ‘New Governance’”, *Global Policy*, 2018, p. 73 on the fact that migration is presented as a crisis, and less a humanitarian one than a security threat. Similarly: BOELES et al., *European Migration Law*, 2nd ed., Cambridge, 2014, p. 28.

² Several studies suggest the existence of a link between integration policies and public opinion on immigrants. For an overview, see CALLENS, “Integration Policies and Public Opinion: In Conflict or in

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 1-24.

This chapter aims to (partially) fill that gap by examining if and how the European regional courts contribute to the construction of a European identity, based on shared European values. It is in times of crisis that identity changes are most probable,³ but is this true for jurisprudence too? In taking a foremost human rights-based approach to analysing the treatment of migrants, this chapter seeks to advance knowledge and insight into the role of the European Court of Human Rights ('ECtHR') and, to a lesser degree, the Court of Justice of the European Union ('CJEU') for the construction of a (perceived) European identity. Based upon ostensible differences between 'us' and 'them', this European identity is contrasted to the one of the 'others' from beyond Europe.

The chapter will draw attention to the manner in which the European courts contribute to the creation or reinforcement of a (perceived) Europeanness, which has a reciprocal impact on (foreign) policy considerations.⁴ The law and the jurisprudence of the regional European courts are highly effective tools to influence and change popular and political understandings of migration.⁵ While especially the ECtHR traditionally maintained a strong institutional standing, the Court does increasingly seek the approval of its constituencies, the State Parties, and can therefore not be viewed as isolated from the political forces, among other populism and increasing nationalism, surrounding it.⁶

The chapter will, among other, scrutinize the language used in judgments of the European courts in their discussion of migration.⁷ There are some indications that the ECtHR attaches a positive connotation to migration from within Europe, consistent

Harmony?", *LISER Working paper* No. 2015-02; ALSTON, "The Populist Challenge to Human Rights", *NYU School of Law Research Paper* No. 18-05, 2018, pp. 7 and 11.

³ LEEK, MOROZOV, "Identity Beyond Othering: Crisis and Politics of Decision in the EU's Involvement in Libya", *International Theory*, 2018/10, p. 123.

⁴ On the central role of foreign policy for the production of identity, see LEEK, MOROZOV, *cit. supra* note 3; CAMPBELL, *Writing Security: United States Foreign Policy and the Politics of Identity*, Minneapolis, 1992.

⁵ See related LANGFORD, "International Courts and Public Opinion", 28 February 2018, available at: <<https://ssrn.com/abstract=3131863>>.

⁶ STOYANOVA, "Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights", *European Journal of Legal Studies*, 2018, pp. 90 and 122-123; BAUMGÄRTEL, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, Cambridge, 2019, pp. 102 and 156.

⁷ On the importance of linguistic practices for the creation of identities in politics, see LEEK, MOROZOV, *cit. supra* note 3, p. 126.

with the principle of free movement, a right granted to citizens of the European Union ('EU'). The ECtHR's favourable approach to migration from within is illustrated by the use of positively loaded terms such as 'opportunities', 'positive', 'globalisation', while reverting to negative connotations in discussing migration from beyond ('challenges').⁸ Paradoxically, the positive effects of globalism seem to be limited to the European context only, and, hence, 'globalisation' acquires a distinctively regional rather than universal flair in the case-law of the court.⁹

This chapter discusses two strands of arguments: the first strand explores the rule of law and whether the courts are influenced more by political guidelines rather than the law. The second strand looks at what the European regional courts consider traditional European values, and whether these values are a judicial creation in response to the migration crisis.¹⁰ In the context of this discussion, is the ECtHR still worthy of its designation as the "lighthouse" for those who seek protection?¹¹ Is the Court really the "crown jewel"¹² and "flagship"¹³ of the Council of Europe, as certain of its Member States see it? Indeed, the question arises whether the lighthouse does not guide individuals into safe haven any longer. Does, rather, the ship increasingly sail under the flag of Euronationalism and thus contribute to the polarization of Europeans and migrants, who as 'others' do not share the same set of European values?

⁸ See for instance, European Court of Human Rights, *Shindler v. The United Kingdom*, Application No. 19840/09, Judgment of 7 May 2013, paras. 37-59.

⁹ Research on European legal culture to a certain extent confirms this hypothesis. See GRØDELAND, MILLER, *European Legal Cultures in Transition*, Cambridge, 2015, p. 6.

¹⁰ On the alleged judicial activism of the ECtHR in the field of migration: LAVRYSEN, "Is the Strasbourg Court Tough on Migration?", 5 December 1992, available at: <<https://strasbourgobservers.com/2012/12/05/is-the-strasbourg-court-tough-on-migration/>>.

¹¹ MIJATOVIĆ, "Continued Reform of the European Human Rights Convention System: Better Balance, Improved Protection", Address by Council of Europe Commissioner for Human Rights, 12 April 2018, Document No. CommDH/Speech (2018), p. 3.

¹² MÄLKSOO, "Introduction Russia, Strasbourg, and the Paradox of a Human Rights Backlash", in MÄLKSOO, BENEDEK (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge, 2017, p. 3.

¹³ As referred to by the Norwegian government, in: <<https://www.regjeringen.no/no/tema/utenrikssaker/menneskerettigheter/innsikt/norge/id578539/>> (all translations by the author). The Committee of Ministers of the Council of Europe reconfirmed its commitment to the ECHR and the ECtHR in the recent Copenhagen Declaration, available at: <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf>.

2. – *Approaches, Hypotheses and Choice of Method*

This chapter works with the hypothesis that the European regional courts, although formally independent from the legislative and executive of the European Council and the EU, respectively, are nonetheless influenced by the current political sentiments. The point of departure is the assumption that the European courts play a significant, yet not well-recognised and severely under-researched role in the construction of a European identity. This chapter is apprehensive that the courts, in their case-law, clearly position themselves as to the question of migration and the human rights of marginalized people not fitting into the understanding of an European ‘us’.¹⁴ As such, it resonates Marie-Bénédicte Dembour’s concerns that the ECtHR implicitly shares a discourse, and arguably also values, that conceive migrants a threatening others.¹⁵

With an ever-increasing caseload, including numerous cases dealing with migration, the courts assume an important responsibility for a common European response to migration. Judgments and decisions do affect and reflect back on the Member States, their administration, their citizenry, and the migrants themselves. As such, focus should be shifted from analysing the effects of the executive (and to a lesser degree the legislative) powers in Europe, to increasing the scrutiny of the judiciary. Thus, this chapter has the underlying objective to create a consciousness of the role that courts play in the creation of a European identity. Interconnected, this chapter also urges an increased attention of legal scholarship to the use of non-binding soft law, as contained in policy documents, and its reference in the case-law of the ECtHR and the CJEU.¹⁶

This chapter applies traditional legal methodology in analysing treaty law, case-law and legal doctrine. However, being situated in the borderland between law and politics, it will also draw on scholarship from the political sciences and related disciplines. Same is valid for academic publications on migration, group identities and so-called ‘othering’, if considered useful to strengthen the arguments. Beyond scholarly writings, this chapter critically examines official reports, documents, and web-sites of the EU and the European Council.

¹⁴ See for a similar concern, STOYANOVA, *cit. supra* note 6, pp. 83, 125.

¹⁵ DEMBOUR, *When Humans Become Migrants*, Oxford, 2015, p. 504.

¹⁶ On the growing significance of soft law for the legal treatment of migrants, see CARDWELL, *cit. supra* note 1, pp. 68, 71-72.

3. – *Checks and Balances*

“The fundamental principles of the separation of powers and judicial independence are considered central tenets of all liberal democracies, everywhere and in every time. And rightly so”, said Marta Cartabia, Vice President of the Italian Constitutional Court, in her speech in occasion of the opening of the ECtHR’s judicial year 2018.¹⁷ In reverting to Montesquieu’s *The Spirit of Laws*, Cartabia emphasised that the separation of powers and judicial independence are basic conditions for the effective protection of individual rights and liberties, in order to guarantee to each individual an effective remedy against any breach of rights.¹⁸ A traditional nation State is structured upon the separation of powers, according to which the executive, legislative and judiciary branches are separated and independent from each other.¹⁹ In a functioning State, it would accordingly be worrisome if the executive or legislative could directly influence the outcome of the judiciary’s decisions. Note that the legislative indirectly influences the judiciary, since it adopts laws that the courts apply. As a matter of fact, the laws of a democratic State will always reflect the current electorate and political tendencies. For obvious reasons, same is valid for regional or international institutions. On the supranational level, in our case the EU, a similar system of checks and balances is put into place. Article 2 of the consolidated version of the Treaty on European Union (2008) explicitly links the rule of law with the notion of human rights: “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”.²⁰ It is broadly acknowledged that these principles include the idea of a separation of powers.²¹ Yet, the separation of powers is less clear-cut at the EU level than in many of its member States, particularly with regard to the legislative and executive branches. CJEU Judge and Professor of Law Allan Rosas points out that legislation is passed by the EU Council, which consists of a ministerial representative of each Member State. In many cases, however, the Council acts jointly with the European Parliament, consisting of elected

¹⁷ CARTABIA, *The Authority of the Judiciary Separation of Powers and Judicial Independence: Current Challenges*, 26 January 2018, p. 1, available at: <https://www.echr.coe.int/Documents/Speech_20180126_Cartabia_JY_ENG.pdf>.

¹⁸ *Ibid.*

¹⁹ Available at: <<https://www.britannica.com/topic/checks-and-balances>>.

²⁰ Consolidated Version of the Treaty on European Union, OJ C 115, 9 May 2008, p. 13 ff.

²¹ ROSAS, “Separation of Powers in the European Union”, *The International Lawyer*, 2007, p. 1034.

representatives.²² This process of so-called ‘codecision’, where the Council acts together with the Parliament, is used for areas of exclusive competence of the EU, or shared competence with the Member States.²³ Thus, the responsibilities of the executive and the legislative are blurred, with a risk of jeopardising the rule of law. It is this structural configuration of the EU that demands increased attention, as it reflects in the jurisprudence of the European courts. In her above mentioned speech, Cartabia requests the preservation of the main dividing line between political institutions and institutions of protection. In her view, the judicial independence is put at risk when the clear duality between government and the judicial branch is distorted. Although, in her speech, Cartabia probably did not have the ECtHR and the European political institutions in mind, her call for preservation is equally valid for them. Thus, not only the executive and the legislative, but also the executive and the judicial branch are not as clearly separated as one would expect. Importantly, Cartabia points out that judge-made law is an important factor that can unhinge checks and balances, since judges act as law-makers rather than law-appliers.²⁴ If the parliamentary legislation is of poor quality, the interpretative power of judges expands “hugely, in the form of value-oriented interpretation”,²⁵ a matter of particular significance to the present discussion on the interpretation of ostensible European values. Given that the ECHR is a living instrument, which is subject to dynamic interpretation, such law-making is acceptable within certain limits. Considering that human rights law aims at protecting individuals from excessive State power, an expansion of the individuals’ rights by means of a dynamic interpretation generally seems justified. While the Court has to decide on how to interpret imprecise provisions or adopt the laws’ application to new, unforeseen circumstances, it may nonetheless not trespass the boundaries of what the law is meant to regulate. Erik Voeten points out that the inherent subjectivity of judicial discretion of a rights review is understood as a political defeat: the Russian president Vladimir Putin, for example, claimed that the *Ilaşcu* decision by the ECtHR was a “purely political decision, an undermining of trust in the judicial international system”.²⁶ It could be argued that the ECtHR’s dynamic interpretation

²² *Ibid.*

²³ Available at: <<https://www.consilium.europa.eu/en/council-eu/decision-making/>>.

²⁴ CARTABIA, *cit. supra* note 17, p. 2.

²⁵ *Ibid.*

²⁶ VOETEN, “Politics, Judicial Behaviour, and Institutional Design”, in CHRISTOFFERSEN, MADSEN (eds.), *The European Court of Human Rights between Law and Politics*, Oxford, 2011, pp. 61-62. See

is a Pandora's box that creates more problems than it solves. Disregarding, for the sake of the argument, the already controversial relationship between the ECtHR and Russia,²⁷ judicial interpretations that are considered subjective judge-made law could be seen as counterproductive to the whole human rights system. Since the concerned States, for whatever (legal, political or moral) reason, do not recognise the judgment as impartial, they are unwilling to acknowledge the decision, thereby leading to a backlash for human rights of the affected individuals.²⁸ Oddly, both side make the argument of politicization: the Court holds that the respondent State disregards its decisions for political reasons (e.g. in order to continue with human rights violations), while the State claims the Court is interfering with its politics (e.g. by not respecting the margin of appreciation) by politicizing the law.²⁹ The non-compliance³⁰ of States with judgments rendered by the ECtHR in cases of migration is arguably also tainted with politics. The stronger the pushback against the migrant 'others' in the domestic political sphere, the more unlikely the respondent State is willing to respect and comply with supranational decisions that determine a violation of the migrants' freedoms and rights, especially if these decisions entail a liberal, inclusive, and non-nationalist interpretation of the law.

Matej Avbelj convincingly argues that the CJEU, prior to the adoption of the Treaty of Maastricht, in a similar manner developed and introduced an unwritten, hence judge-made, standard of human rights protection for the EU and its institutions. In what he terms a human rights "inflation", Avbelj shows that the EU in the case of *Wachauf v. Germany* expanded this standard beyond the institution itself to

European Court of Human Rights. *Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004.

²⁷ For an analysis of the relationship, see: MÄLKSOO, "The European Court of Human Rights and Russia: Quo Vadis?", 22 November 2018, available at: <<http://www.cambridgeblog.org/2018/11/the-european-court-of-human-rights-and-russia-quo-vadis/>>.

²⁸ MÄLKSOO, *cit. supra* note 12, pp. 3-25, concluding that realism has to prevail in dealing with States with anti-liberal history and ideology. Mälksoo considers the weakness of theories of human rights socialization that they tend to suggest universal models without duly taking into account the specific country contexts.

²⁹ For the case of Russia, see, GRIFFIN, Russia could withdraw from European Convention on Human Rights, state news agency RIA reports, 2018, available at: <<https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html>>.

³⁰ On the non-compliance, see the report of the Parliamentary Assembly of the Council of Europe, DE VRIES, *Implementation of Judgments of the European Court of Human Rights*, Doc. 13864 09, September 2015, available at: <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22005>>.

become a binding norm for all its member States in their implementation of EU law.³¹ Although the intent assumingly was good, it nonetheless led to an adverse reaction: the EU Member States and particularly their constitutional courts considered this judge-made law an illegitimate interference, a threat to their sovereignty, and a breach of the principle of legality that prescribes the foreseeability of the law.³²

The following sections will further discuss whether the separation of powers is in jeopardy and whether the judges of the European Courts have created a concept of shared ‘European values’ and a common ‘European identity’, innate to ‘us, the Europeans’, but lacking to the ‘others, the migrants’.

4. – Fundamental Rights and Freedoms in the Case-law of the European Courts

Not only the boundaries of the branches of the EU and the Council of Europe tend to be blurred, also the interface between community and human rights law, which is highly relevant for the discussions of the different European organs’ competence, has become more unclear. Initially, the two areas of law were not confounded. However, already in 1969, the European Court of Justice (ECJ) declared that fundamental rights, although at the time not explicitly codified, formed part of the general principles of community law, the observance of which the Court ensured.³³ Two decades later, the ECJ decided that the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) had “particular significance”,³⁴ and finally in the 1990s, the ECJ started to cite individual judgments of the ECtHR to back up its interpretations.³⁵ The Charter of Fundamental Rights of the EU was proclaimed in 2000 and became legally binding in 2009 with the entry into force of the Treaty of Lisbon. In its chapeau, the Charter

³¹ AVBELJ, ‘Human rights inflation in the European Union’, in VIOLINI, BARAGGIA (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors*, Cheltenham, 2018, pp. 10-11.

³² *Ibid.*

³³ Case 29/69, *Erich Stauder v. City of Ulm - Sozialamt*, 12 November 1969, ECLI:EU:C:1969:57, para. 7.

³⁴ Joined Cases 46/87 and 227/88, *Hoechst v. Commission of the European Communities*, 21 September 1989, ECLI:EU:C:1989:337, para. 13.

³⁵ Case C-13/94, *P v. S & Cornwall County Council*, 30 April 1996, ECLI:EU:C:1996:170, para. 16. See extensive discussion in: ROSAS, *cit. supra* note 21, p. 1041; AVBELJ, *cit. supra* note 31, pp. 12-13.

“reaffirms, with due regard for the powers and tasks of the Union (...), the rights as they result (...) from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, (...) and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”

Interestingly, the Charter connects the notions of powers, constitutional traditions with international obligations arising from the ECHR, and the case-law of the CJEU and ECtHR. With the adoption of the Charter, the EU has clearly, on a political and on a legal level, confirmed its commitment to human rights and the corresponding jurisprudence of the European regional courts. In Article 52(3), the Charter guarantees the rights corresponding to the ones contained in the ECHR.³⁶ In doing so, it prevents different standards of human rights in the national implementation of EU law.³⁷ Moreover, the increasing referral of the ECtHR to the CJEU’s case-law further streamlines the human rights standard in Europe.³⁸ Indeed, the human rights approach of both European courts appears to be largely, if not fully, coherent. At first glance, it seems as though this consistency of the human rights approaches is beneficially for the individuals concerned, in being accorded the same rights by the different judicial institutions of the European community. Nonetheless, a different scenario might be conceivable: what if this coherence is detrimental to migrants? There are indications that the case-law coming out of both courts would take a coordinated approach. If the ECtHR increasingly discusses migrants as the unwanted ‘others’, this jurisprudence would reflect in the case-law of the CJEU, thus amplifying their negative perception. In turn, if the hypothesis is correct that courts’ decisions can influence the public opinion and thereby also policy makers, then the migrants’ situation is further deteriorated.

³⁶ Charter of Fundamental Rights, OJ C 364, 18 December 2000 p. 1. The official commentary to Art. 52(3) holds that the scope of the guaranteed rights is determined by the law itself as well as the case-law of the ECtHR and the CJEU (OJ C 303, 14 December 2007, p. 33).

³⁷ LOCK, “The ECJ and the ECtHR: The Future Relationship between the Two European Courts”, *The Law and Practice of International Courts and Tribunals*, 2009, p. 283; BOELES et al., *cit. supra* note 1, p. 45, pointing out that the ECHR is not legally binding within the ambit of EU law and that the EU is not party to the ECHR.

³⁸ E.g. see European Court of Human Rights, *Maslov v. Austria*, Application No. 1638/03, Judgment of 23 June 2008, para. 42; *Id.*, *Pellegrin v. France*, Application No. 28541/95, Judgment (Grand Chamber) of 8 December 1999, para. 66; *Id.*, *Goodwin v. United Kingdom* Application No. 28957/95, Judgment (Grand Chamber) of 11 June 2002, para. 43. Furthermore: LOCK, *cit. supra* note 37, p. 380.

In addition to its intra-European efforts, including the consistency of the human rights jurisprudence of the regional courts, the EU is committed to cross-regional work on positive human rights narratives.³⁹ This commitment is in line with the human rights priorities of the United Nations ('UN') and the Sustainable Development Goals ('SDG') that the world leaders agreed upon in 2015. The SDG No. 10 has the aim of reducing inequalities and calls upon all States to "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".⁴⁰ The UN 2030 Agenda for Sustainable Development, by which the SDG officially came into force, furthermore recognises the positive contribution of migrants and calls for full respect for their human rights and humane treatment, irrespective of their migration status.⁴¹ Thus, the EU is not only bound by positive law to protecting human rights as contained in the TFEU and the ECHR, it is also devoted to observing the human rights regime of the UN. This commitment of a supranational organisation is praiseworthy and probably uncontroversial, given that its Member States without exception are members to the core UN human rights treaties and, as such, legally bound to fulfilling their provisions. This commitment across treaty regimes is undoubtedly part of a trend, in which international and/or supranational organisations pledge to adhere to international (human rights) treaties to which they formally cannot accede because they lack statehood.⁴² Although the conflation of treaty regimes entails a harmonisation of the law, it at the same time also causes interpretational headaches for the law-applying bodies. The ECtHR, for instance, will be forced to interpret legal sources that it does not formally have jurisdiction over. The Court will also have to refer to case-law that originates in cases that do not deal with human rights violations.

In returning to the UN approach to migration, the UN Secretary General in a report of 2017 on 'Making Migration Work for All' emphasizes its links to the 2030

³⁹ General Secretariat of the Council of the EU, Conclusions on EU Priorities in UN Human Rights Fora, Doc. 6346/18 of 26 February 2018.

⁴⁰ See goal target No. 10.7. Available at: <<https://www.un.org/sustainabledevelopment/inequality/>>.

⁴¹ General Assembly of the United Nations, "Transforming Our World: the 2030 Agenda for Sustainable Development", UN Doc. A/RES/70/1 of 21 October 2015, para. 29.

⁴² A similar development occurred in the field of international criminal law: the International Criminal Court (ICC) and Art. 21(3) Rome Statute commit to respecting human rights law, a treaty regime with a very distinct aim and nature than international criminal law. The ICC, as an international organisation, cannot become member to any human rights treaties that are tailored to prevent the misuse of State power over individuals.

Agenda for Sustainable Development. He acknowledges a shared responsibility of States to address the needs and concerns over migration and to protect the human rights of migrants.⁴³ Although highlighting the positive aspects of migration as “an engine of economic growth, innovation and sustainable development” that assists to create bonds between countries and societies, the Secretary General also stresses that migration is a “source of division within and between States and societies” and, as such, “one of the most urgent and profound tests of international cooperation”.⁴⁴ He hoped that the *Global Compact on Safe, Orderly and Regular Migration*, adopted in the following year, would bring the challenges of migration between Member States under control and bridge the divide between their policy implementations and ambitions. Moreover, he sadly acknowledged that “xenophobic political narratives about migration are all too widespread”, a fact that remains valid today too.⁴⁵ In December 2018 then, the UN General Assembly by resolution adopted the Global Compact.⁴⁶ The resolution acknowledges the existence of “misleading narratives that generate negative perceptions of migrants”, a development that must be countered by providing research and access to objective, evidence-based, and clear information on migration.⁴⁷ The intrinsic connection between the perception of the migrant ‘others’, who are different than ‘we’, and xenophobic, misleading narratives – to borrow the wording of the UN documents – cannot be underestimated. In this connection, researchers have pointed out that the understanding of a European identity based on common values could be lopsided if it is mobilized against European integration, claiming that the ‘others’ lack our shared memories, traditions, and myths.⁴⁸ This dangerous development of othering that has been explored in the social sciences, foremost social psychology and sociology, has to be taken on board by legal and political sciences too. Note that the importance of research is highlighted throughout the Global Compact, a call that we in academia cannot be left unanswered.⁴⁹

⁴³ Report of the UN Secretary-General, “Making Migration Work for All”, UN Doc. A/72/643 of 12 December 2017, para. 5.

⁴⁴ *Ibid.*, para. 1.

⁴⁵ *Ibid.*, para. 9.

⁴⁶ General Assembly of the United Nations, UN Doc. A/RES/73/195 of 19 December 2018 (based upon General Assembly Resolution A/RES/72/244 of 24 December 2017).

⁴⁷ General Assembly of the United Nations, UN Doc. A/RES/73/195, *cit. supra* note 46, para. 10.

⁴⁸ CICEO, “The Difficult Path Towards Europeanness: Assessing the Politics of Culture and Identity in the European Union”, *On-line Journal Modelling the New Europe*, 2016, p. 10.

⁴⁹ *Cit. supra* note 46, paras. 17, 17(f) and (k), 21(j), 35(c), and 66.

5. – *Immigration, Borders, and Human Rights*

Borders represent the belonging and the exclusion, the interiority and the exteriority.⁵⁰ The functions and usefulness of borders in the civic space is, according to Étienne Balibar, becoming more problematic because they allow for the crystallisation of collective identities: the ‘us’, the ‘Europeans’, the ‘majority’. Simultaneously, these borders fill functions of imaginary protection, in separating ‘us’ from ‘them’.⁵¹ Yet, in the state-centred sphere of international and European law, States are free to exercise border controls due to their sovereignty.⁵² In recent years, the border controls at the external border of the EU have been increased and led to tighter removal procedures for nationals of non-EU Member States.⁵³ However, the jurisdiction over immigration and decisions of whom to allow access to the national territory does not free a State from its liability for any human rights violations occurring during the performance of these tasks.⁵⁴ Thus, the recognition of a State’s jurisdiction at its borders runs parallel to its obligations under and the applicability of human rights treaties, which include “affirmative measures to guarantee that individuals subject to their jurisdiction can exercise and enjoy [their] rights”.⁵⁵ In other words, its sovereign right of border controls by no means impedes the respective State’s human rights obligations and can, as such, not be promoted as an argument to curtail these rights. This understanding also resonates in the judgment on the case of *Khlaifia and Others v. Italy*, which deals with the internment of Northern African refugees on the Italian island of Lampedusa in 2011. The Grand Chamber of the ECtHR made clear that it

⁵⁰ BALIBAR, *We, the People of Europe? Reflections on Transnational Citizenship*, Princeton, 2004, p. 5; KESBY, *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford, 2010, p. 103.

⁵¹ *Ibid.*, p. 110. Similarly, DEMBOUR, KELLY, “Introduction”, in DEMBOUR, KELLY (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Abingdon, 2011, p. 5.

⁵² See e.g. discussion in European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, para. 67.

⁵³ GRANT, “Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity”, in DEMBOUR, KELLY (eds.), *cit. supra* note 51, p. 59.

⁵⁴ OCHR, Recommended Principles and Guidelines on Human Rights at International Borders, available at: <<https://www.ohchr.org/en/issues/migration/pages/internationalborders.aspx>>, pt. 22 (discussed in European Court of Human Rights, *M.A. and others v. Lithuania*, Application no. 59793/17, Judgment of 11 December 2018, Concurring Opinion of Judge Pinto de Albuquerque, para. 19).

⁵⁵ Report on the Human Rights Situation of Refugees and Migrant Families and Unaccompanied Children in the United States of America, p. 30, para. 42 (discussed in European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 19).

“an increasing influx of migrants cannot absolve a State of its obligations”.⁵⁶ Although this specific case dealt with the prohibition of torture, the same logic will apply to any other freedom and right of migrants within the jurisdiction of the High Contracting parties to the ECHR (see Article 1 ECHR). The Court moreover pointed out that the “objective difficulties related to a migrant crisis” cannot function as a legitimate excuse of the violation of human rights.⁵⁷ The Court thereby acknowledges both the European States’ struggles in dealing with the sudden influx of migrants and the migrants’ human rights that need to be respected, especially given their vulnerable situation. The ECtHR’s sister court, the Inter-American Court of Human Rights, explicitly recognized that “immigrants are ‘the most vulnerable to potential or actual violations of their human rights’”.⁵⁸ Henceforth, the interpretation of their human rights and freedoms has to take into consideration their vulnerability and heightened need for protection.

Despite the fact that irregular arrivals to Europe have been brought down to so-called ‘pre-crisis levels’, a notable reduction of 90% since the height of the migration crisis in 2015,⁵⁹ certain Member States of the European Council still consider migration as the biggest threat to Europe.⁶⁰ Equally, in the view of Europeans, immigration remains the main concern facing the EU, and is mentioned twice as often as terrorism.⁶¹ Arguably, as long as migration is perceived as a threat, the governments of the respective Member States will not approve of a liberal jurisprudence of the European courts regarding the rights of migrants and immigrant minorities. The adverse political climate regarding migrants and the interrelated mounting pressure on the ECtHR on the part of certain European governments is even explicitly noted by Judge Pinto

⁵⁶ European Court of Human Rights, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment (Grand Chamber) of 15 December 2016, para. 184.

⁵⁷ *Ibid.*

⁵⁸ Inter-American Court of Human Rights, *case of Vélez Loor v. Panama*, Judgment of 23 November 2010, para. 98.

⁵⁹ <<https://www.consilium.europa.eu/en/meetings/european-council/2018/12/13-14/>>. On the reduction see: <<https://www.consilium.europa.eu/en/policies/migratory-pressures/>>.

⁶⁰ See, “Migration Biggest Threat to Europe, Says Defence Minister”, available at: <<https://hungary-today.hu/migration-biggest-threat-to-europe-says-defence-minister/>>.

⁶¹ European Commission, *Standard Eurobarometer 90: Public opinion in the European Union*, Report (2018), p. 12.

de Albuquerque in a very recent judgment.⁶² This trend is yet another worrisome challenge to the rule of law in Europe and correlates with research on the progressive interpretation of human rights law on the national level: in the post-war era, European domestic courts expanded the rights of minorities and migrants, foremost by transplanting national rights with universal human rights.⁶³ Yet, it appears that the more the courts expanded the rights of the migrants, the stronger the pushback was against an acceptance of these ‘others’ in society. Current developments on the European regional level suggest that the European courts curb the attribution of rights and, thus, adjust to expectations and perceptions of their constituency.⁶⁴ Most remarkably, this ostensible development, whereby the European governments adjust to their constituency’s fear of the migrant ‘other’ and increase pressure on the ECtHR, cannot be reproduced statistically: the general attitudes of Europeans toward immigration did not become more negative during the years of the “refugee crisis”, quite contrary to what most media and right-wing politicians suggest.⁶⁵

Migration is not a new phenomenon in Europe. Minority immigrant communities have often been successfully integrated, and new national identities have developed over time.⁶⁶ In more recent years, however, migration has been associated with inter-group conflicts and violence, with incompatible national identities, with the rise of populism, xenophobia, and nationalism.⁶⁷ “[A]t some point in our lives or another, we are all minorities”, remarked Stavros Lambrinidis, the EU Special Representative for Human Rights at the United Nations Human Rights Council in February 2018. “If, when in the majority”, he stressed, “we are tolerant when ‘minorities’ we may

⁶² European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 16. See an extended discussion of his concurring opinion below.

⁶³ ÇALI, “Coping With Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights”, *Wisconsin International Law Journal*, 2018, pp. 20 and 23.

⁶⁴ *Ibid.*, p. 22. See also: DEMBOUR, *cit. supra* note 15, pp. 117-119.

⁶⁵ CAUGHEY, O’GRADY, WARSHAW, “Policy Ideology in European Mass Publics, 1981-2016”, *American Political Science Review*, 2019; KUSTOV, LAAKER, RELLER, “The Stability of Immigration Attitudes: Evidence and Implications”, 1 May 2019, available at: <<https://ssrn.com/abstract=3322121>>.

⁶⁶ CESARANI, FULBROOK, “Introduction”, in CESARANI, FULBROOK (eds.), *Citizenship, Nationality and Migration in Europe*, London, 1996, p. 2.

⁶⁷ Report of the UN Secretary-General, “Making Migration Work for All”, *cit. supra* note 43, para. 1; BAUMGÄRTEL, *cit. supra* note 6, p. 4; FØLLESDAL, “Third Country Nationals as European Citizens: The Case Defended”, in SMITH, WRIGHT (eds.), *Whose Europe? The Turn towards Democracy*, Oxford, 1999, p. 105.

not ‘like’, or that may not be ‘like us’, are repressed, then beware: We are opening the floodgates to our own future repression and discrimination as well”.⁶⁸ The UN Secretary-General, António Guterres, equally stressed the importance of reversing those trends and of recommitting to the protection of the rights of all migrants.⁶⁹

The concurring opinion of the ECHR Judge Pinto de Albuquerque in the recent *M.A. and others v. Lithuania* case resonates the same chorus. In unusually strong language, the judge compares the treatment of migrants who have been rejected at land borders and who are returned without an individual assessment of their claims with the treatment of animals: “Migrants are not cattle that can be driven away like this”.⁷⁰ The judge might be talking figuratively, but the image of the unwanted ‘others’ who are treated not like humans, but like beasts, is haunting. It reverberates research from social sciences on othering, especially of cases of dehumanisation, where the ‘others’ are perceived as lacking a human essence. They are seen as inferior, unworthy of dignified treatment, and of a lesser value.⁷¹ If the ‘others’ — the migrants in our case — are understood as animals, ‘we’ will never be able to accept them as equals, as humans with the same inherent rights. The full recognition of the ‘other’ migrants as humans with inalienable human rights is crucial for their approval and integration in ‘our’ society. Interrelated, the acceptance of the rights of ‘others’ is considered one of eight key domains that comprise positive peace.⁷² Hence, the recognition and enforcement of the human rights of migrant ‘others’ appears to have a positive effect on peace.

Judge Pinto de Albuquerque is clear in his opinion that the ECtHR must ensure the effective protection of migrants. Furthermore, he holds that land borders are not

⁶⁸ EU Special Representative for Human Rights, High-level segment by Stavros Lambrinidis at the United Nations Human Rights Council, 27 February 2018, available at: <https://eeas.europa.eu/delegations/un-geneva/40477/hrc-37-high-level-segment-statement-he-mr-stavros-lambrinidis-eu-special-representative-eusr_en>.

⁶⁹ Report of the UN Secretary-General, “Making Migration Work for All”, *cit. supra* note 43, paras. 1, 4(b), 5 and 39.

⁷⁰ European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 29.

⁷¹ HASLAM et al., ‘Humanness, Dehumanization, and Moral Psychology’, in MIKULINCER, SHAVER (eds.), *The Social Psychology of Morality: Exploring the Causes of Good and Evil*, Washington, 2012, p. 205; TAJFEL, *Human Groups and Social Categories*, Cambridge, 1981, pp. 241-243

⁷² INSTITUTE FOR ECONOMICS AND PEACE, *Global Peace Index 2017: Measuring Peace in a Complex World*, p. 81.

zones of exclusion or exception from States' human-rights obligations. What is remarkable in this case, is the continued and strong emphasis of the judge that the ECtHR must remain the "conscience of Europe", especially considering that he concurs with the majority's judgment.⁷³ It could, indeed, be argued that there is no need to further dwell on what the majority already has decided, especially since Pinto de Albuquerque agrees with their conclusion. However, his concern with the respect of the migrants' rights and the Court's corresponding jurisprudence could be explained by an undeniable trend of increased nationalism, which is fuelled by populist views and results in attitudes of fear and hate.⁷⁴ Judge Pinto de Albuquerque clearly goes beyond a restrained, objective legal analysis, when he takes a passionate stance on current developments and urges the Court not to surrender to destructive political developments. His fervent appeal merits a quote in full length:

"In the wake of a new and dangerous 'post-international law' world, this opinion is a plea for building bridges, not walls, for the bridges required by those in need of international protection, not walls arising from the fear that has been percolating in recent years through global sewers of hatred. Although justified as an attempt to curb illegal immigration, human trafficking or smuggling, these physical barriers reflect an ill-minded isolationist policy and represent, as a matter of fact, the prevailing malign political *Weltanschauung* in some corners of the world, which perceives migrants as a cultural and social threat that must be countered by whatever means necessary and views all asylum claims as baseless fantasies on the part of people conniving to bring chaos to the Western world. The culture of fear, with its delirious ruminations against 'cosmopolitan elites' and 'foreign' multiculturalism, and its most noxious rhetoric in favour of 'our way of life' and 'identity politics', has burst into the mainstream."⁷⁵

Pinto de Albuquerque probably oversteps the tasks assigned to him as a judge of the ECtHR on the bench of the *M.A. and others v. Lithuania* case, namely the interpretation and application of the ECHR (see Article 32(1) ECHR). Although his plea could arguably be considered a breach of his duties, the judge demonstrates a very "high moral character", as required by Article 21(1) ECHR. He points to several noteworthy developments that have been topic of research in numerous disciplines,

⁷³ European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 27.

⁷⁴ STOYANOVA, *cit. supra* note 6, pp. 85-86.

⁷⁵ European Court of Human Rights, *M.A. and others v. Lithuania*, *cit. supra* note 54, Concurring Opinion of Judge Pinto de Albuquerque, para. 26.

albeit not so much from law: hatred, threat, and fear of the ‘others’ that stand in opposition to ‘our’ identity. These are issues worth highlighting because of their potential to negatively affect our society, a democratic order and the respect of human rights. The perceived threat of the ‘others’ is also one of the characteristics of violent clashes, among other before the outburst of genocides.⁷⁶ The analysis of this chapter, by no means, has an intention to imply the imminent danger of a genocide. However, it concurs with the worries of Judge Pinto de Albuquerque on how issues of identity politics permeate the *Weltanschauung* of a growing number of individuals in Europe, and elsewhere.⁷⁷ The pledge equally reveals a fear of a weakening ECtHR, a court that surrenders to developments of the political mainstream, a court whose jurisprudence reflects ‘our’ view of the ‘others’ that are not welcome to Europe. Of a court that becomes a part in the political game rather than remaining an independent pillar and the guardian of everyone’s human rights within the territories of the member States of the Council of Europe.

6. – Migration, Human Rights, and Values

The promotion and protection of human rights is at the heart of multilateralism, a central pillar of the UN system, and a core and founding value of the EU itself.⁷⁸ The Treaty on the Functioning of the European Union (TFEU or ‘Treaty of Lisbon’) vows to draw inspiration from the cultural, religious and humanist inheritance of Europe, from which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed.⁷⁹ Yet, do these ‘inalienable rights’ today apply to European citizens only and are the ‘universal values’ in fact regional values? This section will briefly explore the value system that underlies the European human rights regime and how it is interpreted in the case-law of the courts.

⁷⁶ STAUB, “The Roots and Prevention of Genocide and Related Mass Violence”, in ZARTMAN, ANSTEY, MEERTS (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflict and Preventing Mass Murder*, Oxford, 2012, p. 39; BAUMANN, *The Multicultural Riddle: Rethinking National, Ethnic, and Religious Identities*, New York, 1999, pp. 62-63.

⁷⁷ For a similar concern, see BALIBAR, *cit. supra* note 50, p. 24, discussing the connection of collective identities, national identity, xenophobia, racism, ‘us’, and genocide and ‘ethnic purification’.

⁷⁸ EU Special Representative for Human Rights, High-level segment by Stavros Lambrinidis at the United Nations Human Rights Council, *cit. supra* note 68.

⁷⁹ OJ C 306, 17 December 2007, p. 1, preamble.

The Global Strategy for the European Union's Foreign and Security Policy of 2016 (EU Global Strategy), a non-binding policy document, reconfirms the EU's commitment to human rights as embossed in the Charter of Fundamental Rights.⁸⁰ Albeit its vow to human rights, the EU Global Strategy, unlike earlier strategic documents, treats migration as a challenge and reveals the internal crisis that the EU is facing due to migration inflows. Research has shown that the Global Strategy provides different narratives of migration, for instance in connection with purported values.⁸¹ The Global Strategy even explicitly emphasises that "remaining true to our values is a matter of law as much as of ethics and identity".⁸² Importantly, such value narratives are indicators of the community's understanding of social relations and factors legitimising political decisions.⁸³ Thus, the value system of strategic documents can influence the European polity, and, arguably, also its judiciary. The Global Strategy is so recent that it has not found its way into the case-law of the ECtHR or the CJEU. But it is not unlikely that either court, in the near future, will refer to the Global Strategy in a case that concerns migrants. By way of comparison, take, for instance, the ECtHR judgment in the case of *Shindler v. UK*. It scrutinises on more than five pages (of a total length of 39 pages) resolutions and recommendations of the Parliamentary Assembly of the Council of Europe regarding migration issues. In addition, on two more pages, the judgment discusses the take of the Committee of Ministers on migration, globalisation, and development. Although the Parliamentary Assembly terms itself a "hotbed of ideas" and a "factory of radical ideas",⁸⁴ its recommendations can hardly be considered of a legal nature and, as such, not a source

⁸⁰ *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy*, 2016, pp. 4, 8, 10, available at: < https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf>. References to human rights contained in the EU Global Strategy have been discussed by numerous commentators, e.g. CECCORULLI, LUCARELLI, "Migration and the EU Global Strategy: Narratives and Dilemmas", *The International Spectator*, 2017, p. 88; HACKENESCH, CASTILLEJO, "The European Union's Global Strategy: Making Support for Democracy and Human Rights a Key Priority", European Think Tanks Group, April 2016, available at: <https://www.diegdi.de/uploads/media/16-10252_ETTG_Briefs_01.pdf>; WAGNER, ANHOLT, "Resilience as the EU Global Strategy's new *leitmotif*: Pragmatic, Problematic or Promising?", *Contemporary Security Policy*, 2016, pp. 414-416.

⁸¹ CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 88.

⁸² *Shared Vision, Common Action: A Stronger Europe*, *cit. supra* note 80, p. 15.

⁸³ See, CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 84. Similarly, KESBY *cit. supra* note 50, p. 102.

⁸⁴ <<http://www.assembly.coe.int/nw/Page-EN.asp?LID=InBrief>>.

of law for the ECtHR. The reference of the Court to political documents is problematic. Not only does it interfere with the check and balances, as discussed above in section 3, the narratives of migration contained in such documents will in all probability be reflected in the case-law of the courts.⁸⁵

7. – *Constructing a European Identity: ‘Otherness’ in the Case-law of the ECtHR*

Any law contains certain values and interests.⁸⁶ Courts, in turn, interpret the respective legislation by reference to the preparatory work in order to determine these underlying values. Yet, should courts even be legitimised to make value judgments, beyond the obvious intent of the drafters as manifested in the drafting history? The question arises whether the courts, in their legal reasoning, revert to values beyond the ones expressly stated by the drafters, such as inherent ‘European values’ that imply a difference between ‘us’ (Europeans) and ‘them’ (the others from beyond our borders).⁸⁷ There is also a possibility that the judges refer to ‘European values’ as the implicit values contained in the ECHR, values upon which the European human rights system was erected. From an interpretative point of view, such teleological approach is hardly debatable. However, a seemingly unresolvable issue arises: a reference to values that guided the drafting of the ECHR in 1950 might stand in contrast to a dynamic interpretation of today. At the same time, it should not be ruled out that a dynamic interpretation could reflect current anti-migratory sentiments, which, in return, stand in contrast to the original *telos* of the ECHR.

The reasoning of the courts is, at times, based on moral rather than legal norms. While high morals are part and parcel of an international judge’s desirable characteristics,⁸⁸ there are (at least) two downsides to reverting to ethical arguments in a

⁸⁵ An (unverified) HUDOC search returned 457 instances of case-law that contain ‘Committee of Ministers’ in connection with a violation of Art. 14. Related, see European Court of Human Rights, *Samsónikov v. Estonia*, Application No. 52178/10, Judgment of 3 July 2012, para. 53, discussing a Recommendation of the Committee of Ministers of the Council of Europe on migrants prior to discussing European human rights law.

⁸⁶ See e.g. European Court of Human Rights, *Biao v. Denmark*, Application No. 38590/10, Judgment of 24 May 2016, Dissenting Opinion of Judge Yudkivska, p. 84.

⁸⁷ On the relation of threat perception and integration policies, see: CALLENS, MEULEMAN, “Do Integration Policies Relate to Economic and Cultural Threat Perceptions? A Comparative Study in Europe”, *International Journal of Comparative Sociology*, 2017, pp. 367-391.

⁸⁸ See the related discussion *supra* in Section 5 on the position of ECtHR Judge Pinto de Albuquerque.

judgment: first, moral standards are exposed to changing values and, second, due to the principle of legality the judges cannot build their legal arguments on moral standards that are not embossed in binding law. Two dissenting opinions to two judgments of the ECtHR exemplify these issues. They do, notably, not deal with issues of migration. Yet, since migration is an area that is bound to evoke issues of values, (in)justice, and ethics, similar challenges could arise. In his dissenting opinion in the case of *Ždanoka v. Latvia*, Judge Zupančič ferociously holds that the ECtHR “must take an unambiguous and unshakable *moral* stand on [aggression deriving from regressive nationalism]”.⁸⁹ In the view of the judge, inter-ethnic tolerance is a categorical imperative of modernity and from intolerance too many violations of human rights derive.⁹⁰ While his argument is important and laudable, he nonetheless does not base it on law, but rather on ethics, hence making it more susceptible to attacks. The second judgment is in the case of *Vasiliauskas v. Lithuania*. The minority judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris cautioned against a too formalistic line of reasoning in the fight against impunity, because of the ECtHR’s role as “the conscience of Europe”.⁹¹ Yet, if judges do not apply the law formalistically, but rather based on conscience or ethics, their decisions become void of legitimacy. A weakening of the legitimacy risks entailing a lack of adherence to the law given that its application and interpretation is not foreseeable and not governed objectively or formalistically. Such unpredictability is not advisable. Because while in both cases above, the judges had the best of intentions in guarding the interest of the weaker or suppressed party, the pendulum might swing the other way and be detrimental, for example to migrant, who claim a breach of human rights before a court.

Indeed, research indicates that the ECtHR in recent times has shown increased willingness to depart from its standard jurisprudence in order to accommodate the shifts in attitude of its fractured national audience.⁹² Whether this adjustment occurs as a response to the backlash against the Court or is an expression of a new realist jurisprudential attitude has yet to be determined.⁹³ The nature of the ECHR as a living

⁸⁹ European Court of Human Rights, *Ždanoka v. Latvia*, Application No. 58278/00, Judgment of 16 March 2006, Dissenting Opinion of Judge Zupančič, p. 59, emphasis in original.

⁹⁰ *Ibid.*

⁹¹ *Id.*, *Vasiliauskas v. Lithuania*, Application No. 35343/05, Judgment (Grand Chamber) of 20 October 2015, Dissenting Opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris, paras. 11, 16 and 18.

⁹² ÇALI, *cit. supra* note 63, pp. 22, 44.

⁹³ See for related discussions, *ibid.*, pp. 4-5, 45-46.

instrument arguably enables an adaptation of the ECtHR's jurisprudence to any present-day conditions.⁹⁴ Yet, if a change of values occurs at the level of the national constituencies, which in turn is mirrored in the respective elected governments, will the courts adjust their interpretation of the law accordingly, in order to accommodate 'modern' ideas? What if these contemporary ideas contradict the original high standards of the protection of human rights and fundamental liberties – and as such are detrimental to the rights of migrants? According to recent scholarship there is indeed a risk of a politicization of the ECtHR.⁹⁵ Moreover, as indicated above, the intrinsic value narrative of many a political document will be reflected in the case-law of the Court by way of reference. Thus, the value question will become part of the legal interpretation of human rights law.⁹⁶ With regard to migration, scholars have pointed to the incoherence and disharmony between a value-led polity and the respect of national, European, and international law that is central to the EU's values; they identify a recent tendency of increasing restrictive legislation that “seem to pay lip service to largely shared fundamentals of international law (...), while instead serving the EU's interests.”⁹⁷ Conversely, as discussed above in Section 4, if the EU and the Council of Europe streamline their (human rights) jurisprudence and pledge to respect the UN human rights regime, then international law is harmonised and, largely, builds on the same values. The question remains how susceptible these constructions are to a change in values.

8. – *Migration, Expatriation, Globalisation*

The jurisprudence of the ECtHR reveals a paradox: some judgments, in discussing expatriation and migration, emphasize their positive aspects on globalisation. Yet, these positive sides are seemingly limited to pan-European movements of individuals only. For instance, in the case of *Shindler vs. The United Kingdom*, the EC-

⁹⁴ See, European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010, para. 277.

⁹⁵ ÇALI, *cit. supra* note 63, p. 46.

⁹⁶ See value discussions e.g. in European Court of Human Rights, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, para. 101; Id., *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, Judgment of 11 July 2002, para. 71.

⁹⁷ CECCORULLI, LUCARELLI, *cit. supra* note 80, p. 94. See also, CARDWELL, *cit. supra* note 1, pp. 68-69.

tHR holds that “expatriation could be a positive effect of globalisation that contributed to building diverse, tolerant and multicultural societies”.⁹⁸ Is the globalism that the Court refers to limited to Europe only and, in the interpretation of the Court, is globalism a regional development rather than a global one? Expatriation within Europe is associated with a dynamic, modern, positive, and economic development, while expatriation from beyond Europe’s borders is perceived as a threat. It might seem as though migration, expatriation, and globalisation are considered positive if related to citizens of the EU Member States. The migration of EU citizens is, notably, protected under the rights of free movement (Article 45 TFEU). Yet, the court does not stop with the acknowledgment of this fundamental right. Rather, the Court applies a string of positively loaded words like ‘opportunities’, ‘multi-culturalism’, ‘tolerant’ in its discussion of the movement of individuals within the legal boundaries of Europe.⁹⁹ Several scholars, however, raise concerns of the not only positive effects of globalisation. Arjun Appadurai, for instance, stresses that globalisation exacerbates uncertainties where the lines between ‘us’ and ‘them’ have been blurred. He points to a development of two Europes: the inclusive and multicultural one, and the anxious xenophobic other one, in which minorities activate worries about belonging.¹⁰⁰ In his dissenting opinion in the above-mentioned case of *Ždanoka v. Latvia*, Judge Zupančič chooses to accentuate the negative effects of globalisation. In reference to the Harvard legal scholar, Roberto Mangabeira Unger, the judge asserts that the current developments of preserving national identity (or nationalism) are a reaction to globalisation. Zupančič equally discerns a parallel trend of more aggressive attitudes towards minorities in a society, such as the Roma in Bulgaria (*Nachova and Others v. Bulgaria*), the Serbians in Croatia (*Blečić v. Croatia*), and immigrant workers in Germany and France. He concludes that in “many of these realms, we detect the unhealthy trend from [sic] patriotism on the one hand, to nationalism, chauvinism

⁹⁸ European Court of Human Rights, *Shindler v. The United Kingdom*, cit. supra note 8, para. 56, discussing Recommendation 1650 (2004) of the Committee of Ministers.

⁹⁹ *Ibid.*, para. 43, referring to the same recommendation: “The recommendation further noted that expatriation was the outcome of increasing globalisation and should be viewed as a positive expression of modernity and dynamism, bringing real economic benefit for both host countries and the countries of origin”.

¹⁰⁰ APPADURAI, *Fear of Small Numbers: An Essay on the Geography of Anger*, Durham, 2006, pp. 7-8, 43.

and racism on the other”.¹⁰¹ Thus, although migration within the borders of Europe is associated with (economic) prosperity and a paradoxical construct of ‘regional globalism’, the downside of peoples’ movements, particularly if they are perceived as members of a minority group of ‘other’ Europeans, is incontestable.

9. – Conclusion

“If nationality is the mirror image of citizenship which defines the individual in international law (...), to what extent can citizenship of the [European] Union be considered to have such an identity?”, asks Elspeth Guild.¹⁰² Traditionally, citizenship has been attached to the belonging to a nation State, defined by its stable territory, sovereignty, and population.¹⁰³ This belonging entailed a number of rights and duties of the individuals and formed their collective national identity.¹⁰⁴ At the same time, this national citizenship – by a territorially bound population – also defined who was excluded therefrom. The borders that delimit a national as well as a regional belonging, inevitably contain a system of exclusion.¹⁰⁵ This chapter examined several aspects of (non-) belonging to Europe, the identity of Europe, and the creation of Europeaness within the jurisprudence of the European regional courts. In particular, this chapter worked with a hypothesis that the European regional courts are influenced by the current political sentiments and, as such, reflect value judgments against migrants in their judgments. The case-law coming out of the European regional courts does, so far, not openly discuss migrants as the ‘others’. It also refrains from deliberating on common European values and thereby tries to function as a bulwark against exclusionism: However, there are a number of indications that call for attention. The detrimental effect of the ECtHR jurisprudence on migrants is particularly apparent in the area of immigration control, where States enjoy a wide margin of appreciation, and where the human rights of migrants are curtailed on behalf of State

¹⁰¹ European Court of Human Rights, *Ždanoka v. Latvia*, Application No. 58278/00, Judgment of 15 March 2006, Dissenting Opinion of Judge Zupančič, pp. 58-59. See for an in-depth discussion of these different notions, HEDETOFT, *Discourses and Images of Belonging Migrants Between ‘New Racism’, Liberal Nationalism and Globalization’*, Aalborg, 2002.

¹⁰² GUILD, “The Legal Framework of Citizenship of the European Union”, in CESARANI, FULBROOK (eds.), *Citizenship, Nationality and Migration in Europe*, London, 1996, p. 39.

¹⁰³ Art. 1 of the Convention on Rights and Duties of States (Montevideo Convention of 1933).

¹⁰⁴ FØLLESDAL, *cit. supra* note 67, p. 108. For further reading see, BOELES et al., *cit. supra* note 2, pp. 9-11.

¹⁰⁵ BALIBAR, *cit. supra* note 50, p. 8.

sovereignty.¹⁰⁶ The European courts' current jurisprudence does, unfortunately, not "offer a reliably effective venue for promoting migrant rights".¹⁰⁷ The fact that dissenting and concurring judges in separate opinions fervently urge the ECtHR to resist the treatment of migrants as 'others' in their case-law, points to the Court's susceptibility to political pressure.¹⁰⁸ At the same time, the judges have to maintain strict adherence to the law under their jurisdiction only, without surrendering to (purely) ethical arguments, no matter how passionate they are about the matter at hand. The high legal standards and the legitimacy of the courts are at risk if the judges cross the boundaries assigned to them. It remains to be seen how the courts will manage the balancing act between their judicial impartiality, the expectation of the constituency, and the aim of being 'the lighthouse for those who seek protection'.

¹⁰⁶ For a in-depth discussion of ECtHR and CJEU jurisprudence and how the judgments provide different levels of protection to migrants, see: BAUMGÄRTEL, *cit. supra* note 6, p. 46 ff., and 101 ff.; ALAN, "The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?", *European Journal of International Law*, 2018, pp. 261-265; DEMBOUR, "Human Rights Law and the National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg", *Netherlands Quarterly of Human Rights*, 2003, pp. 68-69. For a (short) discussion of CJEU case-law, see, COSTELLO, "European Justice for Migrants and Refugees", 14 June 2015, available at: <<https://verfassungsblog.de/european-justice-for-migrants-and-refugees-2/>>.

¹⁰⁷ BAUMGÄRTEL. *cit. supra* note 6, p. 156.

¹⁰⁸ For a partial confirmation, *ibid.*

2. QUESTIONS OF JURISDICTION AND ATTRIBUTION IN THE CONTEXT OF MULTI-ACTOR OPERATIONS IN THE MEDITERRANEAN

Fulvia Staiano

SUMMARY: 1. Introduction – 2. The Application before the ECtHR – 3. Extraterritorial Jurisdiction and the Concept of ‘Overall Effective Control’ on the High Seas – 4. Attribution of Conduct and the Allocation of Responsibility for Internationally Wrongful Acts – 5. Concluding Remarks.

1. – Introduction

On 8 May 2018, the Global Legal Action Network (‘GLAN’) and the Association for Juridical Studies on Immigration (‘ASGI’) filed an application before the European Court of Human Rights (‘ECtHR’) concerning an incident which had taken place off the coast of Libya on 6 November 2017.¹ The applicants, in particular, were sixteen Nigerian nationals and one Ghanaian national, two of which also applied on behalf of their deceased children. The application submitted that on the mentioned date a rescue operation directed at approximately 150 migrants on board of a rubber

¹ European Court of Human Rights, *S.S. and Others v. Italy*, Application No. 21660/18, Communicated Case, 26 June 2019. The content of the application was also illustrated during a press release held on 8 May 2018 at the Foreign Press Association in Rome. The video of the press release is available at: <<https://www.asgi.it/allontamento-espulsione/respingimenti-libia-ricorso-cedu/>>. The author’s observations concerning the content of the application and its legal reasoning should be understood as referred to the communicated case itself and to what was presented in this press release.

dinghy - carried out by the non-governmental organisation ('NGO') ship *Sea Watch 3* - had been hindered by the Libyan Coast Guard. The intervention of the latter had been coordinated by the Italian Coast Guard's Maritime Rescue Coordination Centre ('IMRCC'). It was argued that during this incident at least twenty migrants had died, and that some of them had been brought back to Libya where they had suffered serious physical harm. The application alleged, among other claims, Italy's responsibility for breaches of the right to life and of the prohibition of torture, inhuman or degrading treatment respectively under Arts. 2 and 3 of the European Convention of Human Rights ('ECHR').

This chapter reflects on two main issues of international law raised by this application, namely, jurisdiction and attribution of conduct. These questions are crucial in a case such as the one at hand, which presents some new elements in comparison to what the ECtHR has examined so far. As will be illustrated in detail in this chapter, the events at issue occurred outside of Italy's SAR zone and in fact most likely outside of any State's SAR zone. Moreover, the involvement of Italian authorities in this case did not entail any direct contact with intercepted migrants but only consisted in coordination activities carried out by the IMRCC on land. The ECtHR, therefore, will be required to determine whether the events submitted by the application occurred within Italy's jurisdiction, and whether relevant conducts can be attributed to Italy for the purpose of establishing its responsibility for the alleged human rights violations. In this light, a first part of this chapter will be devoted to the question of jurisdiction. This section will consider whether Italy's jurisdiction may be established on the grounds of the models of extraterritorial jurisdiction elaborated by the ECtHR in its jurisprudence. A special attention in this context will be paid to the meaning and scope of the notion of effective control as understood by the ECtHR itself. A second part of the chapter, then, will critically examine the possibility to attribute conducts of the Libyan coastguard to Italian authorities and more broadly the question of allocation of responsibility in the context of multi-State interception activities on the high seas. To this end, this section will particularly focus on the concept of intent within the definition of aid or assistance under Article 16 of the Draft Articles on the Responsibility of States for International Wrongful Acts ('ARSIWA'). Lastly, some final conclusions will be drawn. Regardless of the outcome of the specific application under comment, questions of jurisdiction, attribution and allocation of responsibility will be posed with increasing frequency and urgency in the near future. The increasing diversity of actors involved in search and rescue

activities as well as in interception on the high seas for purposes of contrast of migrant smuggling and trafficking of human beings suggest the need for a serious and continuous reflection on these issues whenever human rights violations are committed in these contexts.

2. – *The Application before the ECtHR*

According to the application under review, on 6 November 2017 the IMRCC received a distress signalisation from a rubber dinghy off the territorial waters of Libya and within its contiguous zone. The applicants were on board of the dinghy. The *Sea Watch 3*, a ship belonging to its eponymous NGO Sea Watch, was authorised by the IMRCC to approach the dinghy and rescue those on board. According to a Report by Forensic Oceanography,² the Italian coastguard communicated the position of the dinghy to the *Sea Watch* and warned it to proceed with caution because the Libyan coastguard (which had been equally notified by the IMRCC) was also present nearby with its ship *Ras Jadir*. When the *Sea Watch* came close to the dinghy, which in the meantime had started to sink, the Libyan coastguard contacted the *Sea Watch 3* to inform them that they had on-scene command. The *Sea Watch* refused to suspend its rescue operation. While *Sea Watch 3*'s rigid hull inflatable boats ('RHIBS') were approaching persons who had fallen in the water, the Libyan coastguard agents started to take persons on board of the *Ras Jadir* from the sinking dinghy. The Report submits that during these rescue activities persons on board of the dinghy experienced difficulties in staying out of the water, and that at least one person drowned in an attempt to reach the RHIBS and escape from the *Ras Jadir*. According to the Report, at least twenty people died before and during the rescue operation. Fifteen of the applicants, some of which escaped from the *Ras Jadir*, managed to board the *Sea Watch 3*. The other two applicants remained on the *Ras Jadir*. They reported being beaten and threatened by the crew, and later on taken to a detention camp in Libya where they were subjected to violence and ill-treatment before being sent back to Nigeria.

² Forensic Oceanography (Forensic Architecture agency), *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, Goldsmiths, University of London, May 2018, available at: <https://www.forensic-architecture.org/case/sea-watch/#toggle-id-3>. The application before the ECtHR under review submitted evidence from this Report. Accordingly, the facts of the case as discussed in this chapter were extracted not only from the communicated case before the ECtHR but also from the description of relevant events in the Report.

The application submitted to the ECtHR that Italy was responsible for the violation of several human rights recognised by the ECHR, and in particular of the right to life under Article 2 ECHR as well as of the prohibition of inhuman and degrading treatment under Article 3 ECHR and of the prohibition of slavery under Article 4 ECHR. Among other allegations, all of the applicants argue that by allowing the *Ras Jadir* to take part to the rescue operations, the Italian authorities put their lives in jeopardy and exposed them to the risk of suffering from ill-treatment at the hands of the *Ras Jadir* crew, as well as to that of being sent back to Libya and being subjected to inhuman and degrading treatment and to slavery. The group of applicants who had boarded the *Ras Jadir* submit that they had been subjected to ill-treatment by its crew. Lastly, two of the applicants allege that they had been illegally refouled to Libya where they were subjected to torture as well as inhuman and degrading treatment in breach of Arts. 3 ECHR and Art. 4 of Protocol No. 4 to the ECHR.

Before examining the merits of the application, it will be necessary for the ECtHR to determine whether either the spatial or the personal model allow it to conclude that the relevant conducts occurred within Italy's jurisdiction. Beyond its substantive aspects concerning the existence of breaches of the abovementioned ECHR provisions, there are two preliminary and crucial matters of interest raised by application under review – namely, the questions of attribution and of jurisdiction. First, the ECtHR will be required to establish Italy's jurisdiction over the alleged facts. Under Article 1 ECHR, State Parties must secure the rights and freedoms established in the ECHR “to everyone within their jurisdiction”. Second, the ECtHR will need to determine whether the conducts allegedly in breach of Arts. 2, 3 and 4 ECHR are attributable to Italy, and thus whether Italy bears responsibility for the actions of the Libyan coastguard agents in the events at issue.

The application under review does not appear to separate questions of jurisdiction from those of attribution. Instead, it merges jurisdiction and attribution, arguing that Italian jurisdiction and its responsibility can be established on the grounds of the effective control exercised by Italian authorities over the facts that constituted a violation of its obligations under Arts. 2, 3 and 4 ECHR. In particular, in the applicants' view Italian authorities exercised effective control because the IMRCC carried out the overall coordination of the actions of the involved naval units. Indeed, the IMRCC had alerted all naval units close the rubber dinghy in distress and had asked the Libyan coastguard to assume on-scene coordination. Moreover, the application argues that Italy retained effective control over interdiction at sea as well as search

and rescue activities on the grounds of legal and financial means. In particular, the application recalls the Memorandum of Understanding signed by Italy and Libya, which envisaged that Italy would provide assets to the Libyan coastguard as well as training to its personnel. The application also highlights in this context that in response to requests by Libya to strengthen the operational capacities of its coastguard, Italy extended the Operation *Mare Sicuro* through the establishment of Operation *Nauras* and the creation of a vessel harboured in Tripoli which the application qualified as a floating IMRCC for Libya. Therefore, in the applicants' view Italy exercised overall effective control over the Libyan coastguard's search and rescue activities, since the latter was fully dependent on Italy's financial support.

In support of this argumentation, the application refers to the ECtHR judgments of *Al-Skeini and Others v. the United Kingdom*³ and *Hirsi Jamaa and Others v. Italy*.⁴ In the *Al-Skeini* judgment, the ECtHR found that the United Kingdom had jurisdiction over the actions of its troops in Iraq during the period of time between the removal from power of the Ba'ath regime and the accession of the interim Iraqi government. Among the various criteria for the recognition of extraterritorial jurisdiction, the ECtHR referred to state agent authority. Indeed, at the time of the events the United Kingdom had assumed the exercise of some of the public powers normally exercised by a sovereign government – namely, the authority and responsibility for the maintenance of security in south-east Iraq. Because in such circumstances British soldiers exercised control and authority over individuals who had been killed during security operations, these events fell within the jurisdiction of the United Kingdom. The criterion of state agent authority and control was also recalled in *Hirsi Jamaa*. Here, indeed, the ECtHR recalled the well-established principle in its jurisprudence whereby state agent authority and control is identifiable with respect to acts carried out on board of vessels flying that State's flag. In this judgment the ECtHR also rejected Italy's view that the control exercised by its authorities had been minimal and thus insufficient to justify jurisdiction. In the ECtHR's view, the applicants had been under the "continuous and exclusive de jure and de facto control of the Italian authorities"⁵ from the moment they had boarded Italian armed forces' ships to the moment when they were handed over to Libyan authorities, regardless of the nature

³ European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011.

⁴ *Id.*, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012.

⁵ *Ibid.*, para. 81.

and purpose of the intervention of Italian ships on the high seas.

The merging of questions of jurisdiction and attribution in the application under review is not surprising. In fact, the ECtHR itself has often failed to distinguish between these aspects. In the vast majority of its judgments, this was due to the fact that the facts of the case did not raise specific problems of attribution. In these cases, the ECtHR's recognition of state responsibility for breaches of human rights protected by the ECHR implied the assessment that relevant conducts were attributable to that State.⁶ Yet, the application under review is likely to stand out from the generality of cases presented to the ECtHR. One of its most striking peculiarities lies in the clear distinction between questions of jurisdiction and questions of attribution raised by the fact of the case. Differently than in the judgments which the application itself recalls (namely, *Al-Skeini* and *Hirsi Jamaa*), in the present case the lamented conduct of the State does not consist in actions or omissions of state organs. More specifically, both the *Al-Skeini* and the *Hirsi Jamaa* judgments concerned actions directly carried out by state agents (respectively, members of the British armed forces in Iraq and Italian military personnel on board of vessels of Italian armed forces). While the question of extraterritorial jurisdiction of the respondent States was analysed by the ECtHR in both judgments, there was clearly no issue of attribution. Therefore, this question remained in the foreground. In the application under review, instead, it will be appropriate to deal with the matter of attribution as a separate question from that of jurisdiction. Indeed, this application appears to rest on the argumentation that Italy is responsible for the conduct not of its own agents or organs but for the conduct of the Libyan coastguard. This responsibility is grounded in the application on the financial and logistical support of Italy to the Libyan coastguard's activities and on the IMRCC's coordination of rescue activities on the high seas, which allegedly suggest that Italian authorities exercised overall control over the conducts under comment.

In examining this case, then, the ECtHR should be careful to distinguish the question of jurisdiction (and thus of whether relevant conducts occurred within Italian jurisdiction on the grounds of effective control or state agent authority) from that of

⁶ MILANOVIC, "Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court", in VAN AAKEN and MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, pp. 103-107; BESSON, "Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities", in VAN AAKEN and MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, pp. 157- 158.

attribution and allocation of responsibility (and thus of whether the conduct of the Libyan coastguard agents can be considered as a conduct of Italian authorities). This distinction is not simply conceptual. Rather, the two concepts of jurisdiction and attribution raise different questions as to the State's effective control over the actions of individuals. This chapter will delve into such questions. Paragraph 3 will enquire on the possibility to establish Italian jurisdiction on the grounds of the criterion of effective control. In search of an answer to this question, it will examine available legal and policy sources as well as the specific circumstances of the incident under consideration. Paragraph 4 will reflect on the applicability of criteria of attribution and allocation of responsibility established by ARSIWA to the incident under review. In particular, it will reflect on the concepts of direction and control under Article 8 ARSIWA and on the appropriateness of this framework as a ground of allocation of responsibility to Italian authorities.

3. – Extraterritorial Jurisdiction and the Concept of 'Overall Effective Control' on the High Seas

The ECtHR has faced the question of extraterritorial jurisdiction on many occasions. From its jurisprudence, it emerges clearly that while territorial jurisdiction is the norm, extraterritorial jurisdiction of a State may be recognised exceptionally on the grounds of two main criteria – namely, 'state agent authority and control' and 'effective control'.⁷ These two grounds for the recognition of extraterritorial jurisdiction have also been qualified respectively as the "personal model" and the "spatial model".⁸ In other words, the ECtHR has recognised that certain acts committed by state agents outside the territory of that State must be considered within its jurisdiction when the State exercises authority and control over individuals (the personal model) or when the State exercises effective control over the territory or area where relevant actions took place (the territorial model).

In cases concerning the interception of vessels by a State outside of its territorial waters, the ECtHR has recognised this State's jurisdiction on the grounds of the per-

⁷ KIM, "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context", *Leiden Journal of International Law*, 2017, p. 48 ff.

⁸ MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, 2011, pp. 127- 199.

sonal model. In the abovementioned *Hirsi Jamaa* judgment, the ECtHR rejected Italy's view that its authorities had exercised such a minimal control over the discussed events that these could not be considered as falling within its jurisdiction. In response to this argumentation, the ECtHR observed that the applicants had been "under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities",⁹ and thus the events at issue occurred within its jurisdiction. Similarly, in the judgment of *Medvedyev and Others v. France*¹⁰ (which concerned the interception of a vessel suspected of illegally carrying drugs) the ECtHR held that the events at issue had occurred within French jurisdiction. In support of this conclusion, the ECtHR recalled that France had retained "full and exclusive control" over the intercepted vessel and its crew "in a continuous and uninterrupted manner" from the time of interception to that of their trial in France.¹¹ Therefore, the applicants had been "effectively within France's jurisdiction for the purposes of Article 1 of the Convention".¹²

One fundamental feature of the events analysed by the ECtHR in *Hirsi Jamaa* and *Medvedyev*, however, sets them apart from those at issue in the application under review. These judgments concerned acts of interception carried out directly by state authorities, albeit outside of their respective States' territorial waters. In the case under comment, on the other hand, the conduct considered to be incompatible with the rights enshrined in the ECHR was carried out by the authorities of a State (Libya) which is not the respondent State before the ECtHR. By recalling the *Hirsi* judgment, this application appears to argue that the personal model of jurisdiction may also ground Italian jurisdiction over acts of the Libyan coastguard on the high seas. To reach this conclusion, however, it is necessary to establish that Italian authorities exercised effective control over intercepted migrants through the coordination activities of the IMRCC. As discussed in the previous paragraph of this chapter, in support of this interpretation the application recalls the Memorandum of Understanding between Italy and Libya ('MOU') as well as the financial support of the former to the latter. The MOU was signed on 2 February 2017 by Italy and by the Libyan Government of National Accord. Its Article 1 establishes, among other things, both Parties' obligation to initiate cooperation activities to stem "illegal migration fluxes" as well as Italy's commitment to provide technical and technologic support to the Libyan institutions in charge of the

⁹ See European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 4, para. 81.

¹⁰ *Id.*, *Medvedyev and Others v. France*, Application No. 3394/03, Judgment of 29 March 2010.

¹¹ *Ibid.*, para. 67.

¹² *Ibid.*.

fight against irregular migration, including the Libyan coastguard. Moreover, Article 4 includes a general obligation for Italy to finance the initiatives mentioned in the MOU or those proposed by a mixed committee composed by an equal number of members for both parties. According to Article 4, this financing cannot entail any additional expenses beyond those already envisaged within Italy's budget, but Italian authorities may use available EU funding for this purpose. It is also important to recall that the adoption of the MOU was presented in its Preamble as also aimed at the implementation of Article 19 of the Treaty of Friendship between Italy and Libya of 2008.¹³ This provision in particular is devoted to the cooperation between Italy and Libya on the fight against terrorism, organized crime, drug trafficking and irregular migration. With reference to irregular migration, it envisages the creation of a system of control over the land border of Libya as well as a cooperation between the Parties in the definition of initiatives aimed at the prevention of irregular migration within countries of origin. At domestic level, in 2017 the Italian Government adopted two decisions concerning its support to the Libyan coastguard. On 14 January 2017, the Government established Italy's participation through military personnel and financial support to a bilateral mission of assistance by the Italian coastguard to the Libyan one with the aim to contrast irregular migration and trafficking of human beings.¹⁴ With a second decision on 28 July 2017, the Italian Government responded to the request of support by the Libyan Government of National accord. The decision granted this support "to the Libyan security forces for the activities of control and contrast of irregular migration and trafficking of human beings". For this purpose, it reallocated naval and air units originally deployed in the context of the *Mare Sicuro* Operation and assigned them the task (among others) of carrying out "connection and consulting activities in favour of the Libyan Navy coastguard". The decision also envisaged the establishment of a maritime

¹³ Treaty of Friendship, Partnership and Cooperation between the Republic of Italy and the Great Socialist People's Libyan Arab Jamahiriya, signed on August 30th 2008 and ratified by Italy with law No. 7 of 6 February 2009, G.U. No. 40 of 18 February 2009.

¹⁴ *Deliberazione del Consiglio dei ministri, Autorizzazioni e proroghe di missioni internazionali*, 14 January 2017, DOC. CCL n. 1, pp. 37-38. The decision clarified that these measures were adopted to implement the Protocol for cooperation between Italy and Libya of 29 December 2007 on irregular migration and trafficking of human beings as well as the Additional Technical-Operational Protocol of 29 December 2009 concerning training activities for the Libyan coastguard as well as patrolling on board of naval units donated by the Italian Government.

operational centre on Libyan territory entrusted with the task of coordinating joint activities.¹⁵

The legal framework described so far envisages generic duties of support for Italy in relation to the Libyan coastguard as well as specific obligations of financial support voluntarily taken on by Italy for the purpose of reinforcing the Libyan coastguard's operational capacity in relation to the contrast of irregular migration and human trafficking at sea. From a strictly legal point of view, therefore, nothing in this framework appears to suggest the exercise of effective control by Italian authorities over the activities of the Libyan coastguard. Italy's logistic and financial support to the Libyan coastguard does not seem to be formally subject to any precondition, least of all the exercise of some form of operational control or command by Italian authorities over the latter's activities.

Nonetheless, one may also argue that in presence of certain factual elements the conduct of Italian authorities could amount to an exercise of effective control. This interpretation might be possible, but the crucial hurdle of the absence of physical custody in the present case should be taken into careful consideration. Indeed, the ECtHR's jurisprudence so far suggests that the exercise of extraterritorial jurisdiction can be established when national authorities have direct physical custody of involved individuals. The same conclusion may not necessarily be reached in case of indirect involvement of the same State in the context of joint operations or in case of support of patrolling activities by third States.¹⁶

To overcome this obstacle, several solutions have been tentatively proposed. For instance, it has been argued that the personal model and thus the criterion of state agent authority and control might be applicable to cases of substantial participation of a State to a joint operation. More specifically, according to this construction the deployment of large assets by a State has been considered as an exercise of a sufficient degree of control to satisfy the threshold of the exercise of extraterritorial jurisdiction as understood by the ECtHR.¹⁷ An alternative proposition suggests that the

¹⁵ For a thorough review of the decisions by the Italian Government, see MANCINI, "Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya Without Regard for their Human Rights", *Italian Yearbook of International Law*, 2017, p. 259 ff.

¹⁶ See KIM, *cit. supra* note 7, pp. 61-63. See also GIUFFRÈ, "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?", *International Journal of Refugee Law*, 2013, p. 692 ff.

¹⁷ FINK, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*, Oxford, 2018, pp. 157-161, who also cautions on the need for the ECtHR to adopt a more lenient approach in order for this model to be feasible.

exercise of extraterritorial jurisdiction could be recognised whenever the State has the power to decide on the admission of foreigners on its territory, even when the procedures for authorisation to enter the national territory occur outside said territory.¹⁸ According to this view, Italian jurisdiction should be recognised whenever the IMRCC instructs NGO vessels to stand down and communicates the position of boats in distress to the Libyan coastguard, because the IMRCC has jurisdiction to decide which unit should carry out rescue activities and to determine a safe port of disembarkation.¹⁹ This interpretation, however, would require the ECtHR to take further steps towards a more extensive understanding of extraterritorial application than the adopted so far in its jurisprudence. Indeed, it is true that in the case of *Kebe and Others v. Ukraine*²⁰ (on which this theory relies) the ECtHR recognised Ukraine's jurisdiction over an Eritrean asylum seeker on board of a Maltese vessel on the grounds of the respondent State's exercise of its power to control the entry of foreigners on its territory. However, in this case there was hardly any question of extraterritorial jurisdiction in the first place, since the State's border guards had boarded the vessel (which was docked in a Ukrainian port) and had met with the applicant. In fact, the question of jurisdiction was relatively uncontroversial between the parties, because both had agreed that from the moment the border guards had embarked the vessel the applicants had been under Ukrainian jurisdiction.

These observations point to the difficulty of identifying the exercise of jurisdiction in the context of joint operations on the high seas – regardless of whether they are aimed at search and rescue, push-back or pull-back of irregular migrants and asylum seekers. In the light of the ECtHR's persistent focus on physical custody, the definition of the minimum threshold of control from a distance for the purpose of establishing the presence of effective control and thus the exercise of state jurisdiction appears as a difficult task. This is more attributable to the novelty of the case under comment than to a clearly identifiable willingness of the ECtHR to establish effective control exclusively on the grounds of physical presence. The case under review is likely to raise new questions before the ECtHR, concerning the necessary degree of involvement of state authorities in joint operations on the high seas were

¹⁸ DE VITTOR, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", *Diritti Umani e Diritto Internazionale*, 2018, p. 5 ff.

¹⁹ *Ibid.*, pp. 21-22.

²⁰ European Court of Human Rights, *Kebe and Others v. Ukraine*, Application No. 12552/12, Judgment of 12 January 2017.

national units are not directly deployed for the purpose of identifying that State's exercise of extraterritorial jurisdiction. With this respect, it should also be noted that a further novelty of the case at hand concerns the fact that the vessel in distress was not only outside the Italian Search and Rescue region ('SAR region) but possibly also outside any State's SAR region. Indeed, at the time of events Libya had notified its designation of a SAR region to the International Maritime Organization (IMO). However, both the existence of this Region as well as of the Libyan Rescue Coordination Centre were not officially reported by the IMO until June of 2018. Therefore, the facts of the case occurred in the context of an uncertain situation concerning the applicable legal framework.²¹ In the context of a decision concerning a different matter, the Tribunal of Ragusa rejected an argumentation concerning the illegitimacy of the assumption of on-scene coordination by the Libyan Coastguard on the grounds of the lack of an officially recognised Libyan SAR region. In the Tribunal's view, the unilateral declaration of a SAR region by coastal States was accepted in state practice as sufficient to establish it for all legal purposes, regardless of its publicity by the IMO. Therefore, it concluded that the Libyan coastguard bore the responsibility of the coordination of rescue operations, regardless of the IMRCC initial communications to an NGO vessel.²²

In the light of these observations, it remains to be seen whether the ECtHR will recognise that the facts of the case occurred under Italy's jurisdiction. Even in case of a positive answer, however, the ECtHR will still need to determine whether relevant conducts which in the applicants' view amounted to violations of their human rights could be attributed to Italian authorities. The next paragraph will delve into this question, enquiring on the possibility to qualify Italy's actions as a form of aid or assistance to the wrongful conduct of the Libyan coastguard. To do so, it will refer to some of the principles enshrined in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

4. – Attribution of Conduct and the Allocation of Responsibility for Internationally Wrongful Acts

The application under review also raises important questions of attribution and allocation of responsibility for violations of human rights occurred in the context of

²¹ CILIBERTO, "Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?", *The Italian Law Journal*, 2019, p. 489 ff., p. 506.

²² Tribunal of Ragusa, decision of 16 April 2014, pp. 13-14.

multi-State operations. The applicants in this case ultimately seem to argue that the conduct of Libyan authorities during the incident at issue (which they believe to be contrary to their right to life, to the prohibition of torture and inhuman or degrading treatment and to the prohibition of slavery, servitude and forced labour) is attributable to Italy on the grounds of the coordination activities carried out by the IMRCC. As clarified above, this argumentation is merged with that concerning Italian jurisdiction and is grounded mainly on the effective control allegedly exercised by Italy over the conduct of the Libyan coastguard on the high seas. Nonetheless, the matter of attribution and allocation of responsibility raises different questions than that of jurisdiction. This paragraph will reflect in particular on the possibility to recognise Italy's responsibility for the violations of the ECHR lamented in the application within the framework of ARSIWA.

A first possibility for the recognition of Italy's responsibility in the case at issue would be that of qualifying the Libyan coastguard as placed at the disposal of Italian authorities and of the IMRCC in particular. In this case, Article 6 ARSIWA would apply. According to this provision, the conduct of an organ placed at the disposal of a State by another State must be considered as act of the former State, provided that this organ acts in the exercise of elements of the governmental authority of the former State. The potential applicability of this framework was actually analysed by the ECtHR in the case of *Xhavara and Others v. Italy and Albania*,²³ which rejected this possibility. This case concerned an alleged breach of Article 2 ECHR in relation to the death of Albanian migrants on board of a vessel who had sank due to a collision off the Italian territorial waters with an Italian warship that was attempting to board and search it. The ECtHR considered the case inadmissible. In its view, the conduct of Italian authorities could not be attributed to Albania merely on the grounds of bilateral agreements between these States which (among other things) envisaged a naval blockade and authorised Italian military ships to board and search in international waters all vessels that transported Albanian citizens who had eluded controls in Albania. This case is also explicitly recalled in the Commentary to ARSIWA by the International Law Commission, to clarify that Article 6 does not apply to "ordi-

²³ European Court of Human Rights, *Xhavara and Others v. Italy and Albania*, Application No. 39473/98, Decision on Admissibility of 11 January 2011.

nary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise”.²⁴ The Commentary indeed explains that in order to be considered as placed at the disposal of another State, an organ of a State must act under the exclusive direction and control of the former State and not on instructions from the sending State. It is clear that in the International Law Commission’s view the participation of a State to joint operations is not in itself sufficient to satisfy this threshold.

Another possible framework for the recognition of Italy’s responsibility in the case under review could be provided by Article 16 ARSIWA. The latter establishes the responsibility of a State for aiding or assisting another State in the commission of an internationally wrongful act in presence of two conditions. First, the aiding or assisting State must have knowledge of the circumstances of the internationally wrongful act. Second, the act must be contrary to international obligations of the aiding or assisting State, in the sense that the act would be internationally wrongful if committed by that State. The Commentary to Article 16 clarifies that in order for the responsibility of the aiding or assisting State to be recognised, “the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so”. According to the Commentary, this requirement refers to the fact that the aiding or assisting State will only be responsible under Article 16 ARSIWA if it intends to facilitate the commission of the wrongful act by another State, which then actually commits it. The aid or assistance does not need to be essential, and can simply constitute a significant contribution to the wrongful act.

Among the requirements of Article 16 ARSIWA, this element of intentionality presents the hardest challenges to the recognition of Italy’s responsibility in the context of the events at issue. Before delving into this question, however, a brief examination of the other, less controversial elements of the conduct described by Article 16 is in order. First, in order for Article 16 to apply it will be necessary to identify the commission of an internationally wrongful act by the aided or assisted State – in the case under review, Libya. This State is evidently not a Party to the ECHR, and is therefore not bound to respect the obligations enshrined therein. However, at least some of the human rights recalled in the application under comment, such as the right to life and the prohibition of torture, enjoy the status of norms of customary law

²⁴ International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 44.

or even of peremptory norms of international law and therefore they are binding on all States, including of course Libya.²⁵ Second, in order for Article 16 ARSIWA to apply it will be necessary to demonstrate that Italy was aware of circumstances that made the conduct of Libya an internationally wrongful act and thus of the circumstances in which its aid or assistance would be used by Libya. With this respect, it is important to recall that in *Hirsi Jamaa* the ECtHR found Italy in breach of Article 3 ECHR because the Italian authorities had returned migrants intercepted on the high seas to Libya despite being fully aware that they would be exposed to a real risk of ill-treatment. To assess knowledge of this risk, the ECtHR took into consideration a number of reports from international and non-governmental organisations highlighting the dire living and detention conditions of irregular migrants in Libya. With respect to the case under review, it is sufficient to recall that further reports concerning the situation of irregular migrants in Libya have highlighted that similar situations persisted at the time when the incident of 6 November 2017 occurred.²⁶ Third, Article 16 ARSIWA would require proof that the conducts of the Libyan coastguard would be internationally wrongful if committed by Italy itself. There is little doubt that the obligation to respect the right to life, to prohibition of torture or inhuman and degrading treatment as well as the prohibition of slavery, servitude and forced labour bound Italy as a Party to the ECHR. From this point of view, it would then be necessary to prove that had Italy carried out the same behaviour submitted by the applicants in the present case, this conduct would have breached this obligation. By using the Report submitted by Forensic Architecture in relation to the circumstances of the events of 6 November 2017, the applicants would have to demonstrate that the Libyan coastguard put rescued migrants' life at risk through dangerous manoeuvres, or that it had put in place violent behaviour towards migrants taken on board.

In sum, the question of Italy's awareness of the circumstances in which its aid or assistance is used by the Libyan authorities, and that of the existence of international

²⁵ See for instance DIMITRIJEVIC, *Customary Law as an Instrument for the Protection of Human Rights*, ISPI Working Papers, 2006, available at: <https://www.ispionline.it/it/documents/wp_7_2006.pdf>; DE WET, "The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law", *European Journal of International Law*, 2004, p. 97 ff.

²⁶ Office of the High Commissioner for Human Rights - United Nations Support Mission in Libya, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 2018, available at: <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>; Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants*, 2017, available at: <<https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>>.

human rights obligations binding Italy, appear less complex and potentially less controversial than that of the degree of its intent to facilitate the commission of a wrongful act through the provision of aid or assistance. The crucial question for the applicability of Article 16 ARSIWA to the case at hand will then be that of establishing whether, by the financial and logistical aid given to the Libyan coastguard, Italy intended to facilitate the occurrence of human rights violations by Libya. The meaning and scope of the requirement of intent has been widely discussed by international law scholars, also with specific reference to Italy's assistance to Libyan authorities in the context of maritime interception. In this context, the applicability of Article 16 ARSIWA as a framework to allocate international responsibility to Italy for human rights violations in the context of activities of interception of migrant on the high seas in coordination with the Libyan coastguard has encountered wide support.²⁷

With this respect, the most appropriate interpretation appears to be that of approximating intent to knowledge, and thus of considering intent to be present whenever the aiding or assisting State is shown to be aware of the circumstances of the wrongful act committed by the aided or assisted State. This solution has been supported in both general terms²⁸ and in relation to Italy's aid or assistance to the Libyan coastguard. With this respect, references have been made to the concept of a State's constructive knowledge that its aid or assistance will be used by the aided or assisted State to breach its obligation,²⁹ while others have argued that in the case of Italy actual knowledge is also identifiable with respect to violations of irregular migrants' and asylum seekers' human rights by Libya.³⁰ While grounding complicity on constructive knowledge might excessively stretch the scope of application of Article 16 ARSIWA, actual or near-certain knowledge is closer to intent and thus offers a balanced interpretative solution.³¹ In addition to being logically sound, this construction

²⁷ GAUCCI, *Back to Old Tricks? Italian Responsibility for Returning People to Libya*, EJIL:Talk!, available at: <<https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/>>; PIJENBURG, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?", *European Journal of Migration and Law*, 2018, p. 396 ff.

²⁸ PUMA, *Complicità di Stati nell'Illecito Internazionale*, Torino, 2018, pp. 101-120.

²⁹ GAMMELTOFT-HANSEN and HATHAWAY, "Non-Refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, 2015, p. 236 ff., pp. 278-281.

³⁰ DASTYARI and HIRSCH, "The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy", *Human Rights Law Review* (forthcoming).

³¹ On this matter, see MOYNIHAN, *Aiding and Assisting: Challenges in Armed Conflict and Counter-*

also allows to conceive of a more reasonable threshold of proof, focusing on an objective element (actual or near-certain knowledge) rather than on an extremely subjective and ineffable one (intent of a state organ).³² Moreover, this interpretation is supported by the fact that the inclusion of the subjective element of fault within the notion of internationally wrongful act was thoroughly discussed and ultimately discarded by the International Law Commission.³³

These conclusions are also reconcilable with the criticism that doing away with intent altogether in the context of complicity would lead to a confusion between aid or assistance in the commission of an internationally wrongful act and ordinary forms of cooperation, introducing a risk-based responsibility for complicity. In any case, in relation to the case at hand this risk appears to be less present than in other instances.³⁴ Without going so far as identifying an explicit intent of the Italian Government to aid and assist Libya in committing serious breaches of international human rights law, it is at the very least possible to conclude that Italy was aware not simply of a risk of ill-treatment but of actual human rights violations occurring at the hands of the Libyan authorities at the time of events. Therefore, the proposed interpretation of Article 16 ARSIWA appears to be particularly apt to support the recognition of Italy's responsibility in aiding and assisting the Libyan coastguard in the specific case under comment.

5. – *Concluding Remarks*

This chapter has analysed questions of jurisdiction and attribution raised by the application brought before the ECtHR against Italy in relation to serious human rights violations committed during a specific incident in the context of maritime interception carried out by the Libyan coastguard under the coordination of the IMRCC. The chapter has argued that due to its peculiar features, this case present

terrorism, Chatham House Research Paper, 2016, available at < <https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism>>; MOYNIHAN, "Aiding and Assisting: the Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility", *International and Comparative Law Quarterly*, 2018, p. 455 ff.

³² LANOVOY, *Complicity and its Limits in the Law of International Responsibility*, London, 2016, pp. 101-103; PUMA, *cit. supra* note 28; MORENO-LAX and GIUFFRÈ, "The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows", in JUSS (ed.), *Research Handbook on International Refugee Law*, Cheltenham (forthcoming).

³³ LANOVOY, *cit. supra* note 32.

³⁴ AUST, *Complicity and the Law of State Responsibility*, Cambridge, 2011, pp. 230-249.

new questions before the ECtHR. This case also suggests to the importance of distinguishing between the matter of Italian jurisdiction over conducts carried out by another State's agents outside of its territorial waters and that of attribution to Italy of said conducts for the purpose of the recognition of its responsibility for the alleged human rights violations. Two main arguments have been put forward in this chapter. First, in cases such as the one at issue it is difficult to establish Italy's jurisdiction on the grounds of either the spatial or the personal model of jurisdiction embraced by the ECtHR. In particular, the IMRCC's coordination activities may hardly satisfy the threshold of effective control for this purpose. Second, provided that Italian jurisdiction is recognised, another obstacle to the recognition of a violation of the ECHR by Italian authorities concerns the matter of attribution of conduct for the purpose of the allocation of responsibility for the commission of an internationally wrongful act. This article has argued that the most appropriate framework for this purpose appears to be that of Article 16 ARSIWA, provided that the requirement of intent in this context is interpreted as conclusive or near-certain knowledge. Accordingly, reference to Article 16 ARSIWA would entail the need to prove that Italian authorities were aware or near-certain that their aid or assistance to the Libyan coastguard would be used by the Libyan coastguard to commit violations of the right to life or of the prohibition of torture and inhuman or degrading treatment against intercepted migrants and asylum seekers.

The question of Italy's jurisdiction might constitute a significant obstacle to the success of the application under comment. The latter indeed does not simply challenge the traditional understanding of jurisdiction as territorial, but also the spatial and personal models of jurisdiction so far applied by the ECtHR. This article has shown that one of the principles established by the ECtHR with this respect appear to be equipped to capture Italy's involvement in joint operations of interception on the high seas in the way desired by the applicants.

More broadly, these observations raise doubts on the suitability of the ECtHR as the most appropriate judicial realm for the recognition of human rights violations perpetrated by States during interception activities on the high seas. A related question, then, concerns whether an application before the International Criminal Court ('ICC') for said internationally wrongful acts might bear different results. Support for the opening of a preliminary investigation by the ICC into crimes suffered by asylum seekers and migrants (including in the context of interception at sea) is increasingly gaining steam in both academic and institutional realms. In February

2018, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recommended that States and the ICC Prosecutor examine the possibility to investigate on crimes against humanity (including torture, ill-treatment and other serious human rights violations) suffered by migrants “also as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement”.³⁵ In this context, the Special Rapporteur specifically discussed push-back and pull-back operations. These observations, in turn, have led some international law scholars to argue that an ICC investigation should also concern Italy’s aiding and abetting to the crime of trafficking of human beings under the framework of Article 25(3) of the Rome Statute, and even the possible role of the EU itself in this context.³⁶

Clearly, this proposition presents its own hurdles. It is beyond the scope of this chapter to analyse the implications and possible difficulties of this choice. In this context, it is sufficient to recall that the identification of perpetrators, the qualification of all human rights violations suffered by involved migrants as international crimes, as well as questions of state jurisdiction and state responsibility are only some of the aspects that a potential ICC judgment would need to consider. While in different terms than those examined so far, questions of extraterritorial jurisdiction and allocation of responsibility (including the problem of shared responsibility) in particular would equally be raised before the ICC. To be sure, the search of judicial avenues of redress for migrants and asylum seekers whose lives and physical integrity have been put in danger by interception activities on the high seas is likely to dominate legal and political debates on extraterritorial jurisdiction and attribution in the years to come. These discussions are the product of a dissatisfaction with current legal categories and criteria of allocation of state jurisdiction and attribution which appear incapable of capturing the complex interactions of state and non-state actors in this field, undermining victims’ access to justice and their possibility to obtain redress.

³⁵ Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, UN Doc. A/HRC/37/50 of 26 February 2018, p. 20. See also General Assembly, “Unlawful death of refugees and migrants”, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, UN Doc. A/72/335 of 15 August 2017.

³⁶ MANN, MORENO-LAX and SHATZ, *Time to Investigate for Crimes against Migrants in Libya*, EJIL:Talk!, available at: <<https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>>.

3. ALLOCATING RESPONSIBILITY FOR REFUGEE PROTECTION TO STATES: ACTUAL AND POTENTIAL CRITERIA IN INTERNATIONAL (CASE) LAW

Ruben Wissing

SUMMARY: 1. Introduction – 2. Refugee Protection and State Responsibility – 3. Territorial Jurisdiction and Externalisation – 4. First Mechanism: Attribution on the Basis of Extraterritorial Jurisdiction – 4.1. European Case-law: Control, Authority, Effect – 4.2. International Law and Decisions: Control, Relationship, Effect – 4.3. Potential of Extraterritorial Jurisdiction for Refugee Protection: Impact, Instructions, Assistance – 4.4. Beyond Jurisdiction: Alternative Allocation Mechanisms in International (Case) law – 5. Second Mechanism: Allocation on the Basis of the Principles of Cooperation and Solidarity – 5.1. International Law Concepts – 5.2. Responsibility-sharing in International Refugee Law – 5.3. Responsibility-sharing in Human Rights Law – 5.3.1. *Erga Omnes* Obligation of Cooperation to Protect Peremptory Norms – 5.3.2. Global Climate Policy and Human Rights – 5.4. Solidarity in a Regional Context: EU Migration Law – 5.4.1. Internal Dimension – 5.4.2. External Dimension – 5.5. The Potential of Cooperation and Solidarity for Refugee Protection – 6. Third Mechanism: Allocation on the Basis of the Responsibility to Protect – 6.1. The RtoP-doctrine in International Law – 6.2. The Potential of the RtoP-doctrine for Refugee Protection – 7. Conclusion

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 45-90.

1. – Introduction

International law has restricted States' national sovereignty by according rights to refugees.¹ A State's responsibility to respect and protect those rights is triggered whenever a refugee finds himself within that State's jurisdiction.

However, this jurisdiction-based criterion for responsibility allocation, combined with States' migration policies directed at avoiding responsibility by keeping refugees out of their jurisdiction, have led to an unequal distribution of responsibilities for refugee protection among States. International refugee law has not developed a distribution mechanism for States to each take up an equitable share of the responsibilities towards refugees. The result is a continued asymmetric burden on countries of first asylum or transit: 84 percent of the world's refugees are in developing countries.²

Despite some successful historical precedents and recent endeavours in developing a responsibility-sharing framework,³ the political will to structurally handle the issue and to go beyond *ad hoc* emergency systems and voluntary pledges seems to be lacking.⁴

¹ The term 'refugee' is used in the chapter in its broadest sense, including not only recognised status-holders under the 1951 Refugee Status Convention, but also de facto refugees who are not recognised as such, holders of a regional protection status (e.g. subsidiary protection in the EU) and other forcibly displaced migrants. Refugee law also deals with forcibly displaced migrants that are not Convention-refugees, but are protected under regional 'international protection' law or international human rights law.

² United Nations High Commissioner for Refugees ('UNHCR'), Global Trends. Forced Displacement in 2018, 2019, p. 18, available at: <www.unhcr.org/globaltrends2018>. For numbers on the unequal distribution of asylum applicants, refugees and other 'burdens' related to refugee protection within the EU, see: WAGNER, KRALER, BAUMGARTNER, "Solidarity – an Integral and Basic concept of the Common European Asylum System", ICMPD Working Paper, June 2018, available at: <ceaseval.eu/publications>.

³ For an overview of historical precedents: SUHRKE, "Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action", *Journal of Refugee Studies*, 1998, p. 396 ff.; TÜRK and GARLICK, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees", *International Journal of Refugee Law*, 2016, p. 656 ff. The most recent global initiative is the UN Global Compact on Refugees: Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees, UN Doc. A/73/12 (Part II) (2018).

⁴ Examples of critique on the lack of political commitments: DURIEUX, "'Success under the GCR': Can it be measured?", *RLI Blog on Refugee Law and Forced Migration*, 29 January 2019, available at: <rli.blogs.sas.ac.uk/2019/01/29/success-under-the-gcr-can-it-be-measured>; COSTELLO, "Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?", *International Journal of Refugee Law*, 2018, p. 1 ff., p. 5; DOWD and MCADAM, "International Cooperation And Responsibility-sharing To Protect Refugees: What, Why And How?", *International and Comparative Law Quarterly*, 2017, p. 863 ff., pp. 865-866; European Council for Refugees and Exiles (ECRE), "ECRE

This chapter looks at international jurisprudence for potential solutions. Have international and regional courts come up with criteria for responsibility allocation other than territorial jurisdiction?

A first avenue this chapter looks into is the evolving concept of extraterritorial jurisdiction in international human rights law, and its potential beyond the models of spatial and personal control. Besides those developments related to extraterritorial jurisdiction, there is little international case-law that deals directly with refugee rights or even migration issues, let alone with issues related to non-substantive rights such as the inter-state distribution of refugee protection obligations.⁵

The chapter therefore also analyses two other legal mechanisms from general and other branches of international law, which encompass criteria to attribute or allocate responsibilities to States beyond their jurisdictions. First, I assess the principles of cooperation and solidarity and their implementation in international and regional refugee and human rights law, to enquire its potential beyond voluntary commitments in crisis situations. Then, I evaluate the potential of the Responsibility to Protect doctrine and the specific obligations it imposes on States to help other States protecting populations against atrocities.

The findings of the chapter are no ready-made solution that provides global refugee protection policy with an allocation mechanism that is structural, a priori, equitable and legally enforceable. This is a mapping exercise in which I want to assess under which conditions the proposed mechanisms might apply by analogy to international refugee law and what the assets and obstacles are for each mechanism's legal viability in global refugee protection.

Whether the alternative criteria also have the legal potential to eventually bring about an equitable distribution of refugee protection burdens among States, or whether they might be usefully deployed in litigation settings by individual refugee or hosting States against (other) States: those are questions for which satisfying answers also depend on extra-legal aspects, such as political feasibility and free riders-

Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270", October 2016, available at: <www.ecre.org/ecre-comments-on-commission-proposal-for-reform-of-the-dublin-system>.

⁵ For an overview of substantive rights under the 1951 refugee Status Convention and applicable human rights regimes, see: HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005.

problems, to name just a few.⁶ It will be impossible to be conclusive on the distributive and litigation potential of the proposed mechanisms in global refugee policy within the scope of this chapter; these are areas for future research.

Neither is it the intention to conclusively clear the terminological fog hanging over some of the discussed concepts, such as solidarity, cooperation, responsibility- and burden-sharing, but also refugee protection or responsibility. Those terms sometimes have different meanings in different contexts or other branches of international or regional law. The lack of exact definitions adds to the already difficult identification of normative content,⁷ but also makes the notions “attractively void of precise meaning”.⁸ Where there is need for clarity, I will justify the working definitions I adopt or let cited case-law speak for itself.

In two short introductory sections I will first clarify for which refugee rights States bear responsibility (Section 1), and how this responsibility is traditionally attributed to States on the basis of jurisdiction and how they try to avoid it (Section 2). Then I will explain which criteria there are to establish extraterritorial jurisdiction (Section 3), what alternative criteria the principles of cooperation and solidarity (Section 4), and the Responsibility to Protect-doctrine (Section 5) could come up with, and what distributive potential these mechanisms might have among States with regard to responsibilities for refugee protection.

2. – *Refugee Protection and State Responsibility*

Refugees are migrants, by definition. Access of migrants to the territory of a State and their residence traditionally are considered to fall under the national sovereignty of States. First bilateral agreements, and later human rights law have long since imposed restrictions on the absolute and discretionary meaning attached to this principle before.⁹ The concept of sovereignty now no longer only describes national States’

⁶ See e.g.: BETTS, “Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory”, *Journal of Refugee Studies*, 2003, p. 274 ff.; NOLL, “Prisoners’ Dilemma in Fortress Europe. On the Prospects of Burden Sharing in the European Union”, *German Yearbook of International Law*, 1997, p. 405 ff.; SUHRKE, *cit. supra* note 3.

⁷ INDER, “The Origins of ‘Burden Sharing’ in the Contemporary Refugee Protection Regime”, *International Journal of Refugee Law*, 2017, p. 523 ff., pp. 528-530.

⁸ NOLL, “Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field”, *Journal of Refugee Studies*, 2003, p. 236 ff., pp. 236-237.

⁹ HATHAWAY, *cit. supra* note 5, pp. 75-153.

See also, Permanent Court of International Justice, *France v. Great Britain (Nationality Decrees)*,

competence and powers, but also their legal responsibility under contemporary international law.¹⁰

States now undisputedly have a legal responsibility towards refugees: contemporary international refugee law imposes obligations upon States to respect, secure and fulfil rights of refugees – besides additional regional commitments, such as under the European Union ('EU') asylum *acquis*. Some of those rights have the status of international customary law, and are specific to their status as migrant (most notably, the non-refoulement principle),¹¹ or as human being (such as non-discrimination or the prohibition of inhumane or degrading treatment);¹² others are treaty-based general human rights or rights of a specific category of forcibly displaced persons,¹³ or established by case-law.¹⁴

The – in this chapter further unspecified –¹⁵ totality of those refugee rights and corresponding State obligations towards refugees can be referred to as 'refugee pro-

Advisory Opinion 7 February 1927, p. 24: "[...] in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law."

¹⁰ CHETAIL, "The transnational Movement of Persons under general international law- Mapping the customary law foundations of International Migration Law", in CHETAIL and BAUDOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham, 2014, p. 1 ff., p. 32; CARLIER and SAROLEA, *Droit des Étrangers*, Bruxelles, 2016, pp. 75-78.

¹¹ HURWITZ, *The Collective Responsibility of States to Protect Refugees*, Oxford, 2009, p. 204; CHETAIL, *cit. supra* note 10, pp. 27-72.

¹² HATHAWAY, *cit. supra* note 5, pp. 160-170; Office of the High Commissioner for Human rights (OHCHR), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 1986.

¹³ E.g.: 'Convention-refugees', to whom the strict definition of Article 1(A) of the 1951 Refugee Status Convention applies, have, to the same level as nationals, civil status guarantees (Art. 12), access to work (Art. 23), travel documents (Art. 24) or social aid (Art. 28); HURWITZ, *cit. supra* note 11, pp. 173-222.

¹⁴ E.g.: access to an asylum procedure, recognized by the Inter-American Commission on Human Rights, *The Haitian Centre for Human Rights et al. v. United States*, Case Judgement of 13 March 1997; see: HURWITZ, *cit. supra* note 11, p. 211. Or admission to the territory, see: HATHAWAY, *cit. supra* note 5, p. 301.

¹⁵ This chapter is not intended to enumerate all the different (categories of) rights that together make up 'refugee protection', nor to specify which legal category of 'refugee' (see *supra* note 1) is entitled to which rights under which subfield of international law, then to analyse which State might be responsible to ensure each right, etc. This chapter only wants to map some legal mechanisms for the distribution of State responsibility, then to evaluate what their potential might be for States' refugee protection responsibilities.

tection'. When respected and protected by the State, refugee protection can be qualified as 'effective'.¹⁶

3. – *Territorial Jurisdiction and Externalisation*

International refugee law determines protection status and rights. However, international refugee law did not establish a specific inter-state mechanism to determine which state is responsible to uphold which share of global refugee protection (let alone how to hold it accountable).¹⁷ Such a legal mechanism with binding allocation criteria could be instrumental to deal with the question of distribution of refugee protection obligations, and the actual refugees themselves, between States and avoid unjustifiable imbalances and inequalities.

There is a clear distinction between two types of State responsibility distribution mechanisms. I have opted to call responsibility 'allocation', the legal mechanisms for sharing and distributing responsibilities between States on an *a priori* basis of binding criteria. The other type I call responsibility 'attribution', to refer more generally to the judicial *a posteriori* correcting mechanisms for establishing responsibility for violations of individuals' rights by applying legal criteria to connect law violations with a specific State.¹⁸ Attribution is restorative, allocation rather preventive.¹⁹

The prime instrument of international refugee law, the 1951 Refugee Status Convention, does not provide a specific allocation criterion for state responsibility, and initiatives taken under United Nations ('UN') auspices or at regional level to establish a (re)distribution mechanism have so far failed to deliver,²⁰ notwithstanding the

¹⁶ HURWITZ, *cit. supra* note 11, pp. 52-56 and 214.

¹⁷ WALL, "A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?", *International Journal of Refugee Law*, 2017, p. 201 ff., p. 203; HATHAWAY and NEVE, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection", *Harvard Human Rights Journal*, 1997, p. 115 ff., p. 141; TENDAYI ACHIUME, "Syria, Cost-Sharing, and the Responsibility to Protect Refugees", *Minnesota Law Review*, 2015, p. 687 ff., pp. 690-691; MCADAM and DOWD, *cit. supra* not 4, p. 865.

¹⁸ While the terminological distinction is my own, I find inspiration for the conceptual difference in CHRISTENSON, "The Doctrine of Attribution in State Responsibility", in RICHARD (ed.), *International Law of State Responsibility for Injuries to Aliens*, 1983, p. 321 ff.

¹⁹ The distinction is not necessarily clear cut: a practice of inter-state allocation can find its legal basis in an *a posteriori* dispute over violation of rights, initiated by an individual (e.g. the non-discretionary application of the sovereignty clause in the Dublin II-regulation found its origin in the European Court of Human Rights ('ECtHR') *MSS*-case).

²⁰ See *supra* note 4.

repeated recognition of the need for binding engagements.²¹ This flaw exacerbates ‘overburdening’ of certain countries, mostly in developing regions of origin, while others stay unaffected and can basically keep their borders closed to refugees.²²

To fill this hiatus in international refugee law, we thus have to fall back to general international law. More exactly, I decided to look at international case-law for solutions, one of jurisprudence’s *raisons d’être* precisely being the attribution of responsibility.

In the absence of binding inter-state allocation criteria in refugee law, refugees generally have to undertake individual judicial action to stand up for their protection rights. Since no specific international court has the competence at supranational level to deal with claims against States for violations of the international refugee law itself, individuals generally bring them before international or regional human right courts or committees and relate to violations of parallel human rights provisions. To attribute responsibility for the violation of an individual’s human rights to a specific State, human rights treaties determine the State’s exercise of jurisdiction as the defining criterion.²³ Classic sovereignty doctrine establishes jurisdiction on a territorial basis: the primary State responsible for securing someone’s human rights is the territorial State on which he or she is present.²⁴ International and European jurisprudence, however, have gradually applied a broader interpretation of State jurisdiction by acknowledging its exercise beyond its territory, because of the negative consequences of a purely territorial interpretation of jurisdiction.

A good illustration of such negative effects are the EU ‘externalisation’ policies.²⁵

‘Externalisation’ is the term broadly used for the amalgam of policy measures, practices and actions, legal provisions and political agreements in migration policies employed by national governments and supranational organisations, such as the EU,

²¹ New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1, para 68, and Annex 1 (Comprehensive Refugee Response Framework), para 1; WALL, *cit. supra* note 17 pp. 210-214.

²² For figures, see *supra* note 2.

²³ Article 2 International Covenant on Civil and Political Rights (ICCPR), Article 2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and Article 1 ECHR.

²⁴ CHETAIL, *cit. supra* note. 10, pp. 27-28; CARLIER and SAROLEA, *cit. supra* note 10, pp. 63-64; In refugee law this same idea – discretionary jurisdiction of the territorial state to grant asylum – is expressed in the concept of ‘territorial asylum’ (UNGA, 1967, Resolution 2312, Declaration on Territorial Asylum, art. 3).

²⁵ Also called ‘politics of *non-entrée*’. See: GAMMELTOFT-HANSEN and HATHAWAY, “Non-Refoulement in a World of Cooperative Deterrence”, *Columbia Journal of Transnational Law*, 2015, p. 235 ff., p. 241.

intended to avoid migrants coming under their jurisdiction in order to circumvent responsibility for refugee protection and regional and national judicial scrutiny – basically the outsourcing of border management to third States, by exporting it under their territorial jurisdiction.²⁶ Generally the term is used for EU’s external policies:²⁷ carriers sanctions, strengthened external border controls in the Mediterranean, the deal with Turkey to keep refugees from onward movement,²⁸ agreements with Libya or Niger to intercept and return migrants, etc.²⁹ But also mutual deterrence policies between EU Member States themselves, although less commonly labelled as such, are good examples of ‘externalisation’: the strict application of Dublin III-regulation, reluctance to fully implement the relocation mechanisms, the reintroduction of internal border controls.

Externalisation causes burden-shifting, unequal distribution of refugees and protection responsibility, and a globally shrinking protection space for those in need of and entitled to international protection.³⁰ When refugees are constrained to countries of first asylum in the Global South, away from the common EU protection regime, their access to effective protection is endangered, and international (and European) refugee and human rights standards are more likely to be infringed. Implementing policies that physically prevent migrants from entering the EU or a specific member

²⁶ RODIER, “Analysis of the External Dimension of the European Union’s Asylum and Immigration Policies - Summary and Recommendations for the European Parliament”, European Parliament, DT\619330EN.doc (2006), p. 8; GAMMELTOFT-HANSEN and HATHAWAY, *cit. supra* note 25, pp. 244 and 249. For a distinction between the external dimension and externalisation based on the effectiveness of control by the externalising State or need for implementation by the third State, see MC NAMARA, “Member State Responsibility for Migration Control within Third States – Externalisation Revisited”, *European Journal of Migration and Law*, 2013, p. 319 ff., pp. 326-328.

²⁷ Gammeltoft-Hansen and Hathaway distinguish between a first generation of ‘non-entrée’ measures (visa controls, carrier sanctions, creation of ‘international zones’ and deterrence on the high seas), and seven forms of second generation cooperation-based policies. See GAMMELTOFT-HANSEN and HATHAWAY, *cit. supra* note 25, pp. 244-256.

²⁸ European Council, EU-Turkey Statement, 18 March 2016, available at: <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement> (“Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU”).

²⁹ For examples and references of externalisation measures, see i.a.: GAMMELTOFT-HANSEN and TAN, “The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy”, *Journal on Migration and Human Security*, 2017, p. 28 ff.

³⁰ I use the term ‘protection space’ to refer to the global complex composed of different territories, policies and practices that, separately or taken together, guarantee refugee protection in conformity with international (and regional) law. When such protection is accessible for refugees, it can be called ‘effective’.

State immobilises refugees in substandard legal and material conditions,³¹ including within the EU itself.³² Strict EU external border policies have also made irregular border-crossings more difficult and deadly, leading to increased reliance on smuggling networks.³³ Externalisation further causes spill-over effects in many transit countries with already restricted refugee protection regimes, as it does not incentivizes them to fully implement the international refugee and human rights law themselves. Rather refugee hosting countries start copying externalisation practices, and might back down from existing non-refoulement guarantees or make them conditional upon stronger responsibility-sharing commitments by countries in the Global North.³⁴

Could States that undertake externalisations practices and policies be held responsible for violations of international refugee or human rights law outside their own territory? Before focussing on alternatives to the jurisdiction criterion, I will first analyse under which conditions jurisdiction can be engaged extraterritorially.

4. – First Mechanism: Attribution on the Basis of Extraterritorial Jurisdiction

States have been held responsible for practices outside of their territorial borders that affected persons who were considered to fall under their jurisdiction. This Section first analyses the scope and interpretation given to extraterritorial jurisdiction in European and international case-law. Then it will assess the potential of extraterritorial jurisdiction for responsibility allocation to States for acts that affect refugee rights beyond its borders and executed by others than its own agents.

³¹ Such as collective detention camps, lack of asylum processing and reception, legal uncertainty and precarious protection status, limited to no access to work, education, integration opportunities or material support.

³² E.g. reception conditions on the Greek islands. See: Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her Visit to Greece from 25 to 29 June 2018, available at: <www.coe.int/en/web/commissioner/-/greece-should-safeguard-social-rights-for-all-and-improve-the-reception-and-integration-of-migrants>.

³³ For data on deaths at sea and human smuggling, see International Organisation for Migration's database, available at <missingmigrants.iom.int/> and <migrationdataportal.org/themes/smuggling-migrants>; COSTELLO, *cit. supra* note 4, p. 5.

³⁴ HURWITZ, *cit. supra* note 11, pp. 165-176; CHIMNI "Aid, Relief, and Containment: The First Asylum Country and Beyond", *International Migration*, 2002, p. 75 ff., pp. 83-84; GAMMELTOFT-HANSEN, *Access to Asylum*, Aarhus, 2009, pp. 265-266.

4.1. – European Case-law: Control, Authority, Effect

In the context of EU Member States' migration policies, regional courts have played a central role in interpreting the scope of State jurisdiction, and thus setting out the extent of States' responsibility for human rights and refugee protection. To determine States' extraterritorial jurisdiction, the European Court of Human Rights ('ECtHR') in particular has developed extensive case-law on the application of Article 1 of the European Convention on Human Rights ('ECHR'): "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Although, in the 2001 *Banković* case, the Court declared sovereign territorial jurisdiction to be the general rule, accepting non-territorial based jurisdiction "only in exceptional cases" demanding special justification,³⁵ it had already adopted in the 1997 *Loizidou* case that "under its established case-law the concept of jurisdiction under Article 1 [...] is not restricted to the national territory [...] the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory."³⁶

The Court established extraterritorial jurisdiction in cases in which the State had an overall control over a part of the territory beyond its borders as a consequence of military action, but also when State authorities have control over the person affected. The Court explicits in its 2005 *Öcalan* and *Issa* judgements, that a State can exercise jurisdiction over persons outside of its territory, whenever that State has authority or effective control over them, even temporarily or de facto.³⁷ In *Al-Skeini*, the Court clarifies: "What is decisive in such cases is the exercise of physical power and control over the person in question."³⁸

The Court specifies that "[i]n each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the

³⁵ European Court of Human Rights, *Banković and Others v. Belgium and Others*, Application No. 52207/99, Decision (Grand Chamber) of 12 December 2001, para. 67.

³⁶ *Id.*, *Loizidou v. Turkey*, Application No. 153818/89 Judgment (merits) of 18 December 1996, para. 52.

³⁷ *Id.*, *Issa v. Turkey*, Application No. 31821/96, Judgment of 16 November 2005, para. 74; *Id.*, *Öcalan v. Turkey*, Application No. 46221/99, Judgment (Grand Chamber) of 12 May 2005, para. 91.

³⁸ *Id.*, *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Judgment (Grand Chamber) of 7 July 2011, para. 136.

particular facts.”³⁹ Certain activities of EU State’s agents outside their national territory (under EU’s externalisation policy), constitute an effective control or power over a person extraterritorially, and thus allocate responsibility with that State.⁴⁰

The Court also explicitly applied this line of reasoning in specific migration situations at and beyond State borders, where refugee rights such as the prohibition of refoulement or the right to seek asylum were at stake. The Court finds that a state exercises jurisdiction in international zones at airports,⁴¹ at sea ports,⁴² on airplanes it refuses to land and at checkpoints outside its territory.⁴³ Most notoriously, in the *Hirsi Jamaa* case, concerning the interception of migrants on the high seas, the Court establishes that State action “the effect of which is to prevent non-nationals from reaching the borders of the State or even to push them back to another State”, constitutes an extraterritorial exercise of jurisdiction.⁴⁴ To attribute State responsibility for situations aboard ships, the findings in the *Hirsi* judgement were based on the fact that ship and crew were de facto as well as de iure under the control of the (Italian) State, since it sailed under its flag.⁴⁵ In its earlier *Medvedyev* judgement, it also assumed (French) jurisdiction on the basis of mere de facto control of the crew, superseding the flag state criterion.⁴⁶

At yet, doctrine generally identifies two models for attributing extraterritorial jurisdiction in European case-law, both based on effective control. First, a spatial model, based on the exercise by a State, through its agents, of overall control or authority over (a part of) a territory beyond its own borders. Second, a personal model based on effective control and physical power over the alleged victims.⁴⁷ Both

³⁹ *Ibid.*, para. 132.

⁴⁰ GAMMELTOFT-HANSEN and HATHAWAY, *cit. supra* note 25, p. 263.

⁴¹ European Court of Human Rights, *Amuur v. France*, Application No. 19776/92, Judgment of 25 June 1996.

⁴² *Id.*, *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, Judgment of 21 October 2014.

⁴³ *Id.*, *East African Asians (British protected persons) v. the United Kingdom*, Application Nos. 4715/70, 4783/71 and 4827/71, Judgment of 6 March 1978.

⁴⁴ *Id.*, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (Grand Chamber) of 23 February 2012, paras. 78 and 180.

⁴⁵ *Ibid.*, paras. 70-75.

⁴⁶ *Id.*, *Medvedyev and Others v. France*, Application No. 3394/03, Judgment of 29 March 2010, para. 66-67

⁴⁷ Gammeltoft-Hansen and Hathaway distinguish a third model whereby extraterritorial jurisdiction is established on the basis of exercising ‘public powers’ abroad, namely when, as identified in *Al-Skeini*, “in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive

models concern acts exercised extraterritorially by organs or agents of the externalising State.

4.2. – International Law and Decisions: Control, Relationship, Effect

UN human rights bodies also have elaborated extraterritorial jurisdiction criteria for international law.

The Human Rights Committee ('HRC') clarifies the scope of the obligation under Article 2(1) of the International Covenant on Civil and Political Rights ('ICCPR') to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" in its General Comment No. 31. It ascertains State jurisdiction "to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party [...], regardless of the circumstances in which such power or effective control was obtained".⁴⁸

The HRC developed a consistent practice since the 1981 *Lopez Burgos* case, in which it finds the Covenant applicable and the State responsible for the actions of its agents "on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it".⁴⁹ Extraterritorial jurisdiction for human right violations does not vaporise on account of complicity of the territorial State.

or judicial functions on the territory of another State" (para. 135). See: GAMMELTOFT-HANSEN and HATHAWAY, cit. supra note 25, pp. 266-272. I tend to see in it rather a variation of the other two 'control'-models. The existence of an agreement or other legal basis or not, does not appear, to me, to be in itself the constitutive element for extraterritorial jurisdiction. Rather it is an element of proof to indicate that control, power or authority might have been exercised extraterritorially. From the existence and content of such an agreement one might infer the personal or territorial control State agents were *entitled* to exercise on the territory of the third State, but not that they *have effectively* done so, nor that it is a necessary condition to do so. The two additional conditions identified by the authors in order for this proposed model to apply – in particular "the breach of human rights resulting from the exercise of public powers must be attributable to the extraterritorially acting state, rather than to the territorial state" –, has the same effect as sorting it as a variation of the other models. Their conclusion seems to support my suggestion: "Where there is an agreement to deploy liaison officers or provide other forms of support that *in substance result in the exercise of effective control* by the sponsoring state, jurisdiction—and hence liability—is established." (emphasis added)

⁴⁸ United Nations Human Rights Committee (UNHRC), General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

⁴⁹ Id., *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (1984), para. 12.3

In the same case, the Committee also determines that jurisdiction (under the Optional Protocol) does not refer “to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”⁵⁰ The relevance of the ‘State-individual relationship in relation to the violation’ leaves room for accepting State jurisdiction even beyond violations committed directly by its agents abroad – e.g. for human rights violations of refugees in a transit country due to policies exactly intended to have a cross-border impact on that population.

In its 2003 concluding observations on Israel, the HRC further clarified the relation between the conduct of the State and the violation, regardless of the range of control: “the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” [*sic*].⁵¹

The Committee Against Torture (‘CAT’), in its General Comment on Article 2 of the Convention against Torture, determines that “the concept of ‘any territory under its jurisdiction’ [...] must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of the State party”.⁵² In its 2008 *Marine I* decision, on the interception of migrants at sea by Spanish State agents and their continuous detention in Mauritania, the CAT accepted that a State’s jurisdiction applied “to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.”⁵³

The International Court of Justice (‘ICJ’) has endorsed the position of the UN bodies. In its 2004 advisory opinion *Construction of a Wall*, the Court refers to the “constant practice of the Human Rights Committee” since the *Lopez Burgos* case and its concluding observations on Israel, as well as to the original inspiration of the ICCPR drafters in 1955:

⁵⁰ *Ibid.*, para. 12.2.

⁵¹ *Id.*, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, UN Doc. CCPR/C0/78/1SR (2003), para. 11.

⁵² United Nations Committee Against Torture (UNCAT), General Comment No. 2, Implementation of Article 2 by States parties, UN Doc. CAT/C/GC/2 (2008), para. 7.

⁵³ *Id.*, *J.H.A. v. Spain*, Judgments, Decision of 10 November 2008, para. 8.1.

“The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”⁵⁴

In conclusion, also international law reflects in judicial and quasi-judicial decisions the two models for establishing jurisdiction that was identified within the ECtHR case-law: the spatial, based on territorial control, and the personal, based on control over the individual. It further adds some extra qualifying elements: the irrelevance of the complicity or agreement of the territorial state, and the relevance of the state-individual relation for establishing the rights violation.

4.3. – Potential of Extraterritorial Jurisdiction for Refugee Protection: Impact, Instructions, Assistance

The two control-based models for identifying extraterritorial jurisdiction (spatial and personal) do not suffice, however, to attribute responsibility for more indirect externalisation practices – let alone for an equitable allocation of responsibility for refugee protection in general, independent from a State’s involvement in externalisation or not. What about violations that are not exercised by agents of the externalising State, but implemented in and by third countries themselves? It feels legally logical that, irrespective of the question whether or not spatial or personal extraterritorial jurisdiction can be established, a State should respect and ensure human rights to the extent that it reasonably can: jurisdiction would thus be established by the State’s obligation of due diligence.⁵⁵

Doctrine seems to be identifying a third way of establishing extraterritorial jurisdiction.⁵⁶ In a 2018 draft for a new General Comment on the right to life, the HRC includes under persons over whom a state exercises power or effective control, those “located outside any territory effectively controlled by the State, whose right to life

⁵⁴ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 109-110.

⁵⁵ MILANOVIC, *The Extraterritorial application of human rights treaties : law, principles, and policy*, Oxford, 2011, p. 209-210.

⁵⁶ MOGSTER, “Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR”, EJILtalk, 27 November 2018, available at <www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr>; GAMMELTOFT-HANSEN and HATHAWAY, *cit. supra* note 25, p. 268.

is nonetheless *impacted* by its military or other activities *in a direct and reasonably foreseeable manner*.⁵⁷ Even though the HRC considers it as a form of exercise of power or control by the State, ‘direct and reasonably foreseeable impact’ clearly adds a new layer to the already accepted criteria to establish extraterritorial jurisdiction.

The new model made explicit here reflects the range of control that State jurisdiction can entail, beside, or on top of, the forms of control acknowledged under the spatial and personal models. What is new, and relevant for evaluating external migration policies, is the shift in focus from the link of the responsible State with the victim (effective control under the personal model) to the link with (acts of) the perpetrator (the impact model). This shift overcomes the distinction between violations committed by State agents beyond their State’s borders, and those committed by non-agents or third State officials acting under (another) State’s direction or control.

This broadening application of the extraterritorial jurisdiction, beyond the State’s control as envisaged by the established models, is also made explicit in the *Draft articles on Responsibility of States for Internationally Wrongful Acts*, of the International Law Commission (‘ILC’). Article 8 reads: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact *acting on the instructions* of, or under the direction or control of, that State *in carrying out the conduct*.”⁵⁸

Attribution of responsibility for giving instructions to persons that are not agents of the instructing State goes beyond the classical attribution to State agents. In its *Commentary* to the Draft Articles, the ILC points to the importance of “the existence of a *real link* between the person or group performing the act and the State machinery.”⁵⁹ In order to qualify this ‘link’ more precisely, the ILC refers to the ICJ judgement in *Military and Paramilitary Activities (Nicaragua)*, where State responsibility

⁵⁷ UNHRC, (Advance unedited version) General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (2018), para. 63 (emphasis added).

⁵⁸ ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), Art. 8 (emphasis added). The *Articles* have repeatedly been commended and their importance acknowledged by the UN General Assembly. An overview of those Resolutions is available at: <legal.un.org/ilc/guide/9_6.shtml>.

⁵⁹ ILC, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 31 ff., Art. 8, Commentary (1).

was attributed for the employment of auxiliaries:⁶⁰

“Each case will depend on its own facts, in particular those concerning the *relationship between the instructions given or the direction or control exercised and the specific conduct complained of*. [...] the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.”⁶¹

While discarding responsibility attribution for conduct of persons that clearly goes beyond lawful instructions of the State, the ILC however accepts responsibility in case “particular instructions may have been ignored”.⁶² The ICJ in its 2005 *Armed Activities (DRC v. Uganda)* judgement also considered it irrelevant whether auxiliaries (UDFP soldiers) “acted contrary to instructions given or exceeded their authority” “for their attribution of their conduct” on the territory of their own State (Congo) to an external State (Uganda).⁶³

Also the HRC further qualifies the extraterritorial impact on third State perpetrators of human rights violations, referring in its draft General Comment No. 36 to Article 16 of the ILC *Draft Articles*, by reminding States that they also have “obligations under international law *not to aid or assist activities undertaken by other States and non-State actors* that violate the right to life”.⁶⁴

From this perspective, it can be concluded that the impact-model could find a potential application as an attribution mechanism for refugee protection responsibility. Refugee rights violations conducted on the territory of a third State, but instructed or directed by a ‘sponsoring State’ or under the direct and foreseeable impact of its policies intended at externalising its refugee protection responsibilities, can be attributed to that instructing State which thus bears responsibility for it.⁶⁵ In this respect, an interesting judgement to watch out for is the *M.N. v. Belgium* case pending before the ECtHR Grand Chamber.⁶⁶ The Court might need to interpret the scope of

⁶⁰ International Court of Justice, *Nicaragua v. United States of America (Military and Paramilitary Activities in and against Nicaragua)*, Judgement (merits) of 27 June 1986, para. 86 (emphasis added).

⁶¹ See *supra* note 58, Art. 8, Commentary (7) (emphasis added).

⁶² *Ibid.*, Art. 8, Commentary (8).

⁶³ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168 ff., para. 214.

⁶⁴ See *supra* note 57.

⁶⁵ GAMMELTOFT-HANSEN and HATHAWAY, *cit. supra* note. 25, p. 268.

⁶⁶ European Court Of Human Rights, *M.N. and Others v. Belgium*, Application no. 3599/18; ECtHR, “Grand Chamber to examine case concerning consular authorities’ refusal to grant humanitarian visas requested by Syrian nationals”, 26 November 2018, ECHR 402 (2018), available at: <hudoc.echr.coe.int/eng-press?i=003-5127469-6327387>.

the impact-model when it will have to judge if the extraterritorial jurisdiction of a the State (Belgium) is engaged by refusing a visa to a refugee in a country of first asylum (Lebanon), and if by consequence it could be held responsible for eventual violations of the refugee's fundamental rights in that third country.

The scope of application of the HRC impact-model seems so far limited to right to life violations – and the threshold as well as qualification ('direct and reasonably foreseeable') will need further interpretation. Still, refugee lives are endangered and deprived due to the border controls and detention and refoulement practices in countries of transit or first asylum. Even in situations where agents of an EU Member State have not been directly engaged, one could soundly argue that its externalisation policies and cooperation with the territorial State have a direct and foreseeable impact on refugees' right to life, irrespective of the exact degree of control.

4.4. – Beyond Jurisdiction: Alternative Allocation Mechanisms in International (Case) Law

The jurisprudence referred to so far is mainly case-law *attributing* responsibility (*a posteriori*) to a State for violations of international law, by determining if the violation happened under its jurisdiction, be it territorial or extraterritorial. Jurisdiction simply attaches legal consequences to acts or omissions of a State on an objective basis (control, impact). This approach, however, does not suffice to structurally *allocate* (*a priori*) responsibility among States for global refugee protection in an equitable manner.

Since States hardly allocate on a voluntary basis, a responsibility criterion is sought for that establishes a positive obligation on States to guarantee quality and availability of international protection also for refugees who find themselves beyond their jurisdiction.⁶⁷

Can international jurisprudence teach us something about structural inter-state responsibility allocation beyond their respective jurisdictions? The answer to that question might find in global refugee protection one of its most useful practical applications. I will map some of the lines of reasoning in international case-law, and tentatively hint at their potential for a more equal and fair distribution of responsi-

⁶⁷ For the definition of 'quality of protection', I refer to the use of the term by Gammeltoft-Hansen: "the certainty, scope and level of rights afforded to refugees". GAMMELTOFT-HANSEN, *cit. supra* note 34, p. 62-63.

bilities for refugee protection. First, I enquire into the obvious legal basis in international law for responsibility-sharing, the principles of international cooperation and solidarity (Section 5). Then, I evaluate a concept from international humanitarian law, the Responsibility to Protect-doctrine (Section 6).

5. – Second Mechanism: Allocation on the Basis of the Principles of Cooperation and Solidarity

After first explaining what the central concepts of solidarity, cooperation and responsibility-sharing mean under general international law, this Section explores whether and how those principles have been operationalised in international refugee law and in international human rights law, to conclude with a glimpse at a regional implementation, in the EU migration policy.

5.1. – International Law Concepts

Solidarity, cooperation, burden- and responsibility-sharing are confusingly used almost as synonyms in refugee studies.⁶⁸ This chapter does not intend to settle the issue, but approaches it with pragmatism. The following working definitions are based on doctrine and legal sources commonly referred to in the field of international refugee law, but demand a pragmatic use due to unavoidable overlap and incoherence.

International cooperation is an overarching objective of the UN, entailing the legal duty for States to take joint and separate action in areas where there are shared interests and mutual benefits.⁶⁹ The UN Charter mentions it as one of the UN's principal purposes "in solving international problems of [...] humanitarian character, and in promoting and encouraging respect for human rights".⁷⁰ The principle itself does not specify the specific contribution due by States to comply with this duty, nor its form or content.

The UN General Assembly, in its Millennium Declaration, further considers "certain fundamental values to be essential to international relations in the twenty-first century", i.a.: "Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity

⁶⁸ INDER, *cit. supra* note 7, p. 528.

⁶⁹ TÜRK and GARLICK, *cit. supra* note 3, p.658-660.

⁷⁰ Art. 1(3) UN Charter.

and social justice. Those who suffer or who benefit least deserve help from those who benefit most.”, and: “Shared responsibility. Responsibility for managing world-wide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. [...]”⁷¹

Solidarity is a fundamental value that acknowledges a shared interest in the need for support between States in order to lighten the unequal distribution of burdens and costs that are necessary to satisfactorily implement humanitarian principles.⁷² It is a political principle that is value driven (equity, fairness), has legal quality, and is context-sensitive for its implementation.⁷³ While the duty of cooperation is not defined by its outcome, solidarity is, in demanding an equitable, fairer sharing of burdens – still that does not yet make it sufficiently precise to substantiate specific legal obligation for States.⁷⁴

Burden- and/or responsibility-sharing reflect a more concrete goal for international cooperation, and an intended outcome of solidarity,⁷⁵ namely the distribution of costs and benefits between States.⁷⁶ In refugee policy it includes engagements for an equitable distribution of the consequences of refugee hosting and protection. The term ‘burden’ could cover all kinds of specific commitments and efforts a certain obligation entails for a State. It is widely understood to refer to the rather negative aspect of ‘costs’ of refugee protection for a State. Hence the use of the more neutral term ‘responsibility-sharing’, which also refers to a broader set of inter-state assistance measures, such as resettlement of refugees or assistance in migration management, besides simple cost-sharing.⁷⁷

⁷¹ United Nations Millennium Declaration, UN Doc. A/RES/A/55/2, 18 September 2000, para. 6.

⁷² TURK and GARLICK, *cit. supra note 3*, pp. 661-663.

⁷³ KOTZUR, “Solidarity as a Legal Concept”, in GRIMMEL and MY GIANG (eds.), *Solidarity in the European Union*, Hamburg, 2017, p. 36 ff., pp. 39-40.

⁷⁴ MORENO-LAX, “Solidarity’s reach: Meaning, dimensions and implications for EU (external) asylum policy”, *Maastricht Journal of European and Comparative Law*, 2017, p. 740 ff., pp. 743 and 749. For an extended analysis of the concept of solidarity in refugee and EU law, see: WAGNER et. al., *cit. supra note 2*.

⁷⁵ MORENO-LAX, *cit. supra note 74*, p. 749.

⁷⁶ BETTS, COSTELLO, ZAUN, “A Fair Share: Refugees and Responsibility-Sharing”, Delmi-report Stockholm, 2017, pp. 19-22.

⁷⁷ TURK and GARLICK, *cit. supra note 3*, pp. 663-665; HATHAWAY and NEVE, *cit. supra note 17*, p. 201-209.

The principles of international cooperation and solidarity are key to dealing with transnational issues under international law and enshrined in numerous soft-law documents, including Resolutions of the General Assembly.⁷⁸ The instruments are not operationalised in directly enforceable responsibility-distributing mechanisms or sufficiently specific provisions: burden-sharing commitments tend to be limited to voluntary contributions or ad hoc solutions, and they lack State practice to be considered international customary law. International solidarity and cooperation, and responsibility-sharing solutions are consequently fraught with collective-action and free-rider problems.⁷⁹

5.2. – Responsibility-sharing in International Refugee Law

Also more specifically in international refugee law itself, references to the duty to cooperate, inspired by the principle of solidarity, and engagements to share burdens and responsibilities are made repeatedly, though also in soft-law instruments that lack enforceable operationalisation.

The Preamble of the 1951 Refugee Status Convention endorses cooperation and burden-sharing:

“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation,”

The objective of the Convention itself, finding a ‘satisfactory solution’ for the global issue of refugee protection, is directly attached to the States’ duty to cooperate. From the *Travaux Préparatoires* to the Convention, it becomes clear that with “the principle of burden-sharing [...] not only international cooperation in the field of protection but also in the field of assistance, help for States on which the refugee problem places too heavy a burden was meant”.⁸⁰ The Final Act of the Conference

⁷⁸ E.g. Declaration on the Right to Development, UN Doc. A/RES/41/128 (1986), Annex, Arts. 3 and 6; Promotion of a Democratic and Equitable International Order, UN Doc. A/RES/59/193 (2004), para. 4 (f).

⁷⁹ WALL, *cit. supra* note 17, p. 207-209; TENDAYI ACHIUME, *cit. supra* note 17, p. 703; see *supra* note 6.

⁸⁰ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary* by Dr. Paul Weis, 1990, p. 32.

adopting the Convention additionally recommends “that these refugees may find asylum and the possibility of resettlement”.⁸¹ However, neither the Convention nor the interpretative texts, tell how burden-sharing should exactly come about or go that far as to establish a concrete responsibility allocation mechanism.

Interestingly, Article 38 of the Convention appoints the ICJ as the *forum litis* to settle inter-state disputes concerning the interpretation or application of the Convention, in case they cannot be settled by other means. A dispute between States about who should guarantee certain rights under the Convention in a situation of overburdening – referring to the Preamble’s explicit call for cooperative solutions –, could thus theoretically be brought before the ICJ under this provision. In essence this constitutes a question of responsibility-sharing among States.⁸² There is no precedent of the ICJ case-law on the application of the 1951 Convention.⁸³ However, an advisory opinion of the ICJ could give an authoritative interpretation of the restrictions on States’ discretion in border and migration control imposed by minimum standards for Convention refugees. This would essentially entail a practical implementation of burden-sharing obligations between States. Ideally the ICJ would formulate global responsibility allocation criteria, in case of overburdening, or even more structurally.

Numerous UN texts further recall the cooperation and responsibility-sharing principles explicitly in the context of refugee protection, such as the General Assembly’s Declaration on Territorial Asylum, the World Summit Outcome or the 2030 Agenda for Sustainable Development.⁸⁴

The most concrete operationalisation of cooperation and responsibility-sharing in international refugee law is the mandate of the United Nations High Commissioner for Refugees (‘UNHCR’), which includes to “assume the functions of [...] seeking

⁸¹ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/108/Rev.1 (1951), para. IV(D).

⁸² SKORDAS, “The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice”, 2018, *EJILtalk*, available at: <www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/>.

⁸³ In the 1951 *Haya de la Torre* case, the ICJ did call on state parties to “find a practical and satisfactory solution by seeking guidance from considerations of courtesy and good neighbourliness” (*Colombia v. Peru (Haya de la Torre Case)*, Judgment of 13 June 1951, last para. before *dictum*). This case concerned a dispute on consular asylum between the State of origin and the asylum granting State, however.

⁸⁴ Declaration on Territorial Asylum, UN Doc. A/RES/2312 (XXII) (1967), Art. 2; World Summit Outcome, A/RES/60/1 (2005), para. 133; Transforming Our World: the 2030 Agenda for Sustainable Development A/RES/70/1 (2015), para. 29.

permanent solutions for the problem of refugees by assisting governments”, to “engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine”, and to “administer any funds” and “distribute them among the private and, as appropriate, public agencies which he seems best qualified to administer such assistance”.⁸⁵ Treaty States have the legal obligation to cooperate with UNHCR “in the exercise of its functions” on the basis of Article 35 of the 1951 Convention, and are called for voluntary financial contributions to the agency.⁸⁶ Nevertheless States’ effective contributions for structural or emergency responsibility-sharing remain voluntary and funding is increasingly earmarked for internal migration policy preferences rather than in order to share responsibilities more equitably.⁸⁷ And even though the UNHCR Executive Committee (‘EXCOM’) has called numerous times for better cooperation and more responsibility-sharing,⁸⁸ a legally binding mechanism did not come about.

UNHCR’s 2003 Agenda for Protection,⁸⁹ established the ‘Convention Plus’-approach to “focus on those issues and activities that would benefit from multilateral commitment and cooperation”, and one of the goals of its Programme of Action was “sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees”. It was endorsed by the General Assembly,⁹⁰ but has also failed to bring about binding agreements.⁹¹

Finally, the 2016 New York Declaration of the General Assembly, and the 2018 Global Compact on Refugees (‘GCR’) are the most recent global initiatives “to provide a basis for predictable and equitable burden- and responsibility-sharing among

⁸⁵ Statute of the Office of the United Nations High Commissioner for the Refugees, UN Doc. A/RES/428(V) (1950), Annex, paras. 1, 9 and 10.

⁸⁶ *Ibid.*, para. 20.

⁸⁷ BETTS, *cit. supra* note 6, pp. 288-292. In 2018, only 11% of UNHCR budget was funded by unearmarked contributions (while 43% was not funded at all). See: UNHCR, Global Funding Overview, 31 December 2018, available at: <reporting.unhcr.org/financial#tabs-financial-contributions>.

⁸⁸ E.g.: EXCOM, Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) (1981); International Solidarity and Refugee Protection No. 52 (XXXIX) (1988); Conclusion on International Protection No. 89 (LI) (2000); Conclusion of the Executive Committee on international cooperation from a protection and solutions perspective No. 112 (LXVII) (2016).

⁸⁹ UNHCR, Agenda for Protection, UN Doc. A/AC.96/965/Add.1 (2002). Third edition, October 2003, available at: <www.refworld.org/docid/4714a1bf2.html>.

⁹⁰ Office of the United Nations High Commissioner for Refugees, UN Doc. RES/57/187 (2002), para. 9.

⁹¹ UNHCR, Progress Report: Convention Plus, UN Doc. FORUM/2005/6 (2005), paras. 10, 11, 13 and 17, available at <www.unhcr.org/convention-plus.html>.

all United Nations Member States”.⁹² The first text is a “political declaration” States commit to implement,⁹³ the second is explicitly “non-political in nature” and “not legally binding”;⁹⁴ together they establish a Comprehensive Refugee Response Framework (‘CRRF’).

Both texts have added a lot to the conceptualisation and some institutionalisation of the responsibility-sharing issue. Nevertheless, they have not yet led to more concrete binding commitments by States neither.

Set up “to operationalize the principles of burden- and responsibility-sharing”, to “ease pressures on host countries” and “expand access to third country solutions”,⁹⁵ the GCR subscribes to an approach of ‘common but differentiated responsibilities (and respective capabilities)’ (‘CBDR(RC)’):⁹⁶

“To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among States.”⁹⁷

This idea is reflected in the mechanism for responsibility-sharing that is established. The CRRF is conceptualized “for each situation involving large movements of refugees”,⁹⁸ and operationalised under the GCR by the creation of two fora for cooperation: the quadrennial Global Refugee Forum where States will be called to “to announce concrete pledges and contributions towards the objectives of the global compact”;⁹⁹ and context-specific Support Platforms, which host countries could activate in case they lack the response capacity to deal with large-scale, complex or protracted refugee situations.¹⁰⁰

⁹² Report of the United Nations High Commissioner for Refugees, Part II Global Compact on Refugees (GCR), UN Doc. A/73/12 (Part II) (2018), para. 3.

⁹³ New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 (2016), para. 1 and Annex, para. 17.

⁹⁴ GCR, paras. 4 and 5.

⁹⁵ *Ibid.*, paras. 5 and 7.

⁹⁶ DOWD and MCADAM, “International Cooperation And Responsibility Sharing To Combat Climate Change: Lessons For International Refugee Law”, *Melbourne Journal of International Law*, 2017, p. 180 ff., pp. 197-198; HATHAWAY and NEVE, cit. supra note 17, pp. 201-209.

⁹⁷ New York Declaration, para. 68; GCR, para. 1.

⁹⁸ *Ibid.*, Annex, para. 2.

⁹⁹ GCR, para. 17-18.

¹⁰⁰ *Ibid.*, para. 21-24.

Both the New York Declaration and the GCR give a very holistic overview of “tools to operationalise burden- and responsibility-sharing”,¹⁰¹ including, besides the more traditional support through financing or resettlement, assistance for humanitarian relief, supporting host communities, tackling root causes of forced displacement, ensuring sustainable return, and offering complementary pathways for humanitarian admission.¹⁰²

While the Compact and the Framework might potentially evolve into the large-scale structural responsibility allocation mechanism this chapter tries to identify, they so far remain of a very non-committal nature. Responsibility-sharing advancements continue to depend entirely on voluntary contributions and on the activation of an emergency mechanism by hosting States that might not have an interest in doing so – because the label ‘refugee’ crisis also entails a broad range of protection obligations under international law.

5.3. – Responsibility-sharing in Human Rights Law

In the search for mechanisms of responsibility allocation, it is useful to check if principles of international cooperation and solidarity are better implemented and enforceable in other branches of international law than refugee law. State obligations under international human rights law also include a duty to cooperate.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”. The General Assembly repeated the State obligation more generally in relation to all human rights: “Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter”.¹⁰³

Are these general provisions implemented in any more precise manner in human rights law? And did courts impose specific obligations onto States under their duty

¹⁰¹ *Ibid.*, para. 30-48.

¹⁰² New York Declaration, Annex, paras. 6, 8, 9, 12 and 14.

¹⁰³ Declaration on Principles of International Law concerning Friendly relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. RES/2625(XXV) (1970), Annex.

to cooperate in the protection of human rights? This Section first looks at the cooperation obligation in relation to the most absolute human rights, and then at a particular implementation in case-law imposing States to cooperate on a human rights basis.

5.3.1. *Erga Omnes Obligation of Cooperation to Protect Peremptory Norms*

While the responsibility-sharing measures implementing the cooperation and solidarity principles are fundamentally of a soft-law nature, the principles themselves are in some instances endorsed as absolute and legally binding.

As relevant case-law establishing State responsibility for refugee or human rights protection directly on the principle of cooperation is quasi non-existent, a 2018 Advisory Opinion of the Inter-American Court of Human Rights on the right of asylum as a human right, is noteworthy. It firmly concludes on the *erga omnes* binding and customary character of the inter-state duty to cooperate in the observance of human rights:

“la Corte recuerda que el deber de cooperación entre Estados en la promoción y observancia de los derechos humanos, es una norma de carácter *erga omnes*, por cuanto debe ser cumplida por todos los Estados, y de carácter vinculante en el derecho internacional. En efecto, el deber de cooperación constituye una norma consuetudinaria de derecho internacional, cristalizada en el artículo 4.2 de la Resolución 2625 [...]”¹⁰⁴

Also the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts* identify a legally binding State obligation to cooperate when it comes to the protection of some absolute human rights. Articles 40 and 41 identify the duty to cooperate in ending any “gross or systematic failure” of “obligations arising under a peremptory norm of general international law”. The ILC *Commentary* specifies what such a norm entails:

“In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of

¹⁰⁴ Inter-American Court of Human Rights, *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion of 30 May 2018, para. 199: “the Court recalls that the duty of cooperation between States in the promotion and observance of human rights is a norm of an *erga omnes* character, as it must be complied with by all States, and of a binding character in international law. The duty to cooperate constitutes a rule of customary international law, as set out in Article 4.2 of Resolution 2625 [...]” (author’s translation).

general international law is one which is: accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁰⁵

The ILC identifies some human rights as peremptory norms: “the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid”, and “the prohibition against torture as defined in article 1 of the Convention against Torture”.¹⁰⁶

Cooperation under international law thus not only entails State obligations of burden-sharing out of solidarity with other States, but also one of protection out of solidarity with persons suffering serious and systematic human rights violations, such as racial discrimination and torture. No matter how vague this provision still is on its practical implementation, there is no way around the existence of the obligation on the State itself.

When refugees suffer systematic violation of their most fundamental rights in a transit or hosting State, then other States have a shared, but *erga omnes* legal obligation to ensure those refugee rights. Besides extraterritorial jurisdiction-based responsibilities, under international law States also have a responsibility to help improving refugee situations beyond their borders that amount to torture or racial discrimination.¹⁰⁷

5.3.2. *Global Climate Policy and Human Rights*

A legal reasoning on how to make the general duty to cooperate more operational might be found in case-law dealing with other collective action problems which are taken before courts on the basis of human rights violations. Climate change is such a collective problem, whose solution would produce mutual benefits and yet can only be attained by a form of burden-sharing.

In 2018 the Netherlands The Hague Appeal Court judged the responsibility of the Dutch State in dealing with climate change, and determined what exactly was the

¹⁰⁵ See *supra* note 59, Art. 40, Commentary (2).

¹⁰⁶ *Ibid.*, Commentary (4).

¹⁰⁷ E.g. the systematic detention of Sub-Saharan refugees in Libya. See for an assessment of their situation, including torture and racial discrimination: OHCHR and UNSMIL, “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, 20 December 2018, available at: <www.ohchr.org/en/countries/menaregion/pages/lyindex.aspx>.

State's share of the global burden it should take up.¹⁰⁸ Crucial parts of the judge's reasoning could be relevant for dealing with refugee protection responsibility also:

First, the Court accepts that the State's responsibility for a recognised collective problem – the reduction of greenhouse gas emissions – is not a legal obligation with a direct effect flowing from international commitments.¹⁰⁹ However, the fact that it concerns a global issue that can only be solved through cooperation, does not, the Court says, “release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection”.¹¹⁰ In other words, the duty of cooperation to tackle a transnational issue entails an obligation on States to act individually. Also, the Court continues, the multi-lateral nature of the commitment to deal with the collective problem, demands effective remedies in order to avoid a free-rider problem, and thus enforceable judicial decisions.¹¹¹

Furthermore, the rights to life and to private and family life impose a duty of care onto the State “to take concrete actions to prevent future violations”.¹¹² Since it is evident from scientific proof, that there is “a real threat of dangerous climate change, resulting in serious risk”, the State has “a duty to protect against this real threat”,¹¹³ which includes preventive action.¹¹⁴ Previous acknowledgement by the Dutch State of the necessity to act in combination with scientific arguments, according to the Court, impose an obligation on the State to a specific minimum action – a reduction of 25% by 2020. Not undertaking that minimum action would be a violation of the duty of care under Articles 2 and 8 ECHR.¹¹⁵

To draw the parallel with refugee protection is attractive – despite obvious differences, such as the scale of the mutual benefits and shared interests in dealing with the collective problem (all vs. some States), the protected group (world population,

¹⁰⁸ The Hague Court of Appeal, *The State of the Netherlands (Ministry of Infrastructure and the Environment) v. Urgenda Foundation*, Judgement of 9 October 2018, English translation available at: < uitspraak.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610 >.

¹⁰⁹ *Ibid.*, para. 51.

¹¹⁰ *Ibid.*, para. 62.

¹¹¹ *Ibid.*, para. 64.

¹¹² *Ibid.*, para. 41.

¹¹³ *Ibid.*, para. 45.

¹¹⁴ *Ibid.*, para. 43.

¹¹⁵ *Ibid.*, para. 73.

including nationals on the State's territory vs. non-nationals and third States).¹¹⁶ Potentially applicable is the argument that the duty to cooperate in order to tackle collective problems that might lead to human rights violations, entails a duty of care for the individual State, even when it has not taken up any specific international commitment. And that this duty of care includes structural preventive action in the form of burden-sharing that can be concretised in a legally enforceable outcome.

Also relevant for a global refugee protection policy, is that international climate policy has begun to assess the specific shares of burden or responsibility of individual States on an objective scientific basis. This asymmetric allocation mechanism is referred to as the 'common but differentiated responsibilities'-approach ('CBDR'),¹¹⁷ and is also being explored in refugee protection policies, e.g. by calculating national contributions to ad hoc or potential (re)distributions measures on more objective criteria, such as GDP, population size, unemployment rate or number of asylum applications.¹¹⁸

5.4. – Solidarity in a Regional Context: EU Migration Law

To effectively address collective problems, the principles of international cooperation and solidarity need a more precise transposition that is legally enforceable. In the absence of a genuine global community, it is therefore useful to turn to more legally integrated regional frameworks such as the EU in order to assess what role these principles could play in refugee protection.¹¹⁹

At EU level the principles of solidarity and cooperation are enshrined in primary law, but have also been transposed into some mechanisms for operational burden-sharing and responsibility allocation of the EU's migration policy, in its internal as well as external dimension.

The 'principle of sincere cooperation' to "assist each other in carrying out tasks which flow from the Treaties", as established under Article 4(3) of the EU Treaty ('TEU'), and the foundational value of solidarity in Article 2 TEU, are fundamental to the EU communitarian order.¹²⁰ They form a constitutional paradigm of the EU,

¹¹⁶ DOWD, MCADAM, *cit. supra* note 96, pp. 187-190.

¹¹⁷ *Ibid.*, p. 190.

¹¹⁸ E.g. EU relocation and resettlement schemes. See: A European Agenda On Migration, COM(2015) 240 final, 13 May 2015, Annex, p. 19-22.

¹¹⁹ HATHAWAY and NEVE, *cit. supra* note 17, p. 187-188.

¹²⁰ MORENO-LAX, *cit. supra* note 74, pp. 746-750.

“both a prerequisite for and a means of integration”, combining the altruistic value of redistribution, with an effective self-interest due to its judicial enforceability.¹²¹ The Court of Justice (‘CJEU’) has recognised this fundamental value of solidarity for the EU order: “[...] failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.”¹²²

In as far as the principle of solidarity has been operationalised into the EU internal and external refugee protection policy, however, solidarity seems to function merely as a correction mechanism, not as a fundamental allocation criterion among Member States.¹²³ Even when enforceable, the responsibility-sharing mechanisms exist to deal with crisis or overburdening, not as the structural framework to bring about an equal and fair distribution of refugee protection responsibility.

However particular this implementation might be to the specific functioning of the EU, it is still useful to enquire what legal allocation criteria are applied for establishing responsibility beyond the individual Member State or common external borders, and whether they have been evaluated in case-law. This Section will first look at the internal, and then at the external dimension of the EU migration law and policy.

5.4.1. Internal Dimension

The EU’s internal migration policy set out to develop a Common European Asylum System (‘CEAS’), whose, according to Article 80 of the Treaty on the Functioning of the EU (‘TFEU’) “[...] implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.” “Whenever necessary, the Union acts [...] shall contain appropriate measures to give effect to this principle.” Since Article 78(3) TFEU specifies the need for provisional measures in case of an emergency, the general provision in Article 80 should be understood as an obligation to also adopt more structural measures.

The principle of fair responsibility-sharing in Article 80 qualifies the support demanded by the principle of solidarity: “up to the point where each Member State

¹²¹ KOTZUR, *cit. supra* note 73, pp. 42-43.

¹²² Case 39-72, *Commission of the European Communities v Italian Republic*, ECR, 1973, 00101, para. 25. See also: Joined cases 6 and 11/69, *Commission v France*, ECR, 1969, 00523, para. 16.

¹²³ WAGNER, *cit. supra* note 2, pp. 17-18.

contributes their fair share”.¹²⁴ This obligation of result can be understood to include structural measures (“whenever necessary”) in order to prevent overburdening of a Member State in the first place and to avoid further structural imbalances.¹²⁵ However, such a preventive structural mechanism for responsibility allocation is not in place in the EU.

Following the 2015 EU so-called refugee crisis, the EU Council adopted provisional measures in the form of its relocation and hot spot approach. The Council evaluated the situation as an emergency situation that demanded solidarity in application of Article 78(3) TFEU, rather than a deficiency of the structural obligation of prevention.¹²⁶ Two Council Decisions established a temporary emergency relocation scheme which allocated responsibility for the admission of fixed quota of asylum-seekers with individual Member States even though some of them opposed it.¹²⁷

The Court of Justice had to evaluate the legal nature of these emergency measures in its judgments C-643/15 and C-647/15 of 6 September 2017, since Hungary and Slovakia argued that the decision did not have a solid legal basis. The Court, however, accepted that such mechanism could legally be adopted under Article 78(3) TFEU by a non-legislative act of the EU Council with a qualitative majority, even against the will of certain Member States.

Under EU-law a legally binding mechanism was thus established to allocate responsibility to a State, not on the basis of its jurisdiction, but explicitly on the basis of the principle of solidarity and burden-sharing,¹²⁸ and imposed by a regional political organ, against the sovereign will of a State. This solidarity-based binding allocation mechanism provides, to some extent, for a more equitable distribution of responsibilities for refugee protection among States, be it limited to the specific regional emergency context of the EU. In reality, however, the mechanism has not

¹²⁴ TSOURDI, “Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System”, *Maastricht Journal of European and Comparative Law*, 2017, p. 667 ff., p. 673.

¹²⁵ *Ibid.*, p. 675; MORENO-LAX, *cit. supra* note 74, p. 752.

¹²⁶ TSOURDI, *cit. supra* note 124, p. 681.

¹²⁷ Council Decisions (EU) No. 2015/1523 of 14 September 2015 and No. 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

¹²⁸ Council Decision (EU) 2015/1601, Preamble (3), (4), (5), (7), (17).

delivered the anticipated results,¹²⁹ nor is it simply expandable to the external dimension of the EU migration policy for enforceable burden-sharing with overburdened refugee hosting countries outside the EU.

The Dublin system is also a responsibility allocation mechanism under the CEAS, and one of a structural nature.¹³⁰ The allocation is not based on criteria of internal solidarity however, but essentially on criteria of jurisdiction. Responsibility for the protection of a refugee is basically allocated to the Member State under whose territorial jurisdiction they enter the Union (Articles 12-14), or whose extraterritorial jurisdiction would be engaged in case their human rights are violated in other Member States (Articles 3, 8-11, and 16).¹³¹ The discretionary clauses simply reaffirm national sovereignty of Member States to assume responsibility “on humanitarian and compassionate grounds” (or not).¹³² The exception clause in Article 3(2), intended to prevent risks of inhumane and degrading treatment, was given a binding character in the 2013 Recast of the Regulation exactly in order to implement the case-law from the ECtHR (*MSS* case) and CJEU (*NS* case) that attributed responsibility to a Member State on the basis of its extraterritorial jurisdiction for human right violations in other Member States –¹³³ and for not using its discretionary power (under the 2003 predecessor Dublin II Regulation) to apply the clause.¹³⁴ Even though the Dublin Regulation establishes a structural and a priori responsibility allocation, it does so

¹²⁹ Of the initial commitment for relocation of 160.000 asylum seekers from Italy and Greece to other Member States, only 33.690 (or 21%) were relocated by May 2018 - while the program was scheduled to end on 26 September 2017. Compare Council Decision 2015/1523, Arts. 4 and 13, and Council Decision 2015/1601, Arts. 4 and 13; with Progress Report on the Implementation of the European Agenda on Migration, COM(2018) 301 final, 16 May 2018, p. 17.

¹³⁰ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation), Preamble (4) and (7).

¹³¹ The best interest of the child and right to family life (Arts. 8-11 and 16, Preamble (13)-(16)); the right to asylum and the principle of non-refoulement (Art. 3, Preamble (21)).

¹³² See *supra* note 130, Preamble (17).

¹³³ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment (Grand Chamber) of 21 January 2011, paras. 365-367; European Court of Justice (CJEU), joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgment (Grand Chamber) of 21 December 2011, paras. 94, 99, 104 and 106.

¹³⁴ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation), Article 3(2).

along the general criteria for establishing (extra-)territorial jurisdiction, and not in order to share responsibilities equitably.¹³⁵

The Dublin III Regulation also establishes a solidarity-based Early Warning and Preparedness Mechanism.¹³⁶ Together with other implementing measures under the CEAS, such as the Asylum Intervention Pools coordinated by the European Asylum Support Office ('EASO') "to support Member States subject to particular pressure on their asylum and reception systems",¹³⁷ or the internal funding mechanisms,¹³⁸ these are tools of burden-sharing through capacity building or financial support, rather than responsibility allocation mechanisms themselves. The redistributive value of these measures is furthermore very limited: Member States invoking their support are ultimately held to the full implementation of the CEAS, contributions are voluntary and the funding does not primarily target asymmetric overburdening.¹³⁹ These different instruments are not examples of structural responsibility-sharing.

It is clear that as far as the EU's migration policy has implemented responsibility allocation mechanisms in the CEAS, these are either based on emergency-driven ad hoc solidarity – the temporary relocation measures – or on jurisdiction criteria without any structural responsibility-sharing rationale – the Dublin system.

5.4.2. *External Dimension*

As to its general external policy "characterised by close and peaceful relations based on cooperation" (Article 8 TEU), the EU engages "to advance in the wider world [...], the principles of equality and solidarity", to "build partnerships with third countries", "promote multilateral solutions to common problems", and "work for a high degree of cooperation in all fields of international relations in order to [...] promote an international system based on stronger multilateral cooperation and good

¹³⁵ Different reform proposals of the Dublin Regulation that try to incorporate more elements of emergency and/or structural solidarity are currently under discussion. See: WAGNER et. al, *cit. supra* note 2, pp. 10-13; ECRE, "Beyond Solidarity: Rights and Reform of Dublin", February 2018, available at: <www.ecre.org/ecre-publications/>.

¹³⁶ Dublin III Regulation, Preamble (22).

¹³⁷ Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (EASO Regulation), Arts. 10 and 13.

¹³⁸ Regulation (EU) No. 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2003/EC and No. 575/2007/EC of the European Parliament and of the Council Decision 2007/435/EC (AMIF Regulation).

¹³⁹ TSOURDI, *cit. supra* note 124, p. 683.

global governance”, as stipulated in Article 21 TEU.

Article 78(2) TFEU adds an external dimension to the CEAS, consisting of “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”. Cooperation here is a means to control migration, rather than to share protection responsibility with refugee hosting countries on the basis of solidarity.

In the EU Commission’s 2008 Political Plan on Asylum and 2011 overarching framework of EU external migration policy, the Global Approach to Migration and Mobility (‘GAMM’), responsibility-sharing, solidarity and international cooperation with non-EU countries in the neighbourhood are explicitly mentioned as policy priorities.¹⁴⁰ In the first place such cooperation is meant to “enable these countries to offer a higher standard of international protection for asylum-seekers and displaced people who remain in the region of origin of conflicts or persecution” through Regional Protection Programmes, focussing on capacity-building and development. It also adds an “enhanced resettlement component [...] as a sign of international solidarity and a key instrument for pursuing orderly access to durable solutions in the EU”.¹⁴¹

These political declarations on resettlement and supporting protection in countries of transit and first asylum, are repeated in combination with fluctuating practical commitments in the 2015 European Agenda on Migration,¹⁴² its Progress Reports,¹⁴³ and other instruments such as the Partnership Framework with third countries,¹⁴⁴ the

¹⁴⁰ Policy Plan on Asylum, An Integrated Approach to Protection Across the EU, COM(2008) 360 final, 17 June 2008, pp. 3-4 and 9.

¹⁴¹ The Global Approach to Migration and Mobility, COM/2011/0743 final, 18 November 2011, p. 17-18.

¹⁴² A European Agenda On Migration, COM(2015) 240 final, 13 May 2015, p. 4-5. This plan puts forward 20,000 resettlement places, and ‘Regional Development and Protection Programmes’ in Africa.

¹⁴³ E.g.: Managing Migration in all its Aspects: Progress under the European Agenda on Migration, COM(2018) 798 final, 4 December 2018.

¹⁴⁴ Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7 June 2016. This instrument entails commitments of capacity-building in migration management, including for refugee protection, and of improving legal migration options, including resettlement.

Facility for Refugees in Turkey,¹⁴⁵ the Emergency Trust Fund for Africa,¹⁴⁶ or the proposed Union Resettlement Framework.¹⁴⁷ However genuine their burden-sharing potential, up until now the EU external solidarity tools are without exception depending on voluntary commitments of Member States and do not establish any legally binding responsibility allocation mechanism. They clearly do not form a legal basis for third States to claim an equitable sharing of responsibility for refugee protection from EU Member States.¹⁴⁸ No cases have been brought before the Court of Justice by a third State claiming solidarity-based responsibility-sharing under the EU's external migration policy.

On two occasions EU Courts got the opportunity to evaluate claims by individuals in search for international protection in the EU. The judgements could have attributed responsibility for refugee protection to a Member State, on the basis of criteria other than jurisdiction, or might have brought in considerations of solidarity and cooperation in the application of extraterritorial jurisdiction. Unfortunately the Courts did not consider the merits of the cases, nor the potential legal relevance of the principle of solidarity in cooperation agreements with third countries or in the assessments of visa applications by refugees in third countries.

The first case related to the implementation of the EU-Turkey deal, and could

¹⁴⁵ Commission Decision on the Facility for Refugees in Turkey on the coordination of the actions of the Union and of the Member States through a coordination mechanism — the Refugee Facility for Turkey, C(2015) 9500, 24 November 2015.

¹⁴⁶ Commission Decision on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa EU Emergency Trust Fund for Africa: funding to address root causes of irregular and forced migration, C(2015) 7293 final, 20 October 2015.

¹⁴⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2016. With this proposal the Commission plans to make a shift from the current ad-hoc emergency scheme based on voluntary pledges of Member States to a permanent resettlement program of 20,000 persons a year based on a binding distribution key – an example of CBDRRRC -, while trying to persuade Member States to cooperate with financial incentives of 10,000 euro per resettled person. See: BAMBERG, “The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?”, EPC Discussion Paper, 26 June 2018, available at: <www.epc.eu/pub_details.php?cat_id=17&pub_id=8632&year=2018>.

¹⁴⁸ The Mobility Partnerships with individual third countries, implementing the political agenda of the external dimension state it explicitly: “The provisions of this joint declaration and its Annex are not designed to create legal rights or obligations under international law” (Joint declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States, 2014, para. 40).

have led to the assessment of whether a third country should be considered ‘safe’ and what consequences this entails for Member States’ responsibility for admitting refugees entering the Union from such a country. It had the potential of establishing criteria for allocating responsibility to a Member State, that are based on the effectiveness of the protection in a third country that the EU has established far-reaching migration cooperation with.¹⁴⁹ The first instance General Court, in its judgements of 28 February 2017, however, dismissed the claim because it lacked the competence to judge the international agreement it considered the EU as an institution not to be part of.¹⁵⁰ The CJEU dismissed the appeal as manifestly inadmissible.¹⁵¹

The other case, *X and X v. Belgium*, before the Grand Chamber of the CJEU concerned the refusal to a refugee in a third country (Lebanon) of a humanitarian visa aimed at applying for asylum in an EU Member State.¹⁵² The Court could have evaluated whether the extraterritorial jurisdiction of the addressed State extends to its visa posts in third countries that cannot guarantee to refugees some of the most fundamental human rights. In relation to refugees in countries of first asylum that are overburdened, such case-law might add solidarity and equitable burden-sharing considerations to the assessment of jurisdiction as a form of control over or impact on the human rights of refugees beyond their borders – a hybrid, stripped version of the solidarity principle, restricted to emergency situations. The Court, however, judged it to be a visa application for a long-stay, which does not fall under the EU Visa Code, and over which, by consequence, it has no competence.¹⁵³ It will be interesting to see how the Strasbourg court, who has now been called to judge on the humanitarian visa matter, will judge the extent of the State’s responsibility and whether it will include solidarity considerations in situations of inhumane treatment of refugees in overburdened countries of first asylum.¹⁵⁴

The EU’s external migration policy has not produced any binding criteria to allocate responsibility for refugees outside the EU. All in all, in the name of solidarity,

¹⁴⁹ SPIJKERBOER, “Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice”, *Journal of Refugee Studies*, 2017, p. 216 ff., pp. 222-224.

¹⁵⁰ Joined cases T-192/16, T-193/16, T-257/16, *NF and Others v. European Council*, Order of 28 February 2017, paras. 71-73.

¹⁵¹ Joined Cases C-208/17 P to C-210/17 P, *NF, NG and NM v. European Council*, Order of 12 September 2018.

¹⁵² Case C-638/16 PPU, *X and X v. Belgium*, Judgment (Grand Chamber) of 7 March 2017.

¹⁵³ SPIJKERBOER, *cit. supra* note 149, p. 225-227.

¹⁵⁴ See *supra* note 66.

the EU seems to have shifted rather than shared burdens under its externalisation policies, without accepting any legal responsibility for it.

5.5. – The Potential of Cooperation and Solidarity for Refugee Protection

International law concepts as solidarity and cooperation offer a good principled basis to break the deadlock in global refugee policy on a more equitable distribution of State responsibility for refugee protection. The principles, however, have hardly been implemented into sufficiently precise legal provisions, and have only led to few legal commitments of responsibility-sharing; frameworks for cooperation and some emergency mechanisms, but not binding structural obligations or *a priori* criteria.

Nevertheless, the principles show some potential for a more specified application on refugee protection distribution.

When considering refugee protection as a collective problem – whose solution entails shared interests and mutual benefits – parallels could be drawn with global climate policy. States might then be held responsible on the basis of their duty to cooperate for the collective goal if they want to avoid human rights responsibility. Also the *erga omnes* obligation to cooperate in ending serious violations of peremptory human right norms, and the competence of the International Court of Justice to judge inter-states disputes on the application of the Refugee Status Convention offer tentative legal avenues for a more equitable allocation of responsibilities for refugee protection between refugee hosting and other States.

At the regional level of the EU the potential of cooperation and solidarity seems more promising in terms of legally binding engagements. The temporary relocation measures allocate a legally binding ‘common but differentiated responsibility’ (‘CBDR’) to all Member States for the admission of refugees – as is the case with the EU proposals on the Dublin reform and the resettlement scheme.¹⁵⁵

So far, however, it does not look like the underlying fundamental values are able to outweigh the considerations driving EU and Member States’ policies of externalisation. The political priority of the external migration policy is not the equitable distribution of responsibilities with refugee hosting countries, but migration and border control. And whatever the rhetorical shift to more structural solidarity beyond crisis management in the Commission’s legislative proposals, individual Member States are reluctant to follow. The same is true at the internal dimension where short-

¹⁵⁵ See *supra* footnotes 135 and 147.

term national interests seem to take precedence over structural solidarity, however fundamental for the communitarian order.

All in all, the existing legal frameworks to enhance responsibility-sharing are ad hoc solutions, limited to emergency situations of overburdening or based on voluntary contributions to capacity-building and financial support measures. Hence the reluctant position of courts, on the one hand confirming the legally binding nature of the principles of solidarity and cooperation, on the other hand barely capable of enforcing State responsibility on that basis in concrete situations, where States have not yet gone beyond making purely principled commitments.

6. – *Third Mechanism: Allocation on the Basis of the Responsibility to Protect*

A last interesting frame for allocating State responsibility beyond the jurisdiction criteria, this chapter wants to explore, is the so called ‘Responsibility to Protect’-doctrine (RtoP). While its exact content and application are unclear and far from agreed upon in *opinio juris*,¹⁵⁶ the scope of the doctrine, as it has developed in the last two decades, is so far limited to international humanitarian law with regard to the so called atrocity crimes. At best its legally binding nature can be argued to rest on “complementary customary law developments”.¹⁵⁷ Applying it to refugee protection is a hypothesis so far hardly explored in legal doctrine, but might have some potential for the question of responsibility allocation.¹⁵⁸

This Section will first outline the core of the doctrine with a reference to international case-law, before assessing its potential for global refugee protection.

6.1. – The RtoP-doctrine in International Law

Established under UN auspices, the central element of RtoP is that States have a responsibility to protect populations at risk of atrocity crimes, on their territory, but also beyond their borders. The most authoritative basis for RtoP is the 2005 World

¹⁵⁶ For an overview of the discussion on the legal value of the RtoP-doctrine, see: TENDAYI ACHIUME, *cit. supra* note 17, p. 714, note 114.

¹⁵⁷ GLANVILLE, “The Responsibility to Protect beyond Borders”, *Human Rights Law Review*, 2012, p. 1 ff., p. 15.

¹⁵⁸ TENDAYI ACHIUME, *cit. supra* note 17, pp. 692 and 710.

Summit Outcome Document of the UN General Assembly,¹⁵⁹ which outlines the scope of the doctrine in two provisions (and three pillars): the general RtoP-obligation is to protect populations, whether national citizens or not, against genocide, war crimes, crimes against humanity and ethnic cleansing, including through preventive measures. The prime bearer of that responsibility is the territorial State (1st pillar). But there is also a complementary responsibility of the international community to assist territorial States with their prime obligation (2nd pillar),¹⁶⁰ and to undertake collective action in case the territorial State manifestly fails to fulfil its obligation (3rd pillar).¹⁶¹

RtoP had an innovative jurisprudential application, relevant for its potential as a state responsibility allocation mechanism under international law. The International Court of Justice, in its *Application of the Genocide Convention (Bosnia v. Serbia)* judgment,¹⁶² refined criteria for attributing responsibility onto a so called ‘bystander State’ for not having fulfilled its RtoP-duty to (help) prevent genocide. The Court accepted the bystander State (Serbia) not to have committed, nor to have been complicit in the act of genocide (in Srebrenica), but it found that State *in casu* nonetheless responsible for having failed to prevent it (in violation of Article 1 of the Genocide Convention).¹⁶³

The Court qualifies a State’s legal duty to prevent genocide beyond its borders as a due diligence obligation:¹⁶⁴ “to employ all means reasonably available”.¹⁶⁵ This is an obligation of conduct, so the State’s responsibility will be incurred when it “manifestly failed to take all measures to prevent genocide which were within its power” —¹⁶⁶ even though this State can only be held responsible if and once the prohibited act (genocide) would ultimately be committed.¹⁶⁷

So, can every State be held responsible for failing the due diligence-test when a genocide happens somewhere in the world? To a certain extent it could, but here the

¹⁵⁹ 2005 World Summit Outcome, UN Doc. A/RES/60/1, 16 September 2005.

¹⁶⁰ *Ibid.*, para. 138.

¹⁶¹ *Ibid.*, para. 139; TENDAYI ACHIUME, *cit. supra* note 16, p. 715-716.

¹⁶² *Bosnia and Herzegovina v. Serbia and Montenegro (Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Judgment of 26 February 2007

¹⁶³ *Ibid.*, para. 438.

¹⁶⁴ GLANVILLE, *cit. supra* note 157, p. 17.

¹⁶⁵ See *supra* note 162, para. 430.

¹⁶⁶ *Ibid.*, para. 430.

¹⁶⁷ *Ibid.*, para. 431.

Court is innovatory, as it introduces a new criterion for allocating State responsibility. The Court does not attribute responsibility to all States in an undifferentiated way, nor to the international community as a whole, but proceeds to an *in concreto* assessment. The judgement specifies criteria to define exactly which bystander State bears (extraterritorial) responsibility, and to what extent:

“[...] In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide.”¹⁶⁸

The Court clarifies that a State’s capacity to influence the acts of (potential) perpetrators beyond its borders, itself depends on multiple factors, such as the geographical distance from the events, political or other links with the actors, or limitations by international law.

The obligation to take preventive measures exists once a State with such influencing capacity can reasonably be expected to be aware of the existence of a serious risk:

“In fact, a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.”¹⁶⁹

While in principle the duty to prevent genocide rests on all States, the scope of each State’s responsibility to prevent it (and protect persons against it) is not determined by its territorial or extraterritorial jurisdiction, but by its reasonably knowledgeable capacity to influence. What then the obligation on such bystander States to employ all means reasonably available exactly entails, depends on each State’s capacities in that concrete situation.

¹⁶⁸ *Ibid.*, para. 430. The Court does not explicitly mention other parameters than this “first”.

¹⁶⁹ *Ibid.*, para. 431.

6.2. – The Potential of the RtoP-Doctrine for Refugee Protection

Could taking up responsibility for the protection of refugees who find themselves in States of first asylum or transit be a legal obligation for bystander States under their R2P-duty?

In general, the implementation of the RtoP-doctrine by the international community has shifted from forcible intervention (3rd pillar) to more non-coercive and proactive measures (under the 2nd and 3rd pillars) in order to prevent atrocities from happening.¹⁷⁰ In a 2009 Report, the UN Secretary-General hints at capacity-building and other forms of assistance in refugee protection for States to fulfil their obligations under any of the pillars of RtoP,¹⁷¹ and explicitly includes refugee protection in the ‘way forward’ for RtoP:

“[The United Nations and its range of agencies, funds and programmes] could do that [the elimination of man-made scourges] much more effectively if goals relating to the responsibility to protect, including the protection of refugees and the internally displaced, were mainstreamed among their priorities, whether in the areas of human rights, humanitarian affairs, peacekeeping, peacebuilding, political affairs or development.”¹⁷²

Before focussing on the content of the State’s obligation under RtoP, however, it is essential to clarify what it adds as a mechanism for responsibility allocation to States, in comparison with other mechanisms. Advantages of RtoP are that its criteria are not based on jurisdiction and extend beyond territorial borders. Moreover, it is not in the first place directed at sanctioning individual cases of endured violations of international law (attribution), but rather has a more preventive objective of promoting State responses to protection failures (allocation).¹⁷³ Another asset is that the customary obligation the ICJ identified allocates a CBDR to States: a qualified obligation to take preventive measures,¹⁷⁴ based on an a priori criterion to determine the degree of responsibility of respective States, namely their capacity to influence.¹⁷⁵

¹⁷⁰ HAKIMI, “Distributing the Responsibility to Protect” in NOLLKAEMPER and JACOBS (eds.), *Distribution of responsibilities in International Law*, Cambridge, 2015, p. 265 ff., p. 266; GLANVILLE, *cit. supra* note 157, pp. 11-14

¹⁷¹ Implementing the Responsibility to Protect, UN Doc. A/63/677, paras. 17, 29, 30, 35.

¹⁷² *Ibid.*, para. 68.

¹⁷³ MALEY, “Humanitarian law, refugee protection and the Responsibility to Protect”, in THAKUR and MALEY (eds.), *Theorising the responsibility to protect*, Cambridge, 2015, p. 249 ff., p.253.

¹⁷⁴ HAKIMI, *cit. supra* note 170, pp. 270-271.

¹⁷⁵ GLANVILLE, *cit. supra* note 157, pp. 18-19.

If the RtoP reasoning could be applied on global refugee protection, then the State who has the means to prevent the violation of refugee's fundamental rights on the territory of another State, and can be expected to know about it, has an obligation to do all it reasonably can in order to prevent (or stop) it.

Potential limitations for applying RtoP as a mechanism to allocate responsibility for refugee protection, however, concern the nature of the rights it seeks to ensure, as well as the scope and quality of the preventive or protection measures it demands of bystander States. In order to determine the relevance of the doctrine for refugee protection, two questions need an answer. Firstly, could the obligation at stake go beyond the prevention of genocide and also include prevention of violations of refugees' fundamental rights on the territory of another State? And secondly, could the obligation to employ all means reasonably available include an obligation on States to share responsibility for refugee protection with hosting States?

As to the first question, on the nature of the protected rights, RtoP is strictly limited to prevention of and protection against the four atrocity crimes.¹⁷⁶ Moreover, the ICJ explicitly limits its assessment to the obligation to prevent genocide, excluding the direct application of the *Genocide* judgement to other obligations to prevent acts prohibited by international law.¹⁷⁷

Though not directly applicable to violations of refugee rights under international law, nothing excludes *per se* a broader application of the responsibility criteria in other fields of international law. The Court itself acknowledges the existence of other positive obligations "under peremptory norms or [...] obligations which protect essential humanitarian values, and which might be owed *erga omnes*".¹⁷⁸ Reference can be made here once more to the provisions in Articles 40 and 41 of the ILC *Articles on State Responsibility*, which identify peremptory norms whose violation States are held to end collectively, including the prohibition of racial discrimination, torture, and non-refoulement (see *supra* Section 4.3) – with this distinction that 'ending' a rights violation presupposes its commission, and might thus preclude certain preventive action,¹⁷⁹ though not all protective measures.

But even without this extended interpretation of rights (violations) RtoP might apply to, the doctrine could offer a useful alternative to the limits of State jurisdiction

¹⁷⁶ TENDAYI ACHIUME, *cit. supra* note 17, p. 694.

¹⁷⁷ See *supra* note 157, para. 429.

¹⁷⁸ *Ibid.*, para. 147.

¹⁷⁹ GLANVILLE, *cit. supra* note 157, pp. 26-28.

and the weak enforceability of international solidarity, in its application for refugees fleeing genocide or other atrocity crimes. Refugees leaving their country to escape such persecution or violence could be entitled to protection under the RtoP, in order exactly to prevent genocide or stop atrocity crimes from being committed by the State of origin. The RtoP then first lies with their hosting State that should guarantee their non-refoulement and protection under the 1951 Refugee Status Convention or general human rights law (1st pillar).¹⁸⁰ Subsequently, when that State fails to do so due to unwillingness or incapacity, the RtoP-obligation falls on bystander States and obliges them to assist the hosting State (2nd pillar) or employ other means of collective action (3rd pillar).¹⁸¹

As to the second question then, assuming RtoP in general could include State obligations to stop or prevent violations of certain refugees rights beyond its borders, what specific protection measures might such an extended interpretation of the international law then include? Do assistance (2nd pillar) and non-coercive collective action (3rd pillar) measures imposed by RtoP include specific actions by States beyond their territory, for specific categories of refugees or in specific situations?

The Secretary-General's 2009 Report clarifies that, while the scope of RtoP is limited and should not be extended to cover "other calamities", "the response ought to be deep, employing the wide array of prevention and protection instruments". The international community's obligations to "encourage and help" refugee hosting States, and to apply "appropriate diplomatic, humanitarian and peaceful means" could surely include measures of (common but differentiated) responsibility-sharing for refugee protection, such as resettlement, capacity-building or financial support.¹⁸²

A last suggestion for the potential application of RtoP for refugee protection even goes further in its answer to both questions concerning the nature of the protected rights and of the protective measures. Forced displacement of the civilian population is, in the context of armed conflict and under certain conditions, a crime under international criminal law,¹⁸³ as well as a violation of customary international humanitarian

¹⁸⁰ TENDAYI ACHIUME, *cit. supra* note 17, pp. 716-727.

¹⁸¹ The case of the Yazidis fleeing Northern Iraq from the genocidal violence of Islamic State to Turkey in 2014 is a topical example where RtoP could have been helpful not only to demand international help for preventing the genocide, but also for assisting in their protection as refugees. See: ASHRAPH, FINLAY and TAYLOR, "Asylum and the Duty to Protect the Yazidis from Genocide", *OpinioJuris*, 2018, available at: <opiniojuris.org/2018/08/15/asylum-and-the-duty-to-protect-the-yazidis-from-genocide>.

¹⁸² See *supra* note 171, para. 10; TENDAYI ACHIUME, *cit. supra* note 17, p. 730.

¹⁸³ Art. 49 of 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time

law,¹⁸⁴ but it can also be considered a constituting element of atrocity crimes, a tactic or instrument of war,¹⁸⁵ or a crime against humanity in itself.¹⁸⁶ The RtoP-obligation to stop atrocity crimes from happening would then include the protection of a population that already is or is at risk of being forcibly displaced. The responsibility of bystander States in such a situation would thus include preventive measures that go beyond and precede strict refugee protection. As such, RtoP-obligations towards forcibly displaced populations in general, including internally displaced persons or persons threatened to be displaced – potential refugees *in spe* – might be the international law incentive to take effective measures to fight root causes of forced migration.¹⁸⁷

To sum up the findings on the RtoP potential for global refugee protection, there are two interesting, but rather antagonistic conclusions to draw. One, the R2P-mechanism to allocate responsibility to States is very attractive to deal with the current problem of unequitable distribution of refugee protection responsibilities among States, since it establishes an a priori CBDR-criterion beyond States' jurisdiction. And two, even though theoretically applicable to responsibility-sharing in refugee protection, the doctrine does only protect against certain violations of refugees' fundamental rights, and it does not necessarily require of States that they take protective measures in third States to such an extent that as a minimum the standards of international refugee law are guaranteed. In other words, the bystander States' duty to prevent atrocity crimes – including (secondary) forced displacement for that matter – does not entail an obligation to ensure all the rights under the Refugee Status Convention. However, it can be argued that, under R2P, States have the duty to help other States, or even force them to, respect the non-refoulement of refugees on their territory.

7. – Conclusion

Global refugee policy is in need of a legal framework that could distribute responsibility for refugee protection among States in an equitable manner and guarantee effective protection for refugees. This issue being subject to persistent political

of War.

¹⁸⁴ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge, 2005, Rules 129-133, pp. 457-474.

¹⁸⁵ SIMEON, "A New Protection Orientation and framework for Refugees and other Forced Migrants", *Laws*, 2017, 6(4), 30, pp.14-15, available at <doi.org/10.3390/laws6040030>.

¹⁸⁶ Arts. 7-8 of the 1998 Rome Statute of the International Criminal Court.

¹⁸⁷ See i.a.: A European Agenda on Migration, pp. 7-10; GCR, paras. 8-9; New York Declaration, para. 64.

inhibition, is why this article has focussed on the potential of international case-law and theoretical arguments for international law.

At first, it might seem effective for an individual refugee to litigate against a State for it to take responsibility for the violations of her or his rights (e.g. the ECtHR *Hirsi* case). However this jurisprudential avenue has important limitations. Although structural allocation criteria can find their origin in individual cases before regional human rights courts (e.g. the ECtHR *MSS* case), such case-law attributes responsibility only *a posteriori*, once fundamental refugee rights have already been violated. Besides, attribution of responsibility to a State traditionally only happens when such violations happen under its jurisdiction, and prevailing migration policies are precisely designed to keep refugees out of the State's jurisdiction. As a consequence, such externalisation policies cause overburdening of countries of first asylum.

In this chapter, I searched for alternative mechanisms to address these limitations and deliver a more equitable distribution of responsibility among States. And while international case-law has, up to now, not produced a decisive legally binding criterion to allocate State responsibility on an *a priori* basis, I have showed it did come up with some legal avenues with the potential to help breaking through the legal deadlock.

Firstly, in situations where fundamental human rights of refugees are violated in hosting States, some solace might already be found in novel legal interpretations of the existing attribution on the basis of extraterritorial jurisdiction. Other States could be forced to accept their responsibility for refugee protection beyond their borders on the basis of the direct and reasonably foreseeable impact their policies have on the endangerment and violation of refugees right to life, even in the hands of non-state or third State perpetrators.

Secondly, the principles of solidarity and cooperation seem to be the most obvious candidates for equitable responsibility distribution, because they establish *a priori* criteria on the basis of fundamental values in inter-State relations. However, much of this remains theory, and little to no case-law directly applies those principles and States' commitment to burden-sharing as legally binding criteria. At the moment, the principles are unenforceable because they lack implementation into precise legal commitments that go beyond the purely voluntary in emergency situations. Nonetheless, qualifying global refugee protection as a collective problem might impose obligations on States to cooperate by taking preventive measures to safeguard human rights.

Thirdly, in cases where persons have or might be forcibly displaced due to very serious breaches of international humanitarian law or where refugees suffer violations of peremptory norms such as the non-refoulement principle, the Responsibility to Protect-doctrine and ICJ-jurisprudence could be used to allocate responsibility to States. All States have the duty to protect victims, prevent atrocity crimes, and stop violations of peremptory norms even beyond their own borders through assistance or even intervention in refugee hosting States. States even have a differentiated qualified obligation to do all they reasonably can to prevent or end atrocities, which might include taking refugee protection measures, simply because they have the capacity to influence their fate.

Each of these mechanisms has its own legal restrictions: some related to the limitation in rights they protect in comparison with the totality of refugee protection rights – only right to life, prohibition of genocide or atrocity crimes, or peremptory norms –, others linked to the lack of enforceability of State measures – responsibility-sharing such as resettlement is purely based on voluntary commitments. Combined however, the legally binding core of the different criteria this article has assessed – jurisdiction-as-impact, cooperation obligations in solving collective problems and obligations to prevent or stop atrocities beyond borders – could already help establishing legal responsibility of States in situations of overburdening of refugee hosting States that lead to serious rights violations for refugees. Even when limited to emergency situations, this might have some redistributive effect.

Still, this does not equal the sought for structural, a priori allocation mechanism that should guarantee an equitable distribution of responsibilities among States and an effective protection to refugees, just yet. This article however also showed some contours of how such a, more legally robust, mechanism might take form in the future. As to the nature of rights to be protected by States with cooperative and preventive measures, international law already offers better avenues for protection when it concerns absolute human rights: example could be taken from the right to life basis in the climate case, peremptory human rights norms such as non-refoulement from the ILC Draft Articles, or prohibition of atrocity crimes under the RtoP-doctrine – and as to the specific rights guaranteed by the Refugee Status Convention, the ICJ could be a potential *forum litis* for determining respective responsibilities of Contracting States. As to the scope of the measures responsible States should take, a ‘common but differentiated responsibility’-approach (CBDR) seems have the most

potential in creating at least some willingness with States to commit themselves: inspiration could come from the – although limited – EU relocation programme, the capacity-to-influence-criterion from the *Genocide* case, or the scientifically based calculation of a State's contribution to fighting climate change.

My conclusion, for now, is that there are several promising legal avenues to be found in international law, but that a game-changer to legally enforce an equitable inter-State distribution of responsibilities for an effective refugee protection in a structural manner and on a global scale is lacking. As mentioned before, this article only had the intention to map some of the legal landscape covered by international case-law. More legal and practical scrutiny of these, and other, arguments is definitely needed in order to assess their legal coherence and judicial resilience.

The urgency of the issue of equitable distribution, in a time where States intentionally try to circumvent their responsibility by externalising it to other States, might eventually lead to serious disputes between States. Notwithstanding the valued pragmatism of law-making, it is not to be excluded that regional or international courts will have to rule upon this issue one day. Refugee hosting States that are not able to live up to their international refugee protection obligations, due to limited capacities and overburdening, could grow tired of continuously demanding more solidarity and responsibility-sharing from other States on the policy level and take it to the courts.

4. LES REFUGIES EN MER DEVANT LES JURIDICTIONS INTERNATIONALES : VERS LA PROTECTION D'UN DROIT INTERNATIONAL DE L'HOSPITALITE ?

Edoardo Stoppioni

SOMMAIRE: 1. Introduction – 1.1. Un problème lié à la fragmentation du droit international – 1.2. Un problème d'accès à la justice – 1.3. Un problème philosophique – 2. Les discours juridictionnels sur l'applicabilité du principe de non-refoulement – 2.1. Le rejet du découpage territorial de zones de non-droit – 2.2. La condamnation de la non-applicabilité extraterritoriale du principe – 3. Les discours juridictionnels sur l'impact des droits de l'homme – 3.1. Les garanties procédurales au cœur du régime de protection – 3.2. Les conditions de traitement : l'approche de vulnérabilité – 4. Le silence juridictionnel sur l'étendue de l'obligation de secours en mer – 4.1. Un droit individuel au secours en mer ? – 4.2. Les contours incertains de l'obligation de secours en mer – 5. Conclusion.

1. – Introduction

L'Avocat général Mengozzi terminait des conclusions devenues célèbres dans la récente affaire de la Cour de Justice de l'Union européenne ('CJUE') sur la question des visas humanitaires, surgie dans le contexte du conflit syrien, par ces mots,

« permettez-moi de rappeler à votre attention combien le monde entier, en particulier chez nous, en Europe, s'est indigné et profondément ému de voir, il y a deux ans, le corps sans vie du petit Alan, échoué sur une plage, après que sa famille avait tenté, à l'aide de passeurs et d'une embarcation de fortune surchargée de réfugiés syriens, de rallier, par la

BRUNO, PALOMBINO, DI STEFANO (eds.), Migration Issues before International Courts and Tribunals, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 91-117.

Turquie, l'île grecque de Kos. Sur les quatre membres de sa famille, seul son père a réchappé du naufrage. Il est louable et salubre de s'indigner. Dans la présente affaire, la Cour a cependant l'occasion d'aller plus loin, comme je l'y invite, en consacrant la voie légale d'accès à la protection internationale [...]. Que l'on ne se méprenne pas : ce n'est pas parce que l'émotion le dicte, mais parce que le droit de l'Union le commande »¹.

À l'appel de l'Avocat général pour aller vers un dépassement des limites de l'état du droit international et européen pour une protection effective des migrants, la Cour a répondu en refusant l'existence d'une compétence de l'Union et donc de la juridiction qui en administre le droit. Elle a ainsi plongé dans le silence l'appel à l'indignation de son Avocat général.

Face à ce qui a été considéré comme l'une des plus importantes « crises migratoires » de tous les temps, il convient de questionner le rôle joué par le droit international dans ce contexte. Le cas particulier des réfugiés en mer représente un exemple emblématique où le droit international est confronté à ses limites et paradoxes. Ainsi, étudier le discours des juridictions internationales ayant eu à connaître de ce type d'affaires est particulièrement intéressant : conçoivent-elles le droit international comme un élément de solution de cette « crise » ou le façonnent-elles comme un instrument qui participe des failles structurelles qui contribuent à alimenter cette crise ?

Dans une tribune publiée récemment, le philosophe Étienne Balibar affirme que cette situation « appelle une refonte du droit international, orientée vers la reconnaissance de l'hospitalité comme 'droit fondamental' imposant ses obligations aux États, dont la portée soit au moins égale à celle des grandes proclamations de l'après-guerre »². Cette affirmation repose sur l'idée selon laquelle le droit international aurait un rôle fondamental à jouer dans la transformation de masses de migrants en réfugiés sans refuge, et que le discours du droit international devrait être modifié pour justement éviter qu'il contribue à légitimer ces opérations.

Une telle étude du discours des juridictions internationales se développe à partir d'un triple prisme. L'encadrement juridique de la situation des réfugiés en mer est confronté à plusieurs facteurs de complexité. Le premier est d'ordre systémique : répondre à ce phénomène implique de questionner plusieurs branches du droit inter-

¹ Affaire C-638/16 PPU, *X et X c. État belge*, Conclusions de l'Avocat général M. Paolo Mengozzi, 7 février 2017, ECLI:EU:C:2017:93, para. 175.

² BALIBAR, "Pour un droit international de l'hospitalité", *Le Monde*, 16 juillet 2018, accessible sur <https://www.lemonde.fr/idees/article/2018/08/16/etienne-balibar-pour-un-droit-international-de-l-hospitalite_5342881_3232.html>.

national à la fois, ce qui montre bien le fonctionnement compartimenté du droit international fragmenté (1.1). Le deuxième est d'ordre pratique : les réfugiés en mer sont confrontés à une difficulté d'accès à la justice, ce qui inclut à plus forte raison l'accès aux juridictions internationales, élément à prendre en compte dans une telle étude (1.2). Enfin, le discours des juridictions internationales doit être analysé sous un prisme théorique, qui déterminera notre approche. La réflexion philosophique et éthique sur le phénomène des migrants en mer montre bien que le discours politique à ce sujet est polarisé entre deux pôles: un pôle *communautariste* mettant l'accent sur la protection des intérêts collectifs de la communauté d'accueil, correspondant au discours souverainiste, et un pôle *individualiste*, correspondant à la lecture du rôle fondamental des droits individuels des migrants à l'encontre des États (1.3). Montrer comment ces oscillations irriguent le discours des juridictions internationales est le but précis de cet article.

1.1. – Un problème lié à la fragmentation du droit international

Le régime juridique applicable aux migrants en mer constitue un exemple topique de ce que l'on a pu qualifier de fragmentation du droit international. Depuis quelques décennies, le droit international est présenté comme fragmenté : de l'un aux fragments, l'idée fondamentale est une perte d'unité de cet instrument de régulation sociale qui aurait éclaté en une pluralité d'espaces normatifs spécialisés, avec des ambitions particulières³ : « *the new disorder is not the anarchical society of atomized states and inadequate cooperation, but the heterarchical proliferation of disparate international and regional regimes, institutionism and jurisdictions* »⁴.

Penser la situation des migrants en mer en droit international implique de recourir à au moins trois branches distinctes du droit international fragmenté : le droit de la mer, le droit des réfugiés et les droits de l'homme. Or les migrants sont pris dans le morcellement des régimes juridiques applicables à leur situation et dans les angles morts résultant des défauts de communication entre les différentes sphères normatives. Si la relation entre droits de l'homme et droit des réfugiés n'est pas en soi

³ KOSKENNIEMI, MARTINEAU, "La fragmentation du droit international", in DAVID-MENARD, *Chaos*, Paris, 2013, pp. 51-74, p. 52.

⁴ KANWAR, "International Emergency Governance: Fragments of a Driverless System", *Critical Sense: Interdisciplinary Journal of Political Theory*, 2004, p. 41 ss., p. 44.

problématique (les deux étant unies par une communauté généalogique et idéologique⁵), celle qui unit le droit de la mer et les droits des individus l'est assurément.

Trois positions doctrinales différentes peuvent être identifiées concernant les rapports entre droits de la mer et droits des individus. Certains auteurs estiment que les obligations prévues par le droit de la mer et celles prévues par le droit international des droits de l'homme sont si différentes que le champ d'application *ratione materiae* des deux corpus normatifs en ferait presque deux cercles qui ne trouvent pas d'intersection⁶. Inversement, en infléchissant l'idée de parallélisme, il a pu être souligné que les deux espaces normatifs sont en interaction constante⁷. D'autres auteurs, comme Bernard H. Oxman, ont souligné que la Convention de Montego Bay a été conçue précisément pour poursuivre certains intérêts collectifs que pourraient être associés aux droits de l'homme⁸. Ainsi, au-delà de la simple interaction systémique, la Convention aurait été pensée pour poursuivre des buts tout à fait en ligne avec la vision des droits de l'homme, et c'est en raison de cette alliance philosophique, cette

⁵ CANÇADO TRINDADE, PEYTRIGNET, RUIZ DE SANTIAGO, *Las tres vertientes de la protección internacional de los derechos de la persona humana : Derechos Humanos, Derecho Humanitario, Derecho de los Refugiados*, Mexico, 2003, p. 3 ss.

⁶ PAPANICOLOPULU, "Is there a right to be rescued at sea? A skeptical view", *Questions of International Law*, Zoom-in 4, 2014, p. 20.

⁷ PAPANICOLOPULU, "Human Rights and the Law of the Sea", in ATTARD, FITZMAURICE, MARTÍNEZ GUTIÉRREZ, *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea*, Oxford, 2014, p. 509 ss., pp. 531-532:

"interaction between human rights and the law of the sea is developing along three main lines. In the first place, human rights law and labour law instruments provide the standards for the treatment of individuals at sea, that are taken into account in developing law of the sea rules, for example the SUA Convention, or in adjudicating disputes. Even in cases where law of the sea instruments do not mention or do not refer to human rights, these need to be taken into account when determining the rights and duties of States with respect to individuals at sea. Second, the law of the sea, in allocating power and jurisdiction among States, provides the structural background for determining the State or States that have the duty to ensure that such human rights are effectively enjoyed by individuals. The identification of multiple States having jurisdiction as a means to address non-compliance by some States—notably, flag States—is compatible with human rights law and may best help promote the full enjoyment of human rights. Finally, the law of the sea has started considering in detail how maritime activities may impact on human rights and how the marine environment may impose practical constraints on their enjoyment. This has triggered the development of legal instruments that aim at ensuring that human rights are enjoyed by individuals involved in maritime operations and has informed adjudication of disputes by a wide range of tribunals. Thus, human rights are a vector for further development of the law of the sea, along the jurisdictional framework set out in the UNCLOS".

⁸ OXMAN, "Human rights and the United Nations Convention on the Law of the Sea", *Columbia Journal of Transnational Law*, 1998, p. 399 ss.

communauté de buts que les deux branches ne doivent être lues comme antagonistes.

Une première question théorique est donc celle de savoir comment les juridictions internationales articulent ces différents champs normatifs dans le domaine des réfugiés en mer. S'agit-il d'un discours juridictionnel d'interprétation harmonieuse ou de la construction de conflits axio-téléologiques ?

1.2. – Un problème d'accès à la justice

Quand on étudie les décisions juridictionnelles ayant adressé les questions relatives à la migration en mer, il faut garder à l'esprit la grande difficulté à laquelle les migrants font face quand ils souhaitent avoir accès à la justice, nationale ou internationale. Comme la pratique des États consiste souvent à refouler en mer, sans étude individuelle de leurs demandes, le fait d'empêcher l'accès à une procédure juridictionnelle est le problème même dont le droit international vient se saisir. Sans compter, par ailleurs, les difficultés matérielles auxquelles font face des migrants ayant connu de telles persécutions et crises.

Dans l'affaire *Hirsi Jamaa*, le Gouvernement italien avait plaidé que « les circonstances de l'espèce, dès lors qu'elles se sont déroulées à bord de navires, ne permettaient pas de garantir aux requérants le droit d'accès à une instance nationale »⁹. L'argument semble relever de la naïveté, puisque l'article 16 de la Convention de Genève prévoit l'obligation pour tout État partie de « libre et facile accès devant les tribunaux ». L'idée centrale est que « *without access to authorities safeguarding the substantive rights granted to refugees, there would be no way to ensure that these rights are provided not only on paper, but also in practice* »¹⁰. Si l'on pense à l'accès aux juridictions civiles, on sait que les chefs de compétences en droit international privé national reposent sur des critères (nationalité, domicile, résidence habituelle) qui peuvent être extrêmement difficiles à caractériser pour un réfugié. Ces chefs de compétence présupposent, en effet, un degré significatif d'intégration de la personne dans le contexte économique et social de l'État du for.

Par rapport à la justice internationale, les difficultés pratiques concernant l'accès aux juridictions sont reflétées dans l'article 8 du projet d'articles de la Commission du droit international ('CDI') sur la protection diplomatique. Consciente du fait que

⁹ Cour Européenne des Droits de l'Homme, *Hirsi Jamaa et autres c. Italie*, requête n. 27765/09, arrêt du 23 février 2012, para 191.

¹⁰ ELBERLING, "Article 16 – Droit d'ester en justice", in ZIMMERMANN, MACHTS, DÖRSCHNER, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A Commentary*, Oxford, 2011, p. 931 ss., p. 933.

l'État de nationalité ne va pas être enclin à exercer sa protection diplomatique à raison des persécutions politiques qui accablent le réfugié, la Commission cherche à trouver des liens de rattachement alternatifs, permettant à l'État où celui-ci a établi sa « *résidence légale et habituelle* » de le faire. Cette disposition n'est soutenue par aucune pratique étatique et relève pour l'heure de la *lex ferenda*¹¹. Mais au surplus, comme on l'a rappelé, ces critères de rattachement se révèlent de faible intérêt pour le cas des réfugiés qui peuvent avoir besoin d'une protection de la part de l'État d'accueil avant même d'obtenir une résidence légale et habituelle sur le territoire¹². Cela va à l'encontre de l'esprit de la disposition dont, comme noté par la CDI, « *l'objectif est de permettre aux États d'exercer leur protection diplomatique à l'égard de toute personne qu'ils considèrent et traitent comme un réfugié* »¹³.

Le contentieux devant la Cour européenne des droits de l'homme ('Cour EDH') a également montré à quel point l'accès à une juridiction internationale est difficile d'accès pour les réfugiés en mer. Les avocats des migrants dans l'affaire *Hussun* (première grande affaire sur la question, antérieure à *Hirsi*) affirment que « selon les informations fournies par les représentants des requérants le 16 juillet 2006, ces derniers ont perdu tout contact avec les requérants et ne disposent "même pas d'un numéro de téléphone" où pouvoir les joindre »¹⁴. Dans *Hussun*, par ailleurs, la Cour a déclaré irrecevables une grande partie des requêtes, à raison de l'irrégularité des procurations conférant mandat aux avocats¹⁵. De plus, les avocats des migrants éprouvent de grandes difficultés à défendre les migrants détenus car en situation irrégulière de sorte que, dans l'affaire *Hirsi*, la recevabilité de la requête a été rendue possible par la seule action d'intermédiation de l'Agence des Nations Unies pour les réfugiés ('HCR')¹⁶.

¹¹ Queen's Bench (Royaume-Uni), *Al Rawi & Others, R (on the Application of) v. Secretary of State for Foreign Affairs and Another* [2006] EWHC (Admin), §63.

¹² ZIEGLER, "Protecting Recognized Geneva Convention Refugees outside their States of Asylum", *International Journal of Refugee Law*, 2013, p. 260.

¹³ Commission de droit international, *Projet d'articles sur la protection diplomatique et commentaires y relatifs*, 2006, UN Doc. A/61/10, p. 51.

¹⁴ Cour Européenne des Droits de l'Homme, *Hussun et autres c. Italie*, requêtes n. 10171/05, 10601/05, 11593/05 et 17165/05, arrêt du 19 janvier 2010, para 28.

¹⁵ *Ibid.*, para 43-44.

¹⁶ DEMBOUR, "Interception-at-sea : Illegal as currently practiced – *Hirsi and Others v Italy*", *Strasbourg Observers*, 1er mars 2012, accessible sur <<https://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/>>.

1.3. – Un problème philosophique

Tout comme dans le cas du droit international, la réflexion sur les réfugiés en philosophie politique oscille entre deux pôles discursifs opposés, que l'on peut schématiser comme étant représentés par l'approche individualiste et l'approche communautariste de la migration¹⁷.

L'approche communautariste est représentée par la position de Michael Walzer qui, au nom d'une « *communitarian self-determination* », défendait une discrétion quasi pleine et entière des membres d'une communauté politique de décider qui admettre et qui exclure en son sein, au nom d'un intérêt supérieur de cette communauté. L'idée des communautaristes est que l'État est comme un club ou une famille, ayant avant tout des obligations à l'égard de sa propre société¹⁸. Cette vision correspond aux revendications souverainistes de certains juristes.

De manière assez emblématique, le philosophe qui a porté cette logique à son extrême, Garrett Hardin, utilise les demandeurs d'aide en mer pour expliquer les fondements de son éthique de l'immigration, connue sous le nom d'« éthique du bateau de sauvetage »¹⁹. En simplifiant, selon Hardin, on peut concevoir un État développé auquel on demande d'accueillir les migrants par analogie à un bateau de sauvetage qui a un nombre de places limité. Le bateau coulera si on prend plus de passagers que ce que rend possible sa capacité. Ainsi, la seule réponse éthique acceptable consiste à refuser plus de personnes. Cette métaphore est intéressante à garder à l'esprit comme prisme d'analyse d'un certain nombre de revendications juridiques allant précisément dans ce sens. Le secours en mer a toujours été considéré comme un cas limite, permettant de penser les paradoxes de la réflexion philosophique et éthique.

L'approche individualiste est illustrée par l'optique opposée de Joseph Carens qui, au nom d'un « *orthodox individualism* », défend la centralité de la liberté de mouvement. Les droits des migrants sont fondés sur des valeurs démocratiques fondamentales d'égalité et de liberté qui demandent une politique d'*open borders*²⁰. Cette vision correspond aux principales positions des juristes analysant la question essentiellement du point de vue des droits de l'homme.

¹⁷ YPI, "Justice in Migration", *The Journal of Political Philosophy*, 2008, p. 391 ss..

¹⁸ WALZER, *Spheres of Justice*, New York, 1983, pp. 47-59.

¹⁹ HARDIN, "Lifeboat Ethics : the Case against Helping the Poor", *Psychology Today*, 1974, accessible sur <https://www.garretthardinsociety.org/articles/art_lifeboat_ethics_case_against_helping_poor.html>.

²⁰ CARENS, "Aliens and Citizens: The Case for Open Borders", *Review of Politics*, 1987, vol. 49, pp. 251-273.

L'analyse individualiste est généralement inspirée des travaux de John Rawls, selon lequel, par une synthèse extrême, derrière un voile d'ignorance nous sommes tous potentiellement des réfugiés. Être né dans un pays développé n'est pas un critère qui puisse permettre une telle discrimination sociale : les réfugiés sont des personnes ordinaires dans une situation exceptionnelle²¹. Ce type de logique est menée à son extrême par les utilitaristes radicaux comme Peter Singer, pour qui sur ces prémisses il est moralement inacceptable de ne pas appeler à une large redistribution des ressources et que les États devraient donc accepter des migrants jusqu'à ce qu'on ne parvienne pas à égaliser les niveaux de condition de vie²².

On peut également identifier une position intermédiaire, essayant de trouver un compromis entre les revendications individualistes et communautaristes. Une première voie de médiation est constituée par l'approche de vulnérabilité. Comme le constate Matthew Gibney, les individus ont des obligations morales « générales » (à l'égard de l'humanité) et « spéciales » (à l'égard de communautés proches, comme la famille). Si normalement on a tendance à faire prévaloir les obligations spéciales, le principe d'humanité devrait mener à renforcer les obligations que nous avons à l'égard des personnes plus vulnérables, surtout quand le coût social d'une telle démarche est relativement faible²³. Une autre approche est celle défendue par Seyla Benhabib²⁴ et Thomas Pogge²⁵, selon qui on ne pourrait plus penser en termes de communautés nationales à l'ère des interconnexions transnationales : l'existence d'une société globale fait que nous sommes complices dans la souffrance des autres et que cette souffrance a un impact sur nos propres politiques nationales.

Il a également été souligné que l'approche individualiste tout comme l'approche communautariste convergent, le plus souvent en réalité, lorsqu'il s'agit du cas des réfugiés politiques. Les auteurs s'accordent à affirmer que, dans les cas de persécutions donnant lieu à la qualité de réfugié, les liens avec la communauté politique d'origine ont été à ce point sectionnés que les autres communautés politiques ne sauraient refuser d'accueillir en leur sein ces individus²⁶. Telle est en justement la raison

²¹ RAWLS, *A Theory of Justice*, New York, 1974, p. 173.

²² SINGER, *Practical Ethics*, Cambridge, 1993, p. 28 ss.

²³ GIBNEY, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge, 2004, pp. 5 ss.

²⁴ BENHABIB, *The Rights of Others: Aliens, Residents and Citizens*, Cambridge, 2004, p. 17 ss.

²⁵ POGGE, "Migration and Poverty", in BADER (ed.), *Citizenship and Exclusion*, Houndmills, 1997, pp. 12-27.

²⁶ YPI, "Justice in Migration", *The Journal of Political Philosophy*, 2008, p. 391 ss., p. 397.

même de l'émergence du droit international des réfugiés. La pertinence de la distinction ne subsiste que pour les « migrants économiques », une communauté politique pouvant opter pour l'accueil ou le rejet de l'errant selon un bilan coûts-avantages opéré en son sein.

Dans ce chapitre, nous allons analyser le discours des juridictions internationales par rapport aux migrants en mer à l'aune de ces différentes postures philosophiques. Il sera souligné que le discours du droit international fragmenté oscille entre différents pôles, selon l'objectif poursuivi par le locuteur. Déconstruire ces discours nous permettra donc de mettre à nu l'articulation des logiques en jeu dans la jurisprudence internationale, par rapport à une question qui met à l'épreuve les contours du droit international tout autant que ceux de la philosophie politique. Dans cette optique, il sera question d'analyser le discours des juridictions internationales portant sur le pilier du droit des réfugiés, le principe de non-refoulement (2), ainsi que sur l'impact des droits de l'homme (3). Enfin, il s'agira d'analyser leurs silences concernant le secours en droit de la mer (4).

2. – *Les discours juridictionnels sur l'applicabilité du principe de non-refoulement*

La première branche du droit international qu'il convient d'interroger est le droit international des réfugiés, afin de comprendre comment joue le statut protecteur particulier reconnu à l'individu persécuté qui fuit son pays d'origine en empruntant des voies marines. D'un point de vue philosophique, il a été reconnu que « *the underlying ethos of the refugee regime is a reciprocal commitment to the principle of non refoulement* »²⁷. En effet, en interdisant aux États d'expulser ou de refouler « un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques »²⁸, le non-refoulement symbolise au mieux le centre névralgique du statut protecteur du réfugié.

Le discours des internationalistes à cet égard oscille entre deux pôles, selon que

²⁷ BETTS, "The Normative Terrain of the Global Refugee Regime", *Ethics and International Affairs*, 7 octobre 2015, accessible sur <<https://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/>>.

²⁸ Convention relative au statut des réfugiés, signée à Genève le 28 juillet 1951, entrée en vigueur le 22 avril 1954, R.T.N.U., vol. 189, n°2545, article 33 (1).

l'on voit dans le droit international un instrument de progrès ou une partie du problème²⁹. Pour certains, la réponse à la crise migratoire réside dans la nécessité pour les États de donner application pleinement à leurs obligations internationales en matière de droits de l'homme et des réfugiés et ce de la manière la plus englobante possible (y compris de manière extraterritoriale). À ce discours d'expansion s'oppose une logique de minimisation de ceux qui considèrent que le régime juridique en l'état est fortement questionnable et ne peut fonctionner.

La pratique des États suit également ce fonctionnement binaire. Dans un premier moment, les États particulièrement intéressés ont eu tendance à délimiter le champ d'application du principe de non-refoulement afin de limiter le périmètre de sa force obligatoire. En adoptant une perspective chronologique, les pratiques ont porté sur deux grands débats : (1) le recouplement de zones du territoire où le principe n'opère pas et (2) le refus de son applicabilité extraterritoriale. En revanche, les juridictions internationales sont progressivement venues sanctionner ces comportements en appelant à une application plus large de ces obligations.

2.1. – Le rejet du découpage territorial de zones de non-droit

Un certain nombre d'États avaient recoupé, au sein de leur territoire, des zones qui au sens du droit interne devaient relever d'un régime d'extra-territorialité. Ainsi, ces parties du territoire étaient considérées comme exemptes de l'applicabilité du principe de non-refoulement. Ce type de régime juridique était ouvertement contesté par le HCR, qui réaffirmait que l'obligation de non-refoulement « n'est pas soumise à des restrictions territoriales ; elle s'applique en tout endroit où l'Etat en question exerce sa juridiction »³⁰.

La pratique de l'Australie et de la France sont emblématiques à cet égard³¹. Par

²⁹ WILDE, “‘Let them down’: Rescuing migrants at sea and the non-refoulement obligation as a case study of international law’s relationship to ‘crisis’: Part I”, *EJIL:Talk!*, 25 février 2017, accessible sur <<https://www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-i/>>.

³⁰ Comité des droits de l'homme, *Avis consultatif sur l'application extra-territoriale des obligations de non-refoulement en vertu de la Convention de 1951 relative au statut des réfugiés et de son Protocole de 1967*, 16 janvier 2007, AJAC96/951, §9 et §12.

³¹ Pour une analyse historique du droit international des réfugiés en mer et des grandes affaires ayant structuré son évolution, voy. MANN, *Humanity at sea: maritime migration and the foundations of international law*, Cambridge, 2016.

un *Migration Amendment (Excision from Migration Zone)*, en 2001³² l'Australie a défini certaines îles situées dans sa mer territoriale comme étant en dehors de la « *migration zone* » au sens de sa loi sur la migration de 1954, qui est également l'instrument de transposition permettant l'application en droit interne de la Convention de Genève de 1951. Ce faisant il est empêché au migrant d'instituer une instance devant les juridictions nationales afin de contester la légalité de sa détention, son renvoi vers un État tiers ou la qualification de son statut juridique³³. Cet amendement est une réponse à l'épisode du navire *Tampa*, ayant transporté 433 demandeurs d'asile dans les eaux australiennes³⁴.

Le Comité des droits de l'homme a eu l'occasion de critiquer ce régime, notamment dans une affaire concernant les migrants en mer. Dans ses communications dans l'affaire *Shams et autres c. Australie*, le Comité a constaté une violation de l'article 9 du Pacte international relatif aux droits civils et politiques ('PIDCP') du fait de détentions allant au-delà de périodes justifiables par l'État et de l'impossibilité d'accès à un contrôle juridictionnel de leur détention³⁵. Néanmoins, le Comité se réjouit des modifications du cadre législatif interne intervenues depuis 2003, allant progressivement dans le sens de ses recommandations.

De manière similaire, la législation française avait prévu le découpage de zones d'extra-territorialité au sein de ses ports et aéroports, afin de se soustraire à certaines obligations internationales. La Cour EDH, dans l'affaire *Amuur c. France*, a ouvertement critiqué cette approche et affirmé que « même si les requérants ne se trouvaient pas en France au sens de l'ordonnance du 2 novembre 1945, leur maintien dans la zone internationale de l'aéroport de Paris-Orly les faisait relever du droit français. En dépit de sa dénomination, ladite zone ne bénéficie pas du statut d'extra-territorialité »³⁶. Ainsi, « le système juridique français en vigueur à l'époque et tel qu'il a été appliqué dans la présente affaire n'a pas garanti de manière suffisante le droit des requérants à leur liberté »³⁷. On peut en déduire que, selon la Cour, le non-

³² Australia, *Migration Amendment (Excision from Migration Zone) (Consequential Provision)* Act 2001, No. 127/2001.

³³ GOODWIN-GILL, MACADAM, *The Refugee in International Law*, Oxford, 2007, p. 256.

³⁴ CROCK, "In the wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows", *Pacific Rim Law & Policy Journal*, 2003, pp. 49-95.

³⁵ Comité des droits de l'homme, *Saed Shams et autres c. Australie*, communications n. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 du 11 septembre 2007, para. 7.2 et 7.3.

³⁶ Cour européenne des droits de l'homme, *Amuur c. France*, requête n.19776/92, arrêt du 25 juin 1996, para. 52.

³⁷ *Ibid.*, §54.

refoulement s'appliquait sur l'ensemble du territoire et que tout acte unilatéral contraire aurait été inopérant.

2.2. – La condamnation de la non-applicabilité extraterritoriale du principe

Dans une première phase, la pratique (notamment juridictionnelle) des États particulièrement intéressés est allée dans le sens d'un refus catégorique de l'applicabilité du principe de non-refoulement au-delà de la juridiction étatique. Telle a été la position soutenue par la Cour suprême américaine dans l'affaire *Sale c. Haitians* de 1993³⁸, suivie par l'Australie, le Royaume-Uni, la France et le Canada³⁹. Les organisations internationales spécialisées puis les juridictions internationales ont fortement critiqué cette position et mené à l'émergence du principe inverse.

La Cour suprême avait en effet considéré que l'article 33 de la Convention de Genève n'était pas applicable à la situation des Haïtiens interceptés, puisque ceux-ci ne se trouvaient pas sur le territoire des États-Unis et que la norme n'était donc pas applicable dans le cas d'une personne refoulée vers le territoire d'origine à partir de la haute mer.

Une telle lecture repose sur la vision territoriale du principe de non-refoulement, qu'une partie de la doctrine fait découler de l'interprétation du texte et de l'économie générale de la Convention de Genève⁴⁰. Comme le souligne la Cour suprême, le terme « retour » inséré à l'article 33 sous-entend un acte de défense et d'exclusion à la frontière même de l'État⁴¹. Cela est confirmé à la lecture du paragraphe 2 de l'article, visant directement les personnes qui se situent déjà sur le territoire de l'État. Il a également été souligné que, lors des travaux préparatoires, les délégations suisse et néerlandaise avaient soutenu que l'obligation de ne pas refouler n'incluait pas une obligation d'admettre la personne dans le pays dans lequel elle souhaite se rendre⁴² : la rédaction vague du texte serait le résultat de ces divergences politiques. Partant, il

³⁸ Cour suprême des États-Unis, *Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, INC., et al.*, 509 U.S. 155 (1993), n. 92-344, 21 juin 1993.

³⁹ Voy. notamment Cour fédérale d'Australie, *Ruddock c. Vadarlis*, jugement du 18 septembre 2001, [2001, FCA 1329], §126; Chambre des Lords (comité judiciaire), *Regina c. Immigration Officer at Prague Airport and Another*, 9 décembre 2004.

⁴⁰ HATHAWAY, *Rights of refugee under international law*, Cambridge, 2005, p. 339.

⁴¹ Cour suprême des États-Unis, *Sale, Ac Acting Commissioner, Immigration and Naturalization Service, et al. V. Haitian Centers Council, INC., et al, cit.*, §182.

⁴² *Rapport du Comité spécial pour les réfugiés et les apatrides*, Deuxième session, Genève, Suisse, 25 août 1950, E/AC.32/8; E/1850.

est souvent souligné que le non-refoulement ne peut être interprété de manière à fonder un droit à l'asile territorial, idée qui a été clairement rejetée par les rédacteurs de la Convention et qui n'est point admise en droit international coutumier⁴³.

De manière similaire, la Chambre des Lords a jugé dans l'affaire de *Prague Airport* que le principe de non-refoulement n'avait pas été violé par les autorités britanniques qui contrôlaient les passagers sur le territoire de la République tchèque⁴⁴. La pratique de l'Allemagne ainsi que celle de l'Australie vont dans le même sens⁴⁵.

Cette lecture de la disposition est clairement inspirée d'une vision générale du droit international des réfugiés comme fondé sur le pouvoir souverain de l'État d'admettre ou non des étrangers sur son territoire, considéré comme étant le contenu fondamental du droit international coutumier. Si la Convention de Genève de 1951 assure une protection pour les personnes qui ont fui leur pays, elle n'empêche pas les États de mener des actions en dehors de leurs frontières pour réguler les flux de migrants souhaitant demander asile sur leur territoire : cette clef de lecture fournie par l'opinion de Lord Hope aide à comprendre la jurisprudence britannique sur ce point⁴⁶.

Ce sont surtout les juridictions internationales qui vont rejeter ce type de raisonnement. La Commission interaméricaine des droits de l'homme refuse la conformité au droit international des droits de l'homme de la position de la Cour suprême américaine dans l'affaire *Sale* et la Cour européenne des droits de l'homme cautionne la même idée d'extraterritorialité dans l'affaire *Hirsi Jamaa*⁴⁷.

Cette position inverse part aussi de présupposés idéologiques diamétralement opposés. Il s'agit d'une lecture du droit international des réfugiés comme étant une discipline visant à protéger les droits individuels des migrants et posant ainsi autant de limites substantielles à la souveraineté des États. Comme l'a reconnu le HCR, une telle application extraterritoriale s'imposerait en raison de l'objet et du but mêmes

⁴³ CHETAIL, "Le principe de non-refoulement et le statut de réfugié en droit international", in CHETAIL, FLAUSS (éd.), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après : bilan et perspectives*, Bruxelles, 2001, p. 17.

⁴⁴ Chambre des Lords (comité judiciaire), *Regina c. Immigration Officer at Prague Airport and Another*, 9 décembre 2004.

⁴⁵ FISCHER-LESCANO, LÖHR, TOHIDIPUR, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law*, 2009, p. 282.

⁴⁶ Chambre des Lords (comité judiciaire), *Regina c. Immigration Officer at Prague Airport and Another*, *op. cit.*, opinion du Lord Hope.

⁴⁷ Cour Européenne des Droits de l'Homme, *Hirsi Jamaa et autres c. Italie*, *cit. supra* note 9, para. 179-180.

de la Convention de Genève de 1951⁴⁸, dont la téléologie serait de conférer une protection effective aux réfugiés contre des violations de leurs droits⁴⁹. Cette interprétation téléologique entre d'ailleurs dans la veine de l'application extraterritoriale des droits de l'homme⁵⁰.

La Commission interaméricaine affirme ouvertement ne pas pouvoir rejoindre le raisonnement de la Haute juridiction américaine sur ce point et adhère à la vision du HCR (qui était intervenu en tant qu'*amicus curiae* devant la Cour suprême), défendant que l'article 33 ne souffre aucune limitation géographique⁵¹. Ainsi, elle constate qu'en rapatriant en Haïti les demandeurs d'asile haïtiens sans vérifier leur qualité de réfugiés, les États-Unis avaient violé l'article XXVII de la Convention interaméricaine, prévoyant un droit à demander et recevoir l'asile dans un territoire étranger, conformément aux lois de l'État d'accueil et aux traités internationaux⁵².

La Cour EDH affirme clairement que c'est une lecture téléologique de la Convention qui l'amène à dépasser la vision souverainiste sus-énoncée :

« Les considérations ci-dessus ne remettent pas en cause le droit dont disposent les États d'établir souverainement leurs politiques d'immigration. Il importe toutefois de souligner que les difficultés dans la gestion des flux migratoires ne peuvent justifier le recours, de la part des États, à des pratiques qui seraient incompatibles avec leurs obligations conventionnelles. La Cour réaffirme à cet égard que l'interprétation des normes conventionnelles doit se faire au regard du principe de la bonne foi et de l'objet et du but du traité ainsi que de la règle de l'effet utile »⁵³.

On voit donc qu'une logique communautariste peut impliquer une territorialisation des obligations internationales à l'égard des réfugiés. Au contraire, une logique individualiste voit celles-ci comme dépourvues de limites territoriales, dans l'idée selon laquelle c'est le migrant qui est personnellement titulaire de certains droits, qui ne sont pas ancrés dans l'assiette territoriale de la souveraineté étatique.

⁴⁸ Comité des droits de l'homme, *Avis consultatif*, cit. supra note 30, para. 29.

⁴⁹ CARLIER, "Droit d'asile et des réfugiés : de la protection aux droits", *Recueil des Cours de l'Académie de La Haye de droit international*, vol. 332, 2008, pp. 108-109.

⁵⁰ O'BRIEN, "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem", *Goettingen Journal of International Law*, 2011, p. 729.

⁵¹ Commission interaméricaine des droits de l'homme, *The Haitian Centre for Human Rights et al. v. United States*, affaire 10.675, Report No. 51/96, arrêt du 13 mars 1997, para 157.

⁵² *Ibid.*, para 163.

⁵³ Cour européenne des Droits de l'Homme, *Hirsi Jamaa et autres c. Italie*, cit. supra note 9 para. 179.

3. – *Les discours juridictionnels sur l'impact des droits de l'homme*

Le discours des droits de l'homme par rapport aux migrants en mer peut être lu à la lumière d'un parallélisme avec le tiraillement montré par la philosophie politique entre communautarisme et individualisme : entre droit souverain de l'État de gérer efficacement ses politiques migratoires et droits individuels des migrants. La première branche du chiasme est illustrée par l'opinion du juge russe Dedov de la Cour EDH dans l'affaire *Khlaifia* : situant le fondement intellectuel du régime juridique des migrants en mer dans la « présomption du droit souverain de tout État de contrôler ses frontières », celui-ci parvient à affirmer qu'on ne saurait lire le droit international des droits de l'homme comme plaçant une « charge excessive sur les autorités » étatiques « dans une situation de crise migratoire, où des milliers de migrants illégaux arrivaient en même temps sur les côtes »⁵⁴.

Le pivot de la seconde branche de ce tiraillement consiste dans l'exigence d'*examen individuel* de la demande. Le droit international des réfugiés postule déjà, de manière abstraite, l'obligation pour les autorités étatiques compétentes de procéder à l'examen individuel de la demande de reconnaissance de la qualité de réfugié, afin d'éviter le renvoi d'une personne vers un pays où sa vie ou sa liberté serait menacée⁵⁵. Le droit international des droits de l'homme est venu donner des contours plus nets à cette idée en postulant une « *prise en compte réelle et différenciée de la situation de chacune des personnes concernées* »⁵⁶. Cette prise en compte de la situation individuelle du migrant se traduit notamment en deux points distincts : l'importance des garanties procédurales reconnues (3.1) et de la considération de la vulnérabilité de l'individu (3.2).

3.1. – Les garanties procédurales au cœur du régime de protection

L'idée d'exigence d'examen individuel de la situation du demandeur d'asile donne une coloration fortement procédurale aux droits qui lui sont garantis par la

⁵⁴ Cour européenne des droits de l'homme, *Khlaifia et autres c. Italie*, requête n. 16483/12, arrêt (Grande Chambre) du 15 décembre 2016, opinion partiellement dissidente du juge Dedov.

⁵⁵ GIUFFRÉ, "Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations", in MORENO LAX, PAPASTAVRIDIS (eds), *Boat Refugees and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights*, Boston, 2016, pp. 248-279, p. 256.

⁵⁶ Cour européenne des droits de l'homme, *Khlaifia et autres c. Italie*, requête n. 16483/12, arrêt du 1^{er} septembre 2015, para. 157.

Convention de sauvegarde. Elle est placée au cœur de la qualification même d'expulsion collective, prohibée par l'article 4 du Protocole 4 à la Convention. Déjà dans son arrêt *Čonka* ayant défini pour la première fois l'expulsion collective, la Cour affirme que celle-ci consiste en « toute mesure contraignant des étrangers, en tant que groupe, à quitter un pays, sauf dans les cas où une telle mesure est prise à l'issue et sur la base d'un examen raisonnable et objectif de la situation particulière de chacun des étrangers qui forment le groupe »⁵⁷. C'est l'opportunité fournie par les autorités à l'individu de mettre en avant des arguments à l'encontre de son expulsion sur une base individuelle qui permet d'éviter la qualification. Finalement, les garanties procédurales issues du droit des réfugiés deviennent un élément constitutif de l'existence d'une violation du droit international des droits de l'homme.

Le caractère automatique et dépourvu de toute étude individuelle de l'expulsion (et donc l'absence de garanties procédurales suffisantes) constitue le critère central dans la jurisprudence de la Cour à l'égard des migrants en mer. Sur cette base, la Cour a pu condamner l'interception en haute mer méditerranée des navires portant des migrants dès lors qu'ils sont refoulés systématiquement et de manière générale vers la Libye (*Hirsi Jamaa*)⁵⁸, la pratique des autorités italiennes de renvoyer automatiquement vers la Grèce les étrangers arrivant à ses ports de cet endroit (*Sharifi*)⁵⁹, de même que cette même posture des autorités espagnoles à l'égard des migrants provenant du Maroc et rentrant à Melilla (*ND et NT*)⁶⁰. Le Comité exécutif du Programme du Haut Commissaire ('EXCOM)⁶¹ insiste sur « la nécessité d'admettre les réfugiés sur le territoire des États, impliquant le non-rejet aux frontières, en l'absence de procédures justes et efficaces de détermination de statut et des besoins de

⁵⁷ Cour européenne des droits de l'homme, *Čonka c. Belgique*, requête n. 51564/99, arrêt du 5 février 2002, para 59.

⁵⁸ HERVIEU, "Interception et refoulement des migrants en haute mer : la Méditerranée n'est pas une zone de non droit(s) (CEDH, G.C. 23 février 2012, *Hirsi Jamaa et autres c. Italie*) – Appréhension conventionnelle inédite de la pratique d'interception et de refoulement des groupes de réfugiés en mer", *Combats pour les droits de l'homme*, 29 février 2012, accessible sur <<http://combatsdroitshomme.blog.le-monde.fr/2012/02/29/interception-et-refoulement-des-migrants-en-haute-mer-la-mediterranee-nest-pas-une-zone-de-non-droits-cedh-g-c-23-fevrier-2012-hirsi-jamaa-et-autres-c-italie/>>.

⁵⁹ Cour européenne des droits de l'homme, *Sharifi et autres c. Italie et Grèce*, requête n. 16643/09, arrêt du 21 octobre 2014.

⁶⁰ Cour européenne des droits de l'homme, *N.D. et N.T. c. Espagne*, requêtes n. 8675/15 et 8697/15, arrêt du 3 octobre 2017.

⁶¹ *Executive Committee of the Programme of the United Nations High Commissioner for Refugees in 1958* [Résolution de l'ECOSOC 672 (XXV)].

protection »⁶². En conséquence, il est soutenu par la doctrine qu'un droit à l'asile provisoire devrait être accordé au moins pour permettre une étude de la situation individuelle⁶³, sans lequel la reconnaissance de la qualité de réfugié serait dépourvue de tout effet utile⁶⁴.

3.2. – Les conditions de traitement : l'approche de vulnérabilité

Dans l'affaire *M.S.S. c. Belgique et Grèce*, la Cour EDH a développé ce que l'on peut appeler une *approche de vulnérabilité*⁶⁵ à l'égard des migrants. La Cour affirme qu'elle « accorde un poids important au statut du requérant qui est demandeur d'asile et appartient de ce fait à un groupe de la population particulièrement défavorisé et vulnérable qui a besoin d'une protection spéciale », ce qui dérive d'un « consensus à l'échelle internationale et européenne, comme cela ressort de la Convention de Genève, du mandat et des activités du HCR ainsi que des normes figurant dans la directive Accueil de l'Union européenne »⁶⁶. Un tel état de vulnérabilité sert à la Cour pour déterminer l'existence de la violation de l'article 3 de la Convention : les conditions de détention auprès de l'aéroport d'Athènes atteignent le seuil de traitements inhumains et dégradants dans le cas du demandeur d'asile, quand bien même sa durée eût été brève, compte tenu du fait que « la détresse du requérant a été accentuée par la vulnérabilité inhérente à sa qualité de demandeur d'asile »⁶⁷. Comme le souligne le juge Rozakis dans son opinion concurrente, une telle approche de vulnérabilité est mue par une lecture de la Convention à la lumière des autres obligations de l'État issues du droit international des réfugiés et du droit de l'Union.

Néanmoins, dans le contexte spécifique de l'humanité en mer, la Cour a pu nuancer cette approche de vulnérabilité dans son affaire *Khlaifia c. Italie*. En argumentant *a contrario* par rapport à son arrêt *M.S.S.*, la Cour refuse de constater de violation de

⁶² H.C.R., *Conclusion sur la sauvegarde de l'asile N° 82 (XLVIII)*, 17 octobre 1997, A/52/12/Add.1, §d (iii).

⁶³ GIUFFRÉ, "Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations in PAPANASTAVRIDIS, MORENO-LAX, *Boat Refugees and Migrants at Sea: A Comprehensive Approach*, Boston, 2016, pp. 248-279.

⁶⁴ CARLIER, *cit. supra* note 49, p. 78.

⁶⁵ Sur la notion de vulnérabilité, BURGORGUE-LARSEN (ed.), *La vulnérabilité saisie par les juges en Europe*, Paris, 2014.

⁶⁶ Cour européenne des droits de l'homme, *M.S.S. c. Belgique et Grèce*, requête n. 30696/09, arrêt du 21 janvier 2011, para 251.

⁶⁷ Cour européenne des droits de l'homme, *M.S.S. c. Belgique et Grèce*, *cit. supra* note 66, para 233.

l'article 3 car « les intéressés, qui n'étaient pas demandeurs d'asile, n'avaient pas la vulnérabilité spécifique inhérente à cette qualité et qu'ils n'ont pas allégué avoir vécu des expériences traumatisantes dans leur pays d'origine [...]. De plus, ils n'appartenaient ni à la catégorie des personnes âgées ni à celle des mineurs »⁶⁸. La position est contestable. La Cour semble faire preuve d'un formalisme (en exigeant l'existence d'une demande d'asile formulée pour conclure à la vulnérabilité) qui s'accorde mal avec l'idée selon laquelle le statut de réfugié est déclaratoire et non pas constitutif. Si la condition de réfugié est intrinsèque à l'individu ayant subi certaines persécutions, peu importe qu'il ait diligencé la procédure qui aboutit à sa reconnaissance aux fins du constat de la violation de ses droits, dès lors que sa vulnérabilité est acquise avant même l'introduction de la demande. En revanche, l'arrêt *Khlaifia* constitue une avancée en ce qui concerne le rappel des conditions de « régularité » de la détention des migrants, au sens de l'article 5 de la Convention, en rappelant l'importance de garantir une sécurité juridique suffisante et en imposant de la clarté dans le droit interne concernant les modalités de la détention⁶⁹.

Il est soutenu en doctrine que l'approche de vulnérabilité devrait même être prise davantage au sérieux et que le droit international des droits de l'homme viendrait renforcer les exigences de protection de certaines catégories de migrants particulièrement vulnérables. Tel serait notamment le cas des enfants, dont la vulnérabilité en tant que mineurs en développement devrait se rajouter à leur situation de migrants⁷⁰. Cette approche de vulnérabilité renvoie à la théorie philosophique de ceux qui, comme Matthew Gibney, voient dans le principe d'humanité un levier qui permet de renforcer les obligations que nous avons à l'égard des personnes plus vulnérables. Cette voie intermédiaire entre approche communautariste et individualiste montre que les droits de l'homme peuvent être employés comme une manière de nuancer les deux extrêmes et consolider les exigences procédurales.

⁶⁸ Cour européenne des droits de l'homme, *Khlaifia et autres c. Italie*, requête n. 16483/12, arrêt du 15 décembre 2016, para 194.

⁶⁹ FOEGLE, "Un renforcement en trompe-l'oeil des droits des migrants retenus aux portes de l'Europe", *La Revue des droits de l'homme*, 11 janvier 2016, para 11, accessible sur <<http://revdh.revues.org/2904>>.

⁷⁰ VIRZO, "Il coordinamento di norme di diritto internazionale applicabili allo status dei rifugiati e dei bambini migranti via mare", *Rivista del diritto della navigazione*, 2016, pp. 143-173.

4. – *Le silence juridictionnel sur l'étendue de l'obligation de secours en mer*

L'article 98 de la Convention des Nations Unies sur le droit de la mer prévoit une obligation de prêter assistance qui constitue le pivot du régime de sauvetage en mer en droit international public⁷¹. Cette disposition est un terrain d'analyse privilégié pour étudier les divergences rhétoriques entre perspective communautariste et individualiste. D'abord il est discutable de savoir si celle-ci peut être lue comme un droit individuel ou une simple obligation interétatique (4.1). De plus, face à une pratique clairesemée, les divergences concernant plusieurs éléments structurant son fonctionnement peuvent être compris au vu de ce tiraillement (4.2).

4.1. – Un droit individuel au secours en mer ?

Le débat sur la titularité des droits découlant de l'article 98 correspond au tiraillement du droit international et oscille entre une dimension individuelle (le droit au secours en mer) et une dimension communautaire (la simple obligation incombant sur certains États côtiers et limitée à certaines conditions).

Selon Seline Trevisanut, le droit international des droits de l'homme (notamment le droit à la vie) insuffle dans le droit de la mer une logique différente, pouvant constituer un cadre juridique structurant un véritable droit individuel au secours en mer : « *the duty to render assistance can be considered to be the operational obligation deriving from the application of the human right to life at sea* »⁷².

Le point de départ intellectuel d'un tel raisonnement est un *dictum* de l'arrêt *Medvedyev* :

« la spécificité du contexte maritime, invoquée par le Gouvernement en l'espèce, ne saurait aboutir à la consécration d'un espace de non-droit au sein duquel les équipages ne relèveraient d'aucun régime juridique susceptible de leur accorder la jouissance des droits et garanties prévus par la Convention et que les Etats se sont engagés à fournir aux personnes placées sous leur juridiction »⁷³.

⁷¹ GUILFOYLE, "Article 98", in PROELSS, *United Nations Convention on the Law of the Sea*, Munich, 2017, pp. 725-730.

⁷² TREVISANUT, "Is there a right to be rescued at sea? A constructive view", *Questions of International Law*, Zoom-in 4, 2014, pp. 3-15, p. 8.

⁷³ Cour européenne des droits de l'homme, *Medvedyev et autres c. France*, requête n. 3394/03, arrêt

La Cour y affirme clairement que le droit de la mer ne peut être interprété comme étant un bouclier permettant aux États de revenir sur les obligations en matière de droits de l'homme. Du moment où la juridiction de l'État côtier peut être établie à l'égard de l'humanité en mer, comme l'a montré de manière éclatante l'affaire *Hirsi*, le droit à la vie inscrit à l'article 2 de la Convention – tel qu'interprété par la Cour dans l'affaire *Osman*⁷⁴– impose une obligation positive de tout mettre en œuvre pour protéger la vie des individus se trouvant sous sa juridiction ou son contrôle.

Cette logique ne s'inscrit pas en antinomie avec la jurisprudence du Tribunal international du droit de la mer ('TIDM') qui a clairement affirmé que, bien que la Convention de Montego Bay ne constitue pas un instrument de protection des droits de l'homme, on peut lire en filigrane dans cet instrument une certaine logique *pro homine*⁷⁵. Ainsi, le TIDM a développé toute une jurisprudence sur les « *considérations d'humanité* » qui pourrait lui permettre d'accueillir la logique précitée en son sein⁷⁶.

En revanche, Efthymios Papastavridis se montre sceptique en ce qui concerne l'existence d'un tel droit individuel⁷⁷. Son argument principal repose sur l'idée selon laquelle les obligations conventionnelles du droit de la mer (issues de la Convention de Montego Bay, des conventions SAR et SOLAS ainsi que des instruments de l'OMI) consistent seulement en une répartition des compétences parmi les États côtiers et en une organisation de différentes obligations de coordination. Il s'agirait au surplus de simples obligations de moyens et non pas de résultats, consistant au plus en des obligations de diligence due⁷⁸. Ainsi, même si le droit à la vie devrait pouvoir être employé afin de permettre de faire évoluer le droit international dans le sens d'un droit individuel au secours en mer, il s'agirait pour l'heure d'une analyse *de lege ferenda* et non *de lege lata*.

du 29 mars 2010, para 81.

⁷⁴ Cour européenne des droits de l'homme, *Osman c. Royaume-Uni*, requête n° 23452/94, arrêt du 28 octobre 1998, para 101.

⁷⁵ TREVES, "Human Rights and the Law of the Sea", *Berkeley Journal of International Law*, 2010, p. 1.

⁷⁶ Tribunal international du droit de la mer, *Affaire du navire « SAIGA » (No. 2) (Saint-Vincent-et-les Grenadines c. Guinée)*, arrêt du 1^{er} juillet 1999, para 55 ; Id., *Affaire du « Juno Trader » (Saint-Vincent-et-les Grenadines c. Guinée-Bissau)*, arrêt du 18 décembre 2004, para 77.

⁷⁷ PASTAVRIDIS, "Is there a right to be rescued at sea? A skeptical view", *Questions of International Law, Zoom-in* 4, 2014, pp. 17-32.

⁷⁸ *Ibid.*, pp. 20-21.

La décision de la CJUE dans l'affaire *Intertanko* alimente ce type de discours. La Cour y affirme que « la convention de Montego Bay ne met pas en place des règles destinées à s'appliquer directement et immédiatement aux particuliers et à conférer à ces derniers des droits ou des libertés susceptibles d'être invoqués à l'encontre des États, indépendamment de l'attitude de l'État du pavillon du navire »⁷⁹. En observant la nature interétatique de la Convention des Nations Unies sur le droit de la mer, la Cour affirme que celle-ci n'a pas pour vocation de créer des droits directement pour les individus. La position de l'Avocat général Kokott sur ce point semblait, en revanche, plus nuancée. Elle refusait la position du Conseil selon laquelle la Convention réglait des problèmes purement interétatiques et fonctionnait dans une pure logique de réciprocité, car celle-ci se veut en réalité une « constitution des océans », visant à créer un ordre juridique objectif pour les mers et océans⁸⁰. On retrouve alors ce contraste entre logique communautariste et individualiste qui irrigue le traitement que le droit international réserve aux questions de réfugiés en mer.

4.2. – Les contours incertains de l'obligation de secours en mer

Comme on l'a dit, le régime juridique du fonctionnement de l'obligation de prêter assistance demeure peu clair, en raison notamment d'importantes divergences dans la pratique des États. Plusieurs éléments structurant ce fonctionnement font donc l'objet d'oscillations importantes entre une perspective individualiste et une perspective communautariste.

Le premier élément qu'il est intéressant d'observer sous ce prisme est la notion de « détresse », délimitant le champ d'application temporelle de l'obligation : celle-ci débute avec le surgir d'une situation de détresse et se termine lorsqu'elle disparaît. Or, donner un contenu à cette idée de « *menace d'un danger grave et imminent pour la vie humaine* » est loin d'être anodin⁸¹ et l'indétermination du droit international est particulièrement bien illustrée par l'utilisation à géométrie variable de ce concept.

⁷⁹ Cour de Justice de l'Union européenne, *The Queen, à la demande de International Association of Independent Tanker Owners (Intertanko) et autres contre Secretary of State for Transport*, arrêt (grande chambre) du 3 juin 2008, affaire C-308/06, ECLI:EU:C:2008:312, para. 64.

⁸⁰ *Ibid*, conclusions de l'AG Juliane Kokott du 20 novembre 2007, para. 53-55.

⁸¹ KOMP, "The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?", in PAPASTAVRIDIS, MORENO-LAX, *Boat Refugees and Migrants at Sea: A Comprehensive Approach*, Boston, 2016, p. 230.

Une première approche de définition est de nature très restrictive. La pratique de Malte et de l'Irlande⁸² consiste par exemple à considérer que la détresse n'est qualifiée qu'à partir du moment où le navire était sur le point de couler⁸³. Une partie de la doctrine adhère à cette vision, en transposant la lecture restrictive de l'article 24 des articles de la CDI de 2001⁸⁴. En revanche, l'ancien contentieux avait déjà fourni des éléments de raisonnement pour aller au-delà d'une telle optique restrictive. Tel est le cas notamment de la sentence *Kate A Hoff* de 1923 d'une commission mixte :

« While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws »⁸⁵.

Les commissaires incitent à écarter deux extrêmes : la détresse d'un navire ne saurait s'analyser comme la situation d'ultime nécessité où le navire est sur le point de sombrer, ni comme la simple situation d'invocation prétextueuse, finalisée à contourner les exigences du droit local. Cette position intermédiaire est confortée par la pratique de l'UE dans le cadre des actions de son agence *FRONTEX*. D'après cette

⁸² Irish Court of Admiralty, *MV Toledo*, opinion du Justice Barr, 1995, §48-49.

⁸³ KLEPP, "Illegal Migration and Migrant Fatalities in Malta", *Human Cost of Border Control in the Context of EU Maritime Migration Systems*, Amsterdam, 2009, p. 7.

⁸⁴ WALKER, *Definitions of the Law of the Sea: Terms not defined by the 1982 Convention*, Boston, Martinus Nijhoff, 2012, p. 169 ; NOYES, "Places of Refugee", in CHIRCOP, LINDEN, *Places of Refugee for Ships: Emerging Environmental Concerns of a Maritime Custom*, Boston, 2006, p. 139.

⁸⁵ *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison c. Mexique*, sentence de la Commission générale des réclamations américano-mexicaine du 2 avril 1929, *RSA*, vol. IV, pp. 444-449.

dernière, l'assistance doit être apportée dès lors qu'il y a incertitude, alerte ou détresse du navire ou des personnes à son bord⁸⁶.

Une seconde question concerne le périmètre substantiel de l'obligation de l'article 98. Est-ce que celle-ci s'étend jusqu'à imposer aux États une obligation de débarquement sur leur propre territoire ou l'obligation s'estompe-t-elle dès lors qu'on a mis fin à la situation de détresse ?

La lecture individualiste consiste à dire que l'obligation de l'article 98 doit se lire, dans une idée d'interprétation systémique, à la lumière du droit international des réfugiés et des droits de l'homme. Comme ces derniers corpus normatifs prévoient une obligation d'analyser individuellement la situation des demandeurs d'asile, le secours en mer se traduit nécessairement dans l'obligation de l'État côtier de donner accès à son territoire et de prévoir des procédures de vérification du statut des migrants⁸⁷.

La lecture plus restrictive et ancrée dans une lecture particulièrement respectueuse de la souveraineté de l'État côtier va dans le second sens. La disposition en question ne garantit pas explicitement l'accès à un territoire ni à une procédure de demande d'asile⁸⁸. Même son interprétation à la lumière du droit international des réfugiés ne saurait permettre d'obtenir un tel résultat : au sens de la Convention de Genève de 1951, les États sont uniquement liés par une obligation de ne pas renvoyer les migrants dans le pays d'origine qu'ils ont fui. Il n'existe aucune obligation pesant sur l'État côtier de débarquer les migrants sur le territoire conformément au principe de non-refoulement⁸⁹. La Convention ne fait en effet pas état d'un devoir d'accorder l'asile qui lierait les États parties⁹⁰. Telle est la lecture de la disposition que fait la pratique des États comme l'Italie, le Canada, les États-Unis et l'Australie⁹¹.

⁸⁶ Règlement n° 656/2014 du Parlement européen et du Conseil du 15 mai 2014 établissant des règles pour la surveillance des frontières maritimes extérieures dans le cadre de la coopération opérationnelle coordonnée par l'Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures des États membres de l'Union européenne, 15 mai 2014, JO L 189, article 9 2. (a).

⁸⁷ CARLIER, *cit. supra* note 49, p. 43 et p. 175; TREVISANUT, "The principle of Non-Refoulement at Sea", *Max Planck Yearbook of United Nation Law*, 2018, p. 213.

⁸⁸ O'BRIEN, "Refugees on the High Seas : International Refugee Law Solutions to a Law of the Sea Problem", *Gottingen Journal of International Law*, 2011, p. 730; BROUWER, KUMIN, "Interception and Asylum : When Migration Control and Human Rights Collide", *Revue Canadienne sur les réfugiés*, 2003, p. 15.

⁸⁹ LAUTERPACHT, BETHLEHEM, *The Scope and Context of the Principle of Non-Refoulement (Opinion)*, H.C.R., 2001.

⁹⁰ *Ibid.*, §76.

⁹¹ MORENO-LAX, "The Legality of the "Safe Third Country" Notion Contested: Insights from the Law

Ces deux tendances se reflètent dans l'interprétation de tous les éléments de pratique ayant tenté de densifier le contenu normatif de l'article 98, et notamment l'idée selon laquelle il impliquerait une obligation de mettre fin à la détresse en ramenant les personnes en « lieu sûr ». En effet, en réaction à l'affaire du *Tampa*⁹², un groupe de travail rassemblant plusieurs organisations internationales, dont l'Organisation maritime internationale ('OMI'), l'Agence des Nations Unies pour les réfugiés ('HCR'), le Comité des droits de l'homme, et l'Organisation mondiale pour les migrants ('OIM')⁹³, a permis l'adoption des amendements aux Conventions 'SAR' (*Search and Rescue*) et 'SOLAS' (*Safety of Life at Sea*) en 2004, introduisant ainsi en droit positif l'obligation de débarquement des personnes secourues en lieu sûr⁹⁴. Le *lieu sûr* a été défini par des directives de l'OMI⁹⁵, comme un lieu dans lequel la vie des naufragés n'est plus menacée et dans lequel on peut subvenir à leurs besoins fondamentaux⁹⁶.

La posture communautariste a donné lieu à une pratique qui fait une équation entre la notion de « lieu sûr » et celle de « État tiers sûr ». Tout ce que le droit international demanderait, dans cette logique, serait de ne pas renvoyer les migrants vers leur pays d'origine, alors que l'État pourrait se satisfaire de refuser l'accès à son territoire en s'assurant de refouler vers un pays sûr. Dans la mesure où un tel mécanisme entraînerait des renvois automatiques des individus sans examen de leur demande d'asile⁹⁷, cette pratique de renvoi systématique est certainement contraire à l'optique individualiste, soutenue par certaines juridictions nationales⁹⁸ et internationales⁹⁹. En refusant d'examiner leur demande d'asile, une telle pratique revient à

of Treaties", in GOODWIN-GILL, WECKEL, *Migration and Refugee Protection in the 21st Century: Legal Aspects*, Académie de droit international de La Haye, 2015, p. 671.

⁹² Cour fédérale d'Australie, *Ruddock v Vadarlis*, jugement du 18 septembre 2001, [2001, FCA 1329].

⁹³ RATCOVICH, "The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?", *Australian Yearbook of International Law*, 2015, p. 9.

⁹⁴ *Convention SOLAS* telle qu'amendée, Annexe, Chap. 5, Règle 33 (1-1) ; *Convention SAR* telle qu'amendée, Annexe, Chap. 3, 3.1.9.

⁹⁵ VAN HOOYDONK, "Développements récents en matière de lieux de refuge pour navires en détresse (2004-2006)", *Droit maritime français*, 2016, p. 662-682.

⁹⁶ O.M.I., *Directives sur le traitement des personnes secourues en mer*, résolution du Comité de la Sécurité Maritime 167 (78), 20 mai 2004, 6.12.

⁹⁷ FERNANDEZ, VIEL, "Le concept de 'pays tiers sûr' en droit d'asile", A.J.D.A., 2018, p. 322.

⁹⁸ Conseil d'État, 1^{ème} et 9^{ème} sous-sections réunies, arrêt du 23 juillet 2010, *Lebon*, n°336034.

⁹⁹ Cour européenne des droits de l'homme, *Ilias et Ahmed c. Hongrie*, requête n. 47287/15, arrêt du 14 mars 2017.

violer le droit des migrants à une protection effective et notamment à bafouer les obligations découlant du statut de réfugié de certains migrants¹⁰⁰.

Les événements récents concernant la pratique italienne à l'égard des migrants en mer, notamment dans l'affaire *Sea Watch 3*, ont mené à des positions divergentes¹⁰¹. Le ministère de l'intérieur soutenait la licéité internationale du refus italien de débarquement en reproduisant l'argumentaire communautariste analysé ci-dessus. Cette position est en revanche rejetée par une lettre publiée par 21 professeurs de droit international qui rappellent que, s'il est indéniable que chaque État exerce un droit souverain de contrôle de ses propres ports, l'obligation internationale de secours en mer lui impose de porter secours au navire. Comment peut-il alors porter assistance à un navire chargé de migrants sans accepter un débarquement, ne serait-ce que temporaire ? C'est en ce sens que devrait être lu l'article 3.1.9 de la Convention SAR, obligeant les États à coopérer pour permettre le débarquement en lieu sûr, en substituant cette obligation à celle du commandant¹⁰². On voit bien que le dualisme des logiques, individualiste et communautariste, reste un prisme valable d'analyse de l'évolution de la pratique des États. Il reste à espérer que les juridictions internationales viendront clarifier ces questions, en contribuant encore une fois à rétablir une approche de vulnérabilité et de respect des droits procéduraux des migrants dans un contexte où l'on a tendance à cacher derrière la position communautariste la haine de l'autre.

¹⁰⁰ FISCHER-LESCANO, LÖHR, TOHIDIPUR, *op. cit.*, p. 37.

¹⁰¹ Pour une lecture des différentes positions, GRADONI et PASQUET, "Lisistrata a Lampedusa: una riflessione sul caso Sea Watch 3", SIDI Blog, 6 juillet 2019, accessible sur <<http://www.sidi-blog.org/2019/07/06/lisistrata-a-lampedusa-una-riflessione-sul-caso-sea-watch-3/>>.

¹⁰² Lettre de 21 professeurs de droit international en réponse à l'Avocat Busco, du 3 juillet 2019 (signée par Enzo Cannizzaro, Pasquale De Sena, Riccardo Pisillo Mazzeschi, Nerina Boschiero, Andrea Cannone, Gabriella Carella, Marina Castellaneta, Giuseppe Cataldi, Carlo Focarelli, Pietro Gargiulo, Edoardo Greppi, Paola Ivaldi, Paolo Palchetti, Marco Pedrazzi, Laura Pineschi, Fausto Pocar, Lorenzo Schiano di Pepe, Tullio Scovazzi, Massimo Starita, Antonello Tancredi, Ugo Villani):

"non vi è dubbio che nei porti ciascuno Stato eserciti la propria sovranità, ma nel rispetto del diritto internazionale. Per quanto poi tale diritto non imponga un obbligo di accoglienza, esso di certo impone un obbligo di assistere le persone in difficoltà in mare. Allora, come può uno Stato "prestare assistenza" a una nave carica di naufraghi che si presenti di fronte al proprio porto, se non consentendo uno sbarco, sia pure temporaneo? Si noti che l'art. 3.1.9. della Convenzione SAR, emendata nel 2004, obbliga gli Stati a cooperare per consentire lo sbarco delle persone in pericolo in un porto sicuro, sollevando il comandante della nave dal proprio obbligo di assistenza",

accessible sur <https://www.corriere.it/politica/19_luglio_03/chi-viene-soccorso-mare-naufrago-ha-diritto-essere-sbarcato-un-luogo-sicuro-9ac444c4-9daa-11e9-9326-3d0a58e59695.shtml?fbclid=IwAR0UifO2xqEIDs_Fv_yJSFa-jkM2mRuo_fzBKapSS0HLVLM26rwpu7YMEEnGM&refresh_ce-cp>.

5. – *Conclusion*

Cet excursus au travers du discours des juridictions internationales ayant été confrontées aux questions de migrants en mer montre que le droit international contemporain fonctionne à partir d'une dialectique argumentative qui rappelle les oscillations philosophiques entre une logique communautariste et une logique individualiste.

Dans une optique plus individualiste, les juridictions internationales sont venues invalider la pratique étatique ayant tenté de cantonner le champ d'application des obligations découlant du droit international des réfugiés à la situation des migrants en mer. Elles ont également employé le droit international des droits de l'homme pour façonner des garanties procédurales permettant une prise en compte réelle du statut de réfugié et donné corps à une certaine approche de vulnérabilité.

Dans une tendance plutôt communautariste, les juridictions internationales n'ont pas encore lu le droit international de la mer comme une branche irriguée de droits individuels au nombre desquels on pourrait compter le droit au secours en mer. Cette fragmentation du droit international constitue encore une limite à ce que l'on pourrait appeler une sanction juridictionnelle du droit international de l'hospitalité, telle que proposée par Étienne Balibar : « il s'agit d'empêcher que, sous couvert de hiérarchiser ces causes, la politique des Etats transforme l'exode en un processus d'élimination. Les migrants en proie à l'errance et ceux qui leur viennent en aide doivent avoir le droit avec eux, dans leurs efforts pour y résister »¹⁰³. Le droit international fragmenté peut, en effet, être vu comme une segmentation fonctionnelle du panorama international, évoluant en des régimes qui hiérarchisent les causes et valeurs, faisant primer celui pour lequel ils ont été constitués sur tous les autres.

Comme le rappelle le Groupe d'étude de la CDI sur la fragmentation « considérer [l]es institutions [internationales] comme isolées les unes des autres et ne prêtant attention qu'à leurs propres objectifs et préférences revient à faire du droit un simple instrument destiné à réaliser les objectifs d'un régime [...]. Sans le principe d'intégration systémique, il serait impossible d'exprimer et de conserver le sens du bien commun de l'humanité, lequel ne se réduit pas au bien d'une institution ou d'un régime particulier »¹⁰⁴. Le principe d'intégration systémique, inscrit à l'article

¹⁰³ BALIBAR, *cit. supra* note 2.

¹⁰⁴ *Fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international. Rapport du Groupe d'étude de la Commission du droit international établi sous sa forme définitive par Martti Koskenniemi, A/CN.4/L.682, 13 avril 2006, § 480.*

31(3)(c) de la Convention de Vienne sur le droit des traités, peut constituer un point de départ utile pour faire évoluer le régime juridique des réfugiés en mer vers le paradigme de l'hospitalité. Telle est notamment l'approche de la Cour européenne des droits de l'homme, notamment dans l'affaire *Hirsi Jamaa*¹⁰⁵. Défracter notre vision du droit international à l'aune du principe d'intégration systémique permet de considérer la communauté d'objectifs entre droit de la mer et droit de l'homme, plutôt que leurs divergences, comme le font certains¹⁰⁶ et comme l'énonce le TIDM dans son discours de promotion des « considérations d'humanité ». Cela permet de prendre conscience du fait que la rencontre entre réfugiés en mer et autorités étatiques implique une exigence réelle de répondre à un appel à l'aide.

Comme l'affirme Itamar Mann, l'exemple des réfugiés en mer nous encourage à dépasser les oppositions binaires sur lesquelles s'est construit le droit international libéral. Il incite à dépasser le tiraillement entre droit naturel et droit positif concernant le fondement juridique des droits de l'homme. Les droits des migrants seraient fondés sur cet « *asymmetric encounter between a powerful party and a disempowered party, in which the terms of the relationship have not yet been determined* »¹⁰⁷. Cette rencontre est prise dans les mailles du discours juridictionnel dual décrit: si l'on dépasse vision territoriale et communautariste permettant à une société de hisser des murs, « *[w]hen the court realizes the human rights encounter in its own positive jurisprudence, executive agencies push against it to eliminate the encounter* »¹⁰⁸. C'est donc également sur le discours politique qu'il faut travailler. On est confronté aujourd'hui à la montée de discours de haine ou d'abandon, qui sont banalisés et normalisés dans leur violence. Nier l'existence de ces situations de rencontre oblige les migrants à exposer leurs vies à de plus gros dangers, pour fuir la persécution. Ainsi donc, penser la situation juridique des réfugiés en mer en termes de rencontre est une urgence pour repenser non seulement le discours des juridictions internationales mais également les initiatives politiques à l'égard de ceux à qui l'on ne doit jamais cesser de reconnaître ce qu'Hannah Arendt appelait un « droit à avoir des droits ».

¹⁰⁵ Cour européenne des droits de l'homme, *Hirsi Jamaa et autres c. Italie*, cit. supra note 9, para 171.

¹⁰⁶ OXMAN, "Human rights and the United Nations Convention on the Law of the Sea", *Columbia Journal of Transnational Law*, 1998, p. 399 ss.

¹⁰⁷ MANN, *Humanity at sea: maritime migration and the foundations of international law*, Cambridge, 2016, p. 235

¹⁰⁸ *Ibid*, p. 181.

5. THE PROBLEMATIC MANAGEMENT OF MIGRATORY FLOWS IN EUROPE AND ITS IMPACT ON HUMAN RIGHTS: THE PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Francesco Luigi Gatta

SUMMARY: 1. Introduction – 2. The Expulsion of Aliens as the Paradigm of the Tension between State Sovereignty and Migration – 2.1. The Extended Protection against Expulsion through the Dynamic Interpretation of the ECHR: the Prohibition of Torture and the Principle of *non-refoulement* – 2.2. Further Extensions of Migrants' Protection under Article 3 ECHR: the Indirect Refoulement and the 'Dublin Cases' – 3. The Prohibition of Collective Expulsion of Aliens – 3.1. Personal Scope of Application – 3.2. Territorial Applicability and Jurisdiction – 3.3. The Notion of Expulsion – 3.4. The Collective Character of the Expulsion – 3.4.1. The Size of the Group of Aliens – 3.4.2. The Circumstances Surrounding the Adoption and the Implementation of the Expulsion Order – 3.4.3. The Discriminatory Character of the Expulsion – 4. Concluding Remarks

1. – Introduction

In recent years the European Union ('EU') has been dealing with an increasing migratory pressure on its external borders. Migratory flows towards Europe, in par-

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 119-146.

ticular, have been intensified from 2010 onwards, especially due to significant international events such as the ‘Arab Spring’ or the outbreak of the conflict in Syria, reaching the peak in 2015, when an estimated one million migrants reached the territory of the EU across the Mediterranean.¹

EU Member States have reacted to the so-called ‘migration crisis’ in different ways. Many have adopted a strict approach in terms of migration control, based on strengthened security checks and increased border surveillance. Frontline EU Member States, in particular, have often resorted to practices aimed at offshoring migration controls, such as interception of migrants on the high seas, push-back operations and pre-emptive and extraterritorial surveillance activities. Moreover, some Member States, as Italy and Spain, have concluded specific bilateral agreements with African countries with a view to curbing migratory flows, preventing departure of migrants and facilitating repatriation.

This chapter argues that this process of ‘securitisation’ and restrictive border management has produced a direct impact on migrants’ human rights and that a proof of that may be found in the increasing case law of the European Court of Human Rights (‘ECtHR’) concerning the collective expulsion of aliens, prohibited under Article 4 of Protocol No. 4 to the European Convention on Human Rights (‘ECHR’). Indeed, the growing engagement of the Court with such violation of the Convention may be regarded as a direct consequence of the border practices adopted by EU Member States in response to the increasing migratory pressure.

Such parallelism is confirmed by the chronological and geographical characterisation of the case law of the ECtHR. In fact, while over the years Article 4 of Protocol No. 4 had been sparingly invoked before the Court of Strasbourg, with only a limited number of cases, from 2010 onwards the litigation concerning collective expulsion of aliens has been growing considerably, becoming matter of attention for the judges, who have been called to assess the compatibility with the Convention of European migration control and border policies. Geographically, the vast majority of European frontline States have been brought before the Court in Strasbourg for potential violations of the prohibition of collective expulsion of aliens, including Mediterranean countries (Italy, Spain, France, Greece) and islands (Malta and Cyprus), as well as countries with land borders (e.g. Poland, Slovakia, Croatia and Hungary).

Starting from the observation that the issue of the expulsion of aliens exemplifies

¹ For detailed data and statistics on migratory flows and arrivals in the EU during 2015, see FRONTEX, Annual Risk Analysis for 2016, Frontex 2499/2016 (2016), available online.

emblematically the classical tension between State sovereignty and migration (Section 2), the chapter first points out how, in general, the case law of the ECtHR has played a decisive role in strengthening the protection of aliens against expulsion, especially through the interpretation of Article 3 ECHR in connection with the principle of *non-refoulement* (Subsections 2.1. and 2.2.).

The focus is then specifically put on the prohibition of collective expulsions (Section 3), explaining how the ECtHR has extensively interpreted and clarified its main features, including the personal and territorial scope of application, the notion of expulsion and its collective character (Subsections 3.1. – 3.4.). With regard to this latter aspect, in particular, this chapter specifically analyses the criteria developed by the Court to determine whether or not an expulsion may be considered as collective for the purposes of Article 4 of Protocol No. 4, namely, the size of the group of aliens concerned, the circumstances surrounding the adoption and the implementation of the expulsion orders and the discriminatory character of the expulsion (Sub-subsections 3.4.1. – 3.4.3.).

By way of conclusion (Section 4), the chapter points out how the ECtHR has actively contributed to clarify crucial aspects of the prohibition of collective expulsion of aliens and how, through an extensive and dynamic interpretative approach, it has significantly expanded the protection of migrants' rights on the one hand and limited States' sovereign prerogatives on the other.

2. – The Expulsion of Aliens as the Paradigm of the Tension between State Sovereignty and Migration

The expulsion of an alien is an emblematic manifestation of the State sovereign right to control the entry and the stay in its territory and represents a paradigm of the classic tension between sovereignty and protection of human rights in the field of migration. The migrant, indeed, as the definition in and of itself suggests, is a person who migrates, moving from a country to another.² This capacity of movement, however, is guaranteed in one direction but not in the other: while the right to leave any

² At the international level there is not a universally accepted legal definition of 'migrant'. According to the International Organization for Migration ('IOM'), the term "migrant" entails an "umbrella term", comprehensively covering all the various cases of persons who move away from their usual place of residence on the basis of a decision freely taken for reasons of personal convenience. In this sense, thus, the

country freely is recognised in several legal instruments at the international, regional and national level,³ there is not a corresponding specular right to cross the borders and entry in a given State. In other words, there is a right to emigrate (leave a country) but non a right to immigrate (enter in a country).

The State, in fact, enjoys the sovereign right to control the entry and the stay of aliens on its territory, having the prerogative to conduct checks at the borders, refuse the entry and expel aliens. This is the traditional view of ‘classic’ international law, according to which the right of a State to decide on aliens’ admission in or expulsion from its national territory represents a logical and natural consequence of its sovereignty.⁴ This assumption has been confirmed by the jurisprudence, including the ECtHR, which on several occasions has reiterated that States have and maintain the “undeniable right” to control aliens’ entry into their territory.⁵

term encompasses people and family members moving away, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. See IOM, Glossary on migration, International Migration Law n. 43 (2019), available online. The United Nations High Commissioner for Refugees (‘UNHCR’) for its part, in light of its specific mandate, keeps a clear distinction between the terms “migrant” and “refugee”, considering the first one as fundamentally implying a voluntary process of mobility. See UNHCR, *Emergency Handbook*, 4th ed., UNHCR, 2015; Id., *Refugee or migrant?*, UNHCR, March 2016. A legal definition may be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (‘ICRMW’), which, however, specifically refers to the term “migrant worker”, thus identifying and defining a particular category of migrants (according to Article 2(1), ICRMW, the migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”).

³ Universal Declaration of Human Rights (Art. 13), International Covenant on Civil and Political Rights (Art. 12), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 8). Similarly, the right to leave a country is guaranteed in the main human rights texts adopted at regional level, such as the American Convention on Human Rights (Art. 22(2)), the African Charter on Human and Peoples’ Rights (Art. 12(2)) and the ECHR (Art. 2, Protocol No. 4). The right to leave a country is also guaranteed at the national level, being often included in the Constitution as, for example, in the case of Italy (Art. 16(2)).

⁴ See for example INSTITUT DE DROIT INTERNATIONAL, *Règles internationales sur l’admission et l’expulsion des étrangers*, session de Genève, 1892, in which it was affirmed: “[...] pour chaque Etat, le droit d’admettre ou de ne pas admettre des étrangers sur son territoire, ou de ne les y admettre que conditionnellement, ou de les en expulser, est une conséquence logique et nécessaire de sa souveraineté et de son indépendance”.

⁵ European Court of Human Rights (Chamber), *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment of 1st September 2015, para. 119. In the same sense see also Id., *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Applications Nos. 9214/80, 9473/81, 9474/81, Judgment of 28 May 1985; Id., *Amuur v. France*, Application No. 19776/92, Judgment of 25 June 1996; Id., *Mahdid and Haddar v. Austria*, Application No. 74762/01, Judgment of 8 December 2005; Id., *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, Judgment of 22 September 2009.

State sovereign prerogatives as regards migration control are not called into question. However, the traditional vision has been somehow overturned, as States are now subjected to obligations towards migrants and aliens, which arise from international human rights law. As acknowledged by the General Assembly of the United Nations ('UN') "[...] when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants".⁶ In other terms, therefore, if the sovereignty allows the controls, the sovereignty itself is, in its turn, controlled.⁷

This assumption has been further confirmed in the UN framework with specific regard to the expulsion of aliens. In particular, as the relevant legal framework concerning expulsions is particularly diversified and multiform, the International Law Commission decided to launch a process of codification aiming at a comprehensive, organic and uniform regulation of the expulsion of aliens. As a result, in 2006 a *Memorandum by the Secretariat on Expulsion of Aliens* was released, providing a deep analysis of the topic and its legal implications.⁸ In so doing, it clearly recognises that "every State has the right to expel aliens" but, at same time, it also clarifies that "this right is subject to general limitations as well as specific substantive and procedural requirements".⁹

The codification process led to the realisation of the *Draft Articles on the Expulsion of Aliens*, adopted in 2014 by the International Law Commission and submitted to the UN General Assembly.¹⁰ The Draft articles are built on the fundamental premise of the right of expulsion enjoyed by States, which, however, is not absolute as it has to be exercised in accordance with applicable rules of international law and, in particular, those relating to the protection of human rights (Article 3).

This outcome has been reached also by the ECtHR, which, through its case law, has elaborated the limitations and conditions that States encounter in their right to

⁶ General Assembly, Resolution on Protection of Migrants, UN Doc. A/RES/62/156 of 18 December 2007, para. 8. See also Human Rights Council, Resolution on the Human Rights of Migrants, UN Doc. A/HRC/RES/18/21 of 30 September 2011, para. 4.

⁷ CARLIER and SAROLEA, *Droits des étrangers*, Bruxelles, 2016, p. 75.

⁸ International Law Commission, Memorandum by the Secretariat, Expulsion of Aliens, UN Doc. A/CN.4/565 of 10 July 2006.

⁹ *Ibid.*, p. 1.

¹⁰ International Law Commission, Draft Articles on the Expulsion of Aliens, with Commentaries, in *Yearbook of the International Law Commission*, UN Doc. A/69/10, 2014.

expel aliens, whether individually or collectively, in this way giving a decisive contribution to enhance the protection of migrants against States' migration control and border practices.

2.1. – The Extended Protection against Expulsion through the Dynamic Interpretation of the ECHR: the Prohibition of Torture and the Principle of *non-refoulement*

The ECtHR, although aligning itself with the traditional principle of international law of States' sovereign prerogatives as regards migration control, has clarified that Member States of the Council of Europe have to ensure that their migration and border policies are consistent with the obligations arising from the ECHR. On such premise and following a pragmatic and protection-oriented approach, the Court of Strasbourg has progressively developed and strengthened a system of protection of migrants' human rights through a flexible, extensive and 'dynamic' interpretation of the Convention.

This result is particularly remarkable if one considers that the ECHR does not provide for an explicit and articulated system of protection of aliens and migrants. The Court, thus, has conducted its interpretative work by extrapolating principles relating to the protection of migrants from some very specific provisions of the Convention. As for the protection against expulsion, in particular, the interpretative process of the ECtHR has been carried out taking into consideration the right to life (Article 2),¹¹ the prohibition of torture and inhuman or degrading treatment (Article 3), the right to a fair trial (Article 6),¹² the right to respect for private and family life (Article 8)¹³ and the right to an effective remedy (Article 13).

Article 3, in particular, served as the main interpretation tool that allowed the Court to elaborate and develop the protection of migrants against expulsions. In effect, the extensive interpretation given to such provision possibly represents one of the most significant examples of the dynamic and human rights-oriented interpretative evolution of the Convention, which makes and keeps it "a living instrument" adapted to current challenges.

In short, the protection against expulsions based on Article 3 ECHR (prohibition

¹¹ See, for example, European Court of Human Rights, *Bader and Kanbor v. Sweden*, Application No. 13284/04, Judgment of 8 November 2005.

¹² See, for example, *Id.*, *Ahorugeze v. Sweden*, Application No. 37075/09, Judgment of 27 October 2011.

¹³ See, for example, *Id.*, *Nunez v. Norway*, Application No. 55597/09, Judgment of 28 June 2011.

of torture) has been fundamentally developed by the ECtHR in connection with the principle of *non-refoulement*, the cornerstone of the international legal regime for the protection of migrants and refugees, which essentially prohibits States to expel, extradite or return (“*refouler*”) a person to another State where there are substantial risks for his or her personal safety or life.¹⁴

Building on this principle, the Court, starting from the leading case *Soering v. United Kingdom*,¹⁵ has outlined an indirect protection against expulsions through the obligation for the State to refrain from expelling an alien towards a country in which he or she would be subjected to the risk of suffering treatment prohibited under Article 3 ECHR. In this way, even if the State in question is not the material author of the treatment contrary to Article 3, it nevertheless participates in such violation of the Convention in the case of the expulsion of an alien towards a country where there are concrete risks of being subjected to such treatment. Indeed the expulsion, if implemented, would become a decisive step in the chain of events leading to the treatment contrary to Article 3, whose violation, therefore, becomes imputable to the State which carried out the expulsion.

This outcome is particularly relevant if one considers that Article 3 has an absolute character and admits no derogation, according to Article 15(2) of the Convention. The Court, moreover, has affirmed that the prohibition of torture under the terms of Article 3 “must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe”.¹⁶

Over the years the Court of Strasbourg has then enriched the level of protection against expulsions, in particular by extending both the personal and the territorial scope of application of the safeguards guaranteed in the Convention. From the first point of view, for example, the ECtHR has ruled that the protection against the expulsion derived from Article 3 applies to migrants irrespective of their legal status,

¹⁴ The principle of *non-refoulement* is enshrined in relevant international instruments such as the 1951 Geneva Convention relating to Status of Refugees (Art. 33), the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 3), and the Charter of Fundamental Rights of the EU (Art. 19(2)).

¹⁵ European Court of Human Rights, *Soering v. United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989.

¹⁶ See *Ibid.*, para. 88; *Id.*, *M.S. v. Belgium*, Application No 50012/08, Judgment of 31 January 2012, para. 122.

thus covering also those who are in an irregular situation¹⁷. Similarly, Article 3 has been applied to expulsion cases involving a potential danger to national security, preventing States to expel aliens allegedly involved in terrorist activities and regardless of their illicit and dangerous conduct.¹⁸ For the Court, ultimately, the absolute character of the prohibition of torture and of inhuman or degrading treatment prevails over considerations concerning the victim's conduct or legal status.

From the point of view of the territorial scope of application, the protection against expulsions has been extended in light of Article 1 ECHR, which lays down the fundamental obligation for States Parties "to secure to everyone within their jurisdiction" the respect of the human rights protected in the Convention. The exercise of jurisdiction, therefore, is a necessary condition for a State to be possibly held responsible for acts or omissions giving rise to a violation of the ECHR.¹⁹

Accordingly, the ECtHR has considered that, in order to engage the responsibility of the State, it is necessary and sufficient that an individual finds himself subjected, *de jure* and *de facto*, to the control and authority of the State. Consequently, although the notion of jurisdiction has to be considered as essentially territorial, in some exceptional circumstances and for the purposes of Article 1 ECHR, the State's conduct performed, or producing effects, outside the national territory may indeed constitute an exercise of jurisdiction.

It is intuitive that the potential extra-territorial scope of application of the Con-

¹⁷ *Id.*, *Cruz Varas and Others v. Sweden*, Application No. 15576/89, Judgment of 20 March 1991. See also *Id.*, *Hilal v. United Kingdom*, Application No. 45276/99, Judgment of 6 March 2001.

¹⁸ *Id.*, *Chahal v. United Kingdom*, Application No. 22414/93, Judgment (Grand Chamber) of 15 November 1996. The Court affirmed to be "well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct" (para. 79). See also, *Id.*, *Saadi v. Italy*, Application no. 37201/06, Judgment (Grand Chamber) of 28 February 2008.

¹⁹ On the subject of jurisdiction under Article 1 of the Convention and its extraterritorial scope of application, see, among others, GAJA, "Art. 1 Obbligo di rispettare i diritti dell'uomo", in BARTOLE, CONFORTI, RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 23 ff; DE SENA, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002; MERON, "Extraterritoriality of Human Rights Treaties", *American Journal of International Law*, 1995, pp. 78-82; KING, "The Extraterritorial Human Rights Obligations of States", *Human Rights Law Review*, 2009, p. 689 ff; MILLER, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", *European Journal of International Law*, 2009, p. 1223 ff.

vention is particularly relevant in the field of migration control and border management, where States have increasingly resorted to practises aimed at offshoring control operations and intercepting and pushing-back migrants before their arrival in the national territory.²⁰ An emblematic example in this sense is the leading case *Hirsi Jamaa and Others v. Italy*,²¹ concerning the interception of migrants on the high seas and their following transfer to Libya by Italian authorities. The Grand Chamber of the ECtHR unanimously held that the applicants were within the jurisdiction of the Italian State, observing that the events took place on board Italian vessels flying Italy's flag, the crew of which was entirely composed of Italian military personnel, with the consequence that the migrants concerned were under the *de jure* and *de facto* control of Italy.²²

2.2. – Further Extensions of Migrants' Protection under Article 3 ECHR: the Indirect Refoulement and the 'Dublin Cases'

Another example of the extension of aliens' protection against expulsion is the approach developed by the ECtHR with regard to the so-called indirect or "chain *refoulement*":²³ a State may be held responsible under Article 3 ECHR not only if it directly expels an individual towards a country in which he/she will be concretely subjected to the risk of torture or inhuman treatment (direct *refoulement*), but also in cases of removal to an intermediate country, which, in turn, could expel him/her to a third country where the person concerned would face the risk of treatment contrary to Article 3 (indirect or chain *refoulement*).

In such cases, the responsibility of the State remains intact, as it has an obligation to ensure that the intermediate country offers sufficient guarantees in terms of compliance with Article 3 of the Convention. According to the ECtHR, moreover, this obligation to carry out proper assessments as to avoid indirect *refoulement* is even

²⁰ On the topic of offshore migration and border controls, see GAMMELTOFT-HANSEN, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge, 2011; MORENO-LAX, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugees Rights under EU Law*, Oxford, 2017; DEN HEIJER, "Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control", in RYAN and MITSILEGAS (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden, 2010, p. 168 ff.

²¹ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (Grand Chamber) of 23 February 2012.

²² *Ibid.*, paras. 76-82.

²³ CARLIER and SAROLEA, *cit. supra* note 7, pp. 84-85.

more relevant where the intermediate country is not a State Party to the Convention, as it happens especially in cases of bilateral agreements between European and African States on migration matters.²⁴

As a further development of the protection against expulsions, the Court has clarified that Article 3 ECHR and the protection against *refoulement* also apply between Member States of the EU. This principle has been affirmed in a number of ‘Dublin cases’, involving transfers of asylum seekers between EU Member States according to the EU ‘Dublin system’ setting down the criteria and the mechanisms for the allocation of competence for examining an application for international protection lodged in the EU.²⁵

The Dublin system is built on the presumption that all EU Member States respect fundamental rights, are safe countries and are able to provide asylum seekers with proper conditions of reception, protection and treatment, in line with international and EU human rights standards. The Court of Strasbourg has essentially rebutted this presumption, clarifying that EU rules governing the “Dublin transfers” between EU Member States cannot be applied automatically and mechanically, that is to say, without previously conducting a proper assessment of the reception conditions of the receiving Member State, which may not be compatible with Article 3 ECHR.

The Court, sitting as Grand Chamber, reached this conclusion in the case *M.S.S. v. Belgium and Greece*,²⁶ concerning the Dublin transfer of an Afghan asylum seeker from Belgium to Greece, in accordance with EU law. The ECtHR acknowledged the “major structural deficiencies” of the Greek asylum system, amounting to treatment contrary to Article 3 and concluded that this situation was well known or was easily

²⁴ See European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 21, para. 147.

²⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

²⁶ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment (Grand Chamber) of 21 January 2011. For analyses and comments on the case, see CARLIER and SAROLEA, “Le droit d’asile dans l’Union européenne contrôlé par la Cour européenne des droits de l’homme. À propos de l’arrêt *M.S.S. c. Belgique et Grèce*”, *Journal des Tribunaux*, 2011, p. 357 ff.; MAIANI and NERAUDAU, “L’arrêt *M.S.S. c. Grèce et Belgique* de la Cour EDH du 21 janvier 2011. De la détermination de l’Etat responsable selon Dublin à la responsabilité des Etats membre en matière de protection des droits fondamentaux”, *Revue du droit des étrangers*, 2011, p. 7 ff. The approach of the ECtHR in *M.S.S.* was later followed also by the Court of Luxembourg: see, joined Cases C-411/10 and C-493/10, *N.S.*, Judgment (Grand Chamber) of 21 December 2011, ECLI:EU:C:2011:865.

and freely ascertainable by the Belgian authorities, which, by returning the applicant to Greece in application of the Dublin Regulation, knowingly exposed him to treatment prohibited by Article 3 of the Convention.

In the following case *Tarakhel v. Switzerland*,²⁷ concerning the transfer of an Afghan family from Switzerland to Italy, the Court, once again as Grand Chamber, ruled that, even in the absence of systemic and structural problems of a national asylum system (as in *M.S.S. v. Belgium and Greece*), EU Member States have an obligation, before executing a Dublin transfer, to verify, *in concreto*, the potential specific risks for the aliens concerned of being subjected to conditions contrary to Article 3 in the Member State of destination.²⁸

3. – *The Prohibition of Collective Expulsion of Aliens*

While the individual expulsion of an alien is permitted, although in compliance with certain substantive and procedural guarantees, States, on the contrary, encounter an absolute prohibition to expel aliens collectively. The UN Memorandum on Expulsion of Aliens confirms this, highlighting that, while a State has and maintains the right to expel an alien *individually*, the *collective* expulsion of a group of aliens “is contrary to the very notion of the human rights of individuals and is therefore prohibited”.²⁹ Collective expulsions, in this sense, may be viewed as an abuse of the right to expel an alien and represent an aggravated form of violation of human rights.

Collective expulsions, indeed, are firmly and widely prohibited at international level. In Europe, within the Council of Europe, collective expulsion of aliens is prohibited under Article 4 of Protocol No. 4 to the ECHR, which, adopted in 1963, became the first international legal text to explicitly address and prohibit collective expulsions of aliens.³⁰ Collective expulsion is explicitly prohibited also in the Charter of Fundamental Rights of the EU (Article 19).

²⁷ European Court of Human Rights, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment (Grand Chamber) of 4 November 2014.

²⁸ *Ibid.* According to the Court, “it follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applications would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention” (para. 122).

²⁹ International Law Commission, Memorandum, *cit. supra* note 8, p. 2.

³⁰ In the framework of the Council of Europe, another legal instrument which indirectly confirms the prohibition of collective expulsion is the European Convention on Establishment, signed in Paris on 13 December 1955, whose Protocol, Section III, letter c), establishes that “The right of expulsion may be exercised only in individual cases”.

At other regional levels, similar prohibitions may be found in the American Convention on Human Rights (Article 22(9)), in the Arab Charter on Human Rights (Article 26(2)) and in the African Charter on Human and Peoples' Rights (Article 12(5), which refers to "mass expulsion of non-nationals"). At global level, the prohibition of collective expulsion is provided for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, with regard to those specific categories of migrants (Article 22). The UN Draft Articles on the Expulsion of Aliens, adopted in 2014 by the International Law Commission, expressly establishes that "the collective expulsion of aliens is prohibited" (Article 9).

Other international instruments, although not legally binding, address the prohibition of collective expulsion of aliens. The UN *Global Compact for Safe, Orderly and Regular Migration*, for example, affirms the States' commitment to upholding the prohibition of collective expulsion in the context of search and rescue operations in the seas and the enforcement of return policies (Objectives 8 and 21).³¹ Similar considerations may be drawn also from the 2016 *New York Declaration for Refugees and Migrants*.³²

The mentioned provisions share a common rationale, which consists, essentially, in prohibiting the collective character of the expulsion so as to avoid that removals from a certain State take place without a proper examination of the individual and specific situation of the persons concerned. The core purpose, therefore, is to prevent States from removing aliens as group, without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the expulsion measure.³³ So conceived, the prohibition of collective expulsion of aliens has an absolute character, which seems to be considered as a general principle of international law recognised by civilized nations.³⁴

³¹ General Assembly, Resolution on Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 of 11 January 2019.

³² General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 of 19 September 2016, Annex I, para. 5.

³³ European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 21, para. 177.

³⁴ International Law Commission, Third Report on the Expulsion of Aliens by Mr. Maurice Kamto, Special Rapporteur, UN Doc. A/CN.4/581 of 19 April 2007, para. 115. The report, however, as well as the 2014 UN Draft Articles on the expulsion of aliens, makes a distinction between collective expulsions of aliens in time of peace and war: while in the first case collective expulsion is prohibited in a general and absolute manner, in the latter case, possibly, it might be considered admissible under certain circumstances.

However, while the aim and the character of the prohibition of collective expulsion seem to be clear, its concrete features and scope of application have been in need of clarification. Indeed, despite the wide and explicit recognition of the prohibition of collective expulsion in international and regional legal instruments, there is not an unequivocal and uniform definition of its notion. This may be partially explained considering, on the one hand, that the relevant legal provisions contained in international instruments are drafted in a rather generic and concise manner, and, on the other, that the case law on collective expulsion so far has been still relatively modest.³⁵

In this context, the Court of Strasbourg, once again, has been playing a decisive role in outlining the scope of application and the main features of the prohibition of collective expulsion of aliens.³⁶ Even if the violation of Article 4 of Protocol No. 4 ECHR was actually declared only in few cases and only in specific and exceptional circumstances,³⁷ the interpretation given by the ECtHR has been extremely meaningful, being mainly characterised by an extensive and teleological approach, similar to the one used for Article 3 ECHR.³⁸ This wide interpretation of the Convention has led to the result of enhancing the level of protection of migrants and limiting the prerogatives of States, particularly with regard to the aspects addressed in the following paragraphs.

3.1. – Personal Scope of Application

Unlike other provisions of the Convention, Article 4 of Protocol No. 4 generically refers to “aliens”, without specifying anything as regards the situation or the legal

³⁵ On this topic, see CARLIER and LEBOEUF, “The Prohibition of Collective Expulsion as an Individualisation Requirement”, in CORNELISSE, DE BRUYCKER and MORARU (eds.), *Law and Judicial Dialogue in the Implementation of the Return Directive*, Oxford, forthcoming. The Court of Justice, for its part, to date has never been asked to interpret Art. 19(1) of the Charter of Fundamental Rights of the EU.

³⁶ The contribution of the ECtHR to the definition of the notion of collective expulsion is expressly acknowledged in the 2014 UN Draft Articles on the expulsion of aliens, see International Law Commission, Draft Articles on the Expulsion of Aliens, *cit. supra* note 10, commentary to Article 9.

³⁷ At the time of writing the ECtHR has found a violation of the prohibition of collective expulsion of aliens in seven cases.

³⁸ The importance of the case law of the ECtHR relating to the prohibition of collective expulsion of aliens is also proved by the frequent involvement of the Grand Chamber and the intervention in the case as third party of relevant international actors, such as the UNHCR, the UN High Commissioner for Human Rights, Amnesty International (as, for example, in *Hirsi Jamaa, Sharifi and N.D. and N.T.*).

status of the persons concerned.³⁹ The provision, however, must be interpreted in an extensive manner, being applicable to a plurality of individuals.

First of all, with regard to the nationality, in particular, whereas Article 3(1) of Protocol No. 4 to the ECHR prohibits collective expulsions of nationals, Article 4 of the same Protocol must be interpreted as comprising also stateless persons, as confirmed by the Explanatory report to Protocol No. 4⁴⁰ and by the Court itself.⁴¹

As to the legal status and the situation of the individuals involved in the collective expulsion, the Court has clarified that the notion of “aliens” applies not only to those lawfully residing within the territory of a State, but also to irregular migrants trying to cross borders and enter it. In other words, thus, Article 4 of Protocol No. 4 applies to those who find themselves subjected to the removal measure as a group, regardless of their actual legal characterisation in terms of status or nationality, which are irrelevant for the purpose of the protection against the collective expulsion.

Accordingly, in the cases of alleged collective expulsions brought before it, the ECtHR has applied Article 4 of Protocol No. 4 to a variety of individuals, including both asylum seekers (*Sultani v. France*)⁴² and migrants who did not apply for asylum (*Georgia v. Russia I*),⁴³ as well as persons having a specific nationality (*Shiashvili and Others v. Russia*)⁴⁴ or belonging to a particular ethnic group (*Conka v. Belgium*).⁴⁵

For the Court, ultimately, the protection against collective expulsion applies to “aliens” to be intended in a broad meaning, embracing not only those nationals lawfully resident on the territory but also “all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality”.⁴⁶

³⁹ Art. 2(1) of Protocol No. 4 to the ECHR guarantees the freedom of movement to persons who are “lawfully within the territory of a State”. Art. 1(1) of Protocol No. 7 to the ECHR establishes procedural safeguards relating to expulsion of aliens “lawfully resident in the territory of a State”.

⁴⁰ Council of Europe, Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, para. 32.

⁴¹ European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 21, para. 174.

⁴² *Id.*, *Sultani v. France*, Application No. 45223/03, Judgment of 20 September 2007.

⁴³ *Id.*, *Georgia v. Russia (I)*, Application No. 13255/07, Judgment (Grand Chamber) of 3 July 2014.

⁴⁴ *Id.*, *Shiashvili and Others v. Russia*, Application No. 19356/07, Judgment of 20 December 2016.

⁴⁵ European Court of Human Rights, *Conka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002.

⁴⁶ *Id.*, *Hirsi Jamaa* case, *cit. supra* note 21, para. 174.

3.2. – Territorial Applicability and Jurisdiction

If the personal scope of application of Article 4 of Protocol No. 4 does not pose particular problems of interpretation – as the provision covers individuals irrespective of their legal situation – the territorial applicability of the prohibition of collective expulsion of aliens has raised more complex issues. These, in particular, have emerged recently: while, in the past, the ECtHR's case law on Article 4 of Protocol No. 4 used to be relatively moderate, it has gained momentum since 2010, as litigation before the Court of Strasbourg increased in parallel with the growing migratory pressure in the Mediterranean and the consequent responses put in place by EU Member States.

As European States started to engage in practices of border control and migration management such as 'push-back' operations or interception of migrants on the high seas, the Court found itself in the position of dealing with new challenges. Until that moment, indeed, the vast majority of cases concerning Article 4 of Protocol No. 4 had involved aliens who were already on the national territory of the State concerned, therefore, no question of territorial applicability arose.⁴⁷ But the changes occurred in the pattern of migratory flows and the consequent reactions by States led the Court to consider whether Article 4 of Protocol No. 4 applied also to cases in which the relevant events took place outside the national territory of a State.

The turning point was represented by the *Hirsi Jamaa* case, concerning push-back operations on the high seas and subsequent transfers of migrants to Libya by the Italian Coast Guard. As clarified above,⁴⁸ in its judgment of 2012, the Court concluded for the extraterritorial application of Article 4 of Protocol No. 4, basing its interpretation on the concept of jurisdiction under Article 1 ECHR. What is particularly significant in the Court's reasoning, revealing a pragmatic and human rights-oriented approach, is the establishment of the link between the prohibition of collective expulsion and the border control practices put in place by States.

The ECtHR, indeed, drawing the picture of the evolving European migratory scenario, acknowledges that "migratory flows in Europe have continued to intensify, with increasing use being made of the sea" and that "the interception of migrants on

⁴⁷ See, for example, European Commission of Human Rights, *K.G. v. Germany*, Application No. 7704/76, Decision of admissibility of 11 March 1977; European Court of Human Rights, *Andric v. Sweden*, Application No. 45917/99, Decision of admissibility of 23 February 1999; Id., *Conka* case, *cit. supra* note 45.

⁴⁸ *Supra* Subsection 2.1.

the high seas and their removal to countries of transit or origin are now means of migratory control in so far as they constitute tools for States to combat irregular migration”.⁴⁹ Building on such premise and in the light of the core purpose of the prohibition of collective expulsion of aliens, the Court observes that

“if Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision [...] the consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land”.⁵⁰

With regard to the State’s exercise of jurisdiction on the high seas, the Court further affirms that “the special nature of the maritime environment cannot justify an area outside the law”,⁵¹ thus, coming to the conclusion that

“the removal of aliens carried out in the context of interception on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction [...] which engages the responsibility of the State in question under Article 4 of Protocol No. 4”.⁵²

The Court followed the same approach in the case *Sharifi and Others v. Italy and Greece*, concerning the deportation to Greece of migrants who had clandestinely boarded vessels for Italy.⁵³ The ECtHR condemned the immediate *refoulement* of the migrants arrived from Greece to the Italian port of Ancona, establishing the applicability of Article 4 of Protocol No. 4 to cases of refusal to allow entry to the national territory to persons arriving illegally. The Court, thus, did not consider relevant to ascertain whether the migrants were expelled before or after physically reaching the Italian territory. In other terms, for the Court, the prohibition of collective expulsion

⁴⁹ European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 21, para. 176.

⁵⁰ *Ibid.*, para. 177.

⁵¹ *Ibid.*, para. 178.

⁵² *Ibid.*, para. 180.

⁵³ European Court of Human Rights, *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, Judgment of 21 October 2014.

is potentially applicable also when aliens have not concretely “touched” the national territory of the State.⁵⁴

The extraterritorial applicability of Article 4 of Protocol No. 4 and the concept of State jurisdiction in migration control matters were addressed again in the case *N.D. and N.T. v. Spain*.⁵⁵ The case concerned the immediate and allegedly collective expulsion of migrants intercepted in the attempt of crossing the Spanish-Moroccan border in Melilla, a Spanish enclave situated on the North-African Coast. As explained by the Spanish government in its defence, the mentioned border crossing is made up of a total of three enclosures: two external barriers and a third, final, internal fence. According to the government, given the fact that the applicants did not succeed in climbing and passing through all the three protective structures, and, therefore, they had not physically entered the Spanish territory, the events had occurred outside the jurisdiction of Spain.

The Court did not agree with such argumentation and, following its previous approach, considered as irrelevant and unnecessary to determine exactly whether the Spanish-Moroccan border crossing of Melilla was actually located in Spain or not. Rather, the ECtHR, recalling its judgment in *Hirsi Jamaa*, pointed out that what matters for the applicability of the Convention is the circumstance that control is exercised, *de jure* and *de facto*, by the State over the individuals concerned. For the Court, thus, in the *N.D. and N.T.* case, as the migrants were brought down from the barriers, arrested and then expelled by the Spanish *Guardia Civil*, there is no doubt that the events fell within the jurisdiction of Spain for the purposes of Article 1 ECHR.⁵⁶

Accordingly, the Court unanimously declared that Spain violated Article 4 of Protocol No. 4 to the Convention, alone and in conjunction with Article 13. Following the judgment in *N.D. and N.T.*, the Spanish Government requested the case to be referred to the Grand Chamber, before which, at the time of writing, it is still pending.⁵⁷

3.3. – The Notion of Expulsion

The ECtHR, following a pragmatic approach, interprets the notion of ‘expulsion’ in an extensive way. In particular, decisive attention is given to the effects of the removal of the alien concerned, rather than to the concrete modalities in which it is

⁵⁴ *Ibid.*, paras. 210-213.

⁵⁵ European Court of Human Rights, *N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, Judgment of 3 October 2017.

⁵⁶ *Ibid.*, paras. 49-55.

⁵⁷ A public hearing was held before the Grand Chamber of the ECtHR on 26 September 2018.

carried out or the formal definition of the expulsion measure established according to the domestic legislation of the States. For the Court, indeed, also taking into consideration the *travaux préparatoires* of Protocol No. 4 to the ECHR, “the word ‘expulsion’ should be interpreted in the generic meaning, in current use (to drive away from a place)”.⁵⁸

Accordingly, the ECtHR has considered as falling within the scope of application of Article 4 of Protocol No. 4 not only acts entailing an expulsion in the strict meaning (“*ex-pellere*”, from Latin, “to drive out”), that is to say, actions implying first the entry of the individual on the national territory and then his subsequent removal by the State, but also actions and practices taking place without the aliens having necessarily already reached and entered the territory of the State.

This approach was followed in *Hirsi Jamaa*, where the Italian government argued the necessity, when considering the prohibition of collective expulsion of aliens, to stick to the ordinary and strict meaning of the term “expulsion”, according to which, in order for a State to expel someone, the person concerned must be already present on its national territory, having previously entered it. In the specific case, Italy claimed that, given that migrants had been intercepted on the high seas and then removed to Libya, they had actually not entered the Italian territory: a circumstance which constituted a “logical obstacle” to the applicability of Article 4 of Protocol No. 4.⁵⁹ The Court rejected this argumentation, choosing a wide interpretation of the concept of expulsion, which encompasses push-back operations, interception on the high seas and other similar practices aimed at preventing migrants from disembarking on the national territory.

For the Court, moreover, is not relevant how the removal measure concretely takes place. It has considered, for example, as falling within the scope of applicability of Article 4 of Protocol No. 4 both expulsions carried out via sea by vessels (*Hirsi Jamaa* and *Sharifi*) and deportations via air through joint “collective flights” (*Sultani v. France* and *Ghulami v. France*)⁶⁰.

Finally, for the Court the formal legal classification specifically given to a re-

⁵⁸ European Court of Human Rights, *Hirsi Jamaa* case, *cit. supra* note 21, para. 174.

⁵⁹ *Ibid.*, para 172.

⁶⁰ European Court of Human Rights, *Ghulami v. France*, Application No. 45302/05, Decision on the admissibility of 7 April 2009.

removal measure by the domestic legislation of a State is not relevant either. For example, in the case *Khlaifia and Others v. Italy* (Grand Chamber)⁶¹ – concerning the detention of migrants in a reception centre on the island of Lampedusa, their transfer on ships moored in the harbour of Palermo and their subsequent removal to Tunisia – the Italian government argued that, according to the relevant domestic law, the procedure in question was technically defined as “refusal of entry with removal” and not as “expulsion”. The ECtHR, refusing a too formalistic approach, maintained its extensive interpretation of the notion of expulsion, to be intended as “a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State”.⁶²

3.4. – The Collective Character of the Expulsion

The feature that specifically and typically characterises the prohibition established under Article 4 of Protocol No. 4 to the ECHR is the collective character of the expulsion. This element is to be understood as the lack of a reasonable and objective examination of the particular situation of each individual concerned.

This individualisation requirement – the lack of which makes the expulsion “collective” and thus prohibited – can be deduced from the well-established case law of both the European Commission of Human Rights (ECmHR) and the ECtHR, which define a collective expulsion as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”.⁶³

By reading this definition, it follows that, basically, a collective expulsion entails two essential aspects, that is to say, on the one hand, the circumstance that the individual in question is expelled together with other persons, as a group, and, on the

⁶¹ European Court of Human Rights, *Khlaifia and Others v. Italy*, Application No 16483/12, Judgment (Grand Chamber) of 15 December 2016.

⁶² *Ibid.*, para. 243. The Court makes explicit reference to the UN Draft articles on the expulsion of aliens and the definition of expulsion provided therein under Art. 2(a).

⁶³ European Commission of Human Rights, *Becker v. Denmark*, Application No. 7011/75, Decision on admissibility of 3 October 1975; *Id.*, *K.G. v. Germany* case, *cit. supra* note 47; *Id.*, *Alibaks and Others v. the Netherlands*, Application No. 14209/88, Decision on admissibility of 16 December 1988; *Id.*, *Tahiri v. Sweden*, Application No. 25129/94, Decision on admissibility of 11 January 1995; European Court of Human Rights, *Andric* case, *cit. supra* note 47; *Id.*, *Conka* case, *cit. supra* note 45; *Id.*, *Sultani* case, *cit. supra* note 42.

other, the fact that his/her specific situation was not individually and properly examined by the national authorities.⁶⁴ That being said, however, when and how, exactly, an expulsion of aliens becomes ‘collective’?

To answer this question, the Court over the years has identified a number of criteria, which, on the basis of a case-by-case approach, may serve as indicators revealing the collective character of an expulsion. These elements, if taken alone, are not sufficient *per se* to automatically lead to declare a violation of Article 4 of Protocol No. 4, rather, they serve as parameters that are carefully taken in consideration by the Court itself to possibly establish the collective character of an expulsion in the specific case. These are, in particular, the size of the group of aliens involved, the circumstances in which the expulsion measure takes place and its discriminatory character.

3.4.1. The Size of the Group of Aliens

By considering the case law of the ECtHR it seems possible to argue that the question of the collective character of an expulsion is more of a qualitative rather than quantitative nature.⁶⁵ An expulsion, indeed, is not simply and automatically considerable as collective just because it involves a plurality of individuals, who are removed simultaneously, in a group. That being said, nevertheless, it is also true that the involvement of a certain number of persons is inherently necessary in order for an expulsion to be collective.

As to the group of aliens subjected to the expulsion, however, neither the international legal texts nor the case law give precise indications as to the minimum quantity of individuals that should be involved. Rather, the quantitative element of the size of the group of aliens constitutes the characteristic that distinguishes collective expulsions from mass expulsions. The UN Memorandum on the Expulsion of Aliens of the International Law Commission confirms this assumption, by affirming that “the mass expulsion of aliens is generally considered to involve a large number of persons”⁶⁶ and that “the quantitative character of the expulsion of a large number of

⁶⁴ CARLIER and LEBOEUF, *cit. supra* note 35.

⁶⁵ CARLIER and SAROLEA, *cit. supra* note 7, p. 112.

⁶⁶ International Law Commission, Memorandum, *supra* note 8, para. 993. On the topic of mass expulsion, see HENCKAERTS, “The Current Status and Content of the Prohibition of Mass Expulsion of Aliens”, *Human Rights Law Journal*, 1994, p. 301 ff; HENCKAERTS, *Mass Expulsion in Modern International Law and Practice*, Den Haag, 1995.

aliens appears to be the essential element of the notion of *mass* expulsion as opposed to *collective* expulsion”.⁶⁷

Beyond the difference between mass and collective expulsion, still, there is no clear guidance as regards the size of the group of aliens concerned in a collective expulsion, which, anyhow, by its inherent nature, needs to involve a plurality of persons. The case law of the ECtHR does not provide clear answers on that point. In *Conka v. Belgium*, for example, the Court, in dealing with a case of expulsion of some Slovakian Roma families amounting to around 70 people, qualified such group of aliens as a “large number of persons of the same origin”;⁶⁸ whereas, in the case *Berdzenishvili and Others v. Russia*, concerning the expulsion of Georgian nationals from Russia in 2006, the Court upheld the complaints of some of the 19 applicants and declared a violation of Article 4 of Protocol No. 4 to the Convention.⁶⁹

The applicability of this provision was established also with smaller numbers of applicants: in *Shiashvili*, regarding again the issue of collective expulsion of Georgian nationals from Russia, the Court considered Article 4 of Protocol No. 4 applicable, being satisfied with a family consisting of a woman and her four children.⁷⁰ In *N.D. and N.T. v. Spain* (currently pending before the Grand Chamber) the ECtHR unanimously found a violation of Article 4 of Protocol No. 4 with regard to only two applicants, while in *Khlaifia* (Chamber judgment), it applied the provision to three applicants.⁷¹

⁶⁷ International Law Commission, Memorandum, *supra* note 8, para. 985.

⁶⁸ European Court of Human Rights, *Conka* case, *cit. supra* note 45, para. 61. For a detailed analysis and comment of the judgment, see CARLIER, “La détention et l’expulsion collective des étrangers. Commentaire de l’affaire Conka”, *Revue Trimestrielle des Droits de l’Homme*, 2003, p. 198 ff.

⁶⁹ European Court of Human Rights, *Berdzenishvili and Others v. Russia*, Applications Nos. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07 and 16706/07, Judgment of 20 December 2016.

⁷⁰ *Id.*, *Shiashvili* case, *cit. supra*, note 44.

⁷¹ It seems possible to deduce from the jointly partly dissenting opinion of Judges Sajó and Vučinić that the quantitative element should be given a certain consideration when dealing with collective expulsion. Taking into account the origin and the historical background of the prohibition of collective expulsion of aliens, at least a certain number of aliens would be required – in addition to other elements – in order for an expulsion to be considered collective. See European Court of Human Rights (Chamber), *Khlaifia* case, *cit. supra* note 5, Joint partly dissenting opinion of Judges Sajó and Vučinić.

3.4.2. *The Circumstances Surrounding the Adoption and the Implementation of the Expulsion Order*

The ECtHR examines the potential collective character of the expulsion with regard to two different moments: the adoption of the decision to expel and its subsequent implementation. The Court, in particular, seems to lend particular weight to the first aspect as, if the State conducts a serious and objective examination of the individual position of each alien concerned, the following collective implementation of the individual decisions of expulsion does not constitute *per se* a violation of Article 4 of Protocol No. 4.⁷²

At the same time, however, when dealing with cases of alleged collective expulsions, the Court analyses and keeps in consideration also the circumstances surrounding the implementation of the expulsion measure. For the ECtHR, indeed, the fact that an individualised examination has been carried out as regards the single particular case of each applicant does not mean that “the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4”.⁷³

In this framework, a first element that the ECtHR keeps in particular consideration when assessing whether an individualised examination has been effectively carried out is the motivation of the expulsion order. For the Court, however, the circumstance that multiple decisions were issued in similar terms or with a stereotyped motivation is not in itself sufficient to give rise to a violation of Article 4 of Protocol No. 4. Indeed, “the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis”.⁷⁴

Following this approach, in *M.A. v. Cyprus*, despite the fact that expulsion orders were issued with letters drafted in identical and formulaic terms, the Court found no violation of the prohibition of collective expulsion, confirming that “what is important is that every case was looked at individually and decided on its own particular facts”.⁷⁵ In other cases, however, the motivation of the expulsion order has been taken

⁷² See, for example, European Court of Human Rights, *Sultani* case, *cit. supra* note 42, paras. 81-83.

⁷³ *Id.*, *Conka* case, *cit. supra* note 45, para. 59.

⁷⁴ *Ibid.*, para. 81.

⁷⁵ *Id.*, *M.A. v. Cyprus*, Application No. 41872/10, Judgment of 23 July 2013, para. 254.

into particular account as a possible indicator of the collective character of the expulsion. In *Conka*, for example, the stereotyped motivation of the expulsion orders has been considered as a relevant circumstance giving rise to a suspicion of a collective expulsion, although this type of motivation is not prohibited *per se* and does not suffice, if taken alone, to establish a violation of Article 4 of Protocol No. 4.⁷⁶

Among other relevant circumstances that may potentially reveal the collective character of an expulsion, the Court has considered the political context in which the expulsions have taken place. The rulings concerning the expulsion of Georgian nationals from Russia carried out during 2006 and 2007 in the wake of the political tensions between the two countries represent an emblematic example in this sense, clearly revealing an organised strategy of collective expulsion of a given category of aliens.⁷⁷ Also, in *Conka*, the Court has considered the acts and declarations of the Belgian authorities as indicators of the existence of “a general system intended to deal with groups of individuals collectively”.⁷⁸

The number of aliens expelled is a further circumstance, which, although insufficient to establish a collective expulsion alone, is considered by the Court as an element that may reveal the existence of a general policy aimed at collectively expelling a given group of individuals. Once again, the cases concerning Russia and Georgian nationals are particularly significant, as they involved coordinated administrative practices of arrest, detention and following expulsion of numerous groups of aliens, according to specific circulars and instructions issued by Russian authorities for this purpose.

The procedures carried out with regard to the expulsion may also play a relevant role. The Court does not intend to impose strict procedural requirements on States, as it essentially requires them to guarantee objective individualised examinations of the aliens’ situation, but with a certain flexibility as how to do so. From the case law on Article 4 of Protocol No. 4, however, it can be deduced that the ECtHR requires some minimal procedural guarantees such as, at least, the identification of the aliens concerned.

⁷⁶ *CARLIER and LEBOEUF*, *cit. supra* note 35.

⁷⁷ European Court of Human Rights, *Georgia v. Russia (I)* case, *cit. supra* note 43; *Berdzenishvili* case, *cit. supra* note 69; *Shioshvili* case, *cit. supra* note 44.

⁷⁸ *Id.*, *Conka* case, *cit. supra* note 45, para. 56.

Indeed, while in *M.A. v. Cyprus* the violation of the prohibition of the collective expulsion was excluded on the grounds that national authorities had carried out identity checks in respect of each person, in *Hirsi Jamaa* and *Sharifi* the lack of identification of the aliens weighed heavily in the reasoning of the judges, leading to the condemnation of automatic and immediate *refoulement* practices without prior identification of the migrants. Similar emphasis on the lack of identification may be also found in *N.D. and N.T. v. Spain*.⁷⁹

The requirement of identifying aliens, however, is not intended as an absolute obligation for the States, as the Court has excluded the violation of Article 4 of Protocol No. 4 where the lack of the identification and individualised examination was attributable to the culpable conduct of the aliens concerned.⁸⁰ In *Dritsas v. Italy*, for example, a group of Greek nationals, who were on their way to attend the G8 Summit in Italy, were expelled without being previously identified.⁸¹ The Court declared the application inadmissible, observing that the applicants had refused to cooperate and show their identity documents to the Italian police. Ultimately, thus, as for the identification of aliens, States have an obligation of means, not results.⁸²

A procedural approach was also followed in *Khlaifia*. While the Chamber established a violation of the prohibition of collective expulsion on the grounds that applicants were sent back to Tunisia through a simplified fast track procedure without being heard,⁸³ the Grand Chamber overruled the decision, clarifying that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances and the requirement of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against the expulsion and when those arguments are examined in an appropriate manner by national authorities.⁸⁴

3.4.3. *The Discriminatory Character of the Expulsion*

The ECHR and the ECtHR do not require the collective expulsion to have a discriminatory character. Thus, the homogeneity of the group of aliens expelled, in terms

⁷⁹ Id., *N.D. and N.T. v. Spain* case, *cit. supra* note 55, para. 107.

⁸⁰ Id., *Berisha and Haljiti v. the Former Yugoslav Republic of Macedonia*, Application No. 18670/03, Decision on admissibility of 16 June 2005.

⁸¹ Id., *Dritsas v. Italy*, Application No. 2344/02, Decision on admissibility of 1 February 2011.

⁸² *CARLIER and LEBOEUF*, *cit. supra* note 35.

⁸³ European Court of Human Rights, *Khlaifia* case, *cit. supra* note 5, para. 156.

⁸⁴ Id., *Khlaifia* case, *cit. supra* note 61, para. 248.

of characteristics such as nationality or ethnic origin, does not entail a constitutive element of the prohibition established under the terms of Article 4 of Protocol No. 4. Other international instruments follow the same approach, prohibiting the collective expulsion in general terms, without requiring the discrimination of the persons involved in the expulsion. The African Charter on Human and Peoples' rights represents an exception though, as, under Article 12(5), it explicitly prohibits "mass expulsion" to be intended as one "aimed at national, racial, ethnic or religious groups".

That being said, however, even if it does not represent a necessary legal requirement for the purpose of the prohibition of collective expulsion, the element of the discrimination of aliens is not without importance in the context of the expulsion of aliens, whether individually or collectively carried out. The discriminatory character of a removal measure, indeed, may unveil the unlawfulness of an expulsion, which, otherwise, would be admissible. This is confirmed by the UN Memorandum on the expulsion of aliens, according to which "the expulsion of aliens contrary to the principle of non-discrimination may constitute a violation of international law".⁸⁵

More specifically, according to the Memorandum, the discriminatory character of an expulsion is relevant in three respects. First, an individual expulsion of an alien, which, *in abstracto*, represents an admissible and legitimate measure by the State, would turn into an unlawful act if based solely on grounds such as race, religion or any other criteria covered by the principle of non-discrimination. Second, with regard to the implementation of an expulsion measure, the principle of non-discrimination would prohibit failure to comply with the substantive and procedural guarantees prescribed for a lawful expulsion. The State, thus, when exercising its right to expulsion, is under the obligation to respect the rights of the aliens subject to expulsion without discrimination of any kind. This obligation covers the decision to expel, the procedures relating to the adoption of the expulsion measure and those relating to its subsequent implementation.⁸⁶ Finally, the Memorandum highlights how the principle of non-discrimination may be "of particular relevance to the prohibition of collective expulsions",⁸⁷ as it may unveil the collective character of the expulsion, in this way revealing its unlawfulness.

⁸⁵ International Law Commission, Memorandum, *supra* note 8, para. 285.

⁸⁶ A further confirmation of that may be found in the Draft Articles on the expulsion of aliens, which, under Article 14 ("prohibition of discrimination"), prescribes that "the expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind". See International Law Commission, Draft Articles on the Expulsion of Aliens, *cit. supra* note 10, Art. 14.

⁸⁷ International Law Commission, Memorandum, *supra* note 8, para 286.

This same logic is also used and applied in the framework of the ECHR. Indeed, the possible discriminatory character of the removal measure, although unnecessary for the purposes of Article 4 of Protocol no. 4, is taken into account by the ECtHR as a relevant additional circumstance, which may somehow reinforce the suspicion about the existence of a collective expulsion in a given case.

This approach, in particular, has been followed by the Court with regard to factors as the ethnic origin and the nationality of aliens involved in an expulsion. As for the first element, for example, in *Conka*, the ECtHR, when assessing the relevant facts of the case, took well note of the fact that practices as arrest, detention and subsequent expulsion were conducted with specific regard to Roma people, concluding that “in view of the large number of persons of the same origin who suffered the same fate as the applicants (...) the procedure followed does not enable to eliminate all doubt that the expulsion might have been collective”.⁸⁸

On the other hand, the cases concerning Russia and the collective expulsion of Georgian nationals represent a vivid example of the nationality as factor of discrimination, with a multiplicity of individuals specifically and systematically targeted as a particular identified group of aliens to be expelled. In this regard, it is worth mentioning that in all these cases (*Georgia v. Russia (I)*, *Berdzenishvili* and *Shioshvili*) the applicants specifically invoked a violation of Article 14 ECHR (prohibition of discrimination) taken in conjunction with Article 4 of Protocol no. 4. The Court, for its part, acknowledged the discriminatory character of the expulsions, but, having already found a violation of the prohibition of collective expulsion of aliens, considered unnecessary to examine also the violation of Article 14 taken in conjunction with Article 4 of Protocol no. 4 of the Convention.

Within the Council of Europe, the discriminatory character of a collective expulsion has been addressed also by the European Committee of Social Rights with regard to a case of expulsion from France of Roma people of Bulgarian and Romanian origin following the dismantling of the camp sites where they were living.⁸⁹ In its decision, the Committee, also recalling the judgment of the ECtHR in *Conka*, highlighted how, statistically, the vast majority of administrative decisions requiring individuals to leave the French territory issued during the period under consideration

⁸⁸ European Court of Human Rights, *Conka* case, *cit. supra* note 45, para. 61.

⁸⁹ European Committee of Social Rights, *European Roma and Travellers Forum (ERTF) v. France*, Collective Complaint No. 64/2011, Decision on the merits of 24 January 2012.

were principally directed against Roma, in this way revealing the existence of a discriminatory expulsion policy specifically targeting those individuals. As a consequence, the Committee concluded for the incompatibility with the Charter of the expulsion measures issued by the French authorities against Roma people, given that “they were not founded on an examination of their personal circumstances, did not respect the proportionality principle and were discriminatory in nature since they targeted the Roma community.”⁹⁰

4. – *Concluding Remarks*

While the ECtHR’s engagement with the prohibition of collective expulsion of aliens has remained modest during the decades, the recent intense migratory pressure against European borders has paved the way for the development of a new line of case law on Article 4 of Protocol No. 4 to the ECHR. Border practices and migration control operations put in place by EU Member States have indeed raised a number of significant issues in terms of respect of migrants’ fundamental rights.

While Frontline EU Mediterranean countries, such as Italy and Spain, have already been – or currently are⁹¹ – involved in cases of collective expulsions due to their border control practices aimed at tackling maritime migratory flows, the case law on Article 4 of Protocol No. 4 is destined to increase with a number of pending

⁹⁰ *Ibid.*, para. 66.

⁹¹ As for Spain, at the time of writing, cases of collective expulsions of aliens allegedly carried out at the border crossings of Ceuta and Melilla are pending before the ECtHR: *Doumbe Nnabuchi v. Spain*, Application No. 19420/15, communicated to the Spanish Government on 14 December 2015 and *Balde and Abel v. Spain*, Application No. 20351/17, communicated on 12 June 2017. Italy, for its part, is currently involved in two cases of alleged violation of the prohibition of collective expulsion of aliens: *W.A. and Others v. Italy*, Application no. 18787/17, communicated to the Italian Government on 24 November 2017 and *S.S. and Others v. Italy*, Application no. 21660/18, communicated on 26 June 2019.

cases involving potential human rights violations occurred at land borders of eastern European States, such as Slovakia,⁹² Poland,⁹³ Croatia⁹⁴ and Hungary.⁹⁵

This scenario offers a further confirmation of the potential repercussions on migrants' rights of States' border policies. In this sense, the Court of Strasbourg has acknowledged the serious difficulties faced by national authorities in dealing with increasing migratory flows, emphasising that "States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers", and that it "does not underestimate the burden and pressure this situation places on the States concerned".⁹⁶ As for the migration across the Mediterranean, moreover, the Court affirmed to be "particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in Southern Europe".⁹⁷

Having said that, however, the Court, while reiterating, in general terms, the States' sovereign and legitimate right to control borders, at the same time affirms the necessity for national authorities to carry out migration control measures in full compliance with the Convention, even in cases of intense migratory pressure and when national asylum systems are under strain. In striking a balance between EU Member States' interest to control migratory flows and the respect of human rights, the Court firmly states the need to ensure an essential level of protection of aliens against expulsion and *refoulement* practices, which sounds particularly relevant in times characterised by restrictive and aggressive policies towards migrants.

⁹² European Court of Human Rights, *Asady and Others v. Slovakia*, Application No. 24917/17, communicated to the Government on 26 September 2016, concerning the expulsion to Ukraine of 19 Afghan nationals.

⁹³ *Id.*, *M.K. and Others v. Poland*, Application No. 43643/17, communicated on 21 July 2017; *M.A. and Others v. Poland*, Application No. 42907/17, communicated on 3 August 2017; *D.A. and Others v. Poland*, Application No. 51246/17, communicated on 7 September 2017, all concerning the refuse to entry and the following removal to Belarus of migrants of various nationalities.

⁹⁴ *Id.*, *M.H. and Others v. Croatia*, Application no. 15670/18, communicated to the Croatian Government on 11 May 2018, concerning the removal to Serbia of 14 Afghan nationals.

⁹⁵ *Id.*, *H.K. v. Hungary*, Application No.18531/17; *Khurram v. Hungary*, Application No. 12625/17, both communicated to the Hungarian Government on 13 November 2017 and concerning the expulsion of aliens to Serbia.

⁹⁶ *Id.*, *M.S.S. case*, *cit. supra* note 26, para 223.

⁹⁷ *Id.*, *Hirsi Jamaa case*, *cit. supra* note 21, para 122.

6. THE RUSSIAN LAW ON REFUGEES THROUGH THE LENS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Maria Sole Continiello Neri

SUMMARY: 1. Introduction. – 2. The principle of *non-refoulement*: the International and Regional Framework. – 2.1. - Extending the Boundaries of the Risk Assessment Test – 3. The Russian Law on Refugees. – 4. Expulsion and Extradition in Russia. – 5. Strasbourg Criticism to the Russian Federal Law on Refugees and its Implementation. – 6. Bypassing the Interim Measures: Abductions and Irregular Transfers in Russia. – 7. Conclusion.

1. – Introduction

Since the dissolution of the Union of Soviet Socialist Republics ('USSR'), the Russian Federation ('RF') has been the leading destination for those migrating from former Soviet republics ('FSU'), as well as for the numerous people in search of shelter fleeing war, authoritarian regimes and persecution in neighbouring or former allied States. Nowadays, according to the United Nations Department of Economic and Social Affairs ('UN/DESA'), Russia ranked fourth globally as a host country for international migrants.¹ During the last decade, migrants (including voluntary migrants, asylum seekers, refugees, and international displaced persons) came to almost 8% of

¹ See United Nations, Department of Economic and Social Affairs (UN/DESA), Population Division International Migration Report 2017, ST/ESA/SER.A/404 (2017), p. 6.

the overall Russian population. In 2017, this amounted to some 11.6 million people.²

While the migration flow toward Russia seems considerable (and indeed it was), in the last decade the RF has been one of the few states in which the migration flow has declined by -2% per annum.³ This data includes the period from 2014-2016 when a wave of refugees arrived due to the Ukrainian war.⁴ Part of this decreasing trend reflects the fact that since 1993 the RF has adopted restrictive migration policies and practices that hinder voluntary migrants, refugees and asylum seekers coming from States other than the FSU.⁵ Nowadays, migration flows are characterised by mixed movements of individuals migrating from the country of origin for several reasons. Alongside economic migrants, there are different categories of vulnerable individuals that flee their home countries for genuine fear of persecution and seek shelter and international protection, i.e., refugees, asylum seekers, refugee alike person, stateless and refugees *sur place*.

Voluntary and forced migrants often follow similar migratory routes and use the same modes of transport and networks. Nevertheless, it is essential to distinguish between the different categories to apply the appropriate legal framework in each case. Unfortunately, in Russia, domestic courts frequently consider the migration picture in its entirety, adopting a ‘case file logic’⁶ and applying the normative definition of refugee very strictly to cases of involuntary or forced migration. The effects of these policies and practices fall on the vulnerable asylum seekers, who are often most affected by expulsion, deportation and extradition measures.

² See Federal State Statistics Service (Rossstat), The Demographic Yearbook of Russia, Moscow, 11 September 2017, available at: <http://www.gks.ru/free_doc/doc_2017/demo17.pdf>. These data refer only to officially registered migrants. According to Abashin and Cress, this figure does not include 11 million migrants who *de facto* live in Russia permanently, but do not apply for a residence permit or citizenship. See, ABASHIN, “Migration Policies in Russia: Laws and Debates”, in HEUSALA and AITAMURTO (eds.), *Migrant Workers in Russia: Global Challenges of the Shadow Economy in Societal Transformation*, New York, 2017, p. 16; SCHENK, *Why Control Immigration? Strategic Uses of Migration Management in Russia*, Toronto, 2018, p. 1. Moreover, even if until the 2018 a decreasing trend has been stable, from January to April 2019 migration growth almost doubled - up to 98,000 people by the same period of 2018. The number of arrivals in the country grew by 20% to almost 220,000 people.

³ See UN/DESA, *cit. supra* note 1, p. 7.

⁴ See UNHCR, 2016 Year-End report, 28 June 2017, available at: <<http://reporting.unhcr.org/sites/default/files/pdfsummaries/GR2016-RussianFederation-eng.pdf>>.

⁵ See SILVESTRI and TCHERNISHOVA, The Legal Framework Regulating Asylum in the Russian Federation, *International Journal of Refugee Law*, 1998, p.184 ff., pp. 184-188.

⁶ See KURKCHIYAN and KUBAL, *A Sociology of Justice in Russia*, Cambridge, 2018, p. 93 ff.

Most of the expulsion cases relate to lesser administrative offences, such as not having a resident permit (*propiska*) or working without the required permit. These cases typically involve individuals from Central Asia, Syria, Ukraine and Afghanistan, who in a first time have moved temporarily to Russia to work (with or without a permit), making business and sending remittances to their families at home, while in a second time ask for asylum given the changed situation in their countries and in order not to be returned in a context of war or widespread violence and mass human rights violations.

Most extradition cases are related to individuals coming from Uzbekistan, Tajikistan, Turkmenistan, Kyrgyzstan, and Kazakhstan,⁷ who have temporarily moved to Russia to escape from religious or political persecution.⁸ In the majority of cases, the person had suffered intimidation by authorities at home for being too close to religious groups⁹ or for alleged membership in extremist movements and/or political opposition groups. Usually, they move to Russia when their countries issued arrest warrants and extradition requests. However, once they have become internationally wanted persons, on Russian soil, the national authorities can legally keep them in custody and extradite them to their homelands, where many face the risk of torture and other ill-treatment as part of vulnerable groups.

Moreover, since 2010, alongside regular extradition measures, cases of illegal transfer, abduction, kidnapping and extraordinary rendition have been recorded.

With the new constitutional order of 1993, Russia has begun a path of internal regulation of migration issues. Moreover, in 1992 the Russian Federation joined the 1951 Convention Relating to the Status of Refugees and its subsequent New York

⁷ See INTERNATIONAL COMMISSION OF JURISTS, *Transnational Injustices: National Security Transfers and International Law*, Geneva, 2017, available at: <<https://www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf>>; AMNESTY INTERNATIONAL, “Fast-Track to Torture: Abductions and Forcible Returns from Russia to Uzbekistan”, 21 April 2016, available at: <<https://www.refworld.org/docid/574d453f4.html>>; ID., “Asylum-seeker returned from Russia to Uzbekistan in blatant violation of international law”, EUR 62/4488/2016 (19 July 2016), available at: <<https://www.refworld.org/docid/57baf9be4.html>>; HUG, *Shelter from the Storm: the Asylum, Refuge and Extradition Situation Facing Activists from the Former Soviet Union in the Cis and Europe*, 28 April 2014, available at: <<https://fpc.org.uk/wp-content/uploads/2014/04/1630.pdf>>.

⁸ See YORMIRZOEV, “Migration, Remittances and Economic Growth: an Empirical Study in the Case of Former Soviet Republics”, in *Вестник Пермского Университета Серия «экономика»*, Perm, 2016, pp. 86-94.

⁹ See European Court of Human Rights, *Abdulkhakov v. Russia*, Application No. 14743/11, Judgment of 2 October 2012; Id, *Azimov v. Russia*, Application No. 67474/11, Judgment of 18 April 2013; Id, *Erma-kov v. Russia*, Application No. 43165/10, Judgment of 7 November 2013; Id, *Gaforov v. Russia*, Application No. 25404/09, Judgment of 21 October 2010.

Protocol and become a member of the European Convention of Human Rights ('ECHR') in 1998.

Over the past years, the European Court of Human Rights ('ECtHR') has discerned about the respect of refugees and asylum seekers rights in Russian Federation, often condemning the state for the violation of Art. 3 ECHR. In relation to the administrative expulsion, the Court has repeatedly asked to the state to amend its Administrative Procedural Code in order to include a suspensive automatic mechanisms for those who are in the proceeding of the asylum temporary status determination, as well as to review the Code of Administrative Offences and the Criminal Procedural Code in order to guarantee the certainty on the maximum period of detention pending the expulsion procedure.

Furthermore, in recent years the Court has often condemned the RF for extraditions and 'undercover' transfers of Uzbek, Tajik, Kazak and Kirgiz asylum seekers in disregard of the interim measures (Rule 39 of its Rules of the Court), recognising Russia's failure to fulfil its positive obligations entailed a violation of Art. 3 ECHR. Between 2010 and 2015 such provisional measures have often been indicated by the Court, not only to protect applicants from extradition and deportation but also to place the state under a positive obligation to establish appropriate mechanisms to prevent kidnapping or 'extraordinary renditions'.¹⁰ Given the high number of repeated cases, the Council of Europe ('CoE') gathered a set of cases together under the label *Garabayev Group*, all of which concern different extradition-related violations (Arts. 3, 5, 13 and 34 ECHR). Nowadays, this group includes more than 82 cases brought in front at the ECtHR between 2007 and 2018, including several pending cases that will be decided shortly.¹¹

Given the scope of the topic, this research aims at providing an introduction to the situation of refugee and asylum seekers in Russia. Drawing on both qualitative and quantitative methodologies, it analyses the extent to which the Russian Refugee Law and the practice of domestic courts are consistent with the principle of *non-refoulement* and Art. 3 ECHR. This chapter proceeds in three parts. Firstly, it presents the general legal background of international and regional refugee law, detailing the legal frameworks which bind the Russian Federation. Secondly, it details the

¹⁰ European Court of Human Rights, *Savraddin Dzhurayev v. Russia*, Application No. 71386/10, Judgment of 25 April 2013.

¹¹ All the cases included in the *Garabayev Group* are available at: <<https://rm.coe.int/090000168091ed13>>.

Russian Refugee law and its shortcomings. The focus here is on the policies and practices related to administrative expulsion and extradition measures, shedding light on those cases of abduction and extraordinary rendition analysing the ECtHR jurisprudence and the decisions of the Committee of Ministers of the CoE). It concludes with a discussion on the future development and the concrete actions that the RF has promised to implement in the next months.

2. – The principle of non-refoulement: the International and Regional Framework

The right to regulate migration and to return or transfer migrants to their origin countries or third territories is a core dimension of state sovereignty. However, this right is not absolute: states are bound by international and regional instruments that regulate refugees' rights and guarantee that their return must be exercised within limits established by domestic and international law, especially by the so-called principle of *non-refoulement*.

At the international level, the legal framework is provided by the 1951 Convention Relating to the Status of Refugees (the '1951 Refugee Convention')¹² and its subsequent 1967 New York Protocol.¹³ According to Art. 1(a) of the 1951 Refugee Convention,

“refugee is anyone who is owing to a well-founded fear of persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”.

The 1951 Refugee Convention lists refugees' substantive and procedural rights, as well as States' legal obligations. Refugee status is entirely factual and does not depend on national legal recognition. Only in exceptional cases related to the commission of non-political severe international or national crimes or the possession of specific protection, the refugee status will not apply (Art. 1(d)).

¹² UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 ff.

¹³ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267 ff.

The core of the 1951 Convention is the principle of *non-refoulement* (Art. 33), which prohibits the host State from any act to return, expel, extradite, deport or transfer a person to another State where there are substantial grounds to believe that the person would be in danger of being subjected to violations of his/her fundamental rights (i.e. right to life, right to freedom and security, torture or inhuman or degrading treatment, etc.).

This guarantee applies to refugees or asylum seekers, regardless of whether the host State has formally recognised their status. The only admissible exceptions are when a refugee constitutes a danger to the security of the country in which the person is, or if she or he has been convicted of a particularly serious crime (Art. 33(2)).

At the regional level, the ECHR actually must be considered as the most effective instrument for the protection of asylum seekers rights in Europe and all Member States of the CoE. Even if the Convention contains no provisions explicitly dedicated to the rights of asylum seekers or migrants, most of the rights listed therein deal cover asylum issues. Moreover, since 1989 an extensive jurisprudence of the ECtHR has broadened the scope of Art. 3 ECHR in order to guarantee effective respect for refugees' rights and the principle of *non-refoulement*.

Art. 1 ECHR details the duty of Member States of the Council of Europe, including the RF, to protect and secure everyone's fundamental human rights within their jurisdictions – including foreigners, refugees, and asylum seekers. While the ECHR does not expressly include the principle of *non-refoulement*, the ECtHR has repeatedly recognised such a principle as inherent in the general terms to the right to life (Art. 2) – and especially to the prohibition of torture (Art. 3). Since the *Soering* case¹⁴ the ECtHR's jurisprudence on Art. 3 has established that any form of removal (extradition, expulsion or deportation) to another State can give rise to an issue under Art. 3 ECHR if there are substantial grounds for believing that the person concerned if returned in his/her country of origin or a third state, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.¹⁵

¹⁴ European Court of Human Rights, *Soering v. The United Kingdom*, Application No. 14038/88, Judgment of July 1989.

¹⁵ European Court of Human Rights, *Cruz Varas and Others v. Sweden*, Application No. 15576/89, A/201, Judgment of 20 March 1991; Id., *Vilvarajah v. United Kingdom*, Application No. 13163/87, Judgment of 30 October 1991.

Such a principle was consolidated in *Chahal v. UK*¹⁶, which confirmed that the conduct of the applicant cannot be taken into material consideration in order to evaluate the compliance of the extradition or expulsion order with the absolute prohibition of torture or degrading and inhuman treatment.¹⁷ The Court stated that even if the applicants had committed atrocities against other people, they cannot be deprived of the protection guaranteed by Art. 3 ECHR due to its absolute character and “the fact that it enshrines one of the fundamental values of the democratic societies” (para. 98).

In order to guarantee the overall protection of refugees’ rights, the Convention encompasses other provisions that are of great value in cases concerning expulsion and extradition. These include the right to life (Art. 2), the right to liberty and security (Art. 5), the right to a fair trial (Art. 2), the right to respect for private and family life (Art. 8), the right to an effective remedy (Art. 13), and individual applications (Art. 34). The Court has scope to assess these either in conjunction with Art. 3 ECHR or severally. Although an in-depth analysis of these provisions is beyond the competence of this chapter, in the next paragraphs, we will briefly discuss the content of these Articles – and the guarantees they provide – since almost all cases related to extradition and expulsion against Russia include a range of violations, especially of Arts 5 and 6 ECHR.

The ECHR bestows not only substantive rights but also grants procedural safeguards, such as the right of an effective remedy (Art. 13). Concerning *non-refoulement*, a range of remedies can be accessed, including the right to challenge the return or transfer before a national court or an independent and impartial authority; the possibility to appeal a first-instance negative decision on one’s refugee status; and the obligation of the national authorities to provide independent and rigorous scrutiny of a complaint relating to Art. 3 ECHR and the automatic suspensive effect in respect of the impugned measure.

Moreover, in order to protect the applicant’s life from imminent risk of torture, ill-treatment or danger to life, the Court – following a motion by the party concerned – can indicate to the state any interim measures which it considers in the interest of

¹⁶ European Court of Human Rights, *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996.

¹⁷ The Court has followed the same approach in several similar cases related to Russia such as *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 October 2005; *Klein v. Russia*, Application No. 24268/08, Judgment of 1 April 2010; *Khaydarov v. Russia*, Application No. 21055/09, Judgment of 20 May 2010 (not final); *Khodzhayev v. Russia*, Application No. 52466/08, Judgment of 12 May 2010.

the applicant. The interim measure is an instrument through which the court seeks to preserve the status quo of the applicant while his or her case is pending.

Over the years, this instrument has become an essential preventive tool, particularly for cases of *non-refoulement*. Although the ECHR does not directly regulate the interim measures, such instruments are disciplined under Rule 39 of the Rules of Court. The non-compulsory nature of the decision taken by the court on the interim measures was sanctioned in the case of *Mamatkulov and Askarov v. Turkey* in 2005. In a fundamental passage, the Court has ensured that the provisional measures are mandatory, and

“play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions, a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State’s formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.”¹⁸

The Court emphasised the essential role of the provisional measures as guarantees of the right of individual application (Art. 34) and as a fundamental tool to protect the applicant from irreparable harm following his/her extradition/expulsion to the home state, where the subject is at risk of torture, mistreatment or deprivation of life.

After this decision, the number of requests for interim measures among the CoE Member States swelled.¹⁹ However, the Court maintained a restrictive approach, limiting the share of provisional measures granted and reaffirming that the instrument

¹⁸ European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para. 125.

¹⁹ The number of interim measures issued has dramatically increased from 2005 to 2014. In 2005 the decisions on interim measures were 459 (51 requests granted, and 408 requests refused). In 2010, the number of decisions rose to 3,680, recording an increase of 53% compared with the previous year. Among these requests 1,440 had been granted, 1,823 dismissed, and the remainder fell outside the scope of Rule 39 of the Rules of Court but required an urgent examination. In 2015 the overall number of decisions on interim measures decreased to 1,458 (161 granted, 630 dismissed, the remainder out of the scope) and more than 39% of the requests granted were linked to the war in Ukraine. Over 2016-2018, on a total of 5,495 requests, only 389 interim measures were granted while 2,122 had been refused and 2,984 considered as outside the scope of the Convention. ECtHR database on Analysis Statistics of 2006, 2010, 2015, 2016, 2017, 2018, available at: <<https://www.echr.coe.int/Pages/home.aspx?p=reports&c>>.

is designated only for “truly exceptional cases”²⁰ – i.e. when “the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm in breach of the core provisions of the Convention.”²¹

2.1. - Extending the Boundaries of the Risk Assessment Test

Over time, the ECtHR has not only evoked the principle of *non-refoulement* but also broadened its subjective scope. In recent cases, the Court has extended the criteria for determining refugee status going beyond the criteria of the individual risk and taking in consideration the general risks caused by the presence of widespread violence, conflict as well as grave and systematic human rights violations in the origin country. This enlargement is also the result of numerous cases against Russia.

In its leading cases – *Sufi and Elmi v. UK* (2010), and more recently in *L.M. and others v. Russia*²² and *S.K. v. Russia*²³ – the Strasbourg Court stated that “exposing an individual to a situation of general violence of exceptional intensity may be sufficient to conclude that the person will face ill-treatment simply on account of his or her presence in the area in question”.²⁴ That is particularly relevant for places affected by generalised or indiscriminate violence, like a State involved in international or internal armed conflict or territories where “a consistent pattern of gross, flagrant or mass violations of human rights” is observed.

This legal stance was recalled in *L.M. and Others v. Russia*, handed down in October 2015 and concerning the removal of two Syrians and a stateless Palestinian to Syria. The Court was asked for the first time to evaluate the risk of danger to life or ill-treatment in the context of the ongoing conflict in Syria. The Court condemned Russia and cited the UNHCR report that recommends the host State not to carry out returns to Syria,²⁵ as well as the UN documentation, which reports a “massive violation of human rights and humanitarian law by all parties” and describes the situation

²⁰ European Court of Human Rights, *Kasyamakhunov v. Russia*, Application No. 296041/12, Judgment of 14 November 2013, para. 181.

²¹ *Ibid.*

²² See, European Court of Human Rights, *L.M. and Others v. Russia*, Applications nos. 40081/14, 40088/14 and 40127/14, Judgment of 15 October 2015

²³ See, European Court of Human Rights, *S.K. v. Russia*, Application No. 52722/15, Judgment of 14 February 2017.

²⁴ Council of Europe/European Court of Human Rights, “Asylum, CourtTalks/DisCours”, 2016, available at: <https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.PDF>.

²⁵ UNHCR, “Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity”, 11 July 2014, available at: <<http://www.refworld.org/docid/53b69f574.html>>.

as a “humanitarian crisis”. The Court consolidated and recalled its position in a follow-up case, *S.K. v. Russia*, stating the prohibition against returning individuals to Syria because such an extreme case of widespread violence was recognised in the country and especially in Aleppo (para. 61 of the Judgment of 2017).

While assessing violations of the Art. 3, the ECtHR also condemned the transfer of asylum seekers when doing so might risk a flagrant breach of the right to liberty and security (Art. 5) or the right to fair trial (Art. 6) of the Convention on the destination country. These provisions might come into play if the destination country allows arbitrary detention of a suspect, incommunicado detention or unlawful conviction rising from flagrantly unfair trials, as well as a trial in absentia without the possibility to obtain a retrial.

Furthermore, in several cases, the Court has extended the risk test, recognising as an appropriate yardstick in assessing violations of Art. 3 whether applicants belong to certain vulnerable groups. On this point, the Court made clear that individuals - accused of involvement in the activities of Islamic organisations considered extremist and banned in Uzbekistan and Tajikistan (in particular, suspected members of the international pan-Islamist political organization *Hizb al-Tahir*) or accused of possession and dissemination of literature of a religiously extremist nature - belonged to a group systematically exposed to the practice of ill-treatment in these countries.²⁶ Indeed, the charges of religious (or political) extremism borrow its se-

²⁶ See among others, *K.I. v. Russia*, Application No. 58182/14, Judgment of 07 November 2017; *Khamidkariyev v. Russia*, Application No. 42332/14, Judgment of 26 January 2017; *Mukhitdinov v. Russia*, Application No. 20999/14, Judgment of 21 May 2015; *Khalikov v. Russia*, Application No. 66373.13, Judgment of 26 February 2015; *Eshonkulov v. Russia*, Application No. 68900/13, Judgment of 15 January 2015; *Mamazhonov v. Russia*, Application No. 17239/13, Judgment of 23 October 2014; *Rakhimov v. Russia*, Application No. 50552/13, Judgment of 10 July 2014; *Egamberdiyev v. Russia*, Application No. 34742/13, Judgment of 26 June 2014; *Akram Karimov v. Russia*, Application No. 62892/12, Judgment of 28 May 2014; *Nizamov and Others v. Russia*, Applications No. 22636/13, 24034/13 and 24334/13, Judgment of 07 May 2014; *Ismailov v. Russia*, Application No. 20110/13, Judgment of 17 April 2014; *Azimov v. Russia*, Application No. 67474/11, Judgment of 18 April 2013; *Nizomkhon Dzhurayev v. Russia*, Application No. 31890/11, Judgment of 03 October 2013; *Savridin Dzhurayev v. Russia*, Application No. 71386/10, Judgment of 25 April 2013; *Sidikov v. Russia*, Application No. 73455/11, Judgment of 20 June 2013; *Zokhidov v. Russia*, Application No. 67286/10, Judgment of 05 February 2013; *Ermakov v. Russia*, Application No. 43165/10, Judgment of 07 November 2013; *Kasymakhunov v. Russia*, Application No. 29604/12, Judgment of 14 November 2013; *Rustamov v. Russia*, Application No. 11209/10, Judgment of 03 July 2012; *Umirov v. Russia*, Application No. 17455/11, Judgment of 18 September 2012; *Abdulkhakov v. Russia*, Application No. 14743/11, Judgment of 02 October 2012; *Yakubov v. Russia*, Application

mantics from the anti-terrorism law and have to be contextualized with the authoritarian nature of the Central Asian regimes. Any form of political opposition and activism is often considered as terrorist attempts to overthrow the constitutional order. In this respect, since 2008 the Court has found violations of the principle of *non-refoulement* in a high number of complaints concerning extraditions and expulsions to Uzbekistan, Tajikistan, Turkmenistan and Kirgizstan.²⁷

Hence, the Court described the practice of ill-treatment and torture on those accused of religious or political crimes in Uzbekistan as ‘systematic and indiscriminate’ and stated that there is no evidence demonstrating any fundamental improvement in that area over the years.

Recently in *Allanzarova v. Russia*, the Court further extended the risk test, considering detention *per se* to imply the possibility of risk of torture and ill-treatment in certain countries, such as Tajikistan. Indeed, such mistreatment has been documented by several NGOs and IGOs, which have denounced the harsh condition of detentions as well as the lack of access of independent inspectors to detention facilities.

According to the Court in such cases, applicants do not have to show the existence of further special distinguishing features to find a violation of Art. 3 ECHR, whereby the burden shifted to the Russian authorities to “dispel any doubts”²⁸ about

No.7265/10, Judgment of 08 November 2011; *Ergashev v. Russia*, Application No. 12106/09, Judgment of 20 December 2011; *Gaforov v. Russia*, Application No. 25404/09, Judgment of 21 October 2010, *Iskandarov v. Russia*, Application No. 17185/05, Judgment of 23 September 2010; *Khaidarov v. Russia*, Application No. 21055/09, Judgment of 20 May 2010; *Khodjaev v. Russia*, Application No. 52466/08, Judgment of 12 May 2010.

²⁷ As examples for deportations to Uzbekistan see, among others, *Ismoilov and Others v. Russia*, Application No. 2947/06, Judgment of 24 February 2008; *Yakubov case*, *cit. supra* note 24; *Abdulkhakov case*, *cit. supra* note 9; *Ermakov case*, *cit. supra* note 9; *Mamazhonov case*, *cit. supra* note 24; *Nazarov v. Russia*, Application No. 74759/13, Judgment of 11 December 2014; *Khalikov case*, *cit. supra* note 24. For deportations to Tajikistan see, among others, *Gaforov case*, *cit. supra* note 9; *Azimov case*, *cit. supra* note 9. Deportations to Turkmenistan: *Garabayev v. Russia*, Application No. 38411/02, Judgment of 07 July 2007; *Ryabikin v. Russia*, Application No. 8320/04, Judgment of 19 June 2008; *Kolsnik v. Russia*, Application No. 26876/08, Judgment of 10 June 2010. Deportation to Kyrgyzstan: *Saliyev v. Russia*, Application No. 39093/13, Judgment of 17 April 2014; *Kadirzhanov and Mamashev v. Russia*, Applications No. 42351/13 and 47823/13, Judgment of 17 July 2014; *Mamadeliyev v. Russia*, Application No. 5614/13, Judgment of 24 July 2014; *Khamrakulov v. Russia*, Application No. 68894/13, Judgment of 16 April 2015; *Abdullayev v. Russia*, Application No. 8474/14, Judgment of 1 October 2015; *Turgunov v. Russia*, Application No. 15590/14, Judgment of 22 October 2015; *Tadzhibayev v. Russia*, Application No. 17724/14, Judgment of 01 December 2015; *R. v. Russia*, Application No. 11916/15, Judgment of 26 January 2016.

²⁸ European Court of Human Rights, *Muminov v. Russia*, Application No. 42502/06, Judgment of 11 December 2008

possible ill-treatment of the applicant, which they often were unable to do.²⁹

The ECtHR has dealt with numerous claims against the unlawful expulsion and extradition of asylum seekers and refugees from Russia during the last decade. Concerning violations of the principle of *non-refoulement*, since 2007 Russia has received the highest number of citations among Member states of the Council of Europe (46 times), mostly concerning extraditions.³⁰ The Strasbourg Court has more than once used this opportunity to assess the Russian Refugee Law and its implementation, finding several critical weaknesses and shortcomings.

3. – *The Russian Law on Refugees*

In Russia, issues of migration are regulated by federal legislation.³¹ Major principles establishing political asylum, refugee and temporary asylum policies are defined respectively by the national Constitution, and by legislative acts regulating the registration and entry of foreign nationals and stateless persons into the country and granting them refugee status or providing temporary asylum.³²

In 1993, the RF ratified the 1951 Refugee Convention and the 1967 New York Protocol, agreeing to follow and implement international principles and standards that Russian authorities had not yet been familiar with. In the same year, the RF adopted three legislative acts to address the issue of migration: (1) Art. 63 of the Constitution³³, which regulates political asylum; (2) the Law on Forced Migration,³⁴ which addresses citizens of the FSU who moved to Russia for economic reasons after the USSR collapsed and; (3) the Federal Law on Refugees,³⁵ which deals with individuals from the ‘far abroad’ – i.e., anyone arriving from States other than the FSU.

²⁹ DE WECK, *Non-refoulement Under the European Convention on Human Rights and the Un Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights Under Article 3 ECHR and the United Nations Committee against Torture Under Article 3 Cat*, Leiden, 2017.

³⁰ *Ibid.*

³¹ Library of Congress, “Refugee Law and Policy: Russian Federation”, 21 June 2016, available at: <<https://www.loc.gov/law/help/refugee-law/russianfederation.php>>.

³² *Ibid.*

³³ The Constitution of the Russian Federation was adopted on the 12 December 1993 and entered into force on the 25 December 1993. It is available at: <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29/content/id/571508>.

³⁴ Law of 1995 on Forced Migrants, 28 December 1995, available at: <<https://www.refworld.org/docid/3ae6b4fe8.html>>.

³⁵ Federal Law No. N 4528-1 of 1993 on Refugees, 19 February 1993, available at: <<https://www.refworld.org/docid/527246344.html>>.

The Federal Law on Refugees, as amended in 1997, represents the critical legislation for the regulation of the substantive and procedural rights of refugees and temporary asylum seekers. It also disciplines the process for determining the status of refugees. The law establishes two types of protection: refugee status and temporary asylum. The first corresponds to the form of international protection provided by the 1951 Refugee Convention and seeks to safeguard anyone:

“not a citizen of the Russian Federation who, because of a well-founded fear of becoming a victim of persecution by reason of race, religion, citizenship, national or social identity or political conviction is to be found outside the country of his nationality and is unable or unwilling to avail himself of the protection of this country due to such a fear, or having lost his or her nationality and staying beyond the country of his or her former place of residence as a result of similar developments, cannot return to it and does not wish to do so because of such fear.”³⁶

Refugee status is granted for up to three years and is renewable. The administrative procedure for assessing and granting status is defined inside the text of the law.

Art. 12 of the Law on Refugees recognises a form of subsidiary protection, called temporary asylum for those who “do not have grounds to be recognised as refugees, but for humanitarian reasons cannot be expelled/deported outside the territory of the Russian Federation”. Temporary asylum is granted up to one year but can be subsequently extended yearly if the circumstances that serve as grounds for temporary asylum continue.

The procedure for granting temporary asylum is regulated by Law No. 274 “On the Granting of Temporary Asylum in the Territory of the Russian Federation” of 9 April 2001.³⁷ In reality the legislation limits the humanitarian reasons to cases where the asylum seeker is severely ill or incapacitated, and largely ignores external circumstances, such as a state of civil war, post-war devastation, or a brutal regime, linked with torture and summary executions, on the territory of the State from which the applicant has arrived.³⁸

³⁶ Art. 1 of the Federal Law on Refugees

³⁷ Resolution No. 274 of 2001 “On the Granting of Temporary Asylum in the Territory of the Russian Federation”, 9 April 2001, available at: <<https://www.refworld.org/docid/3ed7378b4.html>>.

³⁸ IONTSEV and IVAKHNYUK, “Migrant Integration Models in Modern Russia”, *CARIM-East Research Report*, 13.2013.

Although definition of refugee enshrined in the Federal Law on Refugee is almost identical to that of the 1951 Refugee Convention, it has several deficiencies concerning its substance and, in its enforcement, which contradict Russia's international obligations. In the first place, the act disregards the principle of *non-refoulement* and protection against forced return to a country where a person fears persecution, deprivation of life, torture or inhuman and degrading treatments.³⁹ Indeed, although the law expressly provides a prohibition against *refoulement* for refugee and for those who apply for refugee status (Art. 10), it does not provide the same guarantee for those who are applying for temporary asylum (who make up the majority of applicants). Indeed, the above-mentioned law in Art. 12 guarantees that only a "person who has been granted temporary asylum cannot be returned against his or her will to the country of his or her nationality (his former home)."

This shortcoming is exacerbated by the provisions of Art. 5 which list several grounds on which administrative officers may elect not to assess a person's application on its merit. The Art. 5(1) allows an applicant's status to be refused if there are criminal proceedings against him or her for any crime committed on Russian soil, including administrative offences i.e., the lack of registration or the lack of working permit. In Paragraph 6 is provided that an applicant's status must be refused if the individual is found to have departed illegally from his or her country of origin. Furthermore, in Paragraph 5 established that an applicant's status must be refused if the individual arrived from a so-called 'safe country'. These paragraphs indirectly hinder the correct application of principle of *non-refoulement*. These restrictions especially impact non-Ukrainian applicants

In addition to these normative shortcomings, in practice, the law is often incorrectly enforced by the officials of the Federal Migration Service (nowadays by the Ministry of Internal Affairs' officials).⁴⁰ The access to the procedure is often made harder by administrative constraints and obstacles (i.e. long waiting periods for the application to be processed, long queues, corruption, threats from administrators, language difficulties, insufficient information), which lead to the potential for chaos

³⁹ LÉTOURNEAU-TREMBLAY, "Expulsion of Refugees from Russia to Syria Would Violate International Obligations", PlurisCourt Blog, 8 January 2016, available at: <<http://www.reflaw.org/expulsion-of-refugees-from-russia-to-syria-would-violate-international-obligations>>.

⁴⁰ On 5 of April 2016, the Federal Migration Service was disbanded, and its duties and tasks passed in the hand of the Main Directorate for Migration Affairs of the Russian Federation which is part of the Ministry of Internal Affairs,

and misunderstanding for asylum seekers.⁴¹ Frequently, persons who have applied to be registered as refugees/temporary asylum have to wait for several months before their applications are considered. These persons, living without documents that demonstrate their right to remain in Russia or with an expired visa, are often stopped by the police on the streets, taken in custody and not infrequently end up being arrested for administrative offences, such as lacking registration documents or a work permit and then expelled.

4. – *Expulsion and Extradition in Russia*

After the dissolution of USSR, a massive number of people from the former Soviet Republics or the satellite countries moved to in Russia, in order to return to their motherland, to search for better economic conditions, or to flee from new political regimes or conflict. Since 1998 (first available data) the number of refugees in Russia has rapidly declined – from 235,065 to 598 at the beginning of 2018.⁴² This decrease was allowed thanks to the creation of the temporary asylum status, but also to the limitative migration policies adopted by the state.

However, in the aftermath of the Ukraine conflict, the number of applications for refugee and mainly temporary asylum status grew dramatically.⁴³ From 2012-2014, the 98% of those with temporary asylum in Russia is Ukrainian (123,400 people at the beginning of 2018).

Despite this, the refugee's crisis in Russia is also tied to the presence of asylum seekers from conflict areas such as Syria (1,302 people at the beginning of 2017), Afghanistan (400 people), or Central Asian countries where fundamental human rights are grossly and constantly violated like Uzbekistan, Tajikistan, Kyrgyzstan, and Kazakhstan.⁴⁴

While from one side, the Russian government provides simplified measures aimed at quickly regularizing the status of the Ukrainian citizens and guarantee their

⁴¹ BURTINA, KOROSTELEVA and SIMONOV, *Russia as a Country of Asylum*, 2015, p. 312 ff., available at: <https://refugee.ru/wp-content/uploads/2016/06/doklad_ENG.pdf>.

⁴² ЩЕРБАКОВА Миграция в России, предварительные итоги 2017 года, Демоскоп Weekly, No. 763-764, 2018, available at: <<http://www.demoscope.ru/weekly/2018/0763/barometer763.pdf>>.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

integration into local communities,⁴⁵ other vulnerable groups such as Syrians or Uzbekistanis have faced several obstacles that have hampered their access to the asylum procedure and public services and made it challenging to regularize their status.⁴⁶ These nationalities often experience administrative obstacles, including initiation of expulsion procedures instead of registering asylum claims, long waiting periods and refusal to issue identity cards and documents confirming their legal stay in Russia.⁴⁷ Among these asylum seekers, denial of international or subsidiary protection is widespread, as are cases of expulsion and extradition. For this reason, I will focus on these groups, leaving the analysis of Ukrainian refugees to a separate study.

As regards expulsion, administrative offences, especially offences against the Code of Administrative Offences ('CAO'),⁴⁸ are the most common immigration law cases in Russia. Such offences generally consist in failing to secure a valid residence registration, the Soviet *propiska*, (Art. 18.8 CAO), working without a valid work permit (Art. 18.10 CAO) or violating an immigration rule (Art. 18.11 CAO).

According to these provisions, once a migrant is found without the required documents (registration, visa, identity document or working permit) the Court can consider them *liable for breaching migration regulations* and *sanction them* – a monetary penalty and expulsion to his or her country of origin can be imposed. While administrative deportations were a discretionary measure for all regional courts until 2013, following amendment No. 207-FZ of 23.07.2013 in Moscow, Moscow Oblast, St Petersburg, and Leningrad Oblast, expulsion now follow automatically, and the removal order is included in the 'minimum' sentence.⁴⁹

As a result of this new amendment, the number of administrative immigration cases has increased enormously, doubling the immigration proceedings in front of

⁴⁵ Regulation No. 690 of July 22, 2014, on the "Granting of Temporary Asylum for Citizens of Ukraine in the Territory of the Russian Federation through Simplified Procedure", available at: < <http://government.ru/media/files/41d4f3a5c06af7f5f50e.pdf>>.

⁴⁶See BURTINA, KOROSTELEVA and SIMONOV, *cit. supra* note 39; MATUSEVICH, *Russia's Catch – 22 Asylum System*, 29 January 2018, available at: <<https://www.newsdeeply.com/refugees/community/2018.01.29.russias-catch-22-asylum-system>>.

⁴⁷ UNHCR, 2017 Year-End report, 25 July 2018, available at: < <https://reporting.unhcr.org/node/2551>>.

⁴⁸ Code of Administrative Offences of the Russian Federation, No. 195-fz, 30 december 2001, available at: <https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS48A5_LEG_27.pdf>.

⁴⁹ KUBAL, "In Search of Justice", in KURKCHIYA and KUBAL (eds.), *cit. supra* note 6, pp. 92-117, p. 97.

the courts and pressuring judges to resolve these cases quickly and unequivocally.⁵⁰ Thus, in the majority of cases, judges are compelled to adopt a case file logic in taking decisions.⁵¹ Such a logic, regrettably, precludes adopting a holistic view of an individual case and instead it is entirely based on case file information which often resulted from an inaccurate or in bad faith investigation. The evidence contained in the case file – protocols from immigration and workplace raids, reports by immigration law enforcement agencies, affidavits signed by migrant defendants – is privileged at the cost of human interaction in the courtroom or examining the witnesses. Such maniacal attention to literal formalism allowing judges to save time, however, hinders an in-depth analysis of how the evidence has been acquired.

Furthermore, it is worth noting that migrants are often arrested during proceedings in applying for the refugee or temporary asylum status. According to Kubal,

“[c]ase file logic is particularly challenging to understand and reconcile with the principles of proportionality, justice, and equity if one approaches immigration law cases from a human rights’ perspective. The arguably harsh penalty – deportation – mean[s] disrupted livelihoods, severed family ties and, on many occasions, a contribution to a growing undocumented migrant population in Moscow”.⁵²

In only a few cases judges apply humanitarian logic, thereby not strictly following the case file, but focusing more on the attenuating circumstances derived from international human rights obligations. A humanitarian logic has been primarily extended to asylum-seekers in Russia who cannot be returned to their home countries. As we have seen above, the long delay in the proceeding for obtaining refugee or asylum status implies that migrants often remain without valid documents for a long time. This has deleterious consequences, not only hindering the individual’s social integration but also limited his or her access to the formal labour market, therefore his or her economic rights.⁵³ These limits mean asylum seeker – who most support

⁵⁰ According to KUBAL, *cit. supra* note 47 “The record year thus far was 2014, with 255,235 Art. 18 CAO cases. This translates into over 250,000 foreigners brought to trial, with potential expulsion orders issued against their names.”

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ During the proceedings for the determination of status (either waiting for a decision or appealing a refusal of refugee status) many asylum-seekers work. Until recently, this practice was not regulated by the Russian authority and usually such behavior was not sanctioned. However, following legislative change No. 127-FZ of 5 May 2014, the access to the labor market has been explicitly forbidden in this Federal

themselves somehow – are often brought in front of the courts for working without a valid work permit.

At the procedural level a judgment on the merits in respect of an administrative-offence charge is enforceable after it has acquired legal force (Art. 31.2 CAO). Moreover, the Code provides that first-instance and appeal judgments which have become final can be challenged by way of review (Art. 30.12 CAO). However, a judge shall suspend the judgment enforcement if the prosecutor or another public official has lodged a request for review of judgment ex Art. 30.12 CAO, or in other situations prescribed by the CAO (Art. 31.6 CAO). No suspension is possible if a defendant is seeking the review.⁵⁴

The Article on Administrative Deportation from the Russian Federation of a Foreign Citizen or of a Stateless Person (Art. 3.10 CAO) provides that a judge is empowered to require detention of a foreigner in a special detention facility to enforce the penalty of forcible removal.

As regards extradition, at the regional level the RF is a party to several extradition agreements aimed at fostering inter-state cooperation in criminal justice. At the European level, the RF is part of the European Convention on Extradition⁵⁵ adopted within the framework of the Council of Europe. There have also been many extradition agreements signed between the RF and the Central Asian countries. The main regional extradition treaty among CIS countries remains the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993, as

Law ‘On the Legal Status of Foreign Citizens in the Russian Federation.’ As a result, asylum seekers that work without a permit or patent was charged ex Art.18.10 CAO.

⁵⁴ Supreme Court of the Russian Federation, Resolution No. 5 “On Certain Issues Arising in Courts in Applying the Code of the Russian Federation on Administrative Offenses”, 24 March 2005, para 37, available at <<http://base.garant.ru/12139487/#ixzz68rWnbpYQ>>.

⁵⁵ Federal law № 190-FZ ‘About European Extradition Convention Ratification, October 25, 1999, available at: <http://pravo.gov.ru.proxy.ips.%3Fdoc_itself%3D%26%26nd%3D102062477%26%26page%3D1%26rdk%3D0#10>; and Federal Law ‘About Ratification of the European Convention on Extradition, Additional Protocol and the Second Additional Protocol’, 1 October 1999, available at: <<https://www.global-regulation.com/translation/russia/2942006/on-the-ratification-of-the-european-convention-on-extradition%252c-additional-protocol-and-second-additional-protocol-thereto.html>>; Supreme Court of the Russian Federation, Resolution No. 11 “On the practice of the courts to consider issues related to the extradition of persons for criminal prosecution or execution of sentences, as well as the transfer of persons to serve sentences”, 14 June 2012, available at: <<http://base.garant.ru/70190924/#ixzz68rY4xjPs>>.

amended by the Protocol to that Convention of 28 March 1997 (the Minsk Convention). The Minsk Convention *does not* include specific safeguards to forbid *refoulement* of individuals at risk of torture or ill-treatment, or the imposition of the death penalty once returned in their country of origin.⁵⁶ The RF is also member of the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 2002 (the ‘Chisinau Convention’) which provides a more extensive list of grounds for a refusal to extradite a person, among which are fear of persecution on the grounds of ethnicity, religion, political opinion, nationality, and gender.

At the national level, the rules governing extradition are highly fragmented. They are contained in different legal instruments: the Russian Constitution, the Criminal Code of Russia,⁵⁷ the Russian Criminal Procedure Code (‘CCPr’), several international bilateral agreements, as well as international and regional conventions, and federal laws that implement the treaties. The multiplicity of the sources makes it highly demanding to see the whole picture and apply the law in controversial and ordinary cases.⁵⁸ This problem of fragmentation is exacerbated by the fact that the Russian Code of Criminal Procedure, which regulates the case of “Refusal in the Extradition of a Person”, does not expressly provide for the prohibition of extradition due to the risk of torture or other cruel treatment (Art. 464).

However, as was underlined in June 2012 by the Plenum of the Supreme Court – which provides the guidelines for domestic courts when dealing with extradition cases – the grounds to deny extradition requests are provided for not only in the CCPr but also in other pieces of legislation and international agreements. Indeed, the Plenum reaffirmed that the domestic courts must comply with the provisions of the International Covenant of Political and Civil Rights, the UN Convention Against Torture and the ECHR preventing extradition if there is a risk of torture. Furthermore, it established that the courts in assessing the alleged risk of the applicant in the country of origin are to take into account relevant information from different sources, such as the Ministry of Foreign Affairs and international bodies (it is worth remarking that

⁵⁶ INTERNATIONAL COMMISSION OF JURISTS, *cit. supra* note 7, p. 32.

⁵⁷ Criminal Code of the Russian Federation, No. 63- FZ, 13 June 1996, available at: <<https://www.legislationline.org/documents/section/criminal-codes/country/7/Russian%20Federation/show>>; Criminal Procedure Code of the Russian Federation, No. 174-FZ, December 18, 2001, available at: <<http://www.wipo.int.edocs.lexdocs.laws.en.ru.ru065en.pdf>>.

⁵⁸ SHAIBAKOVA and TALAN, “The Extradition Legislation in the Russian Federation and Germany: A Comparative Analysis”, *Helix*, vol. 8(1), pp. 2227 ff., p 2227, available at: <<http://helix.dnares.in.wp-content/uploads/2017/12/2227-2230.864.pdf>>.

NGOs are not mentioned). These principles have also been reaffirmed in 2013 by the Plenary of the Supreme Court of the Russian Federation No. 21.⁵⁹

5. – *Strasbourg Criticism to the Russian Federal Law on Refugees and its Implementation*

At domestic level, compliance with the provisions enshrined in the ECHR is ensured by Articles 15 (4) and 17 of the Russian Constitution, as well as by the Russian Constitutional Court in 2007⁶⁰ and by the Plenum of the RF Supreme Court in 2003⁶¹ and 2013.⁶² The requirement for Russia to respect ECHR provisions was not challenged by a recent Constitution Court ruling on 14 July 2015, even though it issued an ambiguous decision regarding the compulsory execution of ECtHR judgments and the legal supremacy of domestic law.⁶³

Despite this, the Strasbourg Court has repeatedly ruled against Russia for the violation of refugees and asylum seekers' rights. The Court, since 2008, has issued more than 100 judgments about asylum seekers whom the Russian Federation intended to deport from the country. Most decisions relating to the administrative expulsions or extraditions of individuals belonging to vulnerable groups such as member of banned Islamic groups or political opposition in Central Asia, as well as persons coming from conflict countries and states where there are systematic, serious and widespread violations of human rights. In almost all of these judgments, the

⁵⁹ Supreme Court of the Russian Federation, Resolution No. 21, "Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols", 27 June 2013, available at: <<http://base.garant.ru/70404388/>>. *Contra*, Constitutional Court of the Russian Federation, No. 21-II, Judgment of 14 July 2015; Constitutional Court of the Russian Federation, No. 12-II.2016, Judgment of 19 April 2016 (*Anchugov and Gladkov v. Russia*); as well as Constitutional Court of the Russian Federation, No. 1-II.2017, Judgment of 19 January 2017 (*OAO Neftyanaya Kompaniya Yukos v. Russia*)

⁶⁰ Constitutional Court of the Russian Federation, 2-II.2007, Judgment of 5 February 2007.

⁶¹ Supreme Court of the Russian Federation, Resolution No. 5 "On the application by courts of general jurisdiction of universally recognized principles and norms of international law and international treaties of the Russian Federation", 10 October 2003, available at: <<http://base.garant.ru/12132854/#ixzz68raV17AT>>.

⁶² Supreme Court of the Russian Federation, Resolution No.21 "On the application by the courts of legislation governing the grounds and procedure for exemption from criminal liability", 27 June 2013, available at: <<http://base.garant.ru/70404388/#ixzz68rbQJRIq>>.

⁶³ BURKOV, "The use of European human rights law in Russian courts", in MÄLKSOO and BENEDEK (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge, 2017, pp. 59-92; KOVLER, "European Convention on Human Rights in Russia", *L'Europe en Formation*, vol. 374, 2014, pp. 116-135.

Court found violations of Arts 2, 3, 5, 8 or 13 of the Convention. The threats of probable ill-treatment towards the applicants arise in connection with administrative expulsion procedure⁶⁴ or with extradition procedure.⁶⁵

In almost every case, the Court found that the arguments of one or another applicant were not properly examined by the domestic authorities, which resulted in a violation of positive obligations under Art. 3 of the Convention or a violation of Art. 13 of the Convention. In numerous cases, the Court found that Art. 3 had effectively been breached as the applicants had been removed and transferred from Russian territory despite the risks of ill-treatment in breach of the interim measures hindering the applicants' right of individual petition (Art. 34). These cases will be discussed in detail in the following paragraph.

Furthermore, at the procedural level, the Court has often highlighted the ineffectiveness of the remedies offered by the Russian authorities in conjunction with Art. 3 – in particular, for the absence of an automatic suspensive effect⁶⁶ and independent and rigorous scrutiny.⁶⁷ Recently, in *I.U. v. Russia*,⁶⁸ the Strasbourg judges condemned the Russian authorities for “simplistic rejection – without reference to evidentiary material – of the applicant’s claims as hypothetical and lacking specific indications as to the level of risk, together with the comment that the situation in a requesting state might change over time”.⁶⁹ Indeed, according to the interest

⁶⁴ The CoE Committee of Ministers has grouped all these cases in the so-called *Kim group*. The list is available at: <<https://rm.coe.int/090000168089e16d>>

⁶⁵ *Supra* note 11.

⁶⁶ See, European Court of Human Rights, *S.K. v. Russia*, Application No. 52722/15, Judgment of 14 February 2017. Currently, there are two communicated cases on deportation pending in front of the Court. *S.S. v. Russia*, Application No. 2236/16 and *O.O. v. Russia*, Application No. 36321/16. These cases are aimed at assessing the compliance of the amended Code of Administrative Procedure in force since 2015 under Art. 3 of the ECHR. In particular the court will evaluate if the recent reform in the procedure and time limits for challenging a deportation order provides an effective domestic remedy as well as whether lodging an appeal against a deportation order might have automatic suspensive effect, so that the applicant may obtain an ‘independent and rigorous scrutiny’ of his complaint of a risk of ill-treatment in the event of the return.

⁶⁷ European Court of Human Rights, *Allanazarova v. Russia*, Application No. 46721/15, Judgment of 14 February 2017.

⁶⁸ European Court of Human Rights, *I.U. v. Russia*, Application No. 48917/15, Judgment of 10 January 2017.

⁶⁹ See European Court of Human Rights, *I.U.* case, *cit. supra* note 68, para. 31. Also, TRENINA and ZHARINOV, “From Russia to torture: Lack of or deficient remedies against prohibited treatment in extradition and other types of removal proceedings”, *The Foreign Policy Center*, 4 December 2017, available at:

protected by Art. 3 ECHR, “the effectiveness of the remedy for Article 13 requires imperatively that the complaint is subject to scrutiny by a national authority”.⁷⁰

In order to provide an adequate solution to the automatic suspension the RF in the recent Action Plan 2019 stated:

“This in particular, the issue is addressed of the need to enshrine provisions in the legislation providing for the automatic suspension of the enforcement of judgments on extradition, deportation or administrative expulsion of a person who applied for temporary asylum or refugee status until a judgment on such an application is delivered, and if such a judgment is appealed against – until a final judgment on the relevant appeal is delivered. Within the frames of addressing this issue, the Ministry of the Interior of the Russian Federation is considering the possibility of including the relevant standards in the draft Federal Law “On Granting Asylum in the Russian Federation.” The drafting of this law is laid down in the draft plan of measures (from now on – the “draft plan”) for implementation of the Concept of the State Migration Policy of the Russian Federation for 2019-2025 (approved by Decree of the President of Russia no. 622 of 31 October 2018). According to the draft plan, the deadline for preparing the draft Federal Law “On Granting Asylum in the Russian Federation” is the first half of 2020.”⁷¹

Moreover, the European Court has faced off several cases concerning the violation of the right to liberty and security of asylum seekers temporarily detained in expulsion center, the court has repeatedly found the violation of Art. 5(1) ECHR often related to a range of factors such as the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to extradition and time-limits for such detention; detention beyond the time-limits allowed by domestic law; poor

<<https://fpc.org.uk/russia-torture-lack-deficient-remedies-prohibited-treatment-extradition-types-removal-proceedings/>>.

⁷⁰ See also European Court of Human Rights, *Shamayev and Others* case, *cit. supra* note 17. Moreover, at the 1280th Meeting of the Ministers’ Deputies of the Council of Europe, it was stated that: “A significant number of ECHR judgments include a finding that there would be a violation of Art. 3 if the applicants were to be extradited to the requesting countries and of a violation of Art. 13 as the domestic courts failed to scrutinize the applicants’ rigorously”, in Council of Europe, Committee of Ministers (DH), 1280th Meeting, 7-10 March 2017 (DH), CM/Notes/1280/H46-23, 10 March 2017, available at: <<https://rm.coe.int/native/09000016806e43fb>>.

⁷¹ Council of Europe, Committee of Ministers (DH), 1340th meeting, CM/Notes/1340/H46-18rev, 14 March 2019, available at: <https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809332f1>; Russian Federation, Action Plan - Communication from the Russian Federation concerning the case *Garabayev* case, DH-DD(2019)166 (12 February 2019), available at: <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168092dd4a>

detention conditions; as well as unreported and arbitrary arrest. In *Sultanov v. Russia*,⁷² the Court stated “the provisions of Russian law governing detention of persons with a view to extradition were neither precise nor foreseeable in their application and fell short of the “quality of law” standard required under the Convention”.

Just as numerous are cases related to violations of Art. 5(4) ECHR concerning the right to judicial supervision (remedy) during a person’s detention to allow that person to obtain speedy judicial review of the lawfulness of the detention. The 1280th Human Rights meeting of the Ministers’ Deputies of the CoE emphasized: “failure by the courts to address the applicants’ arguments concerning the lawfulness of detention when examining their appeals; and lengthy consideration of such appeals when a review did take place (usually upon a prosecutor’s request to extend the detention)”.⁷³ Concerning the right to fair trial in a leading case, *Ismoilov and Others v. Russia*, the Court admonished the failure of Russian authorities to respect the presumption of innocence in their decision to extradite the applicants – 12 Uzbekistani and 1 Tajikistani – to their homelands. In this case, the applicants were subject to an extradition request for having financed and taken part in a bloody protest in Andijan. The Russian prosecutor ordered the extradition of the applicants after noting that they had committed acts of terrorism and having received diplomatic assurances that the applicants, once returned to Uzbekistan, would not be tortured, mistreated or deprived of life.

Despite all these pitfalls, it is worth noting that over the years the RF has made several efforts to address the problems indicated by the Court, by amending internal law and improving the practice of the domestic courts and migration services.⁷⁴

⁷² European Court of Human Rights, *Sultanov v. Russia*, Application No. 15303/09, Judgment of 4 November 2010.

⁷³ See Council of Europe, Committee of Ministers (DH), 1280th Meeting, *cit. supra* note 70.

⁷⁴ Over the years, the RF has adopted several reforms in order to adequately and solve the issue related to the violation of Art. 5 ECHR: briefly, Constitutional Court’s decisions of 2006 and 2007 that declared the incompatibility of Art. 466(1) of the CCrP with Art. 22 Russian Constitution and Art. 14(3) ICCPR, concerning the excessive or arbitrary detention, unlimited in time and without appropriate review in all cases, including extradition proceedings; the Supreme Court’s Plenum Ruling No. 22 of 2009, clarifying the application of the custodial measure of restraint to persons apprehended with a view to extradition; and the Supreme Court’s Plenum Ruling no. 41 of 2013, clarifying in general the application of the custodial measure of restraint, the Supreme Court’s Plenum Ruling No. 11 of 2012 which, considerably reaffirmed the mandatory value of the obligations deriving from the ECHR in the Russian legal order and removed any uncertainty in the legal framework. Unfortunately, the guidelines embodied in this decision often crash with the daily practice of the FMS/Internal Minister officers’ activities and are not followed by the district

6. – *Bypassing the Interim Measures: Abductions and Irregular Transfers in Russia*

The high number of claims filed against Russia for the violation of Art. 3 ECHR as a consequence of possible administrative expulsion and extradition has implied a corresponding increase in the request for interim measures.⁷⁵ Between 2012 and 2018, Russia – together with the United Kingdom and Turkey – were the primary state against which the Court requested interim measures about cases of expulsion and extradition.⁷⁶ However, despite the obligatory nature of interim measures, on several occasions Russia has directly or indirectly violated these provisions, especially in extradition cases.⁷⁷ Since 2007, the court has condemned Russia in 82 cases concerning asylum seekers extradition or expulsion to States where they would face a real risk of torture and ill-treatment in violation of Art. 3 ECHR, and in breach of an interim measure indicated by the Court under Rule 39 of its Rules of Procedure, prohibiting the removal of the applicant. These cases have been grouped by the CoE

and regional courts. In addition, on 29 December 2016, draft amendments to the part of the Code of Criminal Procedure concerning extradition procedure were submitted by the government for consideration to the Duma. The amendments provide, *inter alia*, that a person subject to an extradition request is entitled to the same procedural rights as other suspects and accused in relation to all proceedings concerning the measure of restraint. Unfortunately, the amendment is still pending in front of the Duma. See European Court of Human Rights, *Oshlakov v. Russia*, Application No. 56662/09, Judgment of 3 July 2014.

⁷⁵ The general restrictive approach seen in paragraph 2, mismatches with the statistics relative to Russia. Indeed, the Court has plentifully granted interim measures against Russian in expulsion and extradition cases. Indeed, the percentage of the requests accepted has increasingly grown over the past years.

⁷⁶ During 2008 and 2009 the Court granted 7 and 9 interim measures while refused 31 and 30 requests per year. An increasing number of requests have been processed and obtain a positive result in the following years: in 2010, 17 requests have been granted and 46 refused, in 2011, 18 requests have been accepted and 48 refused, while in 2012 only 5 requests have been granted and 50 have been rejected. In the following years the gulf between requests granted and refused highly diminished: in 2013, 21 accepted and 37 refused, in 2014, 27 accepted and 45 refused, in 2015, 28 granted and 47 refused, in 2016, 42 granted and 28 refused and finally in 2017, 31 granted and 67 refused. In 2018, of 237 requests for interim measures submitted against Russia, only 48 were accepted, and all correspond to cases related to expulsion and extradition in violation of Art. 3 ECHR. The information has been given by the Publication Service of the ECHR and are in the availability of the authors if requested.

⁷⁷ The Court found the violation of Art. 34 ECHR for the non-observance of interim measures in the following cases: *Shamayev and Others* case, *cit. supra* note 17; *Kamaliyevy v. Russia*, Application No. 52812/07, Judgment of 03 June 2010; *Abdulkhakov* case, *cit. supra* note 9; *Zokhidov* case, *cit. supra* note 24; *Ermakov* case, *cit. supra* note 9; *Kasymakhunov* case, *cit. supra* note 24; *Mamazhonov* case, *cit. supra* note 24; *Mukhitdinov* case, *cit. supra* note 24.

Committee of Minister creating the so-called *Garabayev Group*.⁷⁸ Among these cases several incidents of disappearance/abduction and illegal transfer of applicants has worried the Court. Indeed, in the face of the possible ECtHR condemnation, Russia has often reacted by laying down various escamotage: such as turn a “blind eye” on illegal transfer, abduction, kidnapping and extraordinary rendition. Especially in recent years, alongside the extradition process and administrative expulsion, there have been numerous cases involving the disappearance of applicants from Russian territory.

Starting with *Iskandarov v. Russia*, 17 cases of abductions, kidnapping and extraordinary renditions of vulnerable individuals have followed.⁷⁹ Most of these cases concern individuals coming from Uzbekistan, Tajikistan and Turkmenistan. All of them were persecuted in their countries for membership in an illegal religious organisation or were charged with alleged terrorist activities or crimes that could be qualified as against national security. Often, those individuals have been previously arrested in Russia with a view of extradition and then released. Once, out from the Russian control, individuals have disappeared and have usually reappeared in the hand of the governmental authority of the origin country. Time and again, these incidents involved individuals that had already been granted the protection of the Court’s interim measures.

Different resolutions and decisions issued by the CoE Committee of Ministers have shed light on this particular problem. The 1280th Human Rights meeting of the Ministers’ Deputies of the CoE noted:

“In six of these cases (*Iskandarov*, *Abdulkhakov*, *Savriddin Dzhurayev*, *Nizomkhon Dzhurayev*, *Ermakov*, *Kasymakhunov*), the Court found that the applicants could not have been abducted, disappeared or forcibly transferred from Russian territory without the knowledge and passive or active involvement of the Russian authorities. Furthermore, in four cases (*Savriddin Dzhurayev*, *Ermakov*, *Kasymakhunov*, and *Mamazhonov*) the Court found that the authorities had breached article 3 by failing to protect the applicants from exposure

⁷⁸ See *supra* note 11.

⁷⁹ *Kamaliyevy* case, *cit. supra* note 77; *Muminov* case, *cit. supra* note 26; *Isakov Abdulazhon v. Russia*, Application No. 14049/08, Judgment of 08 July 2010; *Iskandarov* case, *cit. supra* note 24; *Yakubov* case, *cit. supra* note 24; *Abdulkhakov* case, *cit. supra* note 9; *Zokhidov* case, *cit. supra* note 24; *Azimov* case, *cit. supra* note 9; *Savriddin Dzhurayev* case, *cit. supra* note 24; *Nizomkhon Dzhurayev* case, *cit. supra* note 24; *Ermakov* case, *cit. supra* note 9; *Kasymakhunov* case, *cit. supra* note 24; *Latipov v. Russia*, Application No. 77658/11, Judgment of 12 December 2013; *Mamazhonov* case, *cit. supra* note 24; *Mukhitdinov* case, *cit. supra* note 24; *O.O. v. Russia*, Application No. 36321/16, Judgment 21 August 2019.

to the risk of torture and ill-treatment and also by omitting to hold an effective investigation into the disappearance/abduction incidents.

Further, in seven of these cases (Abdulkhakov, Savriddin Dzhurayev, Zokhidov, Nizomkhon Dzhurayev, Ermakov, Kasymakhunov, Mamazhonov), the Court considered that, by failing to comply with the interim measure indicated under Rule 39 which prohibited the applicants' removal from Russian territory, the authorities had hindered the applicants' right of individual petition in violation of article 34.⁸⁰

However, this note is not exhaustive: other cases have been brought in front of the Court claiming that abductions, disappearances and forcible transfers have occurred.⁸¹

In all these cases, even if the Russian Federation did not take an active part in the illegal transfer, the Court found that RF authorities have violated Art. 3 ECHR by failing to protect the applicants from exposure to the risk of torture and ill-treatment and also by omitting to hold an effective investigation concerning those cases of alleged disappearance and abduction – notably in breach of the interim measures indicated by the Court. In *Savriddin Dzhurayev v. Russia*, the Court emphasised: “that any laxity on the binding legal effects of interim measures would be inconsistent with the fundamental importance of the right to individual petition and more,

⁸⁰ See *supra* note 70.

⁸¹ See European Court of Human Rights, *Azimov case*, *cit. supra* note 9; *Isakov Abdulazhon case*, *cit. supra* note 79; *Yakubov case*, *cit. supra* note 24. Moreover, Amnesty International reported a case of torture and unfair trial in Uzbekistan of an extradite refugee from Russia. Mirsobir Khamidkariev, an Uzbek citizen, asked international protection in Russia while was extraditing towards his home country that had issued an *absentia* trial against him, see AMNESTY INTERNATIONAL, “Uzbekistan: Fear Of Unfair Trial For Extradited Refugee: Mirsobir Khamidkariev”, EUR 62/008/2014, 6 November 2014, available at: <<https://www.amnesty.org/en/documents/EUR62/008/2014/en/>>. These cases were struck out from the Court's list due to lack of applicants' interest. In particular, Russia has announced in its 2019 Action Plan that investigations carried out showed that applicants currently present in their countries of origin have returned voluntarily. The applicants affirm this circumstance in written testimonies. Such declaration cast the light on a corollary problem that has often invested the Court when dealing with cases of unlawful removal, abduction, illegal transfer, or kidnapping: the lack of effective investigation (*Ermakov case*, *cit. supra* note 9). As the Committee of Ministers affirmed, an effective investigation which must be pursuant even when the case have been struck out from the list (*Yakubov case*, *cit. supra* note 24) as well as when the abduction happened after the final judgments (*Isakov Abdulazhon case*, *cit. supra* note 79, *Azimov case*, *cit. supra* note 9). In the merits, the Ministers' Deputies of the Council of Europe affirmed: “It should be reiterated once again in this context that, due to the applicants' vulnerable situation, statements made by them through the authorities of the requesting States do not obviate the need for effective investigations capable of establishing a convincing account of the events, with due regard for the Court's findings”, see Council of Europe, Committee of Ministers (DH), 1280th Meeting, *cit. supra* note 70.

in general, undermine the authority and the effectiveness of the convention as a constitutional instrument of European public order.”⁸²

In the same decision, the court also found the violation of Art. 46 ECHR for the non-observance of the interim measures and recalled that “the repeated abductions of individuals and their ensuing transfer to the countries of destination by deliberate circumvention of due process – notably in breach of the interim measures indicated by the Court – amount to a flagrant disregard for the rule of law and suggest that certain State authorities have developed a practice in breach of their obligations under Russian law and the Convention.⁸³ Such a situation has the most serious implications for the Russian domestic legal order, the effectiveness of the Convention system and the authority of the Court.”⁸⁴ In this context, the Court recalled Art. 46, noting that “the State’s obligations under the judgment require the resolution of [that] recurrent problem without delay” (para. 259) and that the “decisive general measures” to be taken “should include improving domestic remedies in extradition and expulsion cases, ensuring the lawfulness of any State action in this area, effective protection of potential victims in line with the interim measures indicated by the Court and effective investigation into every breach of such measures or similar unlawful acts”(para. 258).

The Court has recognised that the State is not responsible for these violations only in the presence of an objective impediment that prevented the state from complying with the obligation. More than once, Russia has justified non-compliance by relying on the prior request for diplomatic assurances to ensure respect for the right to life and the prohibition of torture and degrading treatment in the state of transfer. Nevertheless, in numerous cases, the Court has reaffirmed that national legislation or agreements with the receiving state – such as diplomatic assurances obtained after the court indication of the interim measures as well as reasons of state security – are not considered objective impediments. Recently, this in *Usmanov v. Russia*,⁸⁵ the Court revealed that “the domestic courts’ unquestioning reliance on the assurances

⁸² European Court of Human Rights, *Savridin Dzhurayev* case, *cit. supra* note 24, para. 213.

⁸³ KLASFELD, “Rendition Of Alleged Islamist Will Cost Russia”, *Courthouse New Service*, 30 April 2013, available at: <<https://www.courthousenews.com/rendition-of-alleged-islamist-will-cost-russia>>.

⁸⁴ *Ibid.*

⁸⁵ European Court of Human Rights, *Usmanov v. Russia*, Application No. 48917/15, pending, para. 31.

of the Uzbek authorities, despite their formulation in standard terms, appear[ed] tenuous given that similar assurances ha[d] consistently been considered unsatisfactory by the Court in the past.”⁸⁶

In order to curb these illegal transfers and execute the jurisprudence of the Court and the recommendations of the CoE Committee of Ministers, the Plenum of the Russian Supreme Court in 2012 noted “when cooperating internationally in the sphere of criminal justice, the Russian Federation is required to observe the human rights and freedoms guaranteed by its legislation, the generally recognized principles and rules of international law, as well as international treaties of the Russian Federation”.⁸⁷ The Plenum also drew “the attention of [the domestic] courts to the fact that conditions and grounds for refusing extradition are established not only in the Criminal Procedure Code of the Russian Federation and other laws but also international treaties of the Russian Federation”.⁸⁸ Finally, it provided that in cases where the ECtHR has adopted

“interim judicial measures prescribing that the authorities of the Russian Federation refrain from extraditing a person to a foreign state, this should not entail deferred consideration of an appeal against an extradition decision. Proceeding from the provisions of article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a person should not actually be handed over until the European Court of Human Rights cancels the interim measures or a judgment of the European Court of Human Rights comes into effect with respect to the results of consideration of the appeal in connection with which the relevant interim measures was applied.”⁸⁹

Moreover, the RF since 2012 has submitted to the CoE Committee of Ministers several Action Plans within the framework of the *Garabayev Group*. In February 2012, the Russian authorities submitted an Action Plan (DH-DD(2012)152), according to which the Ministry of Justice committed by the end of 2012 to finalise draft legislative amendments to the Code of Criminal Procedure, to bring its provisions on extradition in line with ECHR requirements. Also, on 29 December 2016, draft

⁸⁶The Court had consistently considered similar assurances unsatisfactory, see *Abdulkhakov* case, *cit. supra* note 9, paras.149-150; *Tadzhibayev v. Russia*, Application No. 17724/14, Judgment of 1 December 2015, para. 46.

⁸⁷Supreme Court of the Russian Federation, Resolution No. 11 “On Consideration by Courts of Matters Connected with Extradition for Criminal Prosecution or Execution of a Sentence, as well as Handing Over to Serve a Sentence”, 14 June 2012, p. 103, available at: <<http://base.garant.ru/70190924/>>.

⁸⁸*Ibid.*

⁸⁹*Ibid.*

amendments to the part of the Code of Criminal Procedure concerning extradition procedures were submitted by the government for consideration before the Duma. The amendments provide, *among other things*, that a person subject to an extradition request is entitled to the same procedural rights in all proceedings concerning the measure of restraint as other suspects and accused. Moreover, the draft amendments contain provisions prohibiting extradition in the event of a risk that the person to be extradited will be subjected to various forms of ill-treatment in the requesting State.

However in the same 2016, the Committee of Ministers expressed deep concern about continuing abductions and forced returns from Russia to Uzbekistan, Tajikistan, Kazakhstan, and Kyrgyzstan, where suspects or detainees are at real risk of torture or other ill-treatment, as we have seen above.⁹⁰ It also warned about the lack of effective investigations into abductions and forcible returns; reliance on diplomatic assurances and the excessive reliance on asserted confidence in the legal systems of the Central Asian countries.

In the framework of the recent 2019 Action Plan, the Russian government has underscored that in 2018 there have been no forcible deportations or abductions of applicants which have been granted provisional measures.⁹¹ Nevertheless, the RF has adopted a new escamotage: compulsory deportation of “undesirable aliens” for administrative offences. This new practice consists in the deportation of foreigners, including temporary asylum and refugee seekers that have been convicted for a crime under the Russian law or persons are accused of being members of banned Islamic groups. In such cases, an “exclusion order” can be immediately issued and the court can order their automatic and immediate deportation. Amnesty International cast light on this recent practice stating: “Short of resorting to complicity in the abduction of individuals, the Russian authorities have sought other ways to circumvent their international

⁹⁰ See, Council of Europe, Committee of Ministers (DH), 1280th Meeting, *cit. supra* note 70. See, also TRENINA, “Extradition and expulsion of persons from Russia to countries of Central Asia”, in HUG (ed.), *Shelter from the storm? The asylum, refuge and extradition situation facing activists from the former Soviet Union in the CIS and Europe*, The Foreign Policy Centre, 28 April 2014, available at: <<http://fpc.org.uk/publications/shelter-from-the-storm>>.

⁹¹ Recently, the Court is looking at two cases related to forcible return from Russia to Tajikistan despite the interim measures. See *K.Z v. Russia*, Application No. 35960/18, and *Dalerdzhon Bozorovich Buriyev v. Russia*, Application No. 42874/18.

obligations and have used administrative means, such as deportations for administrative offences, to return individuals to Uzbekistan and Tajikistan.”⁹² Unfortunately, this practice emerged also in some recent decisions of the Strasbourg Court.⁹³

7. – Conclusion

The shortcomings of Russia’s Refugee Law – and the broader legal framework around refugee rights – and the consequent violations of the principle of *non-refoulement* have been noted at length by the ECtHR. The Court has also highlighted recently that the expulsion and deportation of Syrian asylum seekers, as well as the extradition of Uzbekistani and Tajik asylum seekers, would give rise to a violation of Art. 3 ECHR.

By such jurisprudence, Russian Appeals Courts have started to reverse their previous restrictive orientation, granting temporary asylum to those comes before them escaping from conflict areas, especially Syrian citizens. However, such openness – probably due to the so-called ‘Strasbourg effect’ – has been limited by the definitive closure of the Federal Migration Service, the centralisation of the system, the transfer of its functions to the Ministry of the Interior, and the adoption of Russia’s more restrictive migration policies.

The tightening of migration is a product of broader policy changes at the federal level. In particular, from 2012 Russia has sought to reorganise its migration and border policy through to 2025 in line with its new national and regional security strategy.⁹⁴ This strategy has impacted all legislation and policy-making, including regional arrangements such as the Commonwealth of Independent States and the Collective Security Treaty Organization. These policy changes, have seen refugees, and asylum seekers caught up as collateral damage, driving a decrease in applications for international and subsidiary protection of about 35% in 2017.⁹⁵

⁹² AMNESTY INTERNATIONAL, “Amnesty International’s submission to the Council of Europe Committee of Ministers: Garabayev v. Russian federation (no.38411/02) group of cases”, 23 February 2017, available at: <<https://www.amnesty.org/download/Documents/EUR6258392017ENGLISH.pdf>>

⁹³ See *Kholmurodov v. Russia*, Application No. 58923/14, Judgment of 04 July 2016 and *O.O.* case, *cit. supra* note 79.

⁹⁴ See, President of the Russian Federation, Executive Decree “The concept of state migration policy of the Russian Federation for the period until 2025”, 31 October 2018, available at: <<http://legacts.ru/doc/kontseptsija-gosudarstvennoi-migratsionnoi-politiki-rossiiskoi-federatsii-na/>>.

⁹⁵ See UNHCR, *cit. supra* note 45.

However, a new amendment to the Law on Refugees is in the works and is expected to be adopted shortly. It includes provisions that guarantee more protection to those who apply for temporary asylum and greater respect for the principle of *non-refoulement*. The UNHCR has heavily promoted this reform in Russia, and it could be the first step to remedying the critical shortcomings of the current legal framework for refugees and asylum seekers in the Russian Federation.

REFOULEMENT AT THE BORDER UNDERMINES THE BEST INTEREST OF THE CHILD: PRELIMINARY REMARKS

Patrizia Rinaldi

SUMMARY: 1. Introduction – 2. Setting the Context – 3. Protecting Borders across Europe – 4. The Border Blackout – 4.1. *N.D. and N.T. v. Spain* – 4.1.1. Spanish Legislative Framework – 4.2. *Sharifi and Others v. Italy and Greece* – 4.2.1. Italian Legislative Framework – 5. Analytical Findings – 6. Conclusion.

1. – Introduction

Migration is a complex phenomenon composed by multiple intervening elements, and unfolded in diverse phases across time and space. The first critical point in the migratory process is access to a new territory. Detention and retention at the border of this new territory relate to the first stage for those who are to be considered migrants. The lack of clear legal pathways and the externalization of border controls are responsible for the majority of human rights violations. According to Article 2 of the 1997 Resolution of the Council on Unaccompanied Minors, the European Union ('EU') demands to stop illegal human trafficking.¹ However, the Resolution is not

¹ Council Resolution of 26 June 1997 on Unaccompanied Minors Who Are Nationals of Third Countries, 18 March 1998, 97/C 221/03. Art. 2. See also, Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, *considerandum* (2); European Commission, "Towards an EU Strategy on the Rights of the Child - Preliminary inventory

binding on all Member States of the European Union and does not sufficiently protect the vulnerability of minors, as it allows and authorizes the rejection of minors and their repatriation if there are guarantees in the country of origin.

As a primary consideration, child entry and residence should be taken in the framework of appropriate mechanisms and procedures in the child's best interests.² At the border, and without any assessment of their age, minors can also be rejected, under the condition of family reunification in their country of origin, or may be considered simply as irregular migrants, without any age discrimination.

This contribution takes into account the decision of the European Court of Human Rights ('ECtHR') about the *refoulement*³ at the border and the indiscriminate expulsion of minors, which is put into effect disregarding the best interests of the minor as provided for by Article 3 of United Nations Convention on the Rights of the Child ('UNCRC'), together with the provisions set by Article 24 (2) of EU Charter of Fundamental Rights. The latter applies to the entry requirements of the EU asylum *acquis* related to children. It establishes that in all actions relating to minors, public authorities or private institutions of EU Member States ought to "...ensure that the best interests of the child are a primary consideration". Access to the territory of a Member State by irregular migrant minors is dealt with in Article 8 of the European Convention on Human Rights ('ECHR'), which guarantees the right to protect private and family life. Article 8 is often referred to in cases involving the expulsion of children who would otherwise have been assessed as not in need of international protection, including subsidiary protection. Violations under Article 8 have been found in cases involving minors, as forced separation from close family members could have an acute impact on their education, social and emotional stability and identity.

By using interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, the ECtHR has developed a large body of case-law dealing with children's rights. In this chapter, a case concerning Italy and Greece is analysed,⁴ on an illegal practice of *refoulement* along the Hellenic coast to potential asy-

of EU actions affecting children's rights", 31 July 2006, para. 2.

² POBJOY, *The Child in International Refugee Law*, Cambridge, 2017, p. 46 ff.

³ *Refoulement* is the act of forcing a refugee or asylum seeker to return to a country or territory where he or she is likely to face persecution.

⁴ European Court of Human Rights, *Sharifi et al. v. Italy and Greece*, Application No 16643/09, Judgment of 21 October 2014.

lum seekers from Afghanistan in 2009. The analysis will cover also a case concerning Spain,⁵ dealing with the immediate return to Morocco of sub/Saharan migrants who attempted on 13 August 2014 to enter Spanish territory illegally by scaling the fences that surround the North African city of Melilla.

Thus, this chapter focuses on first entry immigration and subsequent expulsion of minors not in accordance with the best interest of the child. It is set to compare two EU Mediterranean frontier countries (Spain and Italy) taking into account ECtHR rulings, and providing a broader perspective at similar cases in Europe. An examination of Spanish and Italian legal provisions and practices regarding rejections will be made to address the question of whether or not the policy of border control prevails upon that of protection to minors.

2. – *Setting the Context*

The reception and protection of unaccompanied migrant minors ('UMM') has been a subject of growing interest and debate within the European Union. In general terms, the protection of UMM lacks of a legal conceptualization of them as a separate category and, thus, of political representation. The EU legal framework regarding unaccompanied juvenile migration was developed in 1997 with the adoption of the resolution on reception, stay, and return (or asylum procedure) of minors. Yet, when the legal framework comes to practical developments, individual States are primarily responsible for the protection of children's human rights and, consequently, the effective realization of the rights of children depends on policies enacted by the governments of those Member States.⁶ This pressing issue has reached in some situations the level of social emergency.

In the context of the ongoing migration crisis, the number of applications for international protection presented by unaccompanied foreign minors has been conspicuous. 30,000 children, of which 12,700 were unaccompanied or separated children, arrived in Europe in 2018.⁷ In 2016, there had been 63,300 migrant children, a

⁵ Id., *N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, Judgment of 3 October 2017.

⁶ ALAKBAROVA, "Lack of Opportunities and Family Pressures Drive Unaccompanied Minor Migration from Albania to Italy", *The Online Journal of the Migration Policy Institute*, 18 July 2019, p. 5 ff.

⁷ United Nations Children's Fund (UNICEF), *Latest statistics and graphics on refugee and migrant children*, 2019, available at: <<https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>>.

number lower by about a third compared to 2015⁸. However, this figure represented almost five times the annual average for the 2008-2013 period of around 12,000 per year.⁹ Faced with the challenges posed by these developments, new interactions among actors related to migration, asylum and child protection have evolved rapidly at EU level, albeit in different ways.

Given this context, on 12 April 2017 the Commission adopted the Communication on “The protection of children in migration”,¹⁰ addressing the rights and needs of all children on the move, which links migration, asylum and the protection of minors. In addition, it shifted attention from UMM and Unaccompanied and Separated Children (‘UASC’)¹¹ to cover children who migrate on their own and with their families together with a working document explaining the implementation of the action plan on “unaccompanied migrant minors” (2010-2014).¹² The Communication, in sum, highlighted the needs of both categories regarding accompanied and unaccompanied minors. To prepare targeted actions for the protection of migrant children, there are numerous areas (in particular identification, reception and protection) on which to pay attention. First of all, there is a need to quickly identify children when they arrive in EU soil. This is crucial for the provision of appropriate treatment according to their age and conditions: all children must have immediate access to legal and health care, psychosocial support and to education, regardless of their status (in adequate facilities and in a friendly environment).

While some encouraging improvements have taken place, it is also noticeable that child protection actors (public and private) have left their counterparts (the migratory system) the leading role in managing migrant and refugee children, while providing training, guidance, support and access to services. The migration agents (public and private) have, in turn, adopted concepts relating to children's rights and incorporated them into their practice. In this dichotomy, migration management agencies conduct the game, transporting the issue of migrant minors, accompanied or separated in the migratory narrative. The nature of the partnership is still evolving,

⁸ *Ibid.*

⁹ UNICEF, *Uprooted. The Growing Crisis for Refugee and Migrant Children*, New York, 2016, p. 21.

¹⁰ European Commission, *Communications on the Protection of Children in Migration*, COM(2017)211 final.

¹¹ UNHCR/Council of Europe, *Unaccompanied and Separated Asylum-Seeking and Refugee Children turning eighteen: what to celebrate?*, Strasbourg, 2014, p. 7.

¹² European Commission, *Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014)*. 6 May 2010, COM 213 final.

but a new discourse has developed which puts children's rights at the core of migration and asylum policy and practice.

The precise content of the principles and standards stemming from the children's rights may vary at national level, depending on each Member State's legislative system. Nevertheless, the jurisprudence of the Court of Justice of the European Union ('CJEU') and of the ECtHR provides an exhaustive list of these principles and therefore defines the fundamental meaning of the child's best interests, as a common EU value in accordance with Article 3 of the UNCRC.

These principles include the right to life, which implies the right to health, to be heard, to family life and to education; but also the ruling out of arbitrariness by executive powers; the right to impartial treatment and non-discrimination; the integral compliance of fundamental rights; and the equal and fair treatment before the law and the tribunals. Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for children's rights and human rights. The best interest of the child is to be considered a legal principle with both formal and substantial components that are intrinsically linked to fulfil both democratic values and fundamental rights.

3. – Protecting Borders across Europe

The EU has competence to legislate in the area of migration and asylum concerning both its land and sea borders. It covers a wide range of migration situations, such as long-term work-related migration, asylum, subsidiary protection or irregular situations. All of these situations also include the governance of migrant children.

The main EU laws on protecting borders are:

- the 'Free Movement Directive'¹³, preamble (para. 24), Article 7, Article 12, Article 13 and Article 28 (3) (b);
- the 'Return Directive'¹⁴, Article 17;

¹³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 (the 'Free Movement Directive').

¹⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive').

- the 'Directive on Reception Conditions',¹⁵ Article 11.

Various legal instruments regulate the migration of EU nationals in a more straightforward manner. Instead, the freedom of movement of third-country nationals is subject to more restrictions. The latter is partially regulated by EU law and partially regulated by national immigration laws.

In the context of international protection procedures, children are regarded as "vulnerable persons" whose specific situation Member States are required to take into account when implementing EU law.¹⁶ This requires Member States to identify and accommodate any special provision that asylum-seeking children in particular might need when they enter the host State. Article 24 of the EU Charter of Fundamental Rights applies to the entry and residence requirements of the EU asylum *acquis* as it relates to children. It implies that in all actions relating to children, whether taken by public authorities or private institutions, EU Member States ensure that the best interests of the child are a primary consideration. These underpin the implementation of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (the 'Asylum Procedures Directive').¹⁷ They also apply to the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining any application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin Regulation) as they relate to children.¹⁸ Both texts also contain specific guarantees for UMM, including their legal representation.

The Regulation (EU) 2016/399 on the Schengen Borders Code requires border guards to check that those persons accompanying children have parental care over them, especially when the children are with an adult and there are doubts about the legitimacy of the accompanying persons. In this case, the border guard must investigate further for any inconsistencies or contradictions in the information provided. If

¹⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, (the 'Reception Directive').

¹⁶ See *ibid.* Art. 21 and Return Directive, Art. 3 (9).

¹⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Art. 25(6), (the 'Dublin Regulation').

¹⁸ Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Art. 6.

children are travelling unaccompanied, border guards must ensure, by means of thorough checks on travel and supporting documents, that the children are not leaving the territory against the wishes of the person(s) legitimate responsible for their parental care.¹⁹ However, according to the standards of the Council of Europe (CoE), States have the right to control the entry, residence and expulsion of foreigners. As a matter of consolidated international law and without prejudice to the treaty obligations, including the ECHR, it is legitimate to fully control their borders.

Expulsion, however, takes effects for adults and for minors, despite the guarantees that European and international law has put in place. The subject of rejections and related appeals is also regulated at supranational level. Police authorities should comply with the bilateral agreements stipulated with the migrants' countries of origin, which however, cannot be used as justification for the derogation of the constitutional or EU rules. Article 13 para. 1 of Directive 2008/115 / EC, concerning appeals against return decisions, provides that:

“A third-country national concerned shall be granted effective remedies against decisions related to repatriation referred to in Article 12 (1) or to request a review before a competent judicial or administrative body or a competent body composed of impartial members offering guarantees of independence”.

In any case, Article 13 of Regulation No. 562 of 2006 (Schengen Borders Code)²⁰ stipulates that '*refoulement*' may be ordered only with a motivated provision stating the precise reasons for such a decision. It is to be adopted by a competent authority according to national legislation and is applicable immediately. Nevertheless, the rejected persons have the right to appeal. Appeals are settled in accordance with national legislation. Third-country nationals are also given written indications regarding contact points that can provide information to the representatives entitled to act on behalf of third-country nationals in accordance with domestic law. However, the opening of the appeal procedure does not have suspensive effects on the refusal provision. Forced repatriation procedures are characterized by speed, following the adoption of rejection measures. Thus, the timeliness of the appeal is essential, as is access to legal assistance.

¹⁹ Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders Annex VII, 6 (the 'Schengen Border Code').

²⁰ *Ibid.*, Art. 13.

It is therefore necessary to distinguish between the immediate border rejection that implies a limitation of the freedom of movement (as the person physically is prevented to entry into the territory, although he/she remains free to circulate in the space outside the State territory), and all other forms of rejection, with or without a formal provision (in the latter instance violating Schengen Borders Regulation).²¹

Further distinctions can be made regarding asylum. The regulation provides a list of factors to help the authorities to determine what is in the best interests of the child, for those seeking asylum ('UASASC')²². This includes the possibility of family reunification of the minor as well as the well-being and social development of the child.²³ The regulation includes considerations on safety and security, in particular where there is a risk that the child could be a victim of trafficking in human beings; and the child's own opinion and information, in accordance with his age and maturity.²⁴ Concerning asylum-seeking children whose claims have been rejected, authorities must apply the best interests of the child relating to the process of return of unaccompanied children.²⁵ Moreover, before removing an unaccompanied child from a Member State, the authorities of that Member State must secure that the child is to be returned to a member of his/her family, a nominated guardian or to adequate reception facilities in the State of return.²⁶

4. – *The Border Blackout*

Although the ECHR does not refer to the principle of the best interests for the child, and despite it had preceded the UNCRC by over thirty years, the ECtHR has produced a long series of interpretations where the best principle is a 'hidden' protagonist.²⁷ Thus, in the parental child abduction case of *Neulinger and Ahuruk v Switzerland*, the Court held that there is a broad consensus in support of the idea that in all decisions concerning children, their best interest must be paramount.²⁸

²¹ In this case in violation of Article 14 of the the Schengen Border Code.

²² UNHCR/Council of Europe, *cit. supra* note 11.

²³ SCHWEIGER, "Should states prioritize child refugees?", *Ethics & Global Politics*, 2019, 12:2, p. 48 ff.

²⁴ Dublin Regulation, Art. 6.

²⁵ Return Directive, Art. 10

²⁶ *Ibid.*, Art. 10(2).

²⁷ SMYTH, "The best Interests of the child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?", *European Journal of Migration and Law*, 2019, p.70 ff.

²⁸ European Court of Human Rights, *Neulinger and Ahuruk v Switzerland*, Application No. 41615/07,

In this chapter, and for the sake of comparison, the choice of the two judgments: *N.D. y N.T. v. Spain*,²⁹ and *Sharifi and Others v. Italy and Greece*³⁰ has taken into account the similarities of the events, as well as the modality and commensurability of the Court's judgments. Both Spain and Italy had been in the not too distant past migrant countries themselves, but now they face complex migratory flows for which they are partly unprepared.³¹

The Court ruled on Article 4 of Protocol 4 on collective expulsions. The aforementioned Protocol, drawn up in 1963, was the first international treaty to deal with collective expulsion, and its purpose was to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and without allowing them to present their arguments.

In the two cases examined, Spain and Italy were both convicted of collective expulsions that, among other things, did not allow identification and violated the child's right to protection. The "*devolución en caliente*",³² as well as the collective expulsions, violated article 6 of the UNCRC. The expulsion *de facto* and without identifying the migrants who were in the border areas prevented the identification of the UMM.

4.1 – *N.D. and N.T. v. Spain*

On 3 October 2017, the third section of the ECtHR held responsible Spain for the violation of Article 4 of Protocol No. 4 ECHR (prohibition of collective expulsions of aliens), and for the violation of Article 13 ECHR (right to an effective remedy)³³.

The Court noted that the applicants, N.D. and N.T., had been expelled and sent back to Morocco against their wishes and that the removal measures were taken in the absence of any prior administrative or judicial decision. At no point they were subjected to any identification procedure by the Spanish authorities. The Court concluded that, in those circumstances, the measures were indeed collective in nature,

Judgment (GC) of 6 July 2010, para.135.

²⁹ *Id.*, *N.D. y N.T. v. Spain*, II, *cit. supra* note 5.

³⁰ *Id.*, *Sharifi and Others v. Italy and Greece*, *cit. supra* note 4.

³¹ In the case of *Sharifi and Others* Greece is involved too, as being another country on the southern border of the EU, to complement the scenario of the three main migratory routes to the 'fortress Europe'. Definition used in COOPER, "Historical sociology, 'Fortress Europe' and the EU's frontier politics", Paper presented to the Institute of Human Sciences Fellows Colloquium, 5th November 2018, p. 10 ff.

³² Summary return is the practice of expelling an irregular immigrant from the country at the time he/she attempts to cross the border, without any guarantee of the country's foreign legislation being applied.

³³ European Court of Human Rights, *N.D. and N.T. v. Spain*, *cit. supra* note 5, para. 15.

according to the article 4 of Protocol n.4.

The applicants were, respectively, Malian and Ivorian nationals; they were born in 1986 and 1985, both arrived in Morocco in March 2013 and stayed for about nine months in the makeshift camp on Gurugu Mountain, near the border crossing around Melilla³⁴. After scaling the fence, they were immediately arrested, handcuffed and returned to Morocco by members of the Spanish *Guardia Civil*.³⁵ At no point were their identities checked; neither did they have an opportunity to explain their personal circumstances or to receive assistance from lawyers, interpreters or medical personnel. They were subsequently transferred to the Nador police station, and then to Fez, more than 300 km away from Melilla, in the company of a group of other adult migrants who had attempted to enter Melilla on the same date.

According to the Court, there were substantial failings to respect fundamental rights despite the fact that Spain had been condemned in a similar case for the violation of Article 13 (entitlement to an effective remedy) in a previous judgment: *A.C. and Others v. Spain*.³⁶ The latter judgment had already clearly ruled that the Spanish authorities should have suspended the procedure for removal of international protection seekers until their allegations about the risks they faced in their country of origin had been thoroughly examined.

Following a request from Spain, the case of *N.D. and N.T.* was referred to the Grand Chamber of the ECtHR. The Spanish government submitted on August 17, 2018 new documentation,³⁷ insisting on defending the legality of these express expulsions. The centre-right Rajoy Government presented a circular letter of a 'restricted' nature prepared by the previous Socialist Minister of Foreign Affairs, Miguel Angel Moratinos, and sent in 2009 to all ambassadors and consular offices with instructions in the implementation of the new asylum law. With this circular, the Government intended to strengthen some of the arguments included in its appeal to

³⁴ The Spanish enclaves Ceuta and Melilla are on the northern shores of Morocco's Mediterranean coast.

³⁵ Spanish National Police Guard.

³⁶ European Court of Human Rights, *A.C. and Others v. Spain*, III, Application no. 6528/11, Judgment, 22 April 2014, para. 88.

³⁷ According to Article 43 ECHR, and within three months from the date of a Chamber judgment, any party may request exceptionally that the case be referred to the 17-Member Grand Chamber of the Court. European Court of Human Rights, Grand Chamber hearing in the case *N.D. and N.T. v. Spain* Cases: 8675/15 and 8697/15, Press release ECHR 314, 26 September 2018.

defend the expulsion of N.D. and N.T. in August 2014.³⁸ The hearing in Strasbourg took place on 26 September 2018. A final judgment is expected in the course of 2019.

4.1.1. Spanish Legislative Framework

The peculiarity of the Spanish southern borders is that while Spain and Morocco are largely separated by the Mediterranean Sea, the countries share a short land border at the Spanish enclaves of Melilla and Ceuta in North Africa. Both land borders are ‘sealed’ with a six-metre-high fence.³⁹ For many years, Ceuta and Melilla have been migrant gates of access to Europe from the African continent, the so-called Western Mediterranean route. A mixed flow of immigrants enters through them, mainly from Sub-Saharan Africa and Syria.

The migrant population entering Spain is a heterogeneous group that includes asylum seekers, involuntary migrants (victims of trafficking in human beings), unaccompanied minors and economic migrants who seek a better life for themselves and their families. While their reasons for leaving their land of origin may vary considerably, they have all been exposed to the same harsh conditions on their itinerary to Spain, and have faced similar risks.

Spain complies with the principle of *non-refoulement* enshrined in the 1951 Convention on the Status of Refugees 1951, in the Charter of Fundamental Rights of the European Union, and in the legal instruments of European Union that make up the Common European Asylum System, with the Law 12/2009.⁴⁰ All of them regulate the right to asylum and subsidiary protection and include provisions applicable to all applicants for international protection. In fact, the Spanish Organic Law 4/2000 – Articles 49.a), 51.1.b) and 53.1) – has overcome the punitive concept of the previous Organic Law of 1 July 1985 No. 7/85, by changing the concept of expulsion. Furthermore, it requires that in the case of very serious infringements of letters a), b),

³⁸ EL PAIS, “El Gobierno insiste en defenderlas devoluciones en caliente ante Estrasburgo”, 26 septiembre 2018, available at: <https://elpais.com/politica/2018/09/25/actualidad/1537889632_746605.html>.

³⁹ The greater part of the border between Beni Ansar, Morocco and Melilla, Spain is delineated by a security zone containing six rows of fences: three on Moroccan territory and three on Spanish territory. CASTAÑO and ESTRADA, “Situation report at the Spanish-Moroccan border”, in *On Europe’s External Southern Borders*, Budapest, 2018, p. 17 ff.

⁴⁰ Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria. Modified by: Ley 2/2014, de 25 de marzo BOE núm. 74, de 26 de marzo.

c), d) and f) of Article 53, a fine shall be imposed.⁴¹

Likewise, and following the provisions established in Article 2 of the 1997 Resolution of the Council of the European Union,⁴² Spain ought to pursue the policy of combating the trafficking of human beings, with the eventual rejection at the border and the devolution of unaccompanied minors.⁴³ However, Article 57.5b of the Ley Orgánica 4/2000, prohibits the expulsion of minors in *desamparo*⁴⁴, including them in the broadest category of serious cases and in situations of vulnerability.⁴⁵

The application of the Immigration Law⁴⁶ that entitles Spain to defend its borders, together with the Citizen Security Law,⁴⁷ which replaces the Organic Law 1/1992, of the same name, has created a loophole for the regulation of border rejection around the perimeter of Ceuta and Melilla.

Summary returns, which found regulatory accommodation in the above mentioned Citizen Security Law through the newly created legal figure labelled ‘border rejection’, refers to the act of delivering back migrants intercepted on jumping the border fence separating Morocco and the Spanish cities of Ceuta and Melilla. Spain appealed to the Court because when there is the possibility of a legal passage, the Spanish State has the right and the obligation to protect the border against attempts to illegal passage.⁴⁸ It is important to mention also the Mobility Partnership between the Kingdom of Morocco, the European Union and its Member States, which was signed in Brussels on 3 June 2013, as well as the Agreement between the government of the Kingdom of Spain and the government of the Kingdom of Morocco on the free movement of persons, transit and the readmission of foreigners entering the

⁴¹ Ley Orgánica 4/2000, de 11 de Enero, sobre derechos y libertades de los extranjeros en España y su integración social (Arts 49.a), 51.1.b) y 53.1), en regulación mantenida por la reforma operada por Ley Orgánica 8/2000, de 22 de Diciembre (Arts 53.a), 55.1.b) y 57.1).

⁴² *Cit. supra*, note 1, Art. 2

⁴³ Real Decreto 155/1996 de 2 febrero, por el que se aprueba el Reglamento de ejecución de la Ley Orgánica 7/1985, Art. 62.4.

⁴⁴ *Abandonment* in Spanish.

⁴⁵ Ley Orgánica 4/2000, *cit. supra* note 41, Art. 57.5.b.

⁴⁶ Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, Art. 11.

⁴⁷ Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana BOE núm. 77, de 31 de marzo.

⁴⁸ Gran Chamber hearing on returns to Morocco of migrants who scaled the fence in Melilla, Twitter on 16/09/2018 by @ECHR_Press.

country illegally, which was signed in Madrid on 13 February 13 1992. The implementation of these agreements led to a decrease in the number of arrivals in the border fences. Moreover, a lack of coordination among competent authorities was noted with regard to arrivals on the Andalusian shores, while deficiencies were identified in the provision of information on the right to apply for protection.⁴⁹

4.2. – Sharifi and Others v. Italy and Greece

On 21 October 2014, the ECtHR held Italy and Greece responsible for the collective and arbitrary *refoulements* of Afghan, Sudanese and Eritrean migrants from the port of Ancona to Patras, in 2009.

The Second Section of the Court, in the case *Sharifi et al against Italy and Greece*, found appropriate the application concerning the rejection of summaries from the Adriatic ports of 35 asylum seekers (including 10 children). With this ruling, the ECtHR reiterated the principle already expressed in *M.S.S. against Belgium and Greece*, namely that concerning the notion of ‘safe country’.⁵⁰

The Court holds that no collective expulsion can be carried out in the application of the Dublin Regulation, which must be interpreted and applied in accordance with the ECHR, following the individual examination of each person concerned. According to the Court, Italy and Greece had violated ECHR and, in particular:

- Article 3 (Prohibition of torture and other inhuman or degrading treatment),
- Article 13 (Right to an effective remedy),
- Article 4 of Protocol No. 4 (Prohibition of collective expulsions).

The case concerned 35 applicants, 32 of Afghan origin, 2 Sudanese and one Eritrean, some of whom, at the time when the events occurred, were minors. They had tried to enter in Italy between January 2008 and February 2009. After passing through Greek territory, they were rejected by the border police at the ports of Bari, Ancona and Venice. Their rejection was motivated on the basis the bilateral agreement of the Italian and Hellenic governments concluded in 1999.⁵¹ Although the applicants complained about the violation of Articles 2, 3 and 13 ECHR against Greece

⁴⁹ Spanish Commission on Refugee Aid / Comisión Española de Ayuda Al Refugiado CEAR, Input to the EASO Annual Report 2018.

⁵⁰ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment 21 January 2011, para. 338.

⁵¹ Camera Dei Deputati, Accordo tra Italia e Grecia sulla riammissione delle persone in situazione irregolare, Rome, 30 April 1999.

and the infringement of Articles 2, 3, 13 and 34 ECHR against Italy, the Court upheld the violation of Articles 3 and 13 against Greece and the violation of Articles 2, 3 and 13; plus Article 4 of Protocol 4 for Italy. In addition to the already accepted criterion of collective and indiscriminate expulsion, it should be noted that the Court held responsible Italy for the violation of Article 3 because the applicants did not have access to the request for international protection, also due to their age.

The CoE Committee of Ministers (in its Deputy meeting of 12-14 of March 2019) rejected the requests put forward by the Italian government to close the supervision processes following the *Khlaifia v. Italy* and *Sharifi v. Italy* judgments.⁵² On 26 June 2019, the Italian authorities provided information on the legislative measures adopted to reorganise Italy's migrant reception system. In particular: (a) the Legislative Decree No. 142 of 18 August 2015, which transposed into national law directives 2013/33/EU and 2013/32/EU; (b) the Legislative Decree No. 220 of 22 December 2017 on international protection for unaccompanied minors; and (c) a circular letter sent out on 29 June 2011 which expressly forbids "... repatriations without first examining the individual situation of the people concerned".⁵³ The information provided is under assessment⁵⁴ as "leading repetitive".⁵⁵ This is a leading Court judgment with innovative reasoning. In this case systemic and structural problems have been found. Such a case requires the adoption of new general measures to prevent similar violations in the future.

⁵² The Committee asked Italian Authorities to provide further information, CM/Del/Dec(2019)1340/H46-9.

⁵³ Department of Public Security, 29 June 2011.

⁵⁴ Previously the authorities had provided information on 26 September 2017 (DH-DD(2017)1099), followed by an action report on 23 January 2019 (DH-DD(2019)77). On 18 January 2019, the Office of the United Nations High Commissioner for Refugees ('UNHCR') submitted a communication pursuant to Rule 9.3 of the Rules of the Committee of Ministers (DH-DD(2019)90). Two communications were also submitted pursuant to Rule 9.2 of the Rules of the Committee of Ministers by the *Associazione per gli studi giuridici sull'immigrazione* ('ASGI') (DH-DD(2019)176) and *The Aire Centre* (DH-DD(2019)191) on 11 and 15 February 2019 respectively. Moreover, the Italian authorities submitted additional information on 12 March 2019, during the 1340th meeting (DH) of the Committee of Ministers (DH-DD(2019)275). See, Council of Europe, Committee of Ministers (DH), 1340th Meeting, *Sharifi and Others v. Italy and Greece*. Case: 16643/09 – Pending – Enhanced Procedure - Judgment of 21 October 2014 – Final Judgment of 21 January 2015, Leading Repetitive, 12 March 2019.

⁵⁵ European Court of Human Rights, *Annual Report 2018*, Strasbourg, 2019, p.150 ff. 'Leading cases': these are cases revealing new structural and/or systemic problems that require new general measures. Leading cases are identified by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution.

4.2.1. Italian Legislative Framework.

Since its original formulation, the Legislative Decree⁵⁶ 286/1998⁵⁷ provided for the prohibition of the expulsion of the minor under eighteen years and unaccompanied minors (except cases of expulsion for “reasons of public order or State security”, according to Article 13, para. 1, on prevention of acts of terrorism). However, the Law 47/2017⁵⁸ added to Article 19 the new paragraph *I-bis*, according to which “...under no circumstances can unaccompanied foreign minors be rejected at the border”. It provided disciplinary certainty to a widely debated issue. Likewise, this Law aims at solving some practical problems regarding the reception system.⁵⁹

The reception system for unaccompanied minors in Italy, confirmed by Law 142/2015 and more recently by Law 47/2017, specifically deals with UMM. The role of the Italian Ministry of Interior⁶⁰ in the governance of unaccompanied minor migrants has been strengthened. Previously, this role had been under the responsibility of the Ministry of Labour and Social Policy⁶¹, which financed reception centres. The Ministry of Interior continues to be responsible for the Information System on Minors and tracks their movement and location in Italy.⁶² Since 2017, institutional interventions are described in the National Action Plan to deal with the extraordinary flows of non-EU citizens, families and unaccompanied migrants.⁶³

At the time of crossing the border, the condition of UMM is ascertained by verifying the legitimacy of the adults with whom the child is accompanied. On this point, the new text of Article 33, c. 1, Law 184/1983,⁶⁴ says that:

⁵⁶ A legislative decree is a normative act having the force of law adopted by the executive power (Government) by express and formal mandate of the legislative power (Parliament).

⁵⁷ Decreto Legislativo 286/1998, Testo Unico sull’Immigrazione, Art. 19, c. 2, lett.a t.u..

⁵⁸ Legge 7 aprile 2017, n. 47, “Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati”..

⁵⁹ *Ibid.* As a solution to minors escaping from the first reception facilities, the permanency timing in these structures has been reduced from 60 days to 30 days .After this, unaccompanied minors will be allocated in the centres of the SPRAR (Protection System for Refugees and Asylum Seekers) throughout Italy.

⁶⁰ *Ministero dell’Interno.*

⁶¹ *Ministero del Lavoro e delle Politiche Sociali.*

⁶² DEMURTAS et al., “In search of Protection: Unaccompanied Minors in Italy”, *Center for Migration Studies of New York*, 2018, p. 22 ff., available at: <<https://cmsny.org/publications/2018smc-cse-uam/>>.

⁶³ *Ministero dell’Interno, Circolare* 6909, “Piano nazionale per fronteggiare il flusso periodico di cittadini extracomunitari adulti, famiglie e minori stranieri in accompagnati”, 1 August 2014.

⁶⁴ Legge 4 maggio 1983, n. 184, “Disciplina dell’adozione e dell’affidamento dei minori”.

“... minors who do not have an entry visa issued pursuant to article 32 of this law and who are not accompanied by at least one parent or relatives by the fourth degree will apply the provisions of art. 19, paragraph 1-bis, of the consolidated text referred to in Legislative Decree 25 July 1998, n. 286”.

The provisions of Annex 7, par. 6, of the Schengen Borders Code⁶⁵ stipulate that, in the case of accompanied minors, the border guard ought to verify the existence of parental responsibility towards the minor,

“... especially, if the minor is accompanied by an adult only and there are serious reasons to believe that the child has been illegally removed from custody of the person or persons legally exercising parental authority over him. In the latter case, the border guard carries out further investigations, in order to identify inconsistencies or there are contradictions in the given information, the existence of parental responsibility is verified”.

In the case of minors travelling alone, it is necessary to ensure, “... by means of thorough checks of travel documents and supporting documents, that the child does not leave the territory against the will of the person or persons exercising parental authority over him”.

Guidance centres located in the transit areas of the border crossings are to be improved, in accordance with the provisions of Article 11 c. 6 of the Consolidated Act,⁶⁶ now implemented through agreements stipulated by the Minister of Interior with some selected institutions, although, *de iure condendo*, the legislative provision of the indispensable presence at the border crossings of a third party, guarantor of the right to *non-refoulement* and of the prohibition of refusal of minors⁶⁷ would be much more effective.

According to the combined provisions of Articles 14 and 19 of the Consolidated Act⁶⁸ the child cannot be the subject of administrative measures of detention, as well as with regard to minor applicants for asylum, following Article 19, c. 4, of the legislative decree 18 August 2015, n. 142 (which implemented the 2013/32 / EU and 2013/33 / EU directives).⁶⁹

⁶⁵ Schengen Border Code.

⁶⁶ Decreto Legislativo 25 luglio 1998, n. 286, Testo Unico, *cit. supra* note 57, Titolo II - Disposizioni sull'ingresso, il soggiorno e l'allontanamento dal territorio dello Stato.

⁶⁷ BHABHA, *Child Migration & Human Rights in a Global Age*, Princeton, 2016, pp. 20 ff.

⁶⁸ Decreto Legislativo 25 luglio 1998, n. 286, Testo Unico, *cit. supra* note 57.

⁶⁹ BIEL, “Detention of Minors in EU Return Procedures: Assessing the Extent to Which Polish Law is

Concerning the prohibition of expulsion of the UMM, subtracting this competence from the office of the Ministry of Labour and Social Policy,⁷⁰ Article 8, Law 47/2017⁷¹ provides that the repatriation is to be voluntary and consensual, and can only be adopted:

“... where reunification with family members in the country of origin or in a third country corresponds to the child's best interests, by the competent court for minors, after hearing the minor and the guardian and considering the results of the family surveys in the country of origin or in a third country and the report of the competent social services regarding the situation of the minor in Italy.”⁷²

During 2018, the Italian government delayed or hindered access to individuals rescued at sea, including applicants for protection, such as unaccompanied minors.⁷³

5. – Analytical Findings

A specific legal treatment aimed at immigrant minors in general and those unaccompanied minors in particular is a very important manifestation of the immigration policy of any State. From the analysis of the literature and case studies, the treatment of unaccompanied migrant minors, in Spain and Italy, exposes the vulnerability of multiple principles of the UNCRC. On the one hand, there is the violation of some principles that govern the Convention, such as the principle of non-discrimination (Art. 2), and the best interests of the child (Art. 3). On the other hand, there are concrete violations of rights such as, among others, the right to receive adequate protection, taking into account that they are outside their country of origin, in a condition of vulnerability.⁷⁴

The very concept of vulnerability is key in the court sentences condemning collective expulsions, which is defined as “... any measure of the competent authorities

Reflective of the EU Migration Regime and International Human Rights Standards”, *Central and Eastern European Migration Review*, 2017, pp. 69-102.

⁷⁰ *Direzione Generale per l'Immigrazione del Ministero del Lavoro*.

⁷¹ Legge 7 aprile 2017, n. 47, *cit. supra* note 58.

⁷² *Ibid.* Art. 8

⁷³ MORSELLI, *Testo Unico dell'Immigrazione: Commentario di legislazione, giurisprudenza, dottrina*, Pisa, 2019.

⁷⁴ DALRYMPLE, “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied”, *Boston College Third World Law Journal*, 2006, pp. 1-39.

compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”.⁷⁵

Let us remind that the principle *non-refoulement* in international law prevents a State from delivering an individual to another State in which there are serious risks to his life or his physical integrity. It also prohibits the surrender of a person to a State that could turn it over to a third State where that risk exists, according to the interpretation by the Court of Article 3 ECHR (Article 33 of the 1951 Convention on the Status of Refugees).

According to the drafters of Protocol No. 4, the word ‘expulsion’ should be interpreted in the generic meaning of ‘driving away from a place’, as the Court stated in the *Hirsi Jamaa and Others v. Italy* case,⁷⁶ when referring to *the travaux préparatoires* of Protocol No. 4. It follows the pattern of other sentences against Italy as when the Court considered that an applicant had been brought back to Tunisia against his will.⁷⁷

The circumstances of the case *Sharifi and Others* took place at the time of the great wave of landings of migrants in the island of Lampedusa in 2011, but the issues raised by the applicants, as well as the principles confirmed by the Grand Chamber, are more relevant than ever concerning the current management of the ‘migratory question’. Now the institutions of the European Union and the Member States face a pressing need to deal with the so-called ‘hotspot approach’, which Italy adopted in the framework of the immediate actions envisaged by the European Agenda for Migration⁷⁸ and the expulsion procedures negotiated by the agreements between Italy and the non-European countries. Responsibility for the treatment of migrants and the violation of human rights can be regarded also as a responsibility of agreements between the European Union and third countries.

The same applies to the other frontier object of this study. It is important to mention the ‘Mobility Partnership’ between the Kingdom of Morocco, the European Union and its Members States,⁷⁹ as well the Agreement between the government of the

⁷⁵ European Court of Human Rights, *Conka v. Belgium*, Application No. 51564/99, Judgment 5 February 2002, para. 59.

⁷⁶ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (GC) of 23 February 2012, para.174.

⁷⁷ European Court of Human Rights, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment (GC) of 15 December 2016, paras. 243-244.

⁷⁸ *Ministero dell’Interno, Circolare* of 6 October 2015.

⁷⁹ The Mobility Partnership was signed in Brussels on the 3 June 2013.

Kingdom of Spain and the government of Kingdom of Morocco, on the free movement of foreigners entering the country illegally, which was signed in Madrid, on the 13 February 1992.

With reference to minors, the Court has repeatedly established that it is crucial to bear in mind that the child's extreme vulnerability is the decisive factor that takes precedence over considerations relating to the status of illegal immigrant.⁸⁰ Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.⁸¹ The Court has insisted in the interpretation that the Convention on the Rights of the Child encourages States to act appropriately to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents.⁸²

In application of the general principle, the Court establishes that the expulsion must be organized following a case-by-case assessment. There ought to be procedures prior an expulsion decision (as well as *refoulement*) against vulnerable persons (disabled, elderly), minors, members of single-parent families with minor children, or victims of serious psychological, physical or sexual violence. Expulsions must be conducted in such ways that are compatible with individual personal situations. No form of collective and indiscriminate returns could be justified by reference to the Dublin system.

6. – Conclusion

This chapter has analysed issues revolving around the best interest of the child, even if the status of such a general principle is notoriously problematic.⁸³ It has been described as a principle of interpretation or principle of duty. The concept becomes even more labile in the context of migration. So the meaning is doubled, the best

⁸⁰ See, *inter alia*, European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03; and *Popov v. France*, Application Nos. 39472/07 and 39474/07. In doctrine, see RINALDI, *The Best Interest of the Child: Tabhita Case*, Master's Thesis, Madrid: Repositorio Universidad Pontificia Comillas, 2012, p. 42 ff.

⁸¹ BYRNE, "Migrant, refugee or minor? It matters for children in Europe", *Forced Migration Review*, 2017, p. 94 ff.

⁸² European Court of Human Rights, *Popov v. France*, Application Nos. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 91.

⁸³ POBJOY, "The best interest of the child principle as an independent source of international protection", *Inttentional & Comparative Law Quartely*, 2015, pp. 327-363.

interest can mean to enter or be rejected by the country of destination. The principle can also be used to control immigration and can become a tool for the protection of the border and not for the protection of the child. Hence the defence and definition of vulnerability, which the Court provides in its judgments, goes through and exceeds the concept itself, defending the minor (or the alleged minor), in condemning collective expulsion. In the *Hirsi Jamaa and others c. Italy* ruling, the Court considered the vulnerability of migration regardless of the age of the subjects⁸⁴.

Domestic laws often circumvent vulnerability. Spain, in its recent Organic Law 4/2015,⁸⁵ has ‘legalized’ the hotspot returns. It should be noted that, against this law, two unconstitutionality appeals have been filed and admitted, and many national and international public bodies have expressed their opposition to it.⁸⁶ The Citizen Security Law should be changed to put an end to the immediate devolutions that take place in Ceuta and Melilla, or alternatively guarantees should be established on minors. The also called ‘hot return’ of UMM is not only an illegal act, which does not respect national and international laws and violates human rights, but can be regarded as a violent act given the abruptness with which it is carried out.

Therefore, the Spanish Ombudsman has recommended to the Minister of Interior⁸⁷ that the procedure should contemplate the need to issue an administrative resolution, with legal assistance, an interpreter and information about potential legal actions.⁸⁸ All this should be accomplished in accordance with the Judgment of the Constitutional Court 17/2013.⁸⁹ It has also recommended to the Home Office Secretary, that written evidence should be incorporated in the file stating that the foreigner has been provided with information on international protection and that, through an adequate mechanism of identification and referral, international protection needs have been verified, that he/she is a minor or that there is a concurrence of signs that he may be a victim of trafficking in human beings. These recommendations have not yet been accepted.

The main obstacles regarding access to the Spanish territory are faced mostly at

⁸⁴ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 81, paras. 125-126.

⁸⁵ Ley Organica 4/2015, *cit. supra* note 47.

⁸⁶ The ‘Consejo General de la Abogacia Espanola’ (Committee against Torture and the Committee on the Rights of the Child, in its periodical report of Spain).

⁸⁷ *Ministro del Interior* (author’s translation).

⁸⁸ Defensor del Pueblo, *V y VI Informe sobre la aplicacion de la convención sobre los Derechos del Niño y sus Protocolos Facultativos*, INDH, Madrid, 2017, pp. 40-45.

⁸⁹ *Resolucion del Tribunal Constitucional* n. 17/2013, of 31 January 2013.

the Ceuta and Melilla borders and checkpoints. These physical obstacles are mainly due to the impossibility of asylum seekers to cross the border and exit Morocco. One of the ways used by migrants and asylum seekers to enter the territory is to attempt to climb border fences in groups. The increasing numbers of attempts to jump border fences occur because migrants and asylum seekers (mostly sub-Saharan nationals) still face huge obstacles in accessing the asylum points at the Spanish border, due to the severe checks of the Moroccan police at the Moroccan side of the border. There are several reported cases concerning refusal of entry, *refoulement*, collective expulsions and *pushbacks*, including incidents involving up to a thousand persons during 2017.⁹⁰ In addition, the Human Rights Committee⁹¹ has expressed its concern about the ‘hot expulsions’ that are taking place on the borderline of the territorial demarcation of Ceuta and Melilla.

The Italian case is no different from the Spanish one, and the rejections towards Libya continue despite the rulings of the ECtHR. In January 2018, the ECtHR declared admissible the appeals of five Sudanese citizens, who on 24 August 2016 were victims of a collective *refoulement* in Ventimiglia, near the French border. Sudanese migrants subject to a raid in the Ligurian town illegally locked up in a hotspot in Taranto, with attempted forced repatriation.⁹² Some of these migrants have actually been forced to return to Sudan, although their situation could fall into the status of ‘international protection’.⁹³ The ban on disembarkation in Italian ports can be considered as a form of ‘collective refoulement’, and cases of omitted sea rescue are starting to arrive at the Court, like that of the Sea Watch3 boat on 5 November 2017⁹⁴.

Collective expulsions or *refoulement* do not allow the State to examine the situation of each individual or to assess the risk of serious personal damage. For this reason, this type of expulsion is prohibited in numerous international treaties (see Article 4 of Protocol 4 ECHR, and Article 19.1 of the Charter of Fundamental Rights of the European Union).

⁹⁰ Asylum Information Database, *Country report: Spain*, 2017 p. 16 ff.

⁹¹ Human Rights Committee, UN Doc. CCPR/C/ESP/6 of 14 August 2015, para. 18.

⁹² European Court of Human rights, *W.A. and Others v. Italy*, Application No. 18787/17, lodged on 13 February 2017.

⁹³ The appeals filed by the Sudanese citizens against the Italian Government for collective rejection have been declared admissible. On August 24, 2016, the Italian Police Chief and his Sudanese counterpart, according to the “Memorandum d’intesa tra Italia e Sudan”, Roma 3 agosto 2016.

⁹⁴ European Court of Human rights, *S.S. and Others v. Italy*, Application No. 21660/18, lodged on 3 May 2018.

Minors are of great concern for the Court according to Strasbourg jurisprudence.⁹⁵ The ECtHR has also participated in developing legal protection for children through its jurisprudence. At level of the EU, the entry into force of the Lisbon Treaty recognises the importance of fundamental rights, including children's rights on the EU agenda⁹⁶. The reason given was the the particular vulnerability of minors⁹⁷. In accordance with Directive 2013/32/EU, of the European Parliament and of the Council, of 26 June 2013, on common procedures for the granting or withdrawal of international protection, Member States should endeavour to identify applicants who need special procedural guarantees for reasons, among others, of their age. With the implementation of 'systematic collective *refoulements* at the borders', the rights of minors are at risk. Many are put again in the hands of sea and land smugglers.

The analyses carried out in this chapter served not only to construct an evolutionary path through the development of the case-law, but they can also reinforce the ideology of *non-derogable* obligation under international law. Along this procedure, the ECtHR would clarify constitutive elements that justified the peremptory nature of the clause, and also identify other human rights provisions that could not be dissociated from its application.

⁹⁵ European Court of Human rights, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment (GC) of 4 April 2014, para.118.

⁹⁶ EU Parliament, EU Framework of Law for Children's Rights, 2012 p. 8 ff.

⁹⁷ BIEL, *cit. supra* note 69, p. 78 ff.

8. THE PROTECTION OF THE MIGRANT PARENT-CHILD RELATIONSHIP IN SPANISH AND SUPRANATIONAL JURISPRUDENCE: A SENSITIVE OR A SENSIBLE APPROACH?

*Encarnación La Spina**

SUMMARY: 1. Introduction – 2. The Shift from a Sensible to a Sensitive Approach to the Situation of Migrant Families in Strasbourg Case-law – 2.1. A Preliminary Version of the ‘Sensible Approach’ in Case-law of the ECtHR – 2.2. A Turning Point in the Protection of the Right to Family Life in Favour of Relations between Parents and Minor Children in Difficult v. Exceptional Circumstances – 2.3. A Singular Regression to a Sensible Approach: Parent-Child Relationship in Adult Ages – 3. A Two-Speed Approach to Family Life in the Case-law of the CJEU – 3.1. The Right to Family Life of Third-Country Nationals who are Relatives of EU Citizens: Supporting the ‘Sensitive Approach’ – 3.2. The Special Protection of Family Life for EU Citizen Minor Children and Third-Country National Parents: the ‘Sensitive Approach’ Used in the *Rendón* case – 4. The Minimal Impact of a Rights-Protective Approach to Family Life in the Case-law of the Spanish *Tribunal Constitucional* – 4.1 The Shift from a Sensible to a Sensitive Approach in the Case-law of the Spanish *Tribunal Constitucional*: a Regressive Paradigm – 4.2. The Impact of Judgment 186/2013 of the *Tribunal Constitucional*: an Unexpectedly ‘Sensitive Approach’ – 5. Final Remarks.

1. – Introduction

The emerging prominence of family migration has set out the scope of protection standards applicable to family life in migration contexts in recent decades. The Euro-

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 201-222.

pean Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('CJEU') have adopted an incidental approach to family life¹ at different jurisdictional levels. On the one hand, the ECtHR has extended the reach of Article 8 of the European Convention on Human Rights ('ECHR') and applied it to the field of immigration on an eminently case-by-case basis. The Strasbourg Court has extended the application of Article 8 to situations of cross-border migration in expulsion and family reunion cases, but has broadened its scope to the legal conditions for leave to remain. Therefore, several circumstances have been considered, including the real family situation, the length of their stay in the country, the behaviour of the individual concerned, the degree of the grasp of the language and customs of the country from which they were to be expelled, as well as the seriousness of the difficulties of the parent-child relationship separation. On the other hand, the CJEU has issued extremely sophisticated preliminary rulings and has begun a "quiet revolution" regarding the use of a broad interpretation for EU citizens, in contrast with the limited scope of Directive 2003/86/EC concerning the family members of third-country nationals. Overall, despite the multiple potentialities the EU connection has, the Court has shown a clear preference for a more cautious approach, curtailing its positive application to cases involving EU minors and third-country national parents.²

While the rights-protective approach taken in supranational case-law has been generally significant, it does not seem to have become consolidated, due to reiterated implementation gaps in national contexts. For instance, it has had an unequal impact on

* This publication was supported by the "Ministerio de Ciencia, Innovación y Universidades" (Spanish Ministry of Science, Innovation and Universities) through Postdoctoral research fellowship Ramón y Cajal reference RyC 2016-19465. The research leading to this publication was funded by the same Spanish Ministry within a project entitled "La desigualdad compleja en las sociedades plurales. Indicadores para las políticas públicas", DER2016-77711-P, by the "Basque Government" (Conv. IT1224-19) and by a 2018 Leonardo Grant for Researchers and Cultural Creators, BBVA Foundation BBVA Foundation Red Leonardo 2018 entitled "La protección jurídica de las personas refugiadas en situación de vulnerabilidad y su impacto en los procesos de integración". The Foundation accepts no responsibility for the opinions, statements and contents included in the project and/or the results thereof, which are entirely the responsibility of the authors.

¹ DESMOND, "The private life of family matters: curtailing Human Rights protection for migrants under article 8 of the ECGR", *European Journal of International Law*, 2018, p. 261 ff., p. 263-265; GONZÁLEZ PASCUAL, TORRES PÉREZ, *The right to family life in the European Union*, London, 2017.

² BERNIERI, "Family reunification between static EU citizens and third country nationals. A practical way to help families caught in the current immigration crisis", *European Journal of Migration and Law*, 2018, p. 289 ff, p. 290.

national case-law, particularly regarding the resolution of complex cases and the protection of family life in the cases related to so-called “anchor babies” (children born to a non-citizen mother in a country that has birth-right citizenship, which will help the mother and other family members gain legal residency). In these cases, minors have the nationality of their country of birth and residence, but their family life has been altered by the expulsion of one or both of their third-country national parents who are illegal residents in the State of which the child is a national.³ These cases are complex from the point of view of the weighting of rights because the enforcement of the expulsion order may collide with other interests which are deserving of greater protection, such as the child’s best interest, reverse discrimination between dynamic and static EU citizens, and their right to enjoy family life and free movement.

The shift from a sensible to a sensitive approach adopted by the Courts of Strasbourg and Luxembourg will be analysed below, followed by an assessment of its real impact on the Spanish jurisdiction.⁴ Spanish natives usually make mistakes when it comes to the use of the adjectives ‘sensitive’ and ‘sensible’. These adjectives are considered ‘false friends’, because their meaning is exactly the opposite in their original language, i.e. the meaning of the word (spelt) as ‘sensible’ in the Spanish language is equivalent to the meaning of the English word ‘sensitive’. Following the thread of this paradoxical meaning, this paper seeks to explain two ways of interpreting the protection of parent-child relationship in migration case-law, which have evolved over time in an ambiguous and interchangeable way at supranational level. The interpretation that relates to the sensible approach is characterised by understanding what other families (especially migrant families) need and being helpful and the interpretation that is linked to the sensitive approach is based on good judgment, reasonable and practical ideas and understanding family life. These approaches should not be in conflict, but they are used in an exclusive and contradictory way, in terms of advocating either tolerance or full recognition. I aim to prove that this semantic confusion has been properly resolved at the supranational level, but that it continues to be quietly resisted by the Spanish courts. To this end, I focus on two

³ MERCADER and MUÑOZ RUIZ, “Niños ancla y nuevas formulaciones del derecho a la libre circulación el caso Chen y su repercusión en España”, *Relaciones laborales: Revista crítica de teoría y práctica*, 2009, p 1265 ff. .

⁴ DEMBOUR, *When Humans become migrants: study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, 2015, p. 96.

judgments issued in similar cases in the different jurisdictions. These are the *Tribunal Constitucional* No. 186/2013 and the application of C-165/14, *Rendón Martín v Spain* by the *Tribunal Supremo* in decision No. 15/2017.⁵

2. – *The Shift from a Sensible to a Sensitive Approach to the Situation of Migrant Families in Strasbourg Case-law*

There have been few attempts in Strasbourg case-law to invoke a right involving the unconditional obligation on the part of States Parties to allow at least the closest family member(s) of legally resident foreign nationals into their territory under Article 8 of the ECHR.⁶ However, there have been many attempts to restrict unjustified state interference with family life, such as the expulsion of family members.⁷ The case-law of the ECtHR has reiterated that there are individuals who arrive on a temporary visa or illegally and then start a family, and who use this familiar situation as a “fait accompli” in order to secure legal residence.⁸ In some cases, however, the child’s best interests have shifted the balance decisively against the removal of a

⁵ Second Chamber of the *Tribunal Constitucional*, Judgement of 4 November 2013., No. 186/2013, BOE No. 290, of 4 December 2013, Appeal for relief 2022-2012, available at: <<http://hj.tribunalconstitucional.es/es/Resolucion/Show/23678>>. Brought by Ms G.V.A., in relation to the Judgments of the *Tribunal de Justicia de Andalucía*, based in Seville, and a *Juzgado Contencioso administrativo* of Cadiz, which dismissed her challenge to the expulsion resolution issued by the Government Office in Cádiz. Alleged violation of the right to family privacy and freedom of movement and residence: an order for expulsion from the national territory that does not prevent the minor daughter from effectively enjoying her freedom of movement and residence; the right to family life is not one of the dimensions included in the right to family privacy (Spanish Constitutional Court Judgment 60/2010). As well as *Tribunal Supremo* decision No. 15/2017, January, 2017, available at: <http://www.migrarconderechos.es/jurisprudenciaMastertable/jurisprudencia/STS_10_01_2017> in application of Case C-165/14, *Alfredo Rendón Marín/Administración del Estado* and Case C-304/14, *Secretary of State for the Home Department/CS*, ECR online, 2016

⁶ NICHOLSON, The “essential right” to family unit of refugees and others in need of International protection in the context of Family reunification, Geneva, 2018, p.20; THYM, “Respect for Private and Family life under article 8 ECHR in Immigration cases. A Human right to regularize illegal stay?”, *International and Comparative Law Quarterly*, 2008, p. 87 ff., p.90.

⁷ See, among others, for example, European Court of Human Rights, *Berrehab v the Netherlands*, Application No. 10730/1984, Judgment of 21 June 1988; Id., *Moustaquim v Belgium*, Application No. A193, Judgment of 18 February 1991; Id., *Cruz Varas v Sweden*, Application No. 15576/89, Judgment of 20 March 1991; Id., *Beldjoudi v France*, Application No. A234-A, Judgment of 26 March 1992; Id., *Dalia against France*, Application No. 11444/1985, Judgment of 19 February 1998; and Id., *Ezzouhdi v France*, Application No. 47160/1999, Judgment of 13 February 2001.

⁸ Id., *Boultif v Switzerland*, Application No. 54273/2000, Judgment of 2 August 2001; Id., *Yilmaz v Germany*, Application No. 52853/99, Judgment of April 17 2003; and Id., *Jeunesse v. The Netherlands*, ECtHR Grand Chamber, Judgment of 3 October 2014.

parent on the basis of exceptional circumstances.⁹ Consequently, respect for migrant family life is hardly subject to the real balancing act between the general interests and the range of criteria that need to be taken into account when determining whether removal is in line with Article 8(2) ECHR. Despite this parallel development in the context of the child's best interests, case-law provides a reasonable variety of relevant factors that contribute to the finding of a violation. The case-law of the ECtHR, as outlined above, has identified numerous factors that are relevant to the admission of family reunion¹⁰ and many that are reflected in its jurisprudence on expulsion.¹¹

2.1. – A Preliminary Version of the 'Sensible Approach' in Case-law of the ECtHR

The first time that the ECtHR faced a specific claim regarding application for residence from third-country family members based on Article 8 of the ECHR¹² was in the case of *Abdulaziz, Cabales and Balkandali v the UK*, Judgment of 28 May 1985.¹³ The ruling of the Court confirmed that state immigration control may interfere with family life and thus contravene Article 8 only when would be impossible or extremely burdensome to have a family life in another country.¹⁴ Moreover, Dembour and Staiano criticized this vague criterion and moral conception of good migrant families because it seemed to accept family dislocation and assume that only

⁹ As in several cases, the Court found a violation of Article 8 ECHR, *Rodrigues de Silva and Hoogkamer v. The Netherlands*, Application No. 50435/99, Judgment of 31 January 2006; *Nunez v. Norway*, Application No. 55597/09, Judgment of 28 June 2011, para. 84. 59; *Butt v. Norway*, Application No. 47017/09, Judgment of 4 December 2012; and recently in *Said Mohamed Abokar v. Sweden*, Application No. 23207/16, Judgment of 6 June 2019: "There could be no reasonable or legitimate expectations as to possibilities for establishing family life in the Contracting State it was likely only to be exceptional circumstances that the removal of the non/national family member could constitute a violation of Article 8".

¹⁰ NICHOLSON, *cit. supra* note 7, p. 30 summarized the range of criteria applied.

¹¹ NICHOLSON, *cit. supra* note 7, p. 20 sets out a range of criteria according to *Boulatif* case and *Jeu-nesse* judgments.

¹² SPIJKERBOER, "Structural Instability: 'Strasbourg case law on Children's Family Reunion'", *European Journal of Migration*, 2009, p. 271 ff. p. 292 .

¹³ European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v United Kingdom*, Application Nos. 9214/80, 9473/81, 9474/81, Judgment of 28 May 1985, paras. 60-69. The judgment of the Court was unanimous.

¹⁴ DEMBOUR, *cit. supra* note, pp. 96-103. STAIANO, "Income requirements in family reunification regimes", in *The human rights of migrant women in International and European law*, The Hague, 2016, p. 3 ff., p. 20.

bad migrant families¹⁵ provoke separation, and they are responsible for their free decisions or actions.¹⁶ Although strictly speaking this case did not deal with a parent-child relationship, its argumentation would have repercussions later in the two instances of the case *Biao v Denmark*,¹⁷ where it was considered that the rights were guaranteed under Article 14 ECHR.¹⁸ Consequently, it was used to justify the objectivity and reasonableness of preventive control measures and the application of unequal standards in order to protect the domestic labour market and ensure public order.

A decade later, there would be two cases concerning the protection of family life involving parents and their children where the initial version of the ambiguous “sensible approach” was adopted: *Gül v Switzerland*¹⁹ and the controversial case of *Ahmut v the Netherlands*.²⁰ Although these two decisions expressly alluded to Article 8 of the ECHR, state interference was deemed to be justified if family life was reasonably feasible in the country of origin, even if this did not consider whether this was equally appropriate for a family unit that was made up of parents and their children.²¹ In both cases, the most important protective interest or purpose was the economic welfare of the host State, which failed to understand what family migrant members might need or find helpful. This is an extremely vague approach to reasonable judgment, and

¹⁵ LA SPINA, “Good/bad migrant families and their integration in European Union, *Migraciones internacionales*, 10, 2019, p. 1 ff., pp. 2-5

¹⁶See European Court of Human Rights, *Ejimson v. Germany*, Application No. 5681/12, Judgment of 2 July 2018.

¹⁷ See *Id.*, *Biao v. Denmark*, Application No. 38590/10, Judgment (GC) of 24 May 2016, in which the Court revoked the Judgment of the Grand Chamber of 25 March 2014, which dealt with the discrimination suffered by the applicants on grounds of ethnic origin and nationality. An analysis can be found in CARRERA, “The ECtHR’s judgment in *Biao v. Denmark*: non-discrimination among nationals and family reunification as converging European standards”, *Maastricht Journal of European and Comparative Law*, 2016, p. 856 ff., p. 859; DE VRIES, “The ECtHR grand chamber’s ruling in *Biao v. Denmark*”, *European Journal of Migration and Law*, 2016, p. 467 ff., pp. 468-469.

¹⁸ See European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v United Kingdom*, *cit supra* note 13, paras 73-78.

¹⁹ See European Court of Human Rights, *Gül v Switzerland*, Application No. 23218/94, Judgment of 19 February 1996, para. 38. The judgment was issued with seven votes in favour and two against. This case involved a Kurdish asylum seeker of Turkish nationality whose wife suffered an accident and was transferred to Switzerland to receive medical assistance during the resolution of this petition, leaving the two children in the country of origin. The applicants were subsequently denied asylum, but they ultimately were granted a residence permit for humanitarian reasons, and they applied for family reunion.

²⁰ See European Court of Human Rights, *Ahmut v Netherlands*, Application No. 21702/93, Judgment of 28 November 1996, para. 63.

²¹ See European Court of Human Rights, *Ahmut v. Netherlands*, *cit supra* note 20.

therefore the granting of the entry permit can be tacitly considered as an unproven negative effect that justifies potentially restrictive policies against migrants.²² This kind of interpretation of a sensible approach is a controversial rights-protective approach, because it is only founded in tolerance logic and a wide margin of appreciation with unlimited scopes.

2.2. – A Turning Point in the Protection of the Right to Family Life in Favour of Relations between Parents and Minor Children in Difficult v. Exceptional Circumstances

The case-law of the ECtHR can be described as being rights-protective, since it has established that expelling an individual from the country where they have lived and where they have close relatives can seriously interfere with the right to family life, and above all, it can cause serious harm to minor dependents. The Strasbourg Court has used a different strategy at this turning point by prioritizing the child's best interest and the goal of integration.

Firstly, the role played by integration conditions in the Judgment of 21 December 2001, *Sen v. the Netherlands*²³ was a remarkable turning point in the shift of interpretative guidelines from a sensible to a sensitive approach in ECtHR case-law. The Strasbourg Court ambiguously considered that there were some obstacles to return to the State of origin if other children had been born and raised in the host State and were integrated into it. The best interest of the children was proven to be the basis for substantiating the essence of the right to family life in the host State. This was merely casual, as aptly noted by Van Walsum; the problem of justifying a refusal was no longer presented separately from the very basis of the right,²⁴ if such a right

²² See European Court of Human Rights, *Sulejmanovic et Sultanovic*, Application No. 57574/00; 57575/00, Judgment of 8 November 2002; Id. *Ejimson v. Germany*, Application No. 5681/12, Judgment of 2 July 2018.

²³ European Court of Human Rights, *Sen v. Netherlands*, Application No. 31465796, Judgment of 21 December 2001, para. 38 and 39, where the Court pointed out that there were several parallels between the two cases, para. 40.

²⁴ VAN WALSUM, "Comment on the Sen Case. How Wide is the margin of appreciation regarding the admission of children for purposes of family reunification", *European Journal of Migration and Law*, 2003, p.511 ff., pp. 517-520.

existed.²⁵ Therefore, for the first time, in those cases in which parent-children relationships were at stake, a favourable aspect was not only the presence of other relatives in the host country, but the existence of a certain degree of integration of the other members of the family unit into the host country.²⁶ The Court no longer regarded family reunification as the only means of ensuring family life in the host society, but based its decision on proportionality, which was deemed to be the potentially most suitable and reasonable means for the migrant family as a whole.²⁷ This was the first effect of a compounded sensitive and sensible approach at supranational level. Both approaches were considered to be interchangeable and part of a comprehensive *continuum*.

The scenario described above was completed by new progressive case-law on the positive obligation of the State, since the Court granted legal residence to a migrant family member in subsequent judgments. The Judgment of 1 December 2005, *Tuquabo-Tekle v. Netherlands*, which has certain similarities with the *Sen* case, sought to endorse the favourable decision made by its predecessor.²⁸ But a more developed sensitive approach was used that was more decisive and balanced in its reasoning. However, the Court in several cases held that there would be no violation of Article 8 when the children were increasingly able to fend for themselves.²⁹

Secondly, the defence of the child's best interest was a keystone in subsequent immigration case-law, by referring to the "exceptional circumstances" already mentioned in the case of *Abdulaziz, Cabales and Balkandali*.³⁰ The Court introduced some sensitive factors to be taken into account on a case-by-case basis in the balancing act between concerning family life and immigration in analogous cases.

²⁵ See, however, the dissenting opinion of Judge Martens, supported by Judge Rosso, in the *Giül* judgment, para. 6, and the affirmative individual votes of Judges Thór, Vilhjálmsón and Berhardt in the *Abdulaziz* judgment, who based their opinion on the existence of justification for the measure adopted in accordance with Article 8, para. 2 of the ECHR.

²⁶ VAN WALSUM, *cit. supra* note 18, p. 518.

²⁷ DESMOND, *cit. supra* note 1, p. 27.

²⁸ See European Court of Human Rights, *Tuquabo-Tekle v. The Netherlands*, Application No. 60665/00, Judgment of 1 December 2005; *Id.*, *Darren Omoregie others v. Norway*, Application No. 265/07, Judgment of 31 July 2008, in para. 57; and *Id.*, *Rodrigues da Silva et Hoogkamer v The Netherlands*, *cit. supra* note 9.

²⁹ The ECtHR held that, while this principle was paramount, it was not a "trump card" for minors over 15 years of age. See *Berisha v. Switzerland*, Application No. 948/12, Judgment of 30 July 2013, para. 48; *A.A. and others v. United Kingdom*, Application No. 25960/13, Judgment of 31 March 2016.

³⁰ VILJANEN and HEISKANEN, "The European Court of Human rights: a guardian of minimum standards in the context of immigration", *Netherlands Quarterly of Human Rights*, 2018, p. 174 ff., pp. 190-193.

The Judgment of 31 January 2006 (*Rodriguez de Silva and Hoogkamer v. Netherlands*) and the Judgment of 31 July 2008 (*Darren Omoregie and others v. Norway*) are also of interest, even though they were on the border between the negative and positive obligations derived from respect for family life. They both confirmed that Article 8 had been violated, in the absence of a fair balance between the different interests at stake: the economic prosperity of the country in contrast to the interests of maintaining family life for a mother and a daughter, regardless of the administrative status of the mother. The case involving Rodrigues Da Silva was a quiet revolution because it was the first time that the Court, in the light of the Rome Convention, examined the refusal by the Dutch authorities to grant a residency application filed by a person who had had irregular migrant status throughout her stay in the Contracting State. The ECtHR ruled that refusing to grant the residence permit and returning the mother to Brazil would render a suitable relationship between the mother and daughter impossible; therefore, it was deemed that the government of the Netherlands had to allow the mother to live with her daughter for the due protection of the interests of the minor. This case-law construction would later be qualified by means of “anti-fraud” criteria to avoid unconsciously establishing a wide-ranging precedent of respect for family life in illegal situations that contravened migration policies and sovereignty.³¹

The judgment in the case of *Senigo Longue and Others v. France*³² also contains useful guidance on the assessment of the child’s best interests in family reunification cases. The Court ruled that “it was necessary to institute a procedure that took into account the children’s welfare and that the protracted nature and accumulation of the difficulties encountered had not enabled the mother to assert her right to live with her children, whose situation ought to have been given greater consideration”. The same argument was used in another case, focusing on the determination of the child’s best interests.³³ In its 2016 judgment, the ECtHR underlined the importance of ensuring that “in all decisions concerning children, their best interests must be paramount”. It continued: “While the best interests of the child cannot be a ‘trump card’

³¹ See European Court of Human Rights, *Rodrigues da Silva v. Netherlands*, *cit. supra* note 9, para. 43.

³² See *Id.*, *Senigo Longue et autres c. France*, Application No. 19113/09, Judgment of 10 July 2014, paras. 67-69 and para. 74.

³³ See *Id.*, *El Ghatet v. Switzerland*, Application No. 56971/10, Judgment of 8 November 2016, para. 47, “the reasoning of domestic decisions is insufficient with any real balancing of the interests in issue being absent (...)”.

(...) the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it.”

At this stage, special mention should be made of two additional judgments concerned family reunification of refugees and persons with complementary/subsidiary protection where a sensitive approach was taken.³⁴ The Court considered that it was essential for the national authorities to take account of the vulnerability of the applicant when they had encountered “difficulties participating effectively in the family reunification procedure and especially in putting forward ‘other elements’ of proof of their parent-child relationship and/or the children’s ages”.

2.3. – A Singular Regression to a Sensible Approach: Parent-Child Relationship in Adult Ages

Beyond the relationship between parents and minor children, it is also worth discussing the unequal protection of the parent-child relationship in adult ages, which can be seen in the judgment of the case of *Senchishak v. Finland*.³⁵ The ECtHR lowered the level of protection and consequently the impact of a sensitive approach, allowing the deportation of a 72-year-old woman from Finland to Russia, even though the applicant lived with her Finnish-born daughter in Finland. The Court held that the reasons given were not sufficient to grant her the right to family life under Article 8 of the ECHR, because in the case of adult children and parents the Court had stronger requirements than living together and having normal family ties, especially if the adult children and their relatives had not lived together for some time.³⁶ Essentially, this decision made a difference in the standards of the protection of family reunification between parents and children in adulthood, and interpreted the word “family” in a way that was foreign to the cohabitation that existed in multi-generational environments. In this judgment, the Court placed undue emphasis on the dependency requirement, the interpretation of which clashed with two-way health care

³⁴ See *Id.*, *Mugenzi v. France*, Application No. 52701/09, Judgment of 10 July 2014; *Id.*, *Tanda-Muzinga v. France*, Application No. 2260/10, Judgment of 10 July 2014, paras. 55 and 58. The Court unanimously held that there had been a violation of Article 8 of the ECHR.

³⁵ See *Id.*, *Senchishak v. Finland*, Application No. 5049/12, Judgment of 18 November 2014. For example, the comments of ASKOLA “(No) Migrating for Family Care in Later Life: *Senchishak v. Finland*, Older Parents and Family Reunification”, *European Journal of Migration and Law*, 2016, p. 351 ff., pp. 370-372.

³⁶ This judgment is a logical continuation of *Kwakyé-Nti and Dufie v. The Netherlands*, Application No. 31519/96, Judgment of 7 November 2000; *Emonet and others v. Switzerland*, Application No. 39051/03, Judgment of 13 March 2008.

and with the care of the elderly in the home. This poses a serious risk of age discrimination and exclusion of modern forms of family life from the material scope of the right to family life under Article 8 of the ECHR.

3. – *A Two-Speed Approach to Family Life in the Case-law of the CJEU*

As Bernieri pointed out, the CJEU deliberately placed family life in the area of the fundamental rights of EU citizens who actively exercise their right to free movement (and their families) as a lever for people to move effectively within the European Union.³⁷ Traditionally, cross-border movement had not been applied in the EU. However, a quiet shift from a sensible to a sensitive approach is currently being shaped into a two-speed system. The first level is only a restricted “dependent” category that includes one family member of third-country nationals, and the second level is a “premium category” that includes one family member of the EU minor citizen. Although the rights of ‘dynamic’ Union citizens (those who exercise freedom of movement) have been considerably extended in accordance with the case-law of the Court, the situation is different for ‘static’ Union citizens. They were still condemned to a certain ‘disregard’ by the respective State, a question which seems to be currently changing.

3.1. – The Right to Family Life of Third-Country Nationals who are Relatives of EU Citizens: Supporting the ‘Sensitive Approach’

The first judgment by the European Court of Justice on the existence of a right to family life for EU citizens indirectly protected the families who wanted to reside in a Member State other than their State of origin.³⁸ This was a consequence of the basic principle of free movement, and differentiated it from the families of EU citizens who had never exercised their freedom of movement.³⁹ Similarly, there were some leading cases⁴⁰ that considered the extension of the right to reunify families who had

³⁷ BERNIERI, *cit. supra* note 3, p. 290. JIMÉNEZ BLANCO, “Movilidad transfronteriza de personas, vida familiar y derecho internacional privado”, *Revista Electrónica de Estudios internacionales*, 35, 2018, p. 1 ff., pp.2-5.

³⁸ See Case C-249/86, *Commission of the European Communities v. Federal Republic of Germany*, ECR, 1989, I-01263, pp. 9, 10 and 11.

³⁹ See Case C-35/82, *Morson and Jhanjan v. Netherlands*, Judgment of 27 October 1982, ECLI:EU:C:1982:368, para. 18.

⁴⁰ See Case C-466/00, *Arben Kaba v. United Kingdom*, Judgment of 6 March 2003,

“close family links to the EU” and were residents of another Member State.⁴¹ Therefore, in all of them, the links that third-country nationals who were related to EU citizens had to EU countries generated a right of residence for certain family members, which could only be restricted in exceptional cases that fulfilled strict requirements. However, as of 2000, the Court, despite not being totally inclined to expand the link to European Union law, finally started to make the choice⁴² to be more favourable to an “EU sensitive approach.”⁴³ This was so significant that it resulted in two preliminary questions brought by the Dutch Council of State⁴⁴ and in an opinion given by the General Advocate that considered that the sensitive approach renewed and reinforced the spirit of *Ruiz Zambrano*.⁴⁵ The transition from a sensible to a sensitive approach has been limited on the basis of a possible connection to EU citizenship or of a total exclusion of the migrant category in the strict sense. There is only one exception: Minor children who are EU citizens and are living with third-country national parents, but only in “exceptional circumstances”.

ECLI:EU:C:2003:127 para. 25. Vid. PEERS, “Dazed and confused: family members’ residence rights and the Court of Justice”, *European Law Review*, 2001, p. 76 ff., p 79-82.

⁴¹ See Case C-370/90, *Singh v. United Kingdom*, Judgment of 7 July 1992, ECLI:EU:C:1992:296, para. 20.

⁴² See Case C-109/01, *Akrich v. United Kingdom*, ECLI:EU:C:2003:112, paras. 55, 56, 58, 59 and 60.

⁴³ See Case C-413/99, *Baumbas v. United Kingdom*, Judgment of 17 September 2002, ECLI:EU:C:2002:493, paras. 71-75; Case C-459/99, *Mrax v. Belgium*, Judgment of 25 July 2002, ECLI:EU:C:2002:461, para. 53; Case C-148/02, *García Avello v. Belgium*, Judgment of the Court of 2 October 2003, ECLI:EU:C:2003:539, para. 21; Case C-200/02, *Chen*, Judgment of the Court of 19 October 2004, ECLI:EU:C:2004:639, para. 45; Case C-34/09, *Ruiz Zambrano v. Belgium*, Judgment of the Court of 8 March 2011, ECLI:EU:C:2011:124; Case C-356/11 and C-357/11, *Maahanmuuttovirasto, v. Finland*, Judgment of 6 December 2012, ECLI:EU:C:2012:776. See VAN ELSUWEGE and KOCHENOV; “On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights”, *European Journal of Migration and Law*, 2011, p. 443 ff., pp. 461-465.

⁴⁴ See Case C-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel, v. B*, Judgment of 12 March 2014, ECLI:EU:C:2014:135; and Case C-457/12, *S. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. G*, Judgment of 12 March 2014, ECLI:EU:C:2014:136.

⁴⁵ Case C-165/14 *Rendón Marín v. State Administration*, and C-304/14, *Secretary of State for the Home Department v. CS*, C-304/14, Opinion of Advocate General Maciej Szpunar, 4 February 2016, ECLI:EU:C:2016:75, point 96 and ff.

3.2. – The Special Protection of Family Life for EU Citizen Minor Children and Third-Country National Parents: the ‘Sensitive Approach’ Used in the *Rendón* case

The uniqueness of the *Rendón* case, brought as a preliminary ruling before the CJEU, illustrates the difficulties involved in cases of family protection (concerning parent and child) in Spain and their possible link to the European Union. Mr Rendón was a Colombian citizen and had exclusive guardianship and custody of two children who had EU citizenship (a son who was a Spanish national and a daughter who was a Polish national). His application for a residence permit was rejected due to his criminal record. The crucial difference between the facts of the two cases is that Mr Rendón Marín had a Union citizen daughter who lived in a host Member State, and a son who lived in his home Member State. There was a cross-border component in his daughter’s situation, but not in his son’s, and a possible contradiction with European Union Law. Moreover, Article 31.4 of the Spanish Immigration Act requires that applications for a residence permit be automatically refused in exceptional circumstances when a third-country national has a criminal record.

The CJEU’s decision reformulated the meaning conveyed in the request for a preliminary ruling made by the *Tribunal Supremo* (the Spanish Supreme Court) both within the scope of Article 21 TFEU and Directive 2004/38, and of Article 20 TFEU. After the ruling of the CJEU, the *Tribunal Supremo* issued a decision that ordered not to apply the Spanish Immigration Act, given that it was in contradiction with European Union Law. From a strictly interpretative point of view, this case followed the *Ruiz Zambrano* decision and made it very clear that protection under Article 20 TFEU is only applicable to a very small number of people in “very specific situations”, essentially only to minors who reside with their third-country national parents in their home Member State.⁴⁶ However, the decision was focused on the consequences of a refusal under national legislation. The Spanish Immigration Act required that those children leave the territory of the European Union and de facto forced family separation between them because their father had a criminal record.

⁴⁶ See Case C-200/02, *Zhu and Chen v. United Kingdom*, Judgment of the Court of 19 October 2004, ECLI:EU:C:2004:639, para. 45; and Case C-86/12, *Alopa and Moudoulou v. Luxembourg*, Judgment of 10 October 2013, ECLI:EU:C:2013:645, para. 28. On the interest of the minor KLAASEN, RODRIGUES, “The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter”, *European Journal of Migration and Law*, 2017, p. 191 ff., pp. 191-203.

The CJEU confirmed that there had been cases of EU citizen minors who had a third-country national parent where the Court had ruled for the applicant because otherwise EU citizen minors would have been deprived of their right to residence.⁴⁷

In the *Rendón* case there was clearly a right to residence, but the issue of the parent's criminal record came into play; according to the literal meaning of Directive 2004/38, the stronger the degree of integration of Union citizens and their family members is, the greater the degree of protection against expulsion will be. Limitations under Directive 2004/38 are only for reasons of public order or public safety (Article 27). But this reservation must be strictly interpreted, and its scope cannot be unilaterally determined by Member States. Limitations must be consistent with the principle of proportionality and with an individual examination of each citizen's conduct. It is important to bear in mind that, under Article 27(2) of Directive 2004/38, previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures. In fact, the personal conduct of the individual concerned must represent a genuine and present threat to a fundamental interest of the society or of the Member State concerned.⁴⁸ In the *Rendón* case, the mere existence of a criminal record had automatically triggered the refusal of the application for residence; no examination of proportionality and no analysis of the individual's conduct or of the effect on public order or public safety had been conducted.⁴⁹ Some domestic decisions revealed a lack of balanced reasoning of the interests involved, which was contrary to the requirements of Article 9 of the Convention in the above mentioned cases.

⁴⁷ Case C-34/09, *Ruiz Zambrano v. Belgium*, Opinion of Advocate General Eleanor Sharpston, 30 September 2010, ECLI:EU:C:2010:560, paras. 77 and 78.

⁴⁸ In this regard, see Case C-41/74, *van Duyn v. The Netherlands*, Judgment of 4 December 1974, ECLI:EU:C:1974:133, para. 18; Case C-30/77, *Bouchereau v. United Kingdom*, Judgment of 27 October 1977, ECLI:EU:C:1977:172, para. 33; Cases *Georgios Orfanopoulos and Others (C-482/01)* and *Raffaele Oliveri (C-493/01) v. Land Baden-Württemberg*, Judgment of 29 April 2004, ECLI:EU:C:2004:262, para. 65; Case C-441/02, *Commission v. Germany*, Judgment of 27 April 2006, ECLI:EU:C:2006:253, para. 34; Case C-50/06, *Commission v Netherlands*, Judgment of 7 June 2007, ECLI:EU:C:2007:325, para. 42. DABROWSKA-KLOSINSKA, "The right to family reunification vs. integration conditions for third country nationals. The CJEU's approach and the read not taken", *European Journal of Migration and Law*, 2018, p. 251 ff., pp. 280-285.

⁴⁹ See Case C-33/07, *Jipa v. Romania*, Judgment of 10 July 2008, ECLI:EU:C:2008:396, paras. 23 and 24; and Case C-145/09, *Tsakouridis v. Germany*, Judgment of 23 November 2010, ECLI:EU:C:2010:708, para. 48.

Finally, the judgment of C-133/15, *H.C. Chavez-Vilchez*,⁵⁰ addressed the impact of the presence of the other parent in the country (if they are a citizen of that Member State) and who bore the burden of proof. In this case, the analysis focused on two different situations. On the one hand, the situation of Ms Chávez-Vilchez's daughter, in application of Article 5(1) Directive 2004/38 and Article 21 TFEU, on the grounds that the minor was an EU citizen who had exercised the right of movement. And, on the other hand, the situation of the children of the other appellants, also minors, who had always resided with their mothers in the Member State of which they were nationals and, therefore, they had not exercised the right of movement under Article 20 TFEU.

With regard to the real consolidation of the “sensitive approach”, the main contribution made by this judgment was that “the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground”. Therefore, the CJEU did not limit itself exclusively to the interpretation of Article 20 TFEU, but considered that protecting the child’s best interests was central to the examination of the consequences of depriving the child “of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.⁵¹ Moreover, the Grand Chamber concluded that it was necessary to determine in that specific case “which parent assumes the effective custody of the child, and whether there is an effective relationship of dependence between the child and the parent who is a national of a third country”. In addition, it added that the referring judge, “must” take into account “the right to family life, as recognised in Article 7 of the Charter”, which “must be interpreted in relation to the obligation to take into consideration the child’s best interests, recognised in Article 24(2) of the Charter”.

⁵⁰ ESPINO GARCÍA, “La protección del Estatuto de ciudadanía de la Unión en la última jurisprudencia de Justicia de la Unión Europea (TJUE). A propósito de los asuntos Rendón Marín (C-165/14, Chávez Vilchez C-133-15) y Toufik Lounes (C-165/16)”, *Revista de Derecho de la UNED*, 2018, p. 733 ff, p. 740. See Case C-133/15, *HC Chavez-Vilchez. v. Netherlands*, Judgment of 10 May 2017, ECLI:EU:C:2017:354, paras. 76 and 77. DI COMITÉ, “Derecho de residencia de los progenitores nacionales de terceros estados e interés superior del niño “europeo”. Comentario a la sentencia del Tribunal de Justicia Gran Sala de 10 de mayo de 2017 en el asunto Chávez-Vilchez”, *Revista de Derecho comunitario europeo*, 2017, p. 1041 ff. P. 1056-1058.

⁵¹ See Case C-540/03, *European Parliament case v. Council of the European Union*, Judgment of 27 June 2006, ECLI:EU:C:2006:429. The subsequent judgments followed in the wake of the provisions of that Judgment. In this regard, the CJEU referred to Cases C-356/11 and C-357/11, *O and others v. Finland*, Judgment of 6 December 2012, ECLI:EU:C:2012:776, para. 77.

4. – *The Minimal Impact of a Rights-Protective Approach to Family Life in the Case-law of the Spanish Tribunal Constitucional*

Faced with the recognition of the right to family life, the *Tribunal Constitucional* has traditionally only regarded as fundamental rights those rights recognised in Section 1, Chapter 2, Title One of the Spanish Constitution, which are protected by an appeal before the Constitutional Court (Article 53 of the Spanish Constitution). The *Tribunal Constitucional* has expressly recognised that the interpretation of Article 10.2 of the Constitution refers to the rights included in Articles 14 to 38 of the Constitution. Therefore, Article 39 has not been interpreted as falling within the scope of Article 10.2, although this may be excessively categorical, since the Court has never denied that it can be extended to other rights.

4.1. – *The Shift from a Sensible to a Sensitive Approach in the Case-law of the Spanish Tribunal Constitucional: a Regressive Paradigm*

These preliminary considerations on the scope of the interpretation of rights are essential to reconsider whether a sensible or a sensitive approach can be adopted in connection with the quality of the right to family life for migrants in Spain, and the extent to which that approach is narrow or broad. This would determine whether the exercise of this right could be restricted or limited if the right-holders are immigrants. This dichotomy was addressed in Judgment 236/2007 of the *Tribunal Constitucional*, which expressly stated that family reunification, despite the ambiguity of the Immigration Act and its connection with Article 18 of the Constitution, strictly speaking is not a human right, and therefore its exercise can be limited in migration contexts.⁵² However, denying its nature as a fundamental right is certainly controversial, in the light of the arguments posed by the Court itself and by the interpretative

⁵² See para. 10 and 11 of the *Tribunal Constitucional*, Judgement of 7 November 2007, No. 236/2007, (BOE No. 295 of 10 December, 2007), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6203>> and its referral in Tribunal Constitucional, Judgment of 20 November 2007, no. 260/2007, no. 261/2007, No. 262/2007, No. 263/2007, No. 264/2007, No. 265/2007, (BOE No. 19 of 22 January 2008). And, among others see *Tribunal Constitucional*, Judgement of 30 September 1985, no. 99/1985, (BOE No. 265 of 5 November 1985), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/479>>; Judgement of 7 July 1987, No.115/1987 (BOE N° 180 of July 29 1987), available at: <<https://www.boe.es/buscar/doc.php?id=BOE-T-1987-17724>>; Judgement of 22 March 1993, No. 4/1993 (BOE No. 37 of 27 April 1993), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2133>>; Judgement of 29 March 1993, No.116/1993 (BOE No. 107 of 5 May 1993), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2245>>; Judgement of 29 July

clause of Article 10.2 of the Spanish Constitution.

As Quiros Fons indicated, most of the legal doctrine on the matter supports the latter interpretation, since it considers the articulation and categorisation of family reunification as a fundamental right of foreign migrants to be a complex matter.⁵³ However, it disregards the different forms that the reconstitution or maintenance of the family unit can take in the context of family migration. On the one hand, in general terms, it describes all the possible rights at stake in terms of the normal conduct of family life, that is, both the admission and the expulsion of the various members of a migrant family. As argued by Bhabha and Kofman, both dimensions cause the same disruption to the family unit, because for minors the separation of the family resulting from the expulsion of a parent can be as devastating as the refusal of family reunification.⁵⁴

Different categories have been established regarding the fundamental right to family privacy and the mandate to protect family life, in response to the legal classification of the right to family reunification.⁵⁵ Under this articulation, both concepts

1994, No. 242/1994 (BOE No. 197 of 18 August 1994), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2759>> ; Judgement of 22 May 2003, No. 95/2003 (BOE No. 139 of 10 June 2003), available at: <<http://hj.tribunalconstitucional.es/es/Resolucion/Show/4870>>; Judgement of 4 April 2005, No. 72/2005 (BOE No. 111 of 10 May 2005), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/5332>> .

⁵³ Many authors are in favour of this recognition of a “derived right” or a right that is instrumental to family reunification. For instance, QURIÓS FONTS, *La familia del extranjero. Regímenes de reagrupación e integración*, Valencia, 2008, pp. 35-49. However, there are others who disagree with this assessment, including GARCÍA VÁZQUEZ, *El estatuto jurídico-constitucional del extranjero en España*, Valencia, 2007, pp. 56-68.

⁵⁴ BHABHA, ‘Children, Migration and international norms’, in ALEINJOFF and CHETAIL (eds.), *Migration and International legal Norms*, The Hague, 2003, p. 185 ff., p. 223; KOFMAN, “Family migration as a class matter”, *International Migration*, 2018, p. 33 ff., p. 40.

⁵⁵ Among others, see *Tribunal Constitucional* Judgement of 27 October 1998, No. 209/1998 (BOE No. 288 of 2 December, 1998), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3711>>; Judgement of 1 December 1988, No. 231/1988 (BOE No. 307, of 2 December 1988), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/1172>>; Judgement of 17 October 1991, No. 197/1991 (BOE, No. 274 of 15 November 1991), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/1836>>; Judgement of 11 April 1994, No. 99/1994 (BOE No. 117 of 17 May, 1994), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2616>>; Judgement of 9 May 1994, No. 143/1994 (BOE no. 140, 13 June, 1994), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2660>>; Judgement of 16 December 1996, No. 207/1996 (BOE No. 19 of 22 January 1996), available at: <<http://hj.tribunalconstitucional.es/ca/Resolucion/Show/3259>>; Judgement of 10 April 2000, No. 98/2000 (BOE No. 119 of 18 May 2000), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/4082>>; and Judgement of 2 July 2001, No. 156/2001 (BOE No. 178 of 26

represent two profoundly different legal concepts that affect the content of the right, the subject of the right, and the possible limits to, and conditions of, exercise and protection. This preference for the optimisation mandate bypassed the fact that the existence of family life can be a fundamental presupposition for family intimacy, thus rendering the protection of the family inoperative from the viewpoint of the optimisation mandate.⁵⁶

The existing case-law of the *Tribunal Constitucional*⁵⁷ does not tend to broaden the content of family privacy, in order to prevent any elements of family life (other than the strictly private ones) from falling in the scope of family reunification. In fact, the *Tribunal Constitucional* has ruled on the scope of family privacy from an information-based point of view, thus ensuring some immunity from outside interference. According to significant case-law decisions contained in Judgment 119/2001 (of 24 May), Judgment 186/2000 (of 10 July), and Judgment 107/1984 of the *Tribunal Constitucional*,⁵⁸ it can be concluded that a number of rights exist, in-

July 2001), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/4452>>.

⁵⁶ A critique of the sustainability of a constitutional doctrine that denies the extension of the right to family life in Article 18 of the Spanish Constitution can be found in JIMENA QUESADA, “La cuestión prejudicial europea ante planteamientos más que dudosos”, *UNED Teoría y realidad constitucional*, 39, 2017, p. 271 ff., p. 282.

⁵⁷ *Tribunal Constitucional*, Judgement of 2 December 1998, No. 231/1988 (BOE No. 207 of 2 December, 1988), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/1172>>; Judgement of 17 October 1991, No. 197/1991 (BOE No. 274 of 15 November 1991), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/1836>>; Judgement of 5 April 2000, No. 115/2000 (BOE No. 136 of 7 July 2000), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/4099>>; Judgement of 25 November 1997, No. 201/1997 (BOE No. 312 of 30 December 1997), available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/3466>>.

⁵⁸ The latter is well known due to the threefold classification of fundamental rights and freedoms in relation to their subjects of the rights and their exercise by foreigners. See, among others, Judgments of the *Tribunal Constitucional*, Judgement of 23 November 1984, No. 107/1984 (BOE No. 265 of 23 November 1984) on the right to life, physical and moral integrity, privacy and religious freedom, available at: <<http://hj.tribunalconstitucional.es/HJ/es-ES/Resolucion/Show/SENTENCIA/1984/107>>; Judgement of 30 September 1985, No. 99/1985 (BOE No. 254 of 5 May 1985) on the right to effective judicial protection, available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/479>>; Judgement of 22 May 2003 No. 95/2003 (BOE No. 138 of 10 June 2003) on the instrumental right to free legal assistance, available at: <<http://hj.tribunalconstitucional.es/es/Resolucion/Show/4870>>; Judgement of 26 September 1990, No. 144/1990, (BOE No. 254 of 23 October 1990) on the right to freedom and security, available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/1569>> and Judgement of 29 May 2000 No. 137/2000 (BOE No. 156 of 30 June 2000) on the right not to be discriminated against, available at: <<http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/4121>>.

cluding family privacy, without any distinction based on regular or irregular migration status. The conditions for exercising these rights, just as practically any other, can be limited according to the proportionality to the aim sought and by providing sufficient grounds. On this point, the case-law of the *Tribunal Constitucional* is a long way from the latest sensitive approach applied by the case-law of the Strasbourg Court. The Spanish Court does not assume that the right to family life exists, as the ECtHR does; it imposes limits to the application of the legal grounds for expulsion of foreign nationals, taking into account the circumstances of the case and the weighing of the interests at stake.⁵⁹

4.2. – The Impact of Judgment 186/2013 of the *Tribunal Constitucional*: an Unexpectedly ‘Sensitive Approach’

There are clear differences between the case-law of the *Tribunal Constitucional* and the case-law of the European Court of Human Rights on this matter. The most eloquent instance can be found in Judgment 186/2013 of the *Tribunal Constitucional*,⁶⁰ which combined facts involving two supranational judgments: the *Rendón case* and the case of *Rodrigues da Silva v. Netherlands*. In this case, the *Tribunal Constitucional* heard an appeal for relief against the expulsion of a third-country national who was the mother of a Spanish minor and had been ordered to be expelled from Spain because she had been convicted of a crime, despite having legal residence in Spain. In addition, the minor’s father was in prison at the time the judgment was handed down. One of the most debatable arguments in the ruling of the *Tribunal Constitucional* ruling was that in this case, the administrative decision that ordered the mother to be expelled from Spain (regardless of how much this might affect her Spanish minor daughter) did not entail any legal obligation to leave Spain.⁶¹ It also concluded that her fundamental right to remain in Spain under Article 19 of the Spanish Constitution would be

⁵⁹ By way of example, see European Court of Human Rights, *Shevanova v. Latvia*, Application No. 58822/00, Judgment of 15 June 2006; Id., *Kaftailova v Latvia*, Application No. 59643/00, Judgment of 22 June 2006; Id., *Bashir and others v. Bulgaria*, Application No. 65028/01, Judgment of 14 June 2007; Id., *Musa and others v. Bulgaria*, Application No. 61259/00, Judgment of 11 January 2007; Id., *Gablishvili v. Russia*, Application No. 39428/12, Judgment of 26 June 2014.

⁶⁰ See Judgment of the *Tribunal Constitucional* Judgement of 4 November 2013, *cit supra* note 5, legal ground 6 and the individual vote by Judges Adela Asua Batarrita and Fernando Valdés Dal-Ré on the Judgment issued in appeal for relief No. 2022-2012.

⁶¹ QUICIOS MOLINA, “Sentencia del Tribunal constitucional 186/2013, de 23 de noviembre de 2013. Límites a la aplicación del art. 57.2 LOEX: el derecho a la vida familiar de los menores”, in MARTÍNEZ

violated, taking into account that the child's best interest necessarily involved accompanying her mother to her country of origin, either because she had no family ties in Spain, or because only her mother could support her.

In other words, in the opinion of the *Tribunal Constitucional*, Article 18 does not protect the right to family life of minors with their parents. The Court considered that a 7-year-old child has the capacity to decide whether she would want to stay with her mother or with her father in the event of a forced separation of their parents (although her father was in prison). However, the key aspect, according to the dissenting vote, was the connection between Article 19 of the Spanish Constitution and Article 39.1 of the Spanish Constitution. The protection of the family was extended to cohabitation of the minor with her mother, because in order to support her, she would be forced to leave Spain; and it would be constitutionally inadmissible to have such a contradiction between a fundamental right and the guiding principle to the extent that it would be impossible to satisfy both. It must also be linked to Article 39.3 on the duty of parents to provide assistance to their children in every way, which in this case would also become impossible for the mother if her daughter stayed in Spain, exercising her right to freely choose her place of residence while the mother was expelled.

According to the dissenting vote and in line with a more sensitive approach, it was mistaken to argue that the focus on the child's best interest necessarily involved leaving with her mother, either because of the lack of family ties and support in Spain, or because only she was able to support her daughter. This clearly showed the use of a "sensible" rather than a "sensitive" approach, which ignored more important issues. Parents must provide their children with all kinds of assistance, and not just maintenance. The Court's position disregarded the affective factor and the educational task that falls on parents according to Article 154.1 of the Spanish Civil Code, which stipulates that they should watch over their children, have them in their company, feed them, bring them up and provide them with comprehensive education.

Fortunately, there has been no opportunity to review and contrast the interpretation of the *Tribunal Constitucional*, since the appeal for relief that was dismissed in Judgment 186/2013 of the *Tribunal Constitucional* was referred to the Strasbourg Court. The Spanish State ultimately acquiesced to the plaintiff's claim and recognised that her rights had been violated, so the dispute was settled out of court. This case opened the possibility of referring cases to the supranational jurisdiction once

the internal route had been exhausted, but the case was resolved and set aside before the administrative resolution by which the expulsion of the plaintiff (G.V.A) was issued. The execution was suspended by the interim relief obtained from the ECtHR under Article 34 in fine of the Convention and Article 39 of the Rules of Procedure. In particular, the grounds for the decision were the violation of the right to an effective remedy under Article 13 in relation to Article 8 (both of the ECHR). It was based on the fact that the judgments of the national jurisdiction had failed to correctly interpret and apply Article 57.2 of Organic Law 4/2000, of 11 January, on Rights and Freedoms of Foreigners in Spain. Article 57.5.b) of said Organic Law requires taking into account the consequences that an expulsion would have for the applicant and the other members of his or her family. Suffice it to recall that a judgment is highly likely to be changed, given the precedent of the ECtHR judgment of 10 April 2012 against Spain in the case of *K.A.B v Spain*.⁶² This case involved the expulsion of a mother which led to the father losing contact with his child when the latter was considered to be without parental care, and later fostered and adopted.

5. – *Final Remarks*

Despite current advances at supranational level, the gradual shift from a sensible to a sensitive approach in the case-law of the ECtHR is fully focused on recognising the right from a perspective of exceptionality or as a kind of privilege. This exceptionality not only poses limitations to the chaotic circumstantial grounds for the conduct of family life; it also puts at risk its national interpretation, which denies any rebuttable presumption of the right to family unity in migration contexts by issuing a reactive discourse in favour of the circumstantial exercise of the right. A logic that contrasts with the existence of contradictory solutions without the *de facto* assumptions differing substantially from each other, leading to a possible risk of unpredictability and legal uncertainty.

While Article 8 is essentially intended to protect the individual against arbitrary interference by public authorities, it is not limited to imposing on the State the duty to refrain from such interference; rather, this negative obligation tends to add positive obligations that are inherent to the effective respect for private and family life. In

⁶² Also, more recently, the priority of this right over others was highlighted in the European Court of Human Rights, *K.A.B v. Spain*, Application No. 59819/08, Judgment of 10 April 2012; and in *Id.*, *R.M.S. v. Spain*, Application No. 28775/12, Judgment of 18 June 2014, in which the Court upheld that there had been a violation, as the applicant's right to respect for her family and private life had been breached.

both cases, the fair balance between the concurrent interests of the individual and those of society as a whole must be respected, and the State must put forward specific reasons in light of the circumstances of the case.

This is particularly important considering that the Member State in question (in this case, Spain) does not respect the doctrine established by both European Courts, especially in the *Rendón Case* and the *Chavez Vilchez* case. In fact, in opposition to the *Tribunal Supremo* decision, the interpretation of the *Tribunal Constitucional* had traditionally been that the Spanish Constitution does not recognise a “right to family life” in the same terms as the ECtHR interprets Article 8.1 ECHR and the CJUE outlines Article 7 of the European Charter. This clearly shows proof a predominant preference for an exclusively “sensible approach” and the reluctance to apply a real “sensitive approach” or reasonable judgment according to family needs and vulnerable or exceptional circumstances, as in the *Rendón case*, for example. Paradoxically, in the light of the individual opinion of the 2013 judgment, if the right to family life were taken into consideration, a “sensitive approach” could begin to be generated in accordance with Article 10.2 of the Spanish Constitution. This may result in a right for family members to have a relationship with each other, since family life is not respected if the bond between the minor and each of their parents is protected on a separate basis.

Therefore, despite the acquiescence by the *Tribunal Constitucional* and its recognition that it had misinterpreted the case-law of the ECtHR, the *Tribunal Constitucional* urgently needs to allow and facilitate normal family life to be enjoyed, regardless of where it takes place or of the legal status of the minor’s parents.⁶³ This would involve making a more teleological interpretation and updating the current supranational standards of both European Courts according to the key principle of the child’s best interest and of proportionality. There is a need to find appropriate solutions to accommodate the interests of family migrants and respect for family life rights, as well as the necessity to protect the most vulnerable individuals in a manner that is consistent with current social norms and human rights.

⁶³ ROGERS, “Immigration and the European Convention on Human Rights: are new principles emerging?”, *European Human Rights Law Review*, 2003, p. 53 ff., p. 58.

9.

**MIGRATION ISSUES
IN THE INTER-AMERICAN SYSTEM
OF HUMAN RIGHTS:
THE DEVELOPMENT OF AN INCREASINGLY
HUMANE *JUS MIGRANDI***

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SUMMARY: 1. Preliminary Remarks. – 2. Migration Issues before the Inter-American Commission on Human Rights and Other OAS Bodies. – 3. The IACtHR Case-law on Migration: General Aspects. – 3.1. A Focus on More Vulnerable Migrants: Irregular Migrant Workers and Children. – 3.2. Migration and Nationality. – 3.3. The *non-refoulement* Principle. – 3.4. Asylum and Refugees. – 3.5. Mass Deportations. – 3.6. The Contributions of the IACtHR to the Delineation of the Duty of States to Protect Migrants from non-State Abuses. – 3.7. A Tension between Sovereignty and Limits on State Action in Relation to Migration Aspects? – 4. Final Remarks: Distilling the Essence of the IACtHR Case-law on Migrants.

* This Chapter is the result of the two authors joint thinking and work. Nevertheless, editing requirements made it necessary to share the sections to write. Thus, sections 1., 3., 3.3., 3.5. and 4. have been mostly written by L. Paladini, while sections 2., 3.1., 3.2., 3.4., 3.6. and 3.7. have been mostly written by N. Carrillo Santarelli. The authors would like to thank Professor Felicia Sicignano (University for Foreigners of Siena) for the linguistic revision that She kindly provided.

BRUNO, PALOMBINO, DI STEFANO (eds.), Migration Issues before International Courts and Tribunals, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 223-274.

1. – Preliminary Remarks

According to this volume goal to analyze the international case-law on migration and migrants, the chapter aims at analysing the *jus migrandi* – if we can name it so – developed in the Inter-American System of Human Rights, mainly (but not exclusively) by the Inter-American Court of Human Rights (hereinafter, also ‘the Court’, the ‘IACtHR’, or ‘San José judges’) in its case-law on migration issues, and to explore its contribution to the application and the development of legal rules on human migration.

The pertinent *corpus* of decisions is not extensive, and it is somewhat recent. Three advisory opinions (‘OC’, from the Spanish *Opinión Consultiva*) are especially relevant, the first of which was adopted in 2003 on the legal *status* of undocumented migrants,¹ the second addressed rights of migrant children (2014),² and the third explored the right to asylum (2018).³ Additionally, several contentious cases are pertinent as well, such as, for instance, the judgement in case *Vélez Loo* of 2010⁴ and the 2016 decision in the case *Wong*.⁵

Among others, two features can be found in the IACtHR case-law. Firstly, the presence of landmark decisions (e.g. OC-18/03 *on Undocumented Migrants* and case *Vélez Loo*) that set and recognize relevant bases for the construction of Inter-American standards on the protection of migrants, which influence future decisions by virtue of the already affirmed standards. Secondly, the distinction between contentious cases and advisory opinions in building the protection of migrants in the Inter-American System of Human Rights has proven to be quite positive in terms of building the *jus migrandi*, since it is possible to explore what conduct is required even

¹ IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003 (hereinafter, OC-18/03 *on Undocumented Migrants*).

² IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14 of 19 August 2014 (hereinafter, OC-21/14 *on Migrant Children*).

³ IACtHR, *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18 of 30 May 2018 (hereinafter, OC-25/18 *on the Right of Asylum*).

⁴ IACtHR, *case of Vélez Loo v. Panama (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment of 23 November 2010 (hereinafter, case *Vélez Loo*).

⁵ IACtHR, *case of Wong Ho Wing v. Peru (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment of 30 June 2015 (hereinafter, case *Wong*).

when no individual application has been filed, and due to the control of conventionality doctrine States must take into account and strive to follow what the Court indicates. Furthermore, unlike what happens with contentious jurisdiction judgements, advisory opinions can offer interpretative clarifications on international obligations in migration contexts to all Member States of the Organization of America States ('OAS'), including those which have not accepted the Court's contentious jurisdiction (e.g., the USA).⁶ For instance, in the very recent OC-25/18 *on the Right of Asylum*, the Court took into account its previous judgements, starting with the leading case *Vélez Looz*, extending *de facto* the progressively-built protection standards to all the Inter-American System of Human Rights.

Moreover, it's due underlining that with the main bodies of the Inter-American System of Human Rights having been so important in terms of the promotion and protection of human rights in the region of the Americas, and with the region having faced migration issues in human rights terms, it is not surprising to find, as will be explored in this Chapter, developments promoting an evolutionary and progressive protection of the rights of migrants, whether they are refugees or not. This is of the utmost importance, considering that there are xenophobia, abuses, lack of enjoyment of rights, and other problems (mentioned in international instruments, such as the 2001 Durban Declaration)⁷ that many migrants have suffered throughout the world. Thus, in addition to addressing regional issues, the Inter-American System of Human Rights can set some examples that may be followed elsewhere.

That being said, for presentation purposes, we have chosen to select some issues, *i.e.* the peculiar situation of irregular migrant workers and children, the issue of nationality as an element strictly connected to the migrant *status*, the (fundamental) *non-refoulement* principle, the issue of asylum and refugees and, finally, mass deportations. In addition, we will consider the pertinent case-law in order to identify what the Court has said with regard to obligations of respect (to refrain from abuses)

⁶ See OLMOS GIUPPONI, "Assessing the evolution of the Inter-American Court of Human Rights in the protection of migrants' rights: past, present and future", *The International Journal of Human Rights*, 2017, p. 1482 ff. See also ROA SÁNCHEZ, "Hacia la unificación del derecho al asilo", *DPCE Online*, 2018, n. 3, p. 797 ff. and ALIVERTI, "The Promise of Human Rights? The Inter-American Court's Advisory Opinion on the Rights of Migrant Children", 2014, available at: <<http://bordercriminologies.law.ox.ac.uk>>.

⁷ United Nations, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/Conf.189/12, 8 September 2001.

and protection of migrants – even from non-State abuses, and how those duties sometimes impose limits on State action, and whether this creates some tension with sovereignty-related aspects. The selected issues approach of this text permits to highlight sensitive elements on the rights of migrants in the Inter-American System of Human Rights and permits to help readers identify the standards that are applicable in certain situations. That being said, the IACtHR itself has also provided a document on some salient aspects of its own case-law on the matter.⁸

Before exploring the IACtHR case-law, we also describe some relevant elements found in the practice of other OAS bodies, especially the Inter-American Commission on Human Rights (hereinafter, also the IACHR). They can complement the actions of the Court in a preventive manner and address recommendations based on both the law and humanitarian concerns, thus acting in ways that address migrants' problems and needs, and are not always satisfactorily dealt with by jurisdictional decisions. While internal displacement may involve both nationals and foreigners, it is a dynamic that pertains mobility inside State borders, reason why, although it does involve human rights considerations, it deserves a separate analysis on how the Inter-American System of Human Rights has treated it, as it has also been done elsewhere.⁹

2. – Migration Issues before the Inter-American Commission on Human Rights and Other OAS Bodies

While the pronouncements of the IACtHR garner a well-deserved attention, it would be a mistake to study the developments in the Inter-American System of Human Rights without looking beyond what that Court has decided. This is because one of the defining features of that system, when compared with others such as the one of the Council of Europe, is the fact that the Court is not the only main body in its midst, being the Commission the other one.¹⁰ Furthermore, political bodies as the

⁸ IACtHR, *Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos n. 2: personas en situación de migración o refugio*, 2017, available at: <<http://www.corteidh.or.cr>>.

⁹ See CARRILLO-SANTARELLI, "Inter-American and Colombian developments and contributions on the protection of persecuted internally displaced persons", in KATSELLI PROUKAKI (ed.), *Armed Conflict and Forcible Displacement: Individual Rights under International Law*, Abingdon, Oxon-New York, 2018, p. 139 ff.

¹⁰ On the Inter-American System of Human Rights see, *inter alia*, PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003; RODRÍGUEZ-PINZON, "Basic Facts of the Individual Complaint Procedure of the Inter-American Human Rights System", in ALFREDSSON et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Leiden-Boston, 2009, p. 619 ff.

General Assembly and Permanent Council of the Organization of American States also have the power to address migration and human rights issues. Both the Commission and those bodies can act in furtherance of the protection of migrants in ways that complement the actions of the Court.

As to the Commission, it is important to bear in mind that it can adopt a proactive approach towards recent developments and issue recommendations to both origin and host States of migrants due to, among others, its mandate and function to *promote* the observance of human rights in the Americas. Indeed, Article 41 of the American Convention on Human Rights (hereinafter, also the ‘ACHR’) mentions that the “main function of the Commission shall be to promote respect for and defence of human rights”. Unlike what happens in dynamics before jurisdictional bodies such as the Court, there is no need of a prior application and a contentious procedure for such a mandate to take place, and the Commission can study a wide array of legal implications that often go beyond what is specifically discussed before a Court in reports, press releases and other ways. Furthermore, promotion initiatives provide for recommendations with multiple addressees, as exemplified below. The Commission can thus act by virtue of different acts, such as the publishing of thematic or country reports in which migration matters are addressed; the adoption of precautionary measures in order to deal with urgent situations and call for the prevention of imminent risks of irreparable harm against migrants; press releases in which the plight of certain migrants is highlighted and their respect or protection are called for; the adoption of resolutions on worrisome problems in the region concerning the rights of migrants; and else. Several examples demonstrate this.

As to the adoption of resolutions, an example is that of Resolution 2/18 on “Forced Migration of Venezuelans”. The Commission declared, first, that the mass migration of Venezuelans may be explained by two factors, namely “massive violations of human rights, as well as the serious crisis that Venezuela has been facing as a result of the shortage of food and medicines”.¹¹ In the same resolution, the Commission indicates that non-State actors as criminal organizations are “exploiting recently arrived Venezuelan individuals in some border areas”; that some migrants have been facing “serious xenophobic and discriminatory practices [...] in countries of transit and destination”, and after recalling the right “to request and receive asylum [...] in the Americas”; and recalled the past solidarity of Venezuelans, urging OAS Member States to guarantee the “recognition of refugee status”, to consider adopting

¹¹ IACHR, Resolution 2/18, “Forced Migration of Venezuelans”, 2 March 2018.

“collective protection responses”, to guarantee access to those seeking “urgent humanitarian needs” while respecting the *non-refoulement* principle, to identify persons in a “situation of vulnerability”, to ensure safe migration channels, protect and provide “humanitarian assistance to Venezuelans within national jurisdictions”, to seek the rescue and protection of migrants, guarantee “access to the right to nationality for stateless persons, as well as for children of Venezuelans born abroad who are at risk of being stateless”, to implement coordinated responses and strategies, to avoid criminalizing migration, to ensure access to justice, to provide remedies, to promote social integration, and to permit IACHR visits.¹² This resolution highlights many of the issues surrounding migration that will be explored below in this Chapter, and demonstrates how promotion actions can complement jurisdictional ones in terms of addressing immediate crises, addressing multiple actors in the region, and engaging in both preventive and a reactive initiatives.

With regard to press releases used to achieve the aforementioned goals for the promotion of human rights, one example is the press release of 19 February 2019, by means of which the “IACHR Urge[d] Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan”. The Commission expressed concern at reports of the use of force by police officers, undue restrictions to the right individuals have “to freely leave any country, including their own”, and the *de facto* criminalization of migration. Another example is the press release of 28 August 2015, by means of which the “IACHR Expresse[d] Concern over Arbitrary Deportation of Colombians from Venezuela”, addressing the “arbitrary and collective deportation of undocumented Colombian migrants being carried out by Venezuelan authorities in the border state of Táchira”, the separation of families, and also reminding States that they “must take every necessary step to guarantee that racial profiling does not occur during migration raids” and make sure that there is an “individual decision in respect of each deportation”. Another example is provided in the recent press release of 23 October 2018, in which the Commission expressed its concern over the situation of the “*Migrant Caravan* from Honduras” that was going towards the USA. This not only highlighted the problems faced by migrants on the caravan (violence, hardships, vulnerability, hostile reactions, and else), but also allowed the IACHR to urge the States involved to guarantee the rights of individuals on the caravan, especially “the right of persons in need of international protection to request and receive asylum”, and to “strengthen mechanisms of shared responsibility

¹² *Ibid.*

to address” their situation, in addition to the necessity of refraining from carrying out collective deportations, of providing humanitarian assistance, and of guaranteeing fair trial and due process guarantees, among others. Promotion actions, therefore, permit not only to ask for hard law implementation, but also to engage in prevention and response actions even in relation to very recent events.

Likewise, on 7 January 2019 the Commission expressed its concern over the deaths of migrant children “in the custody of Immigration Authorities in the United States”, recalling its reports on the protection of migrants, children and the family. In those reports, the IACHR took notice of accusations of threats relating to the separation of relatives from children, and said that detention of persons in an irregular migratory situation should be “extraordinary”; that such detentions should be “the least restrictive” ones; that legal representation should be given to unaccompanied children and families at the “States’ expense”; that expedited removal proceedings risk breaching *non-refoulement* and the rights against torture; that there must be a separation of migrants from criminal inmates; that due process always has to be observed; that children undergo separate immigration proceedings;¹³ that children have a “right not to be separated from the family”; that there are rights to not be internally displaced, to special protection and to education, among others;¹⁴ and that relevant rights and freedoms in migration contexts include freedom of movement and residence, the right to a fair trial in deportation or extradition proceedings, the right to the protection of families, the right to protection against cruel, inhuman or degrading treatment, personal liberty, the right to request and receive asylum, the *non-refoulement* principle, the right to nationality and the right to property.¹⁵

In terms of precautionary measures adopted by the Commission, one example is found in the Commission’s address to the USA asking it to protect rights “through the reunification of [...] children with their biological family’s; “regular communication between the beneficiaries and their families”, and the adoption of measures to bring about the reunification of families when “beneficiaries [are] deported separately from their children”.¹⁶

¹³ IACHR, “Refugees and Migrants in the United States: Families and Unaccompanied Children”, 2015, pp. 42, 77, 101-111.

¹⁴ IACHR, “Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System”, 2015, para. 235.

¹⁵ *Ibid.*

¹⁶ IACHR, Press release “IACHR Grants Precautionary Measure to Protect Separated Migrant Children in the United States”, 20 August 2018.

As to the action of political bodies in the OAS, one example is provided in Resolution 2929 of 5 June 2018, by means of which its General Assembly expressed its concern over the crisis that generated “an increasing emigration of Venezuelan citizens and is having impacts on the capacity of some countries of the Hemisphere to meet their different needs”, issued instructions to the Permanent Council to support member States receiving Venezuelan “migrants and refugees”, and urged the regime of Nicolás Maduro “to allow the entry of humanitarian aid [...] to prevent the aggravation of the humanitarian and public health crisis”, also inviting OAS Member States to “implement measures to address the humanitarian emergency in Venezuela”, among others.¹⁷

Altogether, the Commission (and other OAS political bodies, as was just explained) can contribute to identifying necessary standards and courses of action and can have a potential benefit regarding the promotion of the enjoyment of the rights of migrants. In turn, OAS political bodies can debate problems surrounding those rights, including their causes, something the IACHR can do as well.

Having explored the importance of the promotion and political initiatives of different OAS bodies, we will now turn to the analysis of the pronouncements of the IACtHR on issues surrounding the human rights of migrants.

3. – *The IACtHR Case-law on Migration: General Aspects*

Before delving into the core analysis of the selected issues, it is worth identifying some basic concepts regarding migrants and their protection that constantly permeate the Court case-law, such as standards identified in the OC-18/03 *on Undocumented Migrants*.

Firstly, the vulnerability of migrants in the exercise of their rights. In general, the Court has identified some vulnerable categories – e.g. indigenous people, children, stateless persons, *et cetera* – who, due to their personal condition or specific situation in a given society, are particularly vulnerable and thus need more protection and require the adoption of special measures to ensure the protection of their human rights.¹⁸ As for migrants, in the OC-18/03 *on Undocumented Migrants* the San José judges affirmed that

¹⁷ OAS General Assembly, AG/RES. 2929 (XLVIII-O/18), “Resolution on the Situation in Venezuela”, 5 June 2018.

¹⁸ Case *Vélez Loor*, *cit. supra* note 4, paras. 98 ff.

“Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants [...] This situation of vulnerability [...] is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations”.¹⁹

As to vulnerability of migrants when compared to “non-migrants”, the Court has well pointed out that the

“[S]ituation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations [...] Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability [...] which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity [...] there are difficulties [migrants] encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation [...] the international community has recognized the need to adopt special measures to ensure the protection of the human rights of migrants”.²⁰

The Court’s case-law has also stressed that specific categories of migrants suffer from a particular vulnerability, including, *inter alia*, migrants deprived of their liberty, undocumented migrants or migrants in an irregular situation,²¹ migrant workers, and migrant children. With particular regard to workers, in the OC-18/03 *on Undocumented Migrants* the Court affirmed that

“The vulnerability of migrant workers as compared to national workers must be underscored. In this respect, the preamble to the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families refers to the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment”.²²

¹⁹ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 112.

²⁰ *Ibid.*, paras. 112-114, 117.

²¹ Case *Vélez Loor*, *cit. supra* note 4, para. 98.

²² OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 131. See WOJCIKIEWICZ ALMEIDA, “Le Travailleur Migrant en Situation Irrégulière: L'accès Formel et Effectif aux Droits devant les Organes Juridictionnels et Juridictionnels de Contrôle”, *Revista do Instituto Brasileiro de Direitos Humanos*, 2012, p. 324 ff., who refers to their “invisibilité apparente”.

Moreover, with specific regard to children, the Court has considered that they are particularly vulnerable (saying that they have a “especial situación de vulnerabilidad”),²³ which is even more true in the case of migrant children.

Considering the vulnerability that migrants may find themselves in, the Court has adequately required that States carry out an analysis and implementation of the pertinent standards in light of an evolutionary interpretation and the principle of effectiveness or *effet utile*.²⁴ This, coupled with the principle of equality and non-discrimination, implies – among others – that

“States have an obligation not to introduce discriminatory regulations into their laws; to eliminate regulations of a discriminatory nature; to combat practices of this nature; and to establish norms and other measures recognizing and guaranteeing all persons effective equality before the law”.²⁵

Another general standard related to migrants deals with their right not to be discriminated against and their right to equality before the law. In the OC-18/03 *on Undocumented Migrants* the Court affirmed that, at the existing stage of the development of international law, the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*,²⁶ binding all States and demanding its being guaranteed to all persons, including migrants even if their migration status is irregular. Certainly, for the IACtHR “the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of

²³ IACtHR, *case of the girls Yean y Bosico v. República Dominicana (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 8 September 2005 (hereinafter, *case of the girls Yean and Bosico*) and *case of expelled Dominicans and Haitians v. Dominican Republic (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 28 August 2014, para. 428 (hereinafter, *case of expelled Dominicans and Haitians*). See also IACtHR, *case of Veliz Franco y otros v. Guatemala (Excepciones Preliminares, Fondo, Reparaciones y Costas)*, Judgment of 19 May 2014, para. 134, where the Court talked about the children’s *vulnerabilidad consustancial*. See also SIJENSKY, *Interpretación evolutiva de la protección especial debida a las niñas y los niños*, in PARRA VERA et al. (eds.), *La lucha por los Derechos humanos hoy. Estudios en Homenaje a Cecilia Medina Quiroga*, Valencia, 2017, p. 230 ff., and also VANNUCCINI, “La protezione dei minori di età nella prassi della Corte interamericana dei diritti dell’uomo”, *La Comunità internazionale*, 2013, p. 109 ff.

²⁴ IACtHR, *cit.*, *supra* note 8, p. 10.

²⁵ *Case Vélez Loo*, *cit. supra* note 4, para. 248.

²⁶ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 101.

equality and non-discrimination”.²⁷ The Court has well added that the aforementioned principle is breached by *de facto* discriminatory conduct “even when it is not possible to prove a discriminatory intention”, insofar as “international human rights law not only prohibits policies and practices that are deliberately discriminatory, but also those whose impact could be discriminatory with regard to certain categories of individuals”, even in the absence of evidence of such an intention.²⁸

This is also true in relation to migrant workers. In the same OC-18/03 *on Undocumented Migrants*, the Court clarified that

“if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers”.²⁹

This does not mean that States may never grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, neither that it cannot be excluded that a State may sometimes take certain any action against migrants who do not comply with their legal system, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights.³⁰

A third general aspect must be highlighted. It is related to the development of human rights protection standards in the IACtHR case-law, also with relation to migrants. In light of the special nature of human rights treaties, the Court decides cases and releases advisory opinion interpreting the American Convention on Human Rights (ACHR) – and other OAS treaties – as living instruments and, accordingly, in light of the *pro homine* principle enshrined in Article 29 ACHR.³¹ Moreover, it

²⁷ *Ibid.*, para. 118 followed by *case of the girls Yean y Bosico*, *cit. supra* note 23, paras. 155 ff., case *Vélez Loor*, *cit. supra* note 4, para. 248 and also IACtHR, *case of Nadege Dorzema et al. v. Dominican Republic (Merits, Reparations, and Costs)*, Judgment of 24 June 2012, paras. 229 ff. (hereinafter, case *Nadege Dorzema*).

²⁸ Case *Nadege Dorzema*, *cit. supra* note 27, paras. 234, 238.

²⁹ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 136.

³⁰ *Ibid.*, para. 119.

³¹ IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999 (hereinafter, OC-16/99 *on Con-*

systematically made reference to the pertinent elements of general international law (*jus cogens* included, such as the aforementioned prohibition to discriminate) and to external sources, *i.e.* universal treaties (e.g., the 1989 Convention on the Rights of the Child), regional treaties (e.g., the 1950 European Convention on Human Rights), and to decisions of other international Courts and bodies (e.g., the Strasbourg Court, the EU Court of Justice, the African Commission on Human and Peoples' Rights or UN Charter-based bodies), and of national courts from a comparative law perspective. Indeed, this interpretative method, based on the judicial dialogue among Courts and other human rights bodies, brings a more effective protection of human rights in the Inter-American System of Human Rights³² and also underscores the universality of the rights of migrants and the risks they face. In the remainder of our study, the external sources on migrants to which the IACtHR referred to will be highlighted, with particular regard to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol as treaties of "crucial importance".³³

3.1. – A Focus on More Vulnerable Migrants: Irregular Migrant Workers and Migrant Children

We premised that the IACtHR has taken into account the specific needs and vulnerability of some persons, regardless of their refugee *status* or whether they find themselves in a regular migratory situation. Specifically, the Court has referred to children and workers.

Regarding children, acknowledging what the *corpus juris* of the protection of their rights says, the Court often refers to the best interests of the child principle and

sular Assistance) and case of the *Mapiripán Massacre v. Colombia (Merits, Reparations and Costs)*, Judgment of 15 September 2005, para. 106. See also RODRÍGUEZ, "Artículo 29. Normas de Interpretación", in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotá, 2014, p. 712 ff., and also FITZMAURICE, "Interpretation of Human Rights Treaties", in SHELTON (ed.), *International Human Rights Law*, Oxford, 2013, p. 765 ss. and Canosa Usera, "Interpretación evolutiva de los derechos fundamentales", in FERRER MAC-GREGOR and ZALDÍVAR LELO DE LARREA (coords.), *La ciencia del Derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del Derecho*, México, 2008, pp. 59-60.

³² See DE PAUW, "The Inter-American Court of Human rights and the Interpretive Method of external referencing: regional Consensus v. Universality", HAECK et al. (eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge- Antwerp- Portland, 2015, p. 23.

³³ IACtHR, *case of the Pacheco Tineo Family v. Plurinational State of Bolivia (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 25 November 2013, paras. 138-139 (hereinafter, case *Pacheco Tineo Family*).

to the obligation States have to “ensure to the maximum extent possible the survival and development of the child”.³⁴ Quoting the Committee on the Rights of the Child, the Court has indicated that it is necessary to evaluate the following circumstances:

“(a) [P]ersonal and public safety and other conditions, particularly of a socio-economic character, awaiting the child upon return including, where appropriate, a home study conducted by social network organizations; (b) availability of care arrangements for that particular child; (c) views of the child expressed in exercise of her or his right to do so under article 12 and those of the caretakers; (d) the child’s level of integration in the host country and the duration of absence from the home country; (e) the child’s right “to preserve his or her identity, including nationality, name and family relations” (art. 8); (f) the “desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” (art. 20); and (g) in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return”.³⁵

As to children in detention or migration facilities, and in light of the right to family unity, the Court indicated that, if they travel alone, they ought to be with other children, lest adults may abuse their dominant position. If they travel with relatives or parents, they should remain with them unless there is a risk and the best interests of the child dictates otherwise, as was explained in the *OC-21/14 on Migrant Children*.³⁶ For the Court:

“[I]n the case of unaccompanied or separated children [...] the children require special care from the persons in charge of the center and must never be lodged together with adults [...] In the case of children who are with their families [...] the rule must be that they remain with their parents or those acting in their stead, avoiding the separation of the family unit insofar as possible [...] unless the best interest of the child advises otherwise”.³⁷

An event in which it is not in the child’s best interest to remain with their relatives is that of the detention of the latter, reason why States are required to think of alternative measures that permit children to remain with them, albeit in non-imprisonment conditions. According to the Court:

³⁴ *OC-21/14 on Migrant Children*, *cit. supra* note 2, para. 222.

³⁵ *Ibid.*

³⁶ *Ibid.*, paras. 176-179.

³⁷ *Ibid.*, para. 177.

“when the child’s best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children”.³⁸

Additionally, deprivation of the liberty of children should neither be used as a precautionary measure nor as a consequence of failing to observe migration requirements, considering that there may be less intrusive alternatives. In fact, as the San José judges affirmed:

“States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity”. According to the Court, this is because authorities should look for alternative measures that are less inimical to children and their families, ensuring the protection of their rights “as a priority”.³⁹

For the Court, also being related to the protection of family unity, whenever this is possible and is in the best interests of the child, the right to “seek and receive asylum” may entail a requirement that “international protection [is granted] when children qualify for this and to grant the benefit of this recognition to other members of the family, based on the principle of family unity”.⁴⁰ Furthermore, by virtue of the principle of taking into account the best interests of the child, in addition to ordinary guarantees that are applicable “in expulsion proceedings”, when children are subject to them it is necessary to “maintain family unity insofar as possible”. The Court went on to say that:

“Hence, any ruling of an administrative or judicial organ that must decide on family separation owing to the migratory status of one or both parents must take into consideration the particular circumstances of the specific case, thus ensuring an individual decision; it must seek to achieve a legitimate purpose pursuant to the Convention, and it must be suitable, necessary and proportionate”.⁴¹

³⁸ *Ibid.*, para. 158.

³⁹ *Ibid.*, para. 160.

⁴⁰ *Ibid.*, para. 81.

⁴¹ *Case of expelled Dominicans and Haitians, cit. supra* note 23, para. 357.

To achieve this, among others, States must consider “the extent of the disruption of the child’s daily life if the family situation changes owing to the expulsion of a person in charge of the child, so that these circumstances are rigorously weighed in light of the best interests of the child against the essential public interest that it is sought”.⁴²

The Court has identified other specific rights and forms of protecting children in relation to specific rights-related aspects, such as nationality, asylum or refugee *status*, which are examined in the respective sections of this Chapter. That being said, concerning *non-refoulement*, the Court has highlighted, based on what has been said in the UN Human Rights System, that the obligation to not return is not limited to the identification of irreparable harm to a few rights, but rather “applies to other serious violations of [human rights] [...] such as “the insufficient provisions of food or health services”, “whether [...] they originate from non-State actors or such violations are directly intended or are the indirect consequence of action or inaction [...] [r]eturn to the country of origin shall in principle only be arranged if such return is in the best interest of the child” so that it is prohibited “if it would lead to a ‘reasonable risk’ that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of *non-refoulement* applies”.⁴³

Altogether, migrant – and other – children must be protected in ways that take into account their specific needs, situation and the vulnerability they may have in a given situation. This implies, for instance, that it is important to take measures to make sure that all children have registration in a State, considering that, as the Court went on to say, “the failure to register a child ‘can impact negatively on a child’s sense of personal identity and children may be denied entitlements to basic health, education and social welfare’”,⁴⁴ which they are entitled to regardless of whether they are migrants or not, as indicated in the section 3.4. on ‘Asylum and refugees’ of this Chapter.

Moreover, State agents cannot refuse to acknowledge the documents and identification provided by migrants, considering that for reasons similar to the ones just cited this leads to a situation of vulnerability – if children are the victims of this, the principle requiring taking into account their best interest would also be breached. Indeed, the Court has held that it is wrongful for State agents to fail:

⁴² *Ibid.*

⁴³ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 231.

⁴⁴ *Case of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 269.

“[T]o acknowledge the identity of the victims by not allowing them to identify themselves or not considering the documents they presented. This situation affected other rights, such as the right to a name, to recognition of juridical personality, and to nationality that, taken as a whole, impaired the right to identity. In addition, the Court considered that, in this case the State, by ignoring the documentation [...] did not take the best interests of the child into consideration”.⁴⁵

In relation to migrant workers, on the other hand, the Court highlighted in the OC-18/03 *on Undocumented Migrants* the need to consider their vulnerability, regardless of their migratory *status*, and the correlative requirement of protecting them from threats to the enjoyment of their rights due, precisely, to that vulnerability. This logic be found, for instance, when the Court recognizes that there is a risk of labour exploitation. According to the IACtHR:

“[I]t is not admissible for a State of employment to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them, taking advantage of their condition of vulnerability [...] either by paying them lower wages, denying or limiting their enjoyment or exercise of one or more of their labor rights, or denying them the possibility of filing a complaint about the violation of their rights”.⁴⁶

Moreover, in the same OC-18/03 *on Undocumented Migrants* it was indicated that the salaries of migrant workers must be paid even when they have an irregular migration *status*, because by working for private parties or public ones they are automatically entitled to their payment, in light of applicable human rights standards, especially considering the horizontal effects of human rights law (*Drittwirkung*). According to them, protection of human rights is also required from the abuses of private actors. This explains why those workers have a right to access justice, since it permits them to present their respective claims. An example of an implication of this can be found in Article 25 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which “[i]t shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment”. In the words of the Court itself:

“The vulnerability of migrant workers as compared to national workers must be underscored [...] Labor rights necessarily arise from the circumstance of being a worker [...] A

⁴⁵ *Ibid.*, para. 274.

⁴⁶ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 170.

person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition [...] the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment [...] the State and the individuals in a State are not obliged to offer employment to undocumented migrants [...] However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers [...] the obligation to respect human rights between individuals should be taken into consideration [...] the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*) [...] particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals”.⁴⁷

An important aspect to be found in the former quotation, besides the recognition of labour rights irrespective of migration status, is the Court’s insistence on and confirmation of the applicability of human rights in private relations. This issue is discussed in somewhat greater detail in a later section.

3.2. – Migration and Nationality

The remarks of the IACtHR on the right to nationality are interesting for several reasons. If one examines its case-law on the matter of *status civitatis* in light of pronouncements on the pertinent aspects of the *corpus juris*, including the rights of individuals, children (migrants or with migrant parents) and the problems of statelessness, this is made all the more clear.

For instance, in the case of *the girls Yean and Bosico*, the Court pointed out that the right to nationality is non-derogable.⁴⁸ While this is expressed Article 27 ACHR, the Court has engaged in an analysis of its importance that may support the political decisions of the drafters of the Convention. Certainly, the Court has referred to the instrumentality of the right after considering that a nationality is sometimes required in order to enjoy certain social benefits, but also to have the possibility to request State protection in certain situations. Indeed, the Court has said that the “[I]mportance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is

⁴⁷ *Ibid.*, paras. 131-140.

⁴⁸ Case of *the girls Yean and Bosico*, *cit. supra* note 23, para. 136.

a requirement for the exercise of specific rights”.⁴⁹

Furthermore, for the IACtHR, nationality grants individuals a “minimal measure of legal protection in international relations through the link his nationality establishes between him and the State in question”.⁵⁰ Due to its importance, the San José judges considered that, while it is up to the individual State to decide who is entitled to their nationality, there is a current limitation on this freedom, which seeks to ensure the equality – in terms of protection, for instance – of individuals.⁵¹

Accordingly, several things ensue. Firstly, there can be no discriminatory regulations on practices granting a nationality, considering that “States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights”.⁵² Secondly, no one can be deprived of their nationality arbitrarily, nor can its desired change be arbitrarily denied, as indicated in Article 20 ACHR. Thirdly, considering that lacking a nationality places individuals in a situation of vulnerability and deprives them of the possibility of “enjoying civil and political rights”, States have “the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons”.⁵³ Otherwise, according to the Court, States would breach the preemptory principle of equal and effective protection of the law and non-discrimination, which is breached not only when there is an intentional or “deliberate discrimination”, but also when policies, regulations and practices have an impact that affects persons in a discriminatory manner even when “it is not possible to prove [a] discriminatory intention”, as the IACtHR held in the case of *expelled Dominicans and Haitians*.⁵⁴ Fourthly, State Parties to the 1961 Convention on the Reduction of Statelessness are obliged to abide by it, as the Court reminded the Dominican Republic in 2005 in the case of *the girls Yean and Bosico*.⁵⁵

Furthermore, it is forbidden to resort to notions that have a discriminatory impact on questions of who can be a national, such as certain local interpretations on the *status* of children of parents who were regarded as “foreigners in transit”,

⁴⁹ *Ibid.*, para. 137.

⁵⁰ *Ibid.*, para. 139.

⁵¹ *Ibid.*, paras. 140-141.

⁵² *Ibid.*, para. 141.

⁵³ *Ibid.*, para. 142.

⁵⁴ *Case of expelled Dominicans and Haitians, cit. supra* note 23, paras. 263-264.

⁵⁵ *Case of the Girls Yean and Bosico, cit. supra* note 23, para. 143.

considering the IACtHR opinion according to which, in order to determine who was a national in accordance with domestic Dominican law, “[i]t is not possible to consider that people are in transit when they have lived for many years in a country where they have developed innumerable connections of all kinds”.⁵⁶ After all, “States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause”.⁵⁷

Additionally, the Court has indicated that the migratory *status* of an individual cannot be a condition for obtaining a nationality, because such a *status* cannot justify the annulment of that nationality; that migratory *status* is not transmitted to children; and also, importantly, that “the fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born”.⁵⁸ This is consistent with Article 20, para. 2, ACHR, according to which “[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality”.

Moreover, in its decision in the case *Ivcher Bronstein*,⁵⁹ the Court also said that the freedom that States have in determining who are their nationals has been limited by the evolution of international law; and that the right to nationality is to be protected both when it is “acquired by birth, naturalization or some other means established in the law of the respective State”, which is evidently applicable to individuals who once lacked the nationality of a given State, including those who migrated without the nationality of the host State. While nationality can be renounced to (or changed), as the ACHR and the Court have indicated, it cannot be revoked arbitrarily.

The Court found in that case, for instance, that the applicant’s nationality had been annulled by State authorities despite the fact that renouncement was “the only way of losing it, according to the Peruvian Constitution”, reason why it condemned the defendant State.⁶⁰ The San José judges further stated that the contravention of legality evinces arbitrary State actions in regard to nationality when the latter is revoked. In the words of the Court, the victim

⁵⁶ *Ibid.*, para. 153.

⁵⁷ *Ibid.*, para. 155.

⁵⁸ *Ibid.*, para. 156.

⁵⁹ IACtHR, *case of Ivcher Bronstein v. Peru (Merits, Reparations, and Costs)*, Judgment of 6 February 2001.

⁶⁰ *Ibid.*, paras. 88, 90, 95, 97.

“[D]id not expressly renounce his nationality, which is the only way of losing it, according to the Peruvian Constitution, but was deprived of it when his nationality title, without which he was unable to exercise his rights as a Peruvian national, was annulled. Moreover, the procedure used to annul the nationality title did not comply with the provisions of domestic legislation [...] Since this certificate was annulled in July 1997, 13 years after it had been granted, the State failed to comply with the provisions of its domestic legislation and arbitrarily deprived Mr. Ivcher of his nationality, violating Article 20(3) of the Convention [...] Furthermore, the authorities who annulled Mr. Ivcher’s nationality title did not have competence [...] Mr. Ivcher Bronstein acquired Peruvian nationality through a “supreme resolution” of the President [...] he lost his nationality as the result of a “‘directorial resolution’ of the Migration and Naturalization Directorate”, which is undoubtedly of a lower rank than the authority that granted the corresponding right [...] and, consequently, could not deprive the act of a superior of its effects [...] this demonstrates the arbitrary character of the revocation of Mr. Ivcher’s nationality, in violation of Article 20(3)”.⁶¹

3.3. – The *non-refoulement* Principle

Article XXVII of the 1948 American Declaration of the Rights and Duties of Man, and Articles 22, paras. 7 and 8 ACHR, provide for the right of asylum and the *non-refoulement* principle. The former provision affirms that “[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements”. In turn, Article 22 ACHR affirms in para. 7 the right of a person to seek and be granted asylum in a foreign territory if she or he risks persecution for political offenses or related common crimes and, as indicated in para. 8, “[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”. In addition, Article 13 of the 1985 Inter-American Convention to Prevent and Punish Torture states that “Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State”.⁶²

⁶¹ *Ibid.*, paras. 95-96.

⁶² The prohibition of torture is provided also at Article 5, para. 2, ACHR, which reads “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived

Unlike what has happened with some other sensitive issues (e.g., violence against women),⁶³ in the Inter-American System of Human Rights no specific treaty has been drafted on migrants or situations of human mobility. Thus, the Court relied on the aforementioned provisions, and on international (general and treaty) law. In that sense, it is worth recalling UN treaties on human mobility to which the IACtHR has referred in its case-law, such as the 1951 Convention on Refugees its 1967 Protocol, the 1961 Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness, or the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

The relationship between Inter-American provisions (in particular, the ACHR) and other international law sources has been underlined in the case *Pacheco Tineo Family*, in which the Court expressed that

“said Article 22(7) of the Convention indicates two criteria of an accumulative nature for the existence or exercise of this right: (a) ‘...in accordance with the legislation of the State ...,’ in other words, of the State in which asylum is requested, and (b) ‘... in accordance with [...] international conventions.’ This concept [...] understood in conjunction with the recognition of the right to *non-refoulement* in Article 22(8), supports the interrelationship between the scope and content of these rights and international refugee law”.⁶⁴

Moreover, looking at specific situations, in its OC-21/14 *on Migrant Children* the Court added that “*Non-refoulement* is conceptualized as a principle that makes the right to seek and receive asylum effective and as an autonomous right established in the Convention as well as an obligation derived from the prohibition of torture and from other human rights norms and, in particular, the protection of the child”.⁶⁵

According to the IACtHR, apart from being provided for in several universal and regional treaties regarding directly or indirectly refugees,⁶⁶ the *non-refoulement*

of their liberty shall be treated with respect for the inherent dignity of the human person”.

⁶³ See the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ‘*Convention of Belém do Pará*’, available at: <<http://www.oas.org/en/iachr/mamdate/Basics/belemdopara.asp>>.

⁶⁴ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 142.

⁶⁵ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 45.

⁶⁶ As for regional treaties, see e.g. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, that gives expression in binding form to a number of important principles relating to asylum, including the principle of *non-refoulement*. According to Article III, para. 3, “No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be

principle has been widely accepted by States. In fact, the San José judges have affirmed – conclusion with which we agree – that “the prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum [...] [and] is also a customary norm of international law”.⁶⁷ The Court has said it several other times, as in the recent OC-25/18 *on the Right of Asylum*,⁶⁸ in which it also added that when a person to-be returned risks suffering torture or cruel, inhuman or degrading treatment, the principle under discussion becomes absolute. Likewise, and more extensively, in the previous OC-21/14 *on Migrant Children* the Court affirmed that

“This principle seeks [...] to ensure the effectiveness of the prohibition of torture in any circumstance and with regard to any person, without any discrimination. Since it is an obligation derived from the prohibition of torture, the principle of *non-refoulement* in this area is absolute and also becomes a peremptory norm of customary international law; in other words, of *jus cogens*”.⁶⁹

It is worth adding that very recently the UN Committee against Torture affirmed the same.⁷⁰ To ensure the prohibition of expulsion *de qua*, the IACtHR has stressed that it protects refugees “regardless of their legal status or migratory situation in [a] State”.⁷¹

When compared to general international refugee law, in the Inter-American System of Human Rights the *non-refoulement* principle takes on a particular meaning,⁷² as it has a more extensive field of application *ratione personae*. While Article 33, para. 1, of the 1951 Convention addresses *non-refoulement* in relation to refugees, Article, para. 8, ACHR is addressed to every alien, and thus to “any person,

threatened for the reasons set out in Article 1, paragraphs 1 and 2.”

⁶⁷ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 151.

⁶⁸ OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, para. 179, recalling case *Pacheco Tineo Family*, *cit. supra* note 33, para. 151, and OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 211.

⁶⁹ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 225.

⁷⁰ Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 62nd session, 6 November – 6 December 2017, para. 9: “The principle of “non-refoulement” of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute”. In that regard, see PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, Bari, 2019, p. 121, who refers to the evolutionary and coordinated interpretation of those two principles.

⁷¹ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 152.

⁷² OC-21/14 *on Migrant Children*, *cit. supra* note 2, paras. 216-217.

who is not a national of the State in question or who is not considered its national by the State based on its laws”.⁷³ Moreover, the 1984 Cartagena Declaration on Refugees, a document adopted by a group of Latin American experts that the IACtHR has taken into account, affirms that, in light of the regional situation of human mobility,

“[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.⁷⁴

Even if the Declaration is not a direct source of international law, the IACtHR took it into due account in the OC-21/14 *on Migrant Children* and in following pronouncements in terms of both the reality it recognizes and how some States have referred to it in their domestic law, affirming as to the former aspect that

“[T]he obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that originated it, but also meets the challenges of protection derived from other displacement patterns that currently take place. This criterion reflects a tendency to strengthen in the region a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident”.⁷⁵

Concerning the scope of application of the *non-refoulement* principle, the Court has posited that returning aliens to a country where they risk serious human rights violations is prohibited not only directly, but also indirectly. In the case *Pacheco Tineo Family* the Court reminded that States also have the obligation not to return a person to a country from which he may be returned where he suffers this risk, *i.e.* the “indirect refoulement”.⁷⁶ Moreover it also reminded about the extraterritorial

⁷³ *Ibid.*, para. 218, and previously case *Pacheco Tineo Family*, *cit. supra* note 33, para. 135.

⁷⁴ *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 to 22 November 1984, conclusion n. 3.

⁷⁵ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para.79.

⁷⁶ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 153.

application of the *non-refoulement* principle in light of Article 1, para. 1, ACHR, which affirms that the States Parties undertake to respect the recognized rights and freedoms to all persons subject to their jurisdiction. In that sense, in the OC-21/14 *on Migrant Children* the San José judges stated that

“[...] the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory. Consequently, the principle of *non-refoulement* can be invoked by any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State”.⁷⁷

Being connected to asylum – although also applicable to non-refugees – , the *non-refoulement* principle implies that a person cannot be expelled before an accurate analysis of his/her application to determine the refugee *status* or entitlement to complementary protection, in accordance with due process guarantees.⁷⁸ With regard to this aspect, the case *Pacheco Tineo Family* can be considered a leading case, even if in previous cases regarding the detention of non-citizens⁷⁹ the Court found the violation of the victim’s the right to access to justice *ex* Articles 8 and 25 ACHR in relation to Article 1, para. 1, ACHR.⁸⁰ Still, in the case *Pacheco Tineo Family*, regarding the denial of the asylum request of a family with children and their expulsion from Bolivia to their country of origin, the Court ascertained the violation of the right to access to justice in relation to Article 22, para. 8, ACHR on the *non-refoulement* principle. The San José judges affirmed that

“such persons cannot be turned back at the border or expelled without an adequate and individualized analysis of their application. Before returning anyone, States must ensure that

⁷⁷ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 221.

⁷⁸ Accordingly, see Committee against Torture, Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 62nd session, 6 November - 6 December 2017, para. 13 “Each case should be individually, impartially and independently examined by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards”.

⁷⁹ IACtHR, *case of Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 7 September 2004; *case of Acosta et al. v. Nicaragua (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 25 March 2017; finally, case *Vélez Loor*, *cit. supra* note 4.

⁸⁰ With regard to the “Right to Justice”, as emerging from the combined reading of Articles 8 and 25 ACHR, see IBÁÑEZ RIVAS, “Artículo 8. Garantías Judiciales”, in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotá, 2014, p. 207 ff., and ID., “Artículo 25. Protección judicial”, *ibidem*, p. 606 ff.

the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him".⁸¹

For this reason, the deportation of the victims was incompatible not only with the right to seek and to receive asylum, but also with the *non-refoulement* principle and with the right to be heard with due guarantees in judicial and/or administrative proceedings (Article 8 and 25 ACHR) that could culminate in their expulsion.

Similarly, in the OC-21/14 *on Migrant Children* the Court interpreted Article 22, para. 8, ACHR also in relation to other Convention provisions, access to justice included. The San José judges recalled that basic guarantees of due process must be ensured to aliens in administrative proceedings related to migratory *status*, and that their flagrant violation may result in the violation of the *non-refoulement* principle.⁸² The Court added that even if in case of mass influx of persons individual determination may seem to be burdensome, States should guarantee access to protection from *refoulement* and basic humanitarian treatment, *i.e.* admitting asylum seekers within the territory, without discrimination, respecting the *non-refoulement* principles and non-rejection at borders, and granting appropriate international protection.⁸³

Another implication of the *non-refoulement* principle is related to extradition when an individual would risk his/her life or torture or inhumane treatment in a receiving State. The IACtHR first ruled on that issue in the case *Wong*, which involved an international fugitive wanted by the judicial authorities of Hong Kong and arrested and imprisoned in Peru. China asked for his extradition on the basis of an extradition treaty with Peru, but the victim objected by asserting that, if extradited, he could risk the death penalty. Nevertheless, considering the circumstances of the case, the Court concluded that, if the individual were extradited, Peru would not violate his rights to life and to personal integrity (Articles 4 and 5 ACHR) or the *non-refoulement* principle in relation to extradition *ex* Article 13 of the 1985 Convention on torture. Nevertheless, the San José judges found Peru responsible for the violation of the victim's judicial guarantees, protected by Article 8, para. 1, ACHR, because the extradition process exceeded a reasonable time while he was in detention.

It is interesting to draw attention to what the Court affirmed with regard to the

⁸¹ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 153.

⁸² OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 230.

⁸³ *Ibid.*, para. 262.

relationship between the request of extradition and the States obligation to ensure the rights to life and to humane treatment, together with the *non-refoulement* principle.

In fact, even if the ACHR does not prohibit the death penalty in absolute terms, since it is not forbidden for States that had it when the instrument enters into force for them – but only in the strict limits then existing – , the Court has affirmed that the relevant provisions have to be interpreted *pro homine* and in light of the due respect of specific procedural guarantees and the conditions of the States involved. Thus, States Parties that have abolished the death penalty cannot expel, deportate or extradite persons which can be reasonably sentenced to death, without requiring assurances or guarantees (such as affordable diplomatic ones) that the death sentence will not be imposed. Instead, those States that have not abolished that penalty may not return persons who run a real and foreseeable risk of being sentenced to death “unless this is for the most serious crimes for which the death penalty is currently imposed in the requested State Party”.⁸⁴ Moreover, the latter States may not expel anyone who may risk that penalty for crimes that are not punished with the same punishment in their own jurisdiction, without requiring the necessary and sufficient guarantees that the death sentence will not be applied. In addition, the obligation to ensure the right to personal integrity, in conjunction with the *non-refoulement* principle, imposes on States the obligation not to extradite individuals risking a real, foreseeable and personal risk of suffering treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatments. Finally, coming back to the respect of judicial guarantees, States Parties cannot extradite or return individuals who risk suffering a flagrant denial of justice in the destination State.⁸⁵

When analyzing if there is a risk, the Court has held that it is necessary to “examine the conditions in the destination country which are the grounds for the alleged risk, and compare the information presented with the standards derived from the American Convention”.⁸⁶ Furthermore, the concrete danger in which someone is must be considered. According to the Court,

“when analyzing a possible situation of risk in the destination country, it is not sufficient to refer to the general situation of human rights in the respective State, but rather it is necessary to demonstrate the particular circumstances of the person to be extradited that would

⁸⁴ Case *Wong*, *cit. supra* note 5, para. 134.

⁸⁵ *Ibid.*, paras. 126-128.

⁸⁶ *Ibid.*, para. 169.

expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or cruel, inhuman or degrading treatment if he is extradited, such as membership in a persecuted group, prior experience of torture or ill-treatment in the requesting State, and the type of offense for which he is sought, among other matters, depending on the specific circumstances in the destination country”.⁸⁷

As to specific risks from which protection must be given, the Court has said, for instance, that whenever an individual may be expelled somewhere where the imposition of death penalty is a possibility,

“pursuant to the obligation to ensure the right to life, States that have abolished the death penalty may not expose an individual under their jurisdiction to the real and foreseeable risk of its application and, therefore, may not expel, by deportation or extradition, persons under their jurisdiction, if it can be reasonably anticipated that they may be sentenced to death, without requiring guarantees that the death sentence would not be carried out”.⁸⁸

The reference to guarantees is related with the opinion of the IACtHR that it is also necessary to examine if “diplomatic assurances” are satisfactory and trustworthy in a given case (“when assessing diplomatic assurances, the quality of the assurances and their reliability must be analyzed”).⁸⁹ Hence, if someone is expelled when there is no risk, or if there are sufficient guarantees on protection from potential threats, the responsibility of a sending State would not be engaged, as flows from the Court’s reasoning in the case *Wong*.⁹⁰

It is worth mentioning that some remarks on the recent OC-25/18 *on the Right of Asylum*⁹¹ recall and capitalize previous case-law on migrant issues and international practice (e.g., the decisions adopted by the UN Human Rights Committee) in order to answer to the petition submitted by Ecuador. The ICtHR judges were asked to interpret Article 22, para. 7, ACHR and Article XXVII of the American Declaration, to clarify if they provide for the right to seek and receive asylum accordingly with

⁸⁷ *Ibid.*, para. 173.

⁸⁸ *Ibid.*, para. 134.

⁸⁹ *Ibid.*, paras. 177, 180.

⁹⁰ *Ibid.*, paras. 187-188.

⁹¹ For some first comments on the OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, see CASTRO, “La Corte Interamericana se pronuncia sobre la muy golpeada institución del asilo”, available at: <<https://www.ambitojuridico.com/>>, 31 August 2018, and ROA SÁNCHEZ, *cit. supra* note 6, p. 797 ff.

the different modalities, forms and categories developed in international law,⁹² diplomatic asylum included, and which international obligations derive for the asylum State. After an overview of various modalities of asylum (territorial asylum, diplomatic asylum, and Latin American practices on asylum),⁹³ the Court reached the conclusion that the aforementioned provisions protect the right to seek and receive international protection in a foreign territory as a human right, including refugee *status*, accordingly in particular to the 1951 Geneva Convention and its 1967 Protocol, and also protect territorial asylum in accordance with regional conventions on asylum.

That being said, the novelty of the OC-25/18 *on the Right of Asylum* can be found in the expansion of the extraterritoriality of the *non-refoulement* principle with regard to legations. Although under general international law granting asylum is not considered a diplomatic or consular function, States are obliged to respect, through all authorities and agents – diplomatic agents included – the rights and freedoms recognized in the ACHR of all persons under their jurisdiction, without discrimination of any kind. This happens even when a person enters in a diplomatic mission in search of protection, because in that case the person is considered to be under that State’s jurisdiction. In that hypothesis, some obligations arise from the *non-refoulement* principle. Firstly, individuals cannot be returned to another country where they risk an irreparable harm or to any non-safe State to which the persons may subsequently be indirectly refouled. Secondly, States have to evaluate through an interview the individual risk of an asylum seeker, “giving him or her due opportunity to state the reasons for the refusal of refoulement”. This requires carrying out a preliminary assessment on such a risk and, if it is established, the respective person cannot be returned to the country of origin or to another country where the risk exists.⁹⁴

On the other side, Article 22, para. 7, ACHR and Article XXVII of the American Declaration do not cover diplomatic asylum.⁹⁵ The San José judges remind that the will of States during the drafting the American Declaration and the ACHR was to exclude the diplomatic asylum as a protected right, maintaining its regulation in

⁹² In particular, Article 14 para. 1 of the Universal Declaration of Human Rights and the 1951 Geneva Convention relating to the Status of Refugees and its New York Protocol of 1967.

⁹³ OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 61 ff.

⁹⁴ *Ibid.*, para. 195, recalling OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 232, and case *Pacheco Tineo Family*, *cit. supra* note 33, para. 136.

⁹⁵ *Ibid.*, paras. 153 ff.

accordance with the Latin American conventions on asylum, *i.e.* leaving it in the domain of State prerogatives. In other words, even if the *diplomatic* asylum can be an effective mechanism to protect individuals from harms in countries suffering a difficult democratic life, it is still governed by international treaties and domestic legislation provisions, and it is a State prerogative to grant or deny it in specific situations.⁹⁶ Conversely, the so-called *territorial* asylum is not a mere State 'prerogative'. Furthermore, the logic that States are free to act, provided that human and refugee rights are not ignored, applies in relation to both sets of institutions. According to the Court, the subjective right of every human being to seek and be granted asylum overcomes the historical understanding of that institution as a "mere State prerogative".⁹⁷

It is also worth commenting that the Court has said that, while in the exercise of its contentious jurisdiction it is normally required to examine allegations of violations that have allegedly already taken place, some flexibility must be permitted for it in the exercise of such jurisdiction, in order to empower the San José judges to analyze whether a potential expulsion from a country's territory would breach the guarantees pertaining to *non-refoulement*. In this regard, they have said that:

"[I]t is not normally for this Court to pronounce on the existence of potential violations of the Convention. However, when the presumed victim claims that, if he is expelled or, in this case, extradited, he would be subject to treatment contrary to his rights to life and personal integrity, it is necessary to ensure his rights and to prevent the occurrence of grave and irreparable harm. Since the ultimate aim of the Convention is the international protection of human rights, it must be permissible to analyze this type of case before the violation takes place [...] the Court must examine the State's responsibility conditionally [since the extradition has not occurred yet], in order to determine whether or not there would be a violation of the rights to life and personal integrity of the presumed victim should he be extradited".⁹⁸

3.4. – Asylum and Refugees

The OC-25/18 *on the Right of Asylum* not only examined the *non-refoulement* principle, but also addressed other issues pertaining asylum and refugees, reason why it merits some further attention.

It was indicated some lines above that the Court distinguishes between diplomatic

⁹⁶ *Ibid.*, para. 154.

⁹⁷ *Ibid.*, para. 131.

⁹⁸ Case *Wong*, *cit. supra* note 5, para. 142.

and territorial asylum, holding that the former is not required by the regional customary or treaty law, whereas the latter is governed by Inter-American standards. In the advisory opinion, the Court examined the history of the decline of diplomatic asylum in Europe and the rise of the institution of extradition there, which was markedly in contrast to the increasing use and importance of the doctrine in Latin America, “as a response to frequent crises related to the incipient independence of Latin American states”.⁹⁹ In spite of this, in the opinion of the Court, the recognition of diplomatic asylum is not present in the Inter-American instruments, and has even been excluded by virtue of the wording of their pertinent provisions and by persistent objections. Accordingly, its concession is something that States are free to give or not in a sovereign fashion, and there are no rules of interpretation that can be used to consider otherwise, reason why diplomatic asylum is governed by agreements or domestic legislation on the matter, and not by custom, according to the Court.¹⁰⁰

Conversely, as can be said on the basis of pronouncements of the Court, references in the ACHR (Article 22, para. 7) and the 1948 American Declaration of the Rights and Duties of Man (Article XXVII) to a “foreign territory” indicate that the asylum they refer to is a territorial asylum and not a diplomatic one. This territorial asylum the Court refers to is, according to the OC-25/18 *on the Right of Asylum*, a protection granted by States to individuals present in their territory,¹⁰¹ unlike the diplomatic one, where the interested individual is present in the State territory they pretend to flee from or in a third State’s territory, being it required to respect the inviolability of diplomatic facilities where those individuals may be located.¹⁰²

As to the protection of refugees, the Court highlights the fact that in the Americas, due to the adoption of the Cartagena Declaration on Refugees and the subsequent enactment of corresponding domestic legislation by some States, some OAS Member States are legally required to provide a protection that is greater than the one enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.¹⁰³ According to said Declaration, the concept of refugees encompasses, in addition to those protected by such Convention and Protocol, “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human

⁹⁹ OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 76-77.

¹⁰⁰ *Ibid.*, paras. 115, 147-163.

¹⁰¹ *Ibid.*, para. 67.

¹⁰² *Ibid.*, para. 106.

¹⁰³ *Ibid.*, paras. 68, 96, 129-130; OC-21/14 *on Migrant Children*, *cit. supra* note 2, paras. 77-79.

rights or other circumstances which have seriously disturbed public order”. Accordingly, some States in the American region are required to recognize, as refugees, persons that do not meet the conditions set forth in the universal instruments but do find themselves in the circumstances just described. Having said this, the Court deems the definition(s) of refugees as “integral, which means that each and every one of the requirements set forth in the applicable instruments “must be met in order to obtain recognition”.¹⁰⁴

Apart from the identification of applicable definitions and the distinction between categories of asylum in the Americas, the IACtHR has stressed that the granting of asylum cannot be used to promote or cement the impunity of serious violations, because that would be a perversion of the institution of asylum itself and would be contrary to standards identified in the Court case-law addressing the requirements of how to deal with serious violations of human rights. Furthermore, when such serious violations are present, States are required to observe the principle *aut dedere aut judicare*.¹⁰⁵

Another important consideration of the Court, referred to in the section on *non-refoulement*, is how this principle – which “applies to all refugees, even if they have not yet been deemed refugees by authorities”¹⁰⁶ and to some non-refugee migrants by virtue of the general obligations to respect and ensure the human rights of all individuals – must be observed also in an extraterritorial way. This means that when State agents have authority or control over individuals who may benefit from it, even if said agents and persons are not located within the State’s territory, as may happen in the high seas; and also when actions take place in border areas or in “international transit zones”, human rights must be respected.¹⁰⁷ Likewise, asylum seekers cannot be “rejected at the border without an adequate and individualized analysis of their requests with due guarantees”.¹⁰⁸ Just as happens with geographical considerations, this requirement is also applicable regardless of what motivates a given expulsion or how the sending of someone abroad takes place, even if there has been a request of extradition, considering that possible risks of human rights violations must be evaluated. Such an examination ought to lead to an expulsion refusal if a given risk is

¹⁰⁴ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 75.

¹⁰⁵ OC-25/18 on *the Right of Asylum*, *cit. supra* note 3, paras. 91-92.

¹⁰⁶ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 210.

¹⁰⁷ OC-25/18 on *the Right of Asylum*, *cit. supra* note 3, paras. 171-177, 188.

¹⁰⁸ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 81.

real.¹⁰⁹

On the other hand, it must be noted that the Court has also said that even though States are not required, for instance, to grant asylum in a given case, individuals asking for it cannot be left in limbo indefinitely; and that States must take into account all of their international obligations and possibilities of acting, such as requesting safe passage to a third State or elsewhere making sure that the internationally-recognized human rights of individuals will be respected.¹¹⁰

In the OC-21/14 *on Migrant Children*, the IACtHR provided additional insights on the protection of refugees and those who claim a refugee *status*, which not only point towards responses to the effects of mass migration but also towards its causes. Additionally, it provided insights on dynamics of contemporary migration. For instance, the Court noted how complex migration dynamics sometimes involve both migrants and refugees travelling together.¹¹¹

On the other hand, the Court considered that when facing “a mass influx of persons” that makes the “individual determination of refugee status [...] generally impractical”, if there is a “pressing need to provide protection and assistance, particularly when children are involved”, States ought to refrain from returning asylum seekers by providing a *prima facie* protection to groups, without discrimination. Countries of origin, in turn, should try to “resolve and eliminate the causes of displacement” and ensure the possibility of “voluntary repatriation”.¹¹²

Both considerations are important, because they go beyond the immediate request and individual decisions that may be difficult to make in certain situations. On the one hand, this opinion prevents States from invoking excuses on material difficulties when identifying refugees, by telling them that *prima facie* they should protect those who claim to have that *status* by means of a group or collective temporary recognition, lest persons with it are wrongly returned to places where their rights are at risk. Secondly, it tells States that the causes and roots of mass migration must be addressed, which is important because it refrains from only requiring State responses to its effects, by telling them that they must also deal with what causes mass migration, and that both host and also origin States have responsibilities.

¹⁰⁹ OC-25/18 *on the Right of Asylum*, *cit. supra* note 3, paras. 191, 196-197.

¹¹⁰ *Ibid.*, para. 198.

¹¹¹ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 36.

¹¹² *Ibid.*, para. 262.

Additionally, the Court has insisted that Human Rights Law complements Refugee Law, as happens for instance in regard to the possibility of expelling refugees out of “national security or public order considerations” under refugee law. Indeed, under human rights law foreigners lawfully residing in the territory of a State may only be expelled after a decision observing certain legal conditions has been reached.¹¹³ According to the Court, while refugee *status* first comes to mind when exploring issues on migration, “various sources of law”, including international humanitarian law and human rights law, are also applicable.¹¹⁴ Moreover, applicable “complementary protection mechanism[s]” may be called for under some circumstances – with human rights law demanding that basic needs are satisfied, regardless of migration *status*.¹¹⁵ This logic can be found, for instance, in the Court’s judgements in the case *Nadege Dorzema* (and others cases too), in which it said that

“[E]mergency medical care must be provided at all times for irregular migrants; accordingly, the States must provide comprehensive health care taking into account the needs of vulnerable groups [...] failure to register the entry into and exit from the health center, the lack of medical care for five seriously injured victims, and the failure to diagnose their condition and prescribe treatment, denote omissions in the attention that should have been provided to the injured in order to respect and ensure their right to personal integrity”.¹¹⁶

Furthermore, when assessing whether individuals are persecuted, and how to better protect them and their rights, their specific circumstances and vulnerability must be analyzed by a State, lest ignoring their needs engages State responsibility. This can be seen, for instance, in the *Nadege Dorzema* case, in relation to which the Court concluded that “special protection was never provided to [...], based on his condition as a minor, or to [...], who was pregnant, situations that increased the violation of their physical, mental and moral integrity”.¹¹⁷ This requires, for instance, “taking into account the specific forms that child persecution may adopt”, considering “age and gender”; and permitting children submitting “applications for recognition of refugee

¹¹³ *Ibid.*, para. 270.

¹¹⁴ *Ibid.*, paras. 37, 39.

¹¹⁵ *Ibid.*, para. 96.

¹¹⁶ Case *Nadege Dorzema*, *cit. supra* note 27, paras. 109-110.

¹¹⁷ *Ibid.*, para. 110.

status in their own capacity”.¹¹⁸ Furthermore, children’s confidentiality must be ensured; the individualized treatment of their requests must be carried out by virtue of the positive obligations that States have;¹¹⁹ and deprivations of liberty that are *de facto* penalties or punitive sanctions “in the area of immigration control” are deemed as arbitrary and contrary to the ACHR.¹²⁰

As to proceedings on the *status* of refugees, the general due process and remedies guarantees enshrined in Articles 8 and 25 ACHR are applicable, decisions must “expressly include the reasons” for it, and appeal is to be permitted.¹²¹ In this regard, the Court cites the UNHCR to recall that “fair and efficient procedures for the determination of refugee *status* in order to ensure that refugees and other persons eligible for protection under international law are identified and granted protection”.¹²² Guarantees are thus instrumental to make sure that rights are recognized, that protection is given, and that prohibited conduct is not incurred in. Hence, they must also be observed in administrative and all other proceedings in which rights may be affected. In this sense, the Court added that

“[O]wing to the nature of the rights that could be affected by an erroneous determination of the danger or an unfavorable answer, the guarantees of due process are applicable, as appropriate, to this type of proceeding, which is usually of an administrative character. Thus, any proceeding relating to the determination of the refugee *status* of a person entails an assessment and decision on the possible risk of affecting his most basic rights, such as life, and personal integrity and liberty”.¹²³

As to the applicable and pertinent due process guarantees, the Court has said that they include “the necessary facilities, including the services of a competent interpreter, as well as, if appropriate, access to legal assistance and representation”, an objective examination by a proper authority and a “personal interview”; well-founded decisions; the protection of “the applicant’s personal information and the application, and the principle of confidentiality”; information on how to appeal in case an applicant “is denied refugee status”, and a reasonable period for that person

¹¹⁸ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 80.

¹¹⁹ *Ibid.*, para. 82.

¹²⁰ *Ibid.*, para. 147.

¹²¹ *Ibid.*, paras. 246-247, 257.

¹²² Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 156.

¹²³ *Ibid.*, para. 157.

to appeal; the necessity that such an appeal has “suspensive effects and must allow the applicant in the country until the competent authority has adopted the required decision [...] unless it can be shown that the request is manifestly unfounded”; and the effective availability of “certain judicial actions or remedies” when circumstances call for them, such as “for example, *amparo* or *habeas corpus*, that are rapid, adequate and effective to question the possible violation” of rights.¹²⁴

If children are involved, proceedings must be adapted in ways that permit them to have real access to them and that ensure that their specific situation will be considered. In the words of the San José judges: “proceedings [must be] appropriate and safe for children in an environment that creates trust at all stages” – even in the event of denial of the recognition of refugee *status*, by seeking to “avoid or reduce any possible psychological stress or harm” – taking into account the child’s best interests, providing special protection and care, avoiding undue delays, and adapting “proceedings on asylum or on the determination of refugee status, in order to provide children with a real access to these procedures, allowing their specific situation to be considered”.¹²⁵ Moreover, decisions on asylum applications made by children must be expressed in ways that are comprehensible for them and make sure that an adequate representative is present and that decisions may be subject to questioning and appeals. For the Court,

“the decision on the request taken by the competent authority as to whether the applicant is granted refugee status based on the factual and legal determinations must expressly include the reasons for the decision, in order to enable the applicant to exercise his right of appeal, if necessary. In addition, the decision must be communicated to the child in a language and manner appropriate to her or his age, and in the presence of the guardian, legal representative, and/or another support person. If refugee status is recognized, the competent authority should grant a document certifying this decision”.¹²⁶

Finally, it merits noting how, according to the Court, not only refugees but also other migrants, such as those receiving complementary protection, are entitled to rights such as non-devolution and others, which “should be *based on the needs of the applicant* and not on the type of international protection granted” (emphasis

¹²⁴ *Ibid.*, paras. 159-160.

¹²⁵ OC-21/14 on *Migrant Children*, *cit. supra* note 2, paras. 246-247, 254-256, 258, 261.

¹²⁶ *Ibid.*, para. 257.

added).¹²⁷ This rights-centered approach is a most welcome one that requires considering concrete risks that individuals are facing.

Additionally, it is worth noting that, in the case *Pacheco Tineo Family*, the Court made another important contribution in terms of indicating that, based on a proper interpretation of certain exclusion and negative clauses found in international refugee law, whenever someone is recognized as a refugee by a State, other States must afford that person such recognition, *i.e.* they should not refuse to treat that person according to the guarantees refugees have under international – and domestic, we might add – law. In the IACtHR’s own words,

“[O]nce a State has declared refugee status, this protects the person to whom this has been recognized beyond the borders of that State, so that other States that the said person enters must take into account this status when adopting any measure of a migratory character in his regard and, consequently, guarantee a duty of special care in the verification of this status and in the measures that it may adopt”.¹²⁸

3.5. – Mass Deportations

Two recent decisions reveal IACtHR considerations on mass deportations, one of which was rendered in the case *Nadege Dorzema* and another in the case of *expelled Dominicans and Haitians*. Both cases involved the Dominican Republic, which according to the International Organization for Migration is not only a country of emigrants, but also a migration destination and a transit country, especially from Haiti.¹²⁹ As the Court noted in its case-law on mass deportations, in the Dominican territory the Haitian population and individuals of Haitian descent live in conditions of poverty and marginality, and are discriminated against.¹³⁰

The case *Nadege Dorzema*, decided in 2012, dealt with the entry of 30 Haitians in that State, the shooting and killing of some of them by military agents, the survivors’ imprisonment and their transfer to the Haitian territory in exchange for money. The second case, decided in 2014, concerned the arbitrary arrest and summary ex-

¹²⁷ *Ibid.*, paras. 239-242.

¹²⁸ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 150.

¹²⁹ See the Country profile at <<https://www.iom.int/countries/dominican-republic>>.

¹³⁰ Case of *expelled Dominicans and Haitians*, *cit. supra* note 23, paras. 153 e 158, also recalling case *Nadege Dorzema*, *cit. supra* note 27, para 39.

pulsion of 26 Haitians and Dominicans of Haitian descent, and the adoption of discriminatory policies impeding the acquisition of the nationality for those individuals born in the Dominican Republic whose parents were not citizens.

While those cases not only addressed mass deportation – insofar as the Court found the violation of different ACHR provisions – ¹³¹ in both judgements the Court interpreted Article 22, para. 9, ACHR, according to which “The collective expulsion of aliens is prohibited”. The “collective” nature of an expulsion was qualified in the case *Nadege Dorzema* as the return a number of aliens not founded on an objective analysis of the individual situation of each person, but based on arbitrariness.¹³² In other words, the “collective” nature of an expulsion is not an issue related to the amount of returned aliens, but to the fact that they are expelled as a “group”.

In addition to the requirement of them being individualized, the expulsion procedures of aliens must afford sufficient guarantees demonstrating that the personal circumstances of each person have been taken into account,¹³³ *i.e.* according with the basic guarantees of fair trials and with the prohibition to discriminate, among other requirements.¹³⁴ In that regard, in its OC-18/03 *on Undocumented Migrants* the Court stated that those guarantees have to be granted to all persons irrespective of their

¹³¹ Over the violation of Article 22, para. 9, ACHR, in the case *Nadege Dorzema* the Court found the violation of the rights to life, personal integrity, personal liberty, fair trial, freedom of movement, and judicial protection, as well as for the breach of the duty to adapt its domestic law and not to discriminate. It’s due mentioning that, with regard to the violation of the right to life (Article 4, para. 1, ACHR) to the detriment of killed persons and of the right to personal integrity for the survived migrants (Article 5, para. 1, ACHR), the Court ascertained the exceptional use of force by the agents involved in the facts and their following acquittal decided by the military criminal justice (with regard to this specific aspect, see DORREGO, “Límites al uso de la fuerza por agentes estatales. Derechos de los migrantes en procedimientos de expulsión”, *Derechos Humanos*, Noviembre 2013, p. 129 ff.). In the case of *expelled Dominicans and Haitians*, *cit. supra* note 23, the Court held that the State violated the rights to juridical personality, name, nationality, personal liberty, privacy, fair trial, judicial protection, equal protection before the law, freedom of movement and residence, rights of the family, rights of the child, and equality and non-discrimination (for a brief comment, see INTERNATIONAL JUSTICE RESOURCE CENTER, “In the case of Dominican and Haitian People expelled v. the Dominican Republic, IACtHR finds multitude of human rights violations”, 28 October 2014, available at: <<https://ijrcenter.org>>).

¹³² Case *Nadege Dorzema*, *cit. supra* note 27, paras. 171 and 175.

¹³³ *Ibid.*

¹³⁴ Article 22, para. 6, ACHR, which states “No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it”, is aimed to prevent discriminatory and arbitrary expulsions. As noted by UPRIMNY YEPES and SÁNCHEZ DUQUE, “Artículo 22. Derecho de Circulación y de Residencia”, in STEINER and URIBE (eds.), *Convención Americana sobre Derechos Humanos. Comentario*, Berlin-Bogotá, 2014, p. 531 ff., that provision guarantees that the freedom to circulate and to reside is supported by the States’ duty to provide for guarantees just in relation to expulsion procedures.

migration status,¹³⁵ *i.e.* without any discrimination.¹³⁶ In fact, the Court acknowledged the

“importance of legal aid in cases [...] involving an alien who may not know the country’s legal system and who is in a particularly vulnerable situation given the deprivation of liberty, which means that the recipient State must take into account the particular characteristics of the person’s situation, so that the said person may have effective access to justice on equal terms”.¹³⁷

When the consequence of immigration proceedings in a State may entail the punitive (thus, arbitrary) deprivation of liberty¹³⁸ – as happened in the cases *Nadege Dorzema* and *of expelled Dominicans and Haitians* –, due process guarantees become of fundamental importance to prevent such abuse and, according to previous San José case-law, “free legal representation becomes an imperative for the interests

¹³⁵ OC-18/03 on *Undocumented Migrants*, *cit. supra* note 1, para. 121.

¹³⁶ *Ibid.*, para. 122 and case *Nadege Dorzema*, *cit. supra* note 27, para. 159.

¹³⁷ Case *Vélez Loor*, *cit. supra* note 4, para. 132.

¹³⁸ The previous IACtHR case-law (case *Vélez Loor*, *cit. supra* note 4, and OC-21/14 on *Migrant Children*, *cit. supra* note 2) already established the incompatibility with the ACHR of the punitive deprivation of liberty in order to control migratory flows, in particular those of an irregular nature. That being said, the detention of migrants for non-compliance with the immigration laws should only be used when necessary and proportionate in the specific case in order to ensure the appearance of the person in the immigration proceedings or to ensure the application of a deportation order, and only for the least possible time. Consequently, “immigration policies whose central focus is the obligatory detention of irregular migrants will be arbitrary, if the competent authorities do not verify, in each particular case and by an individualized evaluation, the possibility of using less restrictive measures that are effective to achieve those ends” (case *Vélez Loor*, *cit. supra* note 4, para. 171, and, on the same vein, case *Pacheco Tineo Family*, *cit. supra* note 33, para. 131). Moreover, a not arbitrary detention must the following requirements: its purpose is compatible with the ACHR; its appropriateness in light of the intended purpose; it has to be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists; and it’s strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose. As for children, in OC-21/14 on *Migrant Children*, *cit. supra* note 2, the Court affirmed that “States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority” (para 160). On these aspects, see MEDINA QUIROGA, *The American convention on human rights: crucial rights and their theory and practice*, 2nd ed., Antwerpen, 2016 p. 230 ff. On OC-21/14, see also ALIVERTI, *cit. supra* note 6.

of justice”.¹³⁹ In the OC-16/99 *on Consular Assistance* (and in the following case-law), the Court stressed the particular situation of imprisoned migrants

“in a social and juridical milieu different from their own, and often in a language they do not know, [who] experience a condition of particular vulnerability, which the right to information on consular assistance [...] seeks to remedy in such a way that the detained alien may enjoy a true opportunity for justice, and the benefit of the due process of law equal to those who do not have those disadvantages”.¹⁴⁰

As for the contents of minimum guarantees, in the case *Nadege Dorzema* the IACtHR – assertively relying on international law and practice – enumerated them as follows. Firstly, an alien has to be informed expressly and formally of the charges against him/her and the grounds for the expulsion or deportation, information about his/her rights included (e.g. the possibility of contesting the charges and of requesting and receiving consular assistance, legal assistance and, if needed, translation or interpretation). Moreover, in case of an unfavourable decision, the foreigner is entitled to present the case to the competent authority and to submit it for revision. Finally, expulsion may only be executed after notifying the decision.¹⁴¹ On those grounds, the Court concluded that the Dominican Republic acted against migrants as a group, without individualizing them or giving them the differential treatment that they were entitled to as human beings, and failed to consider their protection needs. This represented a collective expulsion contrary to Article 22, para. 9, ACHR.

Finally, it is important to reflect on some remarks on the relationship between the prohibition of collective expulsion and the development of migrant standard protection laws in light of international law and practice. It has been rightly observed that the IACtHR case-law on collective expulsions particularly highlights the emergence of common universal standards on the respect and protection of migrants.¹⁴² Certainly, in the decisions on both the cases *Nadege Dorzema* and *of expelled Domini-*

¹³⁹ Case *Vélez Loor*, *cit. supra* note 4, para. 146.

¹⁴⁰ See OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 121 and case *Vélez Loor*, *cit. supra* note 4, para. 152.

¹⁴¹ Case *Nadege Dorzema*, *cit. supra* note 27, para. 175 and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 356.

¹⁴² See OLMOS GIUPPONI, *cit. supra* note 6, p. 1492.

cans and Haitians there is a strong reliance on several (universal and regional) international human rights treaties¹⁴³ and on international practice, such as decisions of the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Office of the High Commissioner for Human Rights, and the European Court of Human Rights.

In that context, the reference to the works of the International Law Commission deserves a special mention, as it adopted (and submitted to the UN General Assembly) a draft of treaty on the expulsion of aliens in 2014.¹⁴⁴ Article 9 of the draft, on the prohibition of collective expulsion, affirms that “collective expulsion” means expulsion of aliens as a group, and also that a State may expel concomitantly the members of a group of aliens, but only following an assessment of each individual case. In addition, there are also Article 19, on the detention of aliens for the purposes of expulsion, or Article 26 on the procedural rights of foreigners subject to expulsion, widely recalled by the Court in the two cases analysed above.¹⁴⁵ They are, in essence, juridical contents that, under a *de jure condendo* perspective, both reflect the international law and practice on the protection of migrants and the homologous standards developed by the IACtHR.

3.6. – The Contributions of the IACtHR to the Delineation of the Duty of States to Protect Migrants from non-State Abuses

In addition to the States duty to “directly” respect human rights, according to Inter-American standards all migrants must be protected from non-State abuses, as was discussed in section 3.1, when citing the Inter-American Court’s position on *Drittwirkung* and private employers. That protection is required even when migrants

¹⁴³ In particular, the Court recalled the provisions prohibiting collective expulsions contained in the 4th Protocol to the European Convention for the Protection of Fundamental Rights and Freedoms (Article 4), the African Charter on Human and Peoples’ Rights (Article 12, para. 5), the Arab Charter on Human Rights (Article 26, para. 2), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 22, para. 1). See IACtHR, case *Nadege Dorzema*, *cit. supra* note 27, para. 170 ff. and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 361 ff.

¹⁴⁴ International Law Commission, *Expulsion of aliens*. Text and titles of draft articles 1 to 32, provisionally adopted on first reading by the Drafting Committee at the sixty-fourth session (UN Doc. A/CN.4/L.797), 24 May 2012.

¹⁴⁵ Case *Nadege Dorzema*, *cit. supra* note 27, para. 175 and case *of expelled Dominicans and Haitians*, *cit. supra* note 23, para. 355.

are not present in a State's territory in a manner that is consistent with its administrative or other applicable regulations. Due to the horizontal effects of human rights law, a negligent failure to do so engages State responsibility on the basis of what the duty to ensure with due diligence the enjoyment of human rights, found in Article 1, para.1, ACHR, requires States to do. Based on this, it is not only forbidden for States to discriminate against migrants, but they are also required to protect migrants from private abuses, considering that it is prohibited for States to "tolerate discriminatory situations that prejudice migrants".¹⁴⁶

The legal requirement of providing State protection from non-State violations is not only a human rights demand. It is also present, among others, in Refugee Law itself. Indeed, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees indicates the following:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection".¹⁴⁷

While the idea that migrants must be protected by States from non-State abuses as a matter of international law is not revolutionary and is based on basic international human rights obligations, its acknowledgment is nonetheless crucial, considering how frequently migrants are abused by non-State parties such as human traffickers or racist groups, and in contexts as those of smuggling, among others – without a doubt, these conducts, and others, are contrary to the full exercise of human rights guarantees and fundamental freedoms,¹⁴⁸ and are so troubling that the international society has developed instruments against them, such as the 2000 Protocol to

¹⁴⁶ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 119.

¹⁴⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Re-edited, New York, 1992.

¹⁴⁸ OBOKATA, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the UN Convention against Transnational Organized adopted by the General Assembly in the same year. Indeed, the 2001 Durban Declaration recognizes that States must “establish regular monitoring of acts of racism, racial discrimination, xenophobia and related intolerance in the public and private sectors”. Likewise, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination requires action against “racial discrimination by any persons, group or organization”; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families sets forth in Article 16 that migrant workers and their families are entitled to “effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions”.

Furthermore, non-State abuses can be a cause leading to displacement and migration, and both home States must deal with them and host States protect from returning individuals to places where there is no protection against serious non-State threats. As the Court mentioned in OC-21/14 *on Migrant Children*:

“[I]n addition to the traditional reasons for seeking refuge [...] it is pertinent to be aware of the new factors that lead individuals and, in particular children, to be forcibly displaced from their countries of origin, among which transnational organized crime and the violence associated with the actions of non-State groups stand out”.¹⁴⁹

In regard to migrant children, the Court has also recognized the necessity of protecting them from potential non-State and State abuses, preventing¹⁵⁰ or responding to them – e.g. by investigating abuses – ¹⁵¹, for instance when saying that children should be separated from adults, because holding them in the same place creates conditions that “are extremely prejudicial for their development and makes them vulnerable before third parties who, because they are adults, may abuse of their dominant situation”.¹⁵²

State and State Actors under International Human Rights Law”, *International Journal of Refugee Law*, vol. 17, 2005, pp. 394-395, 400-407; CARRILLO-SANTARELLI, *Direct International Human Rights Obligations of Non-state Actors: A Legal and Ethical Necessity*, Wolf Legal Publishers, 2017, p. 215.

¹⁴⁹ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 80.

¹⁵⁰ Case *Nadege Dorzema*, *cit. supra* note 27, para. 237.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, para. 176.

3.7. – A Tension between Sovereignty and Limits on State Action in Relation to Migration Aspects?

Different issues related to the protection of the rights of migrants unavoidably impinge on the freedom of States to make decisions and policy choices, for instance in regards to allowing certain foreigners to remain on their territory, to require the payment of their salaries if they have worked without having the proper permits due to their irregular migration *status*, or concerning the decision of to whom the State will grant its nationality, which has been traditionally regarded as falling under the scope of the States sovereignty. Yet, while at first glance it may seem as if there is a tension between sovereignty and human rights considerations, in truth there is none, because sovereignty empowers States to act in a legal way, and acting contrary to human rights is unlawful, reason why the respective acts are neither truly sovereign nor endorsed by international law. It must be recognized that this is so in authoritarian times and when there are discourses of exclusion.

Apart from the fact that the main bodies of the Inter-American System of Human Rights must take into account the States' sovereign rights under *lex lata*, considering that regional Human Rights Law does not exist in a vacuum and must be interpreted, as far as possible, in harmony with other international legal developments,¹⁵³ in these troubled, partisan and incensed times we are living in, what supervisory bodies as the Court and the Commission say may have political repercussions and trigger reactions such as withdrawals from international instruments or institutional and financial support. Therefore, one could think that such bodies walk a thin line in order to neither abandon the defence of human rights nor to make decisions that are seen as legally incorrect in light of sovereignty that may bring about the ire of certain States. Facing this conundrum, the stance of the IACtHR has been quite interesting and assertive. This is so because the Court has adopted a legally sound position, according to which it is true that in migration, mobility, and nationality matters, States retain the power to make *certain* choices.

Nevertheless, the IACtHR has well argued that in many of those aspects international law has evolved and ended up regulating some of them in terms of setting forth core protections or lowest common denominators that cannot be ignored. If States make choices that go “below” such guarantees, contradicting them, then their inter-

¹⁵³ European Court of Human Rights, *Al-Adsani v. United Kingdom*, Application No. 35763/97, Judgment of 21 November 2001, para. 55.

national responsibility would be engaged. In the own words of the Court, “[t]he determination of who has a right to be a national continues to fall within a State’s domestic jurisdiction. However, its discretionary authority in this regard is gradually being *restricted with the evolution* of international law, to ensure a better protection of the individual” (emphasis added).¹⁵⁴ Likewise, the San José judges have argued that there is no obligation to employ undocumented migrants, but that if they are employed then their labour rights must be respected and guaranteed, as was mentioned above;¹⁵⁵ and that “[I]n the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants [...] provided this is in accordance with measures to protect the human rights of all persons [...] to comply with this requirement States may take different measures, such as granting or denying general work permits or permits for certain specific work, but they must establish mechanisms to ensure that this is done without discrimination”.¹⁵⁶

The Court has also said that while States may adopt migration policies, they must bear in mind the ‘best interests of the child’ principle when their decisions may limit their human rights. For instance, according to the San José judges

“With regard to possible family separation for migratory reasons, the Court recalls that States have the authority to elaborate and execute their own immigration policies [...] a measure of expulsion or deportation may have prejudicial effects on the life, well-being and development of the child, so [...] his or her best interests should be an overriding consideration [...] the legal separation of the child from his or her family is only admissible if it is duly justified by the best interests of the child, if it is exceptional and, insofar as possible, temporary”.¹⁵⁷

In spite of this necessity of certain measures being exceptional, the Court added that – sadly, to us, in a system still attaching too much importance to State interests instead of those of individuals – “the child’s right to family life does not transcend *per se* the sovereign authority of the States Parties to implement their own immigration policies in conformity with human rights [...] Convention on the Rights of the Child also refers to the possibility of family separation owing to the deportation of

¹⁵⁴ Case of the girls *Yean y Bosico*, *cit. supra* note 23, para. 140.

¹⁵⁵ OC-18/03 on *Undocumented Migrants*, *cit. supra* note 1, paras. 135-136.

¹⁵⁶ *Ibid.*, para. 169.

¹⁵⁷ Case of *expelled Dominicans and Haitians*, *cit. supra* note 23, para. 416.

one or both parents”.¹⁵⁸ This State freedom, though, does not exist when States contravene legal frameworks, “basic procedural guarantees [...] international obligations”, do not seek “a lawful purpose”, do not take any measures seeking “to facilitate family reunification”, or engage in discrimination, event in which separation would be legally wrongful¹⁵⁹ – in other words, State freedom in the adoption and implementation of migratory policies has international legal and human rights limits.

Likewise, in the case *Vélez Loor*, the Court said, with very similar words, that “in the exercise of their authority to set immigration policies, States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention”, adding that “although States enjoy a margin of discretion when determining their immigration policies, the goals of such policies should take into account respect for the human rights of migrants”.¹⁶⁰ Interestingly, the San José judges do refer to a margin. However, they do not equate it with the doctrine of a ‘margin of appreciation’ as it is understood in Europe. Rather, the Court points towards an understanding of sovereign powers as existing on the condition that the international law is respected, as is described below.

Indeed, the IACtHR position coincides with the conception according to which, as flows from the Permanent Court of International Justice’s decision in the case *Wimbledon*,¹⁶¹ sovereignty does not equate with States having an unfettered power to make decisions. Instead, sovereignty refers to the powers and capacities States have and can exercise *in a manner that is compatible with international legality*.¹⁶² This rule of law consideration underlies the train of thought of the IACtHR, and *a fortiori* provides an argument of consistency: if States demand the respect of the choices they can legally make, the least they can do is respect legality (and the legal developments on the protection of human dignity) themselves.

¹⁵⁸ *Ibid.*, para. 417.

¹⁵⁹ *Ibid.*, para. 418.

¹⁶⁰ Case *Vélez Loor*, *cit. supra* note 4, para. 97.

¹⁶¹ Permanent Court of International Justice, *S.S. Wimbledon (U.K. v. Japan)*, Judgment of 17 August 1923.

¹⁶² See NOLTE, “Sovereignty as Responsibility?”, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 99, 2005, p. 389 ff. The author argued that, according to international case-law, one may describe sovereignty as being about “the liberty of a state within the limits of international law”.

Hence, States are not, and should be no longer considered as, the only or preponderant subjects of international law. States and the law are social and political constructs, and, as flows from what Antonio Cançado has well said, they should serve human beings because, in his opinion, they instrumentally exist for them: “[t]he State, created by the human beings themselves, and composed by them, exists for them [...] Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality”.¹⁶³ Moreover, the Court has said, “[t]he goals of migratory policies should take into account respect for human rights”.¹⁶⁴

Considering the previous analysis, we conclude that an alleged tension between sovereignty and human rights of migrants and foreigners, no matter what some States suggest, and as flows from the IACtHR case-law – and other human rights bodies – does not truly exist in international legal terms. This is because, after all, the Court enforces the respect of (human rights) legality, and sovereignty presupposes the respect of that legality. Otherwise, States do not have any freedom whatsoever to contravene that legality – based on the dignity of human beings – and choices they make to the contrary would be unlawful. Furthermore, States must recall that “special measures to ensure the protection of the human rights of [...] vulnerable groups” in migration contexts have been adopted at the international level.¹⁶⁵ It must also be noted that the Inter-American System of Human Rights does not use the doctrine of the margin of appreciation;¹⁶⁶ and that even in those regional systems that use, it must be borne in mind that discretion has limits.

4. – Final Remarks: Distilling the Essence of the IACtHR Case-law on Migrants

The analysis of the relevant case-law on the selected issues we have explored in this Chapter has shown a comprehensive picture of the *jus migrandi* as developed by the IACtHR, encompassing developments ranging from the fundamental OC-18/03 *on Undocumented Migrants* to the very recent OC-25/18 *on the Right of Asylum*, and

¹⁶³ IACtHR, *Condición Jurídica y Derechos Humanos del Niño*, Advisory Opinion OC-17/02 of 28 August 2002, Concurring Opinion of Judge A.A. Cançado Trindade, para. 19.

¹⁶⁴ OC-18/03 *on Undocumented Migrants*, *cit. supra* note 1, para. 168.

¹⁶⁵ OC-21/14 *on Migrant Children*, *cit. supra* note 2, para. 59.

¹⁶⁶ CARRILLO-SANTARELLI, “La legitimidad como elemento crucial de la efectividad de pronunciamientos de la Corte Interamericana de Derechos Humanos ante casos complejos y desafíos regionales”, *Revista general de derecho público comparado*, 2015/18, p. 1 ff.

passing through the OC-21/14 *on Migrant Children* and contentious-jurisdiction decisions. Moreover, a look “beyond the Court” has shown the IACHR’s proactive role in the promotion of human rights in the Inter-American System of Human Rights. We reported the case of Venezuelan migrants and pertinent IACHR resolutions recalling (all) the OAS Member States’ basic obligations, e.g. to recognize the refugee *status* and to respect the *non-refoulement* principle. That is a good example of how that OAS body can act in a preventive way, complementing, confirming, and strengthening the standard of protection of human rights judicially developed, even in relation to non-parties to the ACHR.

Definitely, with its case-law and developments, the Court and other OAS bodies have contributed by providing guidelines on the responses to migration, on the protection of the human rights of migrants, and on the prevention of factors that may lead to a worsening or eruption of migratory crises. Interestingly, those bodies have also stood up to human rights abuses against migrants coming from States as different in terms of power as the USA and Latin American States, thus disproving what some may believe as to the Inter-American System of Human Rights supposedly being only concerned with the latter and not daring to scrutinize USA violations. The Court and other OAS bodies have developed a case-law that, while responding to what happens in the region of the Americas, echoes pronouncements and the identification of issues that have been taking place elsewhere. The humane approach they have come up with, which is legally sound and based on principles similar to those of other regions, is likewise worth considering by other regional and universal human rights supervisory bodies – which have considered what the IACtHR has said in other fields already.¹⁶⁷

That being said, when trying to distil the very essence or main points of the analysed case-law, some fundamental points emerge.

Firstly, migrants are vulnerable. They suffer from some unequal conditions when compared to nationals, and that calls for specifically considering their needs in human rights terms, beginning with an analysis of the basic rights (a) not to be discriminated against and (b) to equality before the law.

Secondly, specific demands of protection must be considered in relation to each migrant as well. For instance, in the OC-21/14 *on Migrant Children* the San José judges analyzed the *non-refoulement* principle as an autonomous right established in

¹⁶⁷ For instance, see European Court of Human Rights (Grand Chamber), *Margus v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, paras. 56-66, 131, 138.

the ACHR as well as an obligation derived from the prohibition of torture and other human rights provisions, also stressing that, when migrant children are involved, the need to interpret them in light of the children protection are entitled to.¹⁶⁸ In the same OC-21/14, the IACtHR affirmed that in proceedings on the refugees *status*, the general due process and remedies guarantees *ex* Articles 8 and 25 ACHR apply, and that if children are involved proceedings that are appropriate and safe for them must be ensured and processed in an adequate environment, avoiding any possible psychological stress or harm (e.g. in case of denial), always taking into account the best interests of the child principle.¹⁶⁹ In that regard, in the OC-21/14 it was said that “International migration is a complex phenomenon that may involve two or more States, including countries of origin, transit and destination, for both migrants and those seeking asylum or refugee *status*. In this context and, in particular, that of mixed migration flows that entail population movements of a diverse nature, the characteristics of and the reasons for the journey that children undertake by land, sea or air, to countries other than those of which they are nationals or where they habitually reside, may bespeak both persons who require international protection and others who are moving in search of better opportunities for diverse reasons, which may change during the course of the migratory process. This means that the needs and requirements for protection may vary widely”.¹⁷⁰

Thirdly, States must respect and ensure human rights provided for ACHR in benefit of every person under their jurisdiction, migrants included, even in the case of irregular entry and/or *status*. In some cases, the Inter-American standards of protection take on a particular meaning. For instance, concerning International Refugee Law elements, the *non-refoulement* principle has a wider field of application, considering that the Inter-American System of Human Rights protects all aliens under the jurisdiction of States in the region, and not only refugees.¹⁷¹ This development is certainly welcome as it raises the level of protection of human rights in the Americas. From a general perspective, the same development is welcome also because it can influence other systems of protection of human rights. In fact, just as the IACtHR has adopted comparative analysis and cross-fertilization as hermeneutical tools to

¹⁶⁸ OC-21/14 on *Migrant Children*, *cit. supra* note 2, para. 45.

¹⁶⁹ *Ibid.*, *passim*.

¹⁷⁰ *Ibid.*, para. 36.

¹⁷¹ *Ibid.*, paras. 216-217.

interpret the ACHR, taking advantage of international law and international practice, it is also worth reminding that other Courts and bodies have also taken note of the Inter-American practice and case-law as an interpretative tool¹⁷² that may reflect the crystallization of legal standards. We think that this cross-fertilization dynamic in both ways represents a key element for the development of general and regional rules on the protection of migrants.

Fourthly, as was argued in the Chapter, a tension between sovereignty and limits on State action in relation to migration aspects does not really exist, due to the fact that sovereign decisions must respect human rights – and other – international legal obligations. Since the OC-18/13 on *Undocumented Migrants*, the Court has built a set of protection standards, progressively adding new indications on migrants' rights, depending on the specificities of each case and alleged violations of the ACHR. The result is the Inter-American *jus migrandi* in best part summarized in the OC-25/18 on *the Right of Asylum* and made up of limitations to the States' latitude when regulating and handling migratory flows and their effects. Just to point out an example, we can recall the employment of undocumented migrants: there is no obligation to employ them (*i.e.*, related to a sovereign decision on employment permits), but if they find a job, the duties to respect and guarantee their labour rights arise and bind the State involved both when labour takes place in private or public relations.¹⁷³

In sum, migrants are rightfully recognized as human beings, as human and with

¹⁷² *Ex multis*, see CAMARILLO GOVEA, "Convergencias y divergencias entre los sistemas europeo e interamericano de derechos humanos", *Revista Prolegómenos-Derechos y Valores*, 2016, p. 80 ff.; DI STASI, "La Corte interamericana e la Corte europea dei diritti dell'uomo: da un *trans-regional judicial dialogue* ad una cross-fertilization?", in ARROYO LANDA et al. (eds.), *Diritti e giurisprudenza. La Corte interamericana dei diritti umani e la Corte europea di Strasburgo*, Napoli, 2014, p. 1 ff.; GROPPI, LECIS COCCO-ORTU, "Le citazioni reciproche tra la Corte europea e la Corte interamericana dei diritti dell'uomo: dall'influenza al dialogo?", in MELICA et al. (eds.), *Studi in onore di Giuseppe De Vergottini*, Padova, 2015, p. 439 ff.; HENNEBEL, "Les Références Croisées Entre Les Juridictions Internationales Des Droits De L'Homme", in MARTENS et al. (eds.), *Le dialogue des Juges – Actes du colloque organisé le 28 avril 2006 à l'Université libre de Bruxelles*, Bruxelles, 2007, p. 16 ff. With specific regard to the influence of the case *Vélez Loor* on the EU Court of Justice decision in the case *El Didri* (Judgment of the Court, First Chamber, of 28 April 2011, Hassen El Dridi, alias Soufi Karim. Reference for a preliminary ruling: Corte d'appello di Trento – Italy C-61/11 PPU), see NICOLOSI, "The Treatment of Irregular Migrants in the Inter-American Human Rights and European Union Case law. Two Parallel Lines May even Meet", in HAECK et al. (eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge-Antwerp-Portland, 2015, p. 593 ff.

¹⁷³ OC-18/03 on *Undocumented Migrants*, *cit. supra* note 1, paras. 135-136.

as much dignity as anyone else, and thus deserving and being entitled to the recognition of their equal dignity and worth, which do not depend on any factors different from human identity¹⁷⁴ such as the random place of birth or origin. As the Court has well pointed out,

“The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity [...] according to which ‘[a]ll human beings are born free and equal in dignity and rights’”.¹⁷⁵

Indeed, the dignity of all migrants without discrimination must be respected by States – and other actors – whenever they interact with migrants. In that regard, it’s due to remind what the Court affirmed in the case *Pacheco Tineo Family*, i.e. that

“under international law, certain limits have been developed to the application of migratory policies that impose, in proceedings on the expulsion or deportation of aliens, strict observance of the guarantees of due process, judicial protection and respect for human dignity, whatsoever the legal situation or migratory status of the migrant”.¹⁷⁶

Additionally, it is important to bear in mind that several circumstances may generate migration dynamics, which are sadly too often related to risks, vulnerability and abuses of rights. Moreover, the recognition of the equality and non-discrimination that all human beings are entitled to – as a matter of peremptory law, no less –¹⁷⁷ and the principle of legality underpin the *jus migrandi*, as has been well recognized by the IACtHR. It has well pointed out that several regimes, including human rights law, with their due process and other guarantees and freedoms, are applicable when examining the treatment of migrants. Whenever their rights may be affected, proper guarantees must be observed. Indeed, the San José judges have repeatedly held that due process must be guaranteed to everyone, regardless of their migratory status, because the broad scope of the intangible nature of due process applies not only *ratione materiae* but also *ratione personae* without discrimination, and also that States have the obligation to ensure this fundamental principle to their citizens and to any alien who is in their territory, without any discrimination based on their regular or

¹⁷⁴ CARRILLO-SANTARELLI, *cit. supra* note 148, pp. 45, 77-78.

¹⁷⁵ OC-18/03 on *Undocumented Migrants*, *cit. supra* note 1, para. 157.

¹⁷⁶ Case *Pacheco Tineo Family*, *cit. supra* note 33, para. 129.

¹⁷⁷ OC-18/03 on *Undocumented Migrants*, *cit. supra* note 1, para. 101.

irregular presence, their nationality, race, gender or any other condition. That being said, and as was indicated previously in this Chapter, the Court has also held that, when considering the principle of equality and non-discrimination, it is

“permissible for the State to grant a different treatment to documented migrants in relation to undocumented migrants, or to immigrants in relation nationals, ‘provided that this treatment is reasonable, objective and proportionate, and does not harm human rights’”.¹⁷⁸

Finally, it’s worth mentioning a further point regarding the analysed case-law. The consolidation of the Inter-American set of standards for the protection of migrants has much to contribute to international law and practice and deserves being studied by other regional systems and the UN system of protection of human rights. The potential multidirectional cross-fertilization represents a key element for the development and interpretation of standards on the protection of migrants, for instance in regard to the recognition of the principle of equality before the law and non-discrimination as a *jus cogens* one¹⁷⁹ or the identification of *non-refoulement* not only as treaty but also as found in customary law (even as a peremptory requirement if a person would torture or cruel, inhuman or degrading treatment if returned).¹⁸⁰ Those standards, furthermore, generate *erga omnes* legal effects. Additionally, the *raison d’être* of the rights and guarantees of migrants should never be forgotten. They ought to provide protection for all migrants, independently of their origin and destination, be them a group of Haitians crossing the Dominican border in search of a better life or those who, escaping from poverty and/or persecution, navigate the seas to reach the coasts of the EU Member States or Australia.

Inter-American practice and case-law may also be considered to declare international law. In that regard, under a *de jure condendo* perspective, the reliance made by the IACtHR on the works of the International Law Commission, which in 2014 adopted a draft of treaty on the expulsion of aliens,¹⁸¹ deserves a special mention. In relation to mass deportation and other aspects, it takes into account the vulnerability of migrants (Article 15) and addresses elements of the protection and rights of mi-

¹⁷⁸ Case of expelled Dominicans and Haitians, *cit. supra* note 23, paras. 351, 402.

¹⁷⁹ OC-18/03 on Undocumented Migrants, *cit. supra* note 1, para. 101.

¹⁸⁰ OC-25/18 on the Right of Asylum, *cit. supra* note 3, para. 179.

¹⁸¹ International Law Commission. *Expulsion of aliens*, *cit. supra* note 144 The Court made references to the draft in the case *Nadege Dorzema*, in the case *Pacheco Tineo Family*, in the case of *expelled Dominicans and Haitians* and, finally, in OC-21/14 on *Migrant Children*.

grants, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and the connected obligation to not expel an alien who may face the risk of such treatment (Articles 17 and 24). In some cases, the International Law Commission mentions, in its commentaries to Articles and with interpretative relevance, the IACtHR case-law and the IACHR practice, which are part of the Inter-American *jus migrandi* that likely had an influence on the writing of the draft and may also contribute to the future codification of international law,¹⁸² being this evidence of the cross-fertilization we have referred to, and which more than justifies studying Inter-American developments and standards in different regions and levels of governance.

Interestingly, in December 2017, the United Nations General Assembly took note of the draft, acknowledged the comments expressed by Governments in the 6th Committee (“Legal questions”), and decided to include the item “Expulsion of aliens” in the provisional agenda of its 75th session (2020), with a view to examining, *inter alia*, the question of the form that might be given to the articles or “any other appropriate action”.¹⁸³ Indeed, the future adoption of the draft by the UN General Assembly would represent a further and important step forward the codification of a general more comprehensive (universal, we could affirm) *jus migrandi* and would have an Inter-American footprint. Migration dynamics take place all over the world, and human beings are their protagonists who deserve the recognition of their dignity and the respect of the rights flowing from it.

¹⁸² For instance, the International Law Commission referred to the case *Berenson* (IACtHR, *case of Lori Berenson Mejía v. Peru [Merits, Reparations, and Costs]*) in the commentary to Article 24 “Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, in order to sustain the absolute character of the prohibition *de qua*. As for the IACHR practice, in the commentary to Article 29 “Readmission to the expelling State” some references regard its recommendation on the prohibition of arbitrary expulsions.

¹⁸³ United Nations, General Assembly, UN Doc. A/RES/72/117, adopted on 7 December 2017 at its 67th plenary meeting.

10. GENDER PERSPECTIVES IN THE APPLICATION OF EXISTING INTERNATIONAL RULES AND STANDARDS OF REFUGEE LAW

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SUMMARY: 1. Introduction – 2. Jurisprudence as the Ideal Means of Gender Sensitive Application of Rules and Standards of International Refugee Law – 3. A Gender Sensitive Interpretation of International Refugee Law Treaties – 3.1. The Interpretative Rule of VCLT Article 31 – 3.1.1. The Interpretative Means of VCLT Article 31(1) – 3.1.2. The Interpretative Means of VCLT Article 31(3) – 3.2. The Interpretative Rule of VCLT Article 32 – 4. International Jurisprudence and the Principle of Systemic Integration – 5. Epilogue

1. – Introduction

Despite the fact that fifty per cent of the world's refugees are estimated to be women or girls,¹ the protection granted to them seems to be falling short of being

¹ ALLWOOD, WADIA, *Refugee Women in Britain and France*, Oxford, 2010, p. 2.

effective. Despite the continuous pronouncement of the vulnerability of female refugees and asylum seekers² and, thus, of their being in need of special protection,³ there is much room for improvement left. Indeed, one would find it hard to contradict the observation that “as being a refugee makes refugee women more vulnerable than other women, discrimination on grounds of sex makes them more vulnerable than men, including refugee men”.⁴ Yet, even though the jurisprudence of regional and international fora has to a certain extent contradicted the lack of gender perspectives within refugee law *per se* (by having been developed so as to provide refugee women with a more gender sensitive protection, compatible with their particular hygienic,⁵ gestational⁶ and postpartum needs⁷) more innovative steps concerning the interpretation and, subsequently, the application of existing rules of refugee law are yet to be taken as a response to numerous frightening indications of cruelty plaguing female refugees and asylum seekers worldwide.⁸

² Treaty practice (e.g. General Assembly of the Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, signed on 9 June 1994, entered into force on 5 March 1995, Art. 10); Fora’s practice (e.g. European Court of Human Rights, *RR v Poland*, Application No. 27617/04, Judgment of 26 May 2011, para. 159; Inter-American Commission of Human Rights, “IACHR expresses concern over the situation of the ‘Migrant Caravan’ from Honduras and calls on the States of the region to adopt measures for their protection”, 23 October 2018, available at: <http://www.oas.org/en/iachr/media_center/PReleases/2018/225.asp>.). .

³ European Court of Human Rights, *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgment of 16 March 2010, para 148; European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, para 251; Security Council Resolution 1325 (2000), Landmark resolution on Women, Peace and Security, UN Doc. S/RES/1325 (2000), fourth and tenth preambular paragraphs; MUIŽNIEKS, “Human rights of refugee and migrant women and girls need to be better protected”, *The Commissioner's Human Rights Comments*, 7 March 2016, available at: <<https://www.coe.int/en/web/commissioner/-/human-rights-of-refugee-and-migrant-women-and-girls-need-to-be-better-protected?desktop=true>>.

⁴ JOHNSSON, “The International Protection of Women Refugees: A Summary of Principal Problems and Issues”, *International Journal of Refugee Law*, 1989, p. 221 ff., p. 229.

⁵ European Court of Human Rights, *Aden Ahmed v. Malta*, Application No. 55352/12, Judgment of 23 July 2013, para. 92.

⁶ *Id.*, *Mahmundi and Others v. Greece*, Application No. 14902/10, Judgment of 31 July 2012, para. 70.

⁷ *Id.*, *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, Judgment of 19 January 2010, para. 64.

⁸ COSTA RIBA, “Women face daily dangers in Greek refugee camps”, Amnesty International, 5 October 2018, available at: <<https://www.amnesty.org/en/latest/campaigns/2018/10/women-daily-dangers-refugee-camps-greece/>>; United Nations High Commissioner for Refugees, “Refugee women and children face heightened risk of sexual violence amid tensions and overcrowding at reception facilities on Greek islands”,

Alarming though it may seem, women apply for asylum at lower rates than men, even though acceptance rates of applications submitted by women are higher.⁹ This evinces an insufficiency of the accessibility of asylum seeking procedures to women, which profoundly calls for immediate regulation. Accordingly, sex-oriented specification of obligations arising from provisions granting substantive rights, such as the right to education,¹⁰ the freedom of assembly and association,¹¹ the right to property [potentially in the form of timely financial assistance throughout periods of additional needs (e.g. pregnancies)]¹² and prohibition of discrimination¹³ remains essential, as worrying findings highlight inequalities as to their enjoyment. The enumeration of the said problems in need of solution is indicative and not restrictive, as a complete list highlighting the worries to be confronted would be sadly going on for pages. The same would hold true for wishes of potential measures to be implemented. However, such enumerations should be seen as falling outside the scope of this paper, as does a commentary on the lack of the inclusion of gender-based persecution as a ground of refugee status, which has been extensively analysed elsewhere.¹⁴ The paper at hand will not focus on advocating for a potential customary modification of

The UN Refugee Agency, 9 February 2018, available at: <<https://www.unhcr.org/news/briefing/2018/2/5a7d67c4b/refugee-women-children-face-heightened-risk-sexual-violence-amid-tensions.html>>; WRIGHT, "Rohingya women and girls face renewed risks, harms in refugee camps: Oxfam Canada report", *The Globe and Mail*, 11 September 2018, available at: <<https://www.theglobeandmail.com/world/article-rohingya-women-and-girls-face-renewed-risks-harms-in-refugee-camps/>>; BAKLACIOĞLU, "The Violence of Tolerated Temporality: Syrian Women Refugees on the outskirts of Istanbul", in FREEDMAN et al. (eds.), *A Gendered Approach to the Syrian Refugee Crisis*, Abingdon-New York, 2017, p. 42 ff, pp 42-57.

⁹ FREEDMAN, *Gendering the International Asylum and Refugee Debate*, New York, 2007, p. 30.

¹⁰ United Nations High Commissioner for Refugees, "Her Turn: It's time to make refugee girls' education a priority", *The United Nations Refugee Agency*, available at: <<https://www.unhcr.org/herturn/>>.

¹¹ BEKAJ et al., *Political Participation of Refugees: Bridging the Gaps*, Strömsborg, 2018, p. 49.

¹² BULMAN, "Pregnant refugees facing unacceptable delays in maternity payments", *Independent*, 17 May 2017, available at: <<https://www.independent.co.uk/news/uk/home-news/pregnant-refugees-asylum-seekers-maternity-payments-delays-british-red-cross-a7739366.html>>.

¹³ PITTAWAY and BARTOLOMEI, "Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women", *Refuge: Canada's Journal on Refugees*, 2001, p. 21 ff, p. 24-28.

¹⁴ UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends", *International Journal of Refugee Law*, 1997, p. 79 ff, p. 79-113; United Nations High Commissioner for Refugees, "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", UN. Doc HCR/GIP/02/01, (7 May 2002); See JOHNSON, *cit. supra* note 4, pp. 221-222; CASTEL, "Rape, Sexual Assault and Meaning of Persecution", *International Journal of Refugee Law*, 1992, p. 39 ff, pp. 39-40.

the Convention Relating to the Status of Refugees (hereinafter, the 'Refugee Convention')¹⁵ either, nor will it suggest a modification of the said Convention or *de lege ferenda* interpretations of existing rules of international refugee law in general.

On the contrary, the purpose of the present paper is to shed light to the reasons why existing rules and standards of international refugee law, enshrined in international treaties, should be seen as granting gender sensitive protection, namely protection aiming to address female refugees' and asylum seekers' special gender-related needs. Initially, the paper at hand will highlight that innovative jurisprudence, operating as subsidiary means for the determination of rules of international refugee law, constitutes the key to the establishment of their gender sensitive application. To this end, the significance of jurisprudence within the system of international law will be highlighted and the ultimate limits of precedents' function will be underlined. Furthermore, the present paper will indicate that a gender sensitive application of treaty rules on refugees' and asylum seekers' protection within decisions is not only feasible but also the only *lege artis* correct one. This conclusion will be derived from a thorough analysis of the rules on treaty interpretation, which essentially leads the interpreter to various interpretative tools supporting the said gender sensitive interpretation. Finally, the significance of the abovementioned interpretative approach to the whole system of international refugee law and the confrontation of the adverse phenomenon of fragmentation will be highlighted, verifying the correctness of the conclusion that the establishment of the innovative, gender sensitive application of international rules on refugees' and asylum seekers' protection is essential.

2. – Jurisprudence as the Ideal Means of Gender Sensitive Application of Rules and Standards of International Refugee Law

Despite the fact that no doctrine of *stare decisis* runs through international law,¹⁶ it is beyond doubt that precedents play a significant role therein. Indeed, the *inter partes* effect of binding judicial or arbitral decisions is highlighted within most statutes of international courts and tribunals.¹⁷ Accordingly, Article 38 (1) of the Statute of International Court of Justice ('ICJ'), which has been broadly acknowledged as a provision

¹⁵ Convention Relating to the Status of Refugees, signed on 28 July 1951, entered into force on 22 April 1954, United Nations, Treaty Series, vol. 189, p. 137.

¹⁶ SHAHABUDDIN, *Precedent in the World Court*, Cambridge, 1996, p. 1.

¹⁷ REUTER, *Droit international public*, Paris, 1958, p. 85.

reflecting the sources of international law,¹⁸ classifies judicial decisions as “subsidiary means for the determination of rules of law”,¹⁹ even though an introductory reference to Article 59 of the said Statute explicitly denounces their binding character.

In line with the aforementioned, international courts and tribunals frequently rely on rulings of their predecessors, using previous decisions as the principal basis for the issuance of subsequent ones.²⁰ As a result, this judicial and arbitral practice has been characterized as a “*de facto* system of precedent”,²¹ a “jurisprudence *constant*”,²² and a “*de facto* form of *stare decisis*”.²³ Thus, it seems more and more evident that, despite the unambiguousness of the subsidiary character of judicial and arbitral decisions as sources of law, they do play a very important role in defining international law.²⁴ After all, precedents constitute the least controversial secondary source of law with so decisive an influence on subsequent decisions, state practice and, eventually, primary sources of international law, as even States, having entrusted the interpretation and application of primary sources of law to various fora, will be at least influenced by their decisions as to their subsequent law-making conduct. Hence, since suggestions of *de lege ferenda* interpretations and amendments to the primary sources of international refugee law are to be herein avoided, it is jurisprudence that seems to be the key towards the establishment of an innovative application of international refugee law provisions.

Pursuant to this brief reference to the importance of previous decisions within international law generally, it is about time attention was drawn to the importance of an innovative gender sensitive application of refugee law provisions within decisions of competent international fora specifically. Such decisions will similarly constitute

¹⁸ PELLET, “Article 38” in ZIMMERMANN et al. (eds.), *The Statute of the International Court of Justice. A Commentary*, Oxford, 2012, p. 677 ff., p. 735.

¹⁹ Statute of the International Court of Justice, Art. 38(1)(d).

²⁰ NORTON, “The Role of Precedent in the Development of International Investment Law”, *ICSID Review - Foreign Investment Law Journal*, 2018, p. 280 ff., p. 280; GUILLAUME, “The Use of Precedent by International Judges and Arbitrators”, *Journal of International Dispute Settlement*, 2011, p. 5 ff., p. 13.

²¹ KLAGER, *Fair and Equitable Treatment in International Investment Law*, Cambridge, 2011, p. 35.

²² BJORKLUND, “Investment Treaty Arbitral Decisions as Jurisprudence Constante: UC Davis Legal Studies Research Paper No 158”, *Social Science Research Network Electronic Paper Collection*, December 2008, available at: <<http://ssrn.com/abstract=1319834>>.

²³ KAUFMANN-KOHLER, “Arbitral Precedent: Dream, Necessity or Excuse?”, *Arbitration International*, 2007, p. 357 ff., p. 358.

²⁴ DE BRABANDERE, “Arbitral Decisions as a Source of International Investment Law”, in GAZZINI and DE BRABANDERE (eds.), *International Investment Law. The Sources of Rights and Obligations*, Leiden, 2012, p. 245 ff., pp. 245-288.

subsidiary means for the determination of the rules and standards of international refugee law, contributing significantly to the enhancement of the refugee law system's effectiveness concerning gender-related needs, as international refugee law does not constitute an exception to the abovementioned general rule of a “*de facto* system of precedent” governing international law in general. More precisely, the portraiture of the traditional circular motion running through the construction of international law's sources will – in the case of international refugee law – take the following particular form: the existing international rules and standards of refugee law, applicable to the hypothetical dispute at stake, as applied by the competent forum and as incorporated within its decision, will subsequently constitute a “subsidiary means for the determination of rules of law” and will be used for the purpose of the said determination by competent fora in subsequent similar disputes, ultimately influencing the content of these subsequent decisions. In this exact influence does the great importance of such innovative jurisprudence as means of gender sensitive application of rules and standards of refugee law lie. As time passes by, the innovative path will turn into established case-law.

It is beyond doubt that the formation of this path has already begun, as gender sensitive international fora's decisions have already made their presence clear,²⁵ giving a strong, undoubted gender sensitive message for the determination of international refugee law provisions. Indicatively, the Human Rights Committee has taken the vulnerability of lesbian women due to laws criminalising homosexuality into se-

²⁵ European Court of Human Rights, *Jabari v. Turkey*, Application No. 40035/98, Judgment of 28 October 1999; *Aden Ahmed v. Malta*, cit. *supra* note 5; Id., *Mahmundi and Others v. Greece*, cit. *supra* note 6; Id., *Muskhadzhiyeva and Others v. Belgium*, cit. *supra* note 7; Id., *Emily Collins and Ashley Akaziebie v. Sweden*, Application No. 23944/05, Judgment of 8 March 2007; Id., *N v Sweden*, Application No. 23505/09, Judgment of 20 July 2010; Inter-American Commission on Human Rights, “Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America”, OAS/Ser.L/V/II. 155, Doc. 16, 24 July 2015, p. 40, para. 76; Human Rights Committee [ICCPR], *X v Sweden*, Communication No. 1833/2008, Decision of 1 November 2011; Human Rights Committee [ICCPR], *Jasin (on behalf of S and ors) v Denmark*, Communication No. 2360/2014, Decision of 22 July 2015; Committee on the Elimination of Discrimination against Women, *MEN v Denmark*, Communication No. 35/2011, Decision of 26 July 2013; Committee on the Elimination of Discrimination against Women, *SO v Canada*, Communication No. 49/2013, Decision of 27 October 2014; Committee on the Elimination of Discrimination against Women, *A v Denmark*, Communication No. 53/2013, Decision of 19 November 2015, para. 8.4; BEYANI, “The Needs of Refugee Women: A Human-Rights Perspective”, *Gender and Development*, 1995, p. 29 ff., p. 32.

rious account, noting that, if a deportation to a country with such legislative provisions was implemented, the risks posed to the deported lesbian woman would be so extreme as to breach the International Covenant on Civil and Political Rights ('ICCPR'),²⁶ and in particular the prohibition on refoulement entailed in its Article 7.²⁷ Similarly, the Committee on the Elimination of Discrimination against Women, having noted that the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')²⁸ "complement[s] the international regime, taking into account the lack of explicit gender provisions in international documents for the protection of refugees and stateless persons",²⁹ highlighted that "[t]he positive obligations of state parties that arose from Article 2(d) of CEDAW included the protection of women from the 'real, personal, and foreseeable risk of serious forms of gender-based violence' including in situations that took place outside the territory of the state party."³⁰ It has moved even further to explicitly note that States parties are required also to ensure that each of five grounds enumerated in the Refugee Convention is given a gender-sensitive interpretation, as well as that a gender-sensitive approach should be applied at every stage of the asylum process.³¹ Accordingly, the Committee on the Rights of Child has underlined that the refugee definition "must be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children".³²

²⁶ International Covenant on Civil and Political Rights, adopted on 19 December 1966, entered into force on 23 March 1976, United Nations Treaty Series, Vol. 999, p. 171.

²⁷ Human Rights Committee [ICCPR], *MI v Sweden*, Communication No. 2149/2012, Decision of 25 July 2013, paras. 7.2, 7.5, 8.

²⁸ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, entered into force on 3 September 1981, United Nations Treaty Series, Vol. 1249, p. 13.

²⁹ Committee on the Elimination of Discrimination against Women, *A v Denmark*, *supra* note 25, para. 8.4

³⁰ *Ibid.*, para. 8.6.

³¹ Committee on the Elimination of Discrimination Against Women, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc CEDAW/C/GC/32 (2014), para. 25; Committee on the Elimination of Discrimination against Women, *MEN v Denmark*, *supra* note 25, para. 9.

³² Committee on the Rights of the Child, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc CRC/GC/2005/6 (2005), para. 27; Committee on the Rights of Child, *K.Y.M. v. Denmark*, Communication No. 3/2016, para. 11.3.

Taking such rulings into account, the innovative character of similar gender sensitive decisions might not seem to be so innovative after all. However, until the specific jurisprudential pronouncement of the correctness and the necessity of gender sensitive interpretative specification of obligations stemming from international refugee law and the establishment of the gender sensitive application of international refugee law provisions within decisions as settled case-law, such jurisprudential indications should be at least seen as bright examples to be more frequently used by fora on subsequent occasions; as innovative subsidiary means for the determination of rules of international refugee law.

Even though following the gender perspectives enshrined within such innovative decisions will not be mandatory for subsequent fora, the latter will probably need to justify their decision to not follow a gender sensitive application of the rules of international refugee law, since the real question to be addressed will not be whether a State is held to decisions reached by fora in previous cases, but ‘whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases’.³³ At any rate, even if such an obligation of justification of the choice to depart from earlier rulings could not be seen as being imposed on fora, then at least the non-gender sensitive application of the rules of international refugee law followed by them would undoubtedly have to be the outcome of the applicable law’s interpretation. Instantly, a question arises: Could such an interpretative outcome be extracted from existing rules of international refugee law? Or, in other words, is the abovementioned gender sensitive interpretation the *lege artis* correct one?

The second question arising (particularly when one observes the circular motion described above) is whether this suggested gender sensitive application might eventually lead to a modification of the applicable international treaty, altering also the obligations imposed on States. However, what should be underlined is that such “jurisprudential modifications” contradict the function of precedents within the construction of international law. Jurisprudence does not constitute as a “source” strictly speaking.³⁴ Hence, it cannot lead to the creation of new rules of law.³⁵ Conversely, the role precedents play concerning the rules of international law is a determinative

³³ International Court of Justice, *Cameroon v. Nigeria* (Land and Maritime Boundary), Judgment of 11 June 1998, para. 2.

³⁴ See PELLET, *cit. supra* note 18, 735.

³⁵ PELLET, “Decisions of the ICJ as Sources of International Law?”, in Gaetano Morelli Lectures Series, *Decisions of the ICJ as Sources of International Law?*, Rome, 2018, p. 7 ff., p. 33.

one.³⁶ Evidently, a limit is posed on fora's decisions, according to which the latter cannot create new rules of law; they can only contribute to the determination of existing ones instead. They are tools that fora are invited to use for the purpose of investigating the three sources of international law enumerated in Article 38 subparas. 1a-1c of the ICJ's Statute.³⁷ They cannot lead to the emergence of new obligations; they may only determine the scope of the existing rules³⁸ and, thus, the scope of the obligations enshrined therein.

However, when the determination of the rule of law ends, its interpretation begins. And as the determination cannot lead to the creation of a new rule,³⁹ it could be within the amendment or the interpretation of the treaty that such an alteration could occur.⁴⁰ Nevertheless, the circumstances under which such an amendment might take place, are regulated by the provisions of the Vienna Convention on the Law of Treaties⁴¹ ('VCLT') on treaties' amendment (if such provisions do not exist within the treaty to be modified *per se*).⁴² As the emergence of established case-law is not provided for as a means of treaty modification by VCLT or by any other treaty, falling under the scope of "international refugee law", the answer to the second question arisen above is a negative one. After all, even the ones that do accept that authentic interpretation, whereby *all* parties themselves – or through special mechanisms⁴³ to which they have entrusted the power of authentic interpretation – agree on (or at least accept) the interpretation of treaty terms by means, which are extrinsic to the treaty,⁴⁴ is of a higher interpretative quality,⁴⁵ will undoubtedly agree that such a point of view does not change the said negative answer, as authentic interpretation lies – again – in the hands of the Contracting States – or of the special mechanisms, to which the power of authentic interpretation has been entrusted – and not on the ones of the fora's members, the latter being limited to interpreting and applying the applicable law at the dispute, at least in cases that they do not adjudicate *ex aequo et bono*.

³⁶ See PELLET, *cit. supra* note 18, 783.

³⁷ *Ibid.*, p. 784.

³⁸ See PELLET, *cit. supra* note 30, p. 33.

³⁹ *Ibid.*

⁴⁰ VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, p. 429.

⁴¹ Vienna Convention on the Law of Treaties, signed on May 23, 1969, entered into force on January 27, 1980, UN Treaty Series Vol. 1155, 331.

⁴² VCLT Arts. 39-41.

⁴³ See for example; Free Trade Commission of the North American Free Trade Agreement.

⁴⁴ See VILLIGER, *cit. supra* note 40, p. 429.

⁴⁵ JENNINGS, WATTS, *Oppenheim's International Law: Peace*, 9th Edition, Harlow, 1996, para. 630.

Pursuant to the analysis stated above, the question of whether a modification might occur through a gender sensitive application of refugee law provisions seems to be a question of no substance. The same does not hold true for the first question though, namely the question of whether a gender sensitive interpretative outcome could be *lege artis* extracted from existing rules of international refugee law, since if the answer to this question is affirmative, then the gender sensitive interpretation of the applicable rules of international law (as determined through case-law) will be the only correct one, as if all interpretative tools lead to such an interpretative outcome, then the room for conflicting interpretations will be essentially smaller. It is this very question that attention will be now turned to.

3. – A Gender Sensitive Interpretation of International Refugee Law Treaties

International refugee law undoubtedly incorporates a wide range of rules; it is not only international treaties that frame international refugee law, as aside from its cornerstones, namely aside from the Refugee Convention and the Protocol relating to the Status of Refugees,⁴⁶ and aside from regional and international human rights treaties and international humanitarian and international criminal law conventions, it is international customary law, general principles of international law, soft law regulations and various other sources of law and guidance that compose the international legal framework for refugees' and asylum seekers' protection.⁴⁷ However, as has been already mentioned, the paper at hand will focus on the rules and standards of international refugee law incorporated within international treaties for the purpose of the avoidance of complex issues regarding the (possibility of) customary rules' and general principles' interpretation, which exceed the matter being addressed within the paper at hand and for the purpose of reaching conclusions, which will be more or less generally endorsable. Thus, the present Section will focus on answering the question of whether a gender sensitive interpretative outcome could be extracted

⁴⁶ Protocol relating to the Status of Refugees, signed on 31 January 1967, entered into force 4 October 1967, United Nations Treaty Series, vol. 606, p. 267.

⁴⁷ United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women, UN Doc. UN Doc. ES/SCP/67 (1991); United Nations High Commissioner for Refugees, Policy on Refugee Women, UN Doc. A/AC.96/754 (1990); NICHOLSON, KUMIN, *A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27*, 2017, Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017, p. 15-32.

from existing rules of international refugee law incorporated within international treaties, irrespectively of the fact that some of the provisions contained within such treaties have been subsequently acknowledged as incorporating customary rules of international law.⁴⁸ To this end, guidance will be sought from the customary rules of interpretation,⁴⁹ namely the interpretative rules enshrined in VCLT, as it is in accordance with these interpretative rules – or the customary rules enshrined in VCLT – that the interpretation of international rules and standards of refugee law incorporated within international treaties shall take place.

3.1. – The Interpretative Rule of VCLT Article 31

3.1.1. *The Interpretative Means of VCLT Article 31(1)*

Among the said wide range of rules composing the construction of international refugee law, many examples of treaty provisions granting a gender sensitive protection can be traced.⁵⁰ Having been developed so as to address the specific needs and minimize the particular dangers related to refugee's and asylum seeker's sex,⁵¹ such treaty provisions leave no room to the interpreter than to adopt a gender sensitive interpretative outcome. The gender-protective purpose of such provisions is also reflected on the very wording used within such rules, the latter being itself gender-

⁴⁸ HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005, p. 364.

⁴⁹ AUST, *Modern Treaty Law and Practice*, 2nd ed., New York, 2007, pp. 12-13.

⁵⁰ Convention on the Elimination of All Forms of Discrimination against Women, cit. *supra* note 28; Convention on the Rights of the Child, signed on 20 November 1989, entered into force on 2 September 1990, United Nations Treaty Series, vol. 1577, p. 3, Arts. 22, 29(d); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, signed on 15 November 2000, entered into force on 25 December 2003, United Nations Treaty Series, vol. 2237, p. 319; African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, signed on 11 July 2003, entered into force on 25 November 2005, Art. 4, Art. 10(2)(b), Art. 11; Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, signed on 11 May 2011, entered into force on 1 August 2014, CoE Treaty Series No. 210, Art 4(3), Art 60; General Assembly of the Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, cit. *supra* note 2, Art. 10..;

⁵¹ Convention on the Elimination of All Forms of Discrimination against Women, cit. *supra* note 28, tenth and fifteenth preambular paragraphs; African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, cit. *supra* note 50, seventh, twelfth and fourteenth preambular paragraphs; Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, cit. *supra* note 50, sixth and twelfth preambular paragraphs; General Assembly of the Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, cit. *supra* note 2, sixth preambular paragraph.

related. Specific pronouncements of “women” or “girls” as beneficiaries of a certain form of protection are to be found within such provisions. Hence, when called upon to interpret the treaty, fora will be led by VCLT Article 31(1) to do so “in good faith” and by paying attention to the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. As the ordinary meaning of such wordings and the object and purpose of such treaties is gender-coloured, the correctness of a gender sensitive interpretative outcome and subsequently of a gender perspective in the application of such provisions is undoubted. What should be subsequently examined is whether such a similar interpretation could derive from more obscure provisions, within which no specific reference to female refugees or asylum seekers can be traced. This is the assumption that light will be now turned to.

3.1.2. The Interpretative Means of VCLT Article 31(3)

Indeed, gender perspectives in the application of treaty provisions and standards of refugee law are also promoted by the interpretative rule of Article 31(3) VCLT, which mainly draws the interpreter’s attention to the subsequent agreements⁵² and practice⁵³ of the treaty’s Contracting Parties and to the “relevant rules of international law applicable in the relations between the parties”.⁵⁴ For the purposes of the present paper, this Subsection will focus on highlighting those agreements and manifestations of state practice that should be used as interpretative tools during the performance of the interpretative exercise of VCLT Article 31(3). To this end, it is agreements and indications of state practice placed at a timeline pursuant to the conclusion of the Refugee Convention, that will be noted, despite the prior development of international refugee law that gradually led to the conclusion of the said treaty,⁵⁵ as it is still deemed as the cornerstone of international protection of refugees.⁵⁶ However, it should be underlined that the indications to be analysed below could be used as interpretative tools not only for the interpretation of the Refugee Convention, but

⁵² VCLT Art. 31 (3)(a).

⁵³ VCLT Art. 31 (3)(b).

⁵⁴ VCLT Art. 31 (3)(c).

⁵⁵ SKRAN, “Historical Development of International Refugee Law”, in ZIMMERMANN, DÖSCHNER, MACHTS (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford, 2011, p. 3 ff., pp.3-36.

⁵⁶ KÄLIN, CARONI, HEIM, “Article 33 para. 1 1951 Convention”, in ZIMMERMANN, DÖSCHNER, MACHTS (eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford, 2011, p. 1327 ff., p. 1395.

also of other, anterior or posterior to its conclusion, treaty provisions, which fall within the ambit of international refugee law, to the extent that the criteria to be mentioned below are met.

Initially, it should be highlighted that the very conclusion of subsequent treaties granting gender sensitive protection to female refugees and asylum seekers could be seen as being of a significant interpretative value. The parties to the Refugee Convention, bound by its provisions and bearing the obligations deriving from it in mind, decided to conclude subsequent treaties,⁵⁷ particularizing the protection to be granted to female refugees in order to address their gender-related needs. Such posterior treaties could be seen as subsequent agreements between the parties regarding the application of the provisions of the treaty to be interpreted and could be thus seen as operating as interpretative tools in accordance with VCLT Article 31 (3)(a). The fact that not all of the parties to the Refugee Convention (or to any convention falling within the ambit of international refugee law) are parties to the posterior treaties for the specification of the protection to be granted to female refugees, does seem to lessen the subsequent treaties' interpretative value, as this overall participation of member-States is deemed as an essential prerequisite for the invocation of the interpretative means of VCLT Article 31(3)(a),⁵⁸ even though it has been argued that, if one or more of the parties to the initial treaty are involved by means of an instrument, to which the other parties have agreed (or which they have at least accepted),⁵⁹ then the uniform interpretation of the treaty envisaged by Article 31 (3)(a) will be fulfilled.⁶⁰ In any case, if the said prerequisite is not met, then the aforementioned indications of state practice might be seen as either interpretative means in accordance with VCLT Article 31(3)(b) or with VCLT Article 32. However, given that within none of the subsequent treaties granting a gender sensitive protection to female refugees can an interpretative (or an application-specifying) purpose⁶¹ be spotted, such treaties should be seen as falling within the ambit of VCLT Article 31 (3)(c) instead. If that is the case, their interpretative value will not be lost, as it will rather move from being the one expressed in VCLT Article 31 (3)(a) to being the one described

⁵⁷ See *supra* note 50.

⁵⁸ International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, UN Doc. A/73/10 (2018), p.28, para. 4.

⁵⁹ See VILLIGER, cit. *supra* note 40 p. 429.

⁶⁰ *Ibid.*

⁶¹ See AUST, cit. *supra* note 49, p. 239.

in Article 31 (3)(c). Given that there is no hierarchy among the interpretative means of VCLT Article 31,⁶² the classification of the said treaties as falling under the interpretative tools provided for by VCLT Article 31(3)(a), 31(3)(b) or 31(3)(c), leaves their interpretative value unaffected.

Hence, subsequent treaties concluded by all or some of the States-parties to the treaty to be interpreted, which serve the purpose of granting a sex-oriented protection to women constitute relevant rules of international law applicable in the relations between the parties in accordance with VCLT Article 31(3)(c). But so do any other applicable in the relations between the parties rules of international law, which are relevant with the subject-matter of the treaty term to be interpreted.⁶³ No particular relationship is required between the treaty to be interpreted and the provision being taken into account in this regard, aside from the latter's assistance in the interpretation of the former's terms.⁶⁴ Hence, even treaties concluded prior to the conclusion of the treaty to be interpreted or even treaties, which do not specifically address the matter of female refugees or female asylum seekers and which still concern the term to be interpreted, such as the Convention on the Political Rights of Women⁶⁵ or the Convention on the Nationality of Married Women⁶⁶ or the Convention against Discrimination in Education⁶⁷ and so on, will serve as interpretative tools. Given the wide range of "relevant rules of international law" falling under the scope of VCLT Article 31 (3)(c), it is not only international or regional treaties that constitute interpretative means in accordance with the said provision. On the contrary, customary rules and even the general principles of international law may be used for the purpose of treaty provisions' interpretation.⁶⁸

⁶² See VILLIGER, cit. *supra* note 40, p. 436; METHYMAKI, TZANAKOPOULOS, "Masters of Puppets? Re-assertion of Control through Joint – Investment Treaty Interpretation", in KULICK (ed.), *Reassertion of Control over the Investment Treaty Regime*, Cambridge, 2016, p. 155 ff, p. 169.

⁶³ International Court of Justice, *Djibouti v. France* (Certain Questions of Mutual Assistance in Criminal Matters), Judgment of 4 June 2008, para. 112.

⁶⁴ See VILLIGER, cit. *supra* note 38, p. 432.

⁶⁵ Convention on the Political Rights of Women, United Nations Treaty Series, Vol. 193, p. 135, adopted on 31 March 1953, entered into force on 7 July 1954.

⁶⁶ Convention on the Nationality of Married Women, United Nations Treaty Series, Vol. 309, p. 65, adopted on 29 January 1957, entered into force on 11 August 1958.

⁶⁷ United Nations Educational, Scientific and Cultural Organization, Convention against Discrimination in Education, United Nations Treaty Series, Vol. 429, p. 93, adopted on 14 December 1960, entered into force on 22 May 1962.

⁶⁸ See VILLIGER, cit. *supra* note 40, p. 433.

All the aforementioned hold true provided that the “relevant rules of international law” to be used as interpretative means are indeed applicable in the relations between the parties. The applicability of the said rules will depend on the binding nature of the rule at stake, as well as on whether this binding effect applies to all the parties to the treaty at issue.⁶⁹

Additionally, the interpretative rule of VCLT Article 31(3)(b) will undoubtedly lead to a gender sensitive interpretative outcome as well. More specifically, taking into account “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, the interpreter will find it hard to not be led to the said gender sensitive interpretation, as plenty of indications of subsequent practice undoubtedly evince the sex-oriented protection prospects of the treaties’ provisions. What should be underlined is that for the purposes of VCLT Article 31(3)(b) it is *any* subsequent practice that is relevant and thus, in this way, the said article seems to complete Article 31(3)(a), as it expands the scope of interpretative tools covering indications of practice beyond subsequent agreements.⁷⁰ However, for state practice to fall into the authentic interpretative tool of subsequent practice resembled in VCLT Article 31(3)(b), it should be a conduct in the application of the treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.⁷¹ This practice will constitute objective evidence of the understanding of the parties as to the meaning of the treaty⁷² and should therefore establish the agreement *all* of the parties regarding the treaty’s interpretation,⁷³ as well as their conception of the interpretation as binding upon them.⁷⁴ Additionally, this active practice should be consistent, namely of a certain frequency.⁷⁵ What should be subsequently highlighted is that the number of parties that must actively engage in subsequent practice in order to establish an agreement

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 431.

⁷¹ See International Law Commission, cit. *supra* note 58, Conclusion 4, para. 2, p. 27.

⁷² International Law Commission, Report of the International Law Commission on the work of the second part of its seventeenth session, UN Doc. A/6309/Rev.1 (1966), Yearbook of the International Law Commission 1966, Vol. II, p. 221, para. 15.

⁷³ See VILLIGER, cit. *supra* note 40, p. 431; See International Law Commission, cit. *supra* note 58, p. 31, para 16.

⁷⁴ International Law Commission, Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/167 and Add.1-3 (1964), Yearbook of the International Law Commission 1964, Vol. II p. 60, para. 25.

⁷⁵ *Ibid.*, p. 59 para 24.

under VCLT Article 31(3)(b) may vary.⁷⁶ More specifically, silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.⁷⁷ Hence, the active practice of some of the parties to the treaty to be interpreted might fulfil the common understanding of the parties as to the treaty's interpretation, envisaged by VCLT Article 31(3)(b),⁷⁸ if no other party raises objections thereto.⁷⁹ In line with the aforementioned, the European Court of Human Rights, applying VCLT Article 31(3)(b), held that the State practice at stake was "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions,⁸⁰ indicating that interpreters possess a certain discretion when assessing whether an agreement of the parties regarding a certain interpretation is established.⁸¹

Pursuant to this brief analysis of the circumstances under which subsequent state practice should be taken into account by treaties' interpreters as interpretative means of VCLT Article 31(3)(b), it is about time light was shed on whether such subsequent state practice, supporting refugee law treaties' interpretation in a gender sensitive, protection-granting way actually exists. And the answer to this question is affirmative, given that state practice has throughout the years followed a gender sensitive orientation.

As the International Law Commission (ILC) has stated that subsequent practice under VCLT Articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions,⁸² it is indications of such conducts that will be sought. Initially, it should be noted that indications of States' national legislations, having been formed so as to provide a gender sensitive protection to female refugees are far from infrequent. Aside from specific legislative instruments adopted by certain States for the just evaluation of gender-related claims of asylum seekers and refugees,⁸³ it could be

⁷⁶ International Law Commission, cit. *supra* note 55, Conclusion 10, para. 2, p. 75.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See VILLIGER, cit. *supra* note 40, p. 431; See ILC, cit. *supra* note 74, p. 59, para. 18.

⁸⁰ European Court of Human Rights, *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 23 March 1995, paras. 79, 81.

⁸¹ See International Law Commission, cit. *supra* note 58, p. 76, para. 6.

⁸² *Ibid.*, Conclusion 5 para. 1, p. 37.

⁸³ FREEDMAN, *Female Asylum-Seekers and Refugees in France, Protection Policy and Legal Advice Section (PPLAS) Division of International Protection Services United Nations High Commissioner for*

noted that national legal frameworks of most States worldwide could be seen as granting the said gender sensitive protection, if the specific rules and standards of refugee law, as incorporated within national legal frameworks are invoked and applied in conjunction with provisions safeguarding the equality of genders and non-discrimination. As treating different situations differently is a specific aspect of the principle of equality,⁸⁴ such provisions could be seen as vehicles to the gender sensitive application of rules and standards of refugee law within national legislation. It should be after all noted that European law has had a decisive impact on the expansion of States that adopt and apply explicit gender sensitive measures,⁸⁵ when its provisions are incorporated in national legislations.⁸⁶

Furthermore, jurisprudence of national courts of States-parties to treaties that constitute parts of the international refugee law, operating as indications of state practice, could also provide for indications of such gender sensitive refugee protection. And so it does!⁸⁷ National courts' jurisprudence has indeed been granting a strong gender sensitive protection to refugees throughout the years, constituting this way a useful, gender-coloured tool for the interpretation of refugee law provisions.⁸⁸

Refugees, UN Doc. PPLAS/2009/01 (June 2009), p. 57; WALLACE, "Making the Refugee Convention Gender Sensitive: The Canadian Guidelines", *International & Comparative Law Quarterly*, 1996, p. 702 ff, pp.702-707; CRAWLEY, LESTER, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*; United Nations High Commissioner For Refugees, Evaluation And Policy Analysis Unit, Department Of International Protection, And Regional Bureau For Europe, UN Doc. EPAU/2004/05 (May 2004), pp. 21-32.

⁸⁴ BARNETT, *Understanding Public Law*, Oxon and New York, 2010, p. 44.

⁸⁵ SANSONETTI, *Female Refugees and Asylum Seekers: The Issue of Integration*, EU publications; Directorate-General for Internal Policies of the Union, 2017, p. 17.

⁸⁶ See CRAWLEY, LESTER, cit. *supra* note 83, pp. 23-24.

⁸⁷ EDWARDS, "Age and Gender Dimensions in International Refugee" in FELLER et al. (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge, 2003, p. 46 ff, pp. 52-57, 59-73; United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/1P/4/ENG/REV. 3 (Geneva, 2011), pp. 92-93, para. 6.

⁸⁸ See for example; Court of Appeals (9th Circuit) (United States), *Olympia Lazo-Majano v. Immigration and Naturalization Service*, 9 June 1987, No 813 F.2d 1432; Board of Immigration Appeals (United States), *D.V. v. Immigration and Naturalization Service*, 25 May 1993, Interim Decision No. 3252; Refugee Status Appeals Authority (New Zealand), 29 August 1994, Refugee Appeal No. 915/92 Re S.Y.; Commission des Recours des Réfugiés (France), *Nadia El Kebir*, 22 July 1994; Court of Appeals (3rd Circuit) (United States), *Parastoo Fatin v. Immigration and Naturalization Service*, 20 December 1993, No. 12 F.3d. 1233; Court of Appeals (9th Circuit) (United States), *Fisher v. Immigration and Naturalization Service*, 1996, No. 79 F. 3d 955; Refugee Status Appeals Authority (New Zealand), 12 February 1996, Refugee

Indicatively, since the early 1990s, an increasing number of jurisdictions have recognised female genital mutilation as a form of persecution in their asylum decisions.⁸⁹ Indeed, in its exemplary sentence, the Spanish National Court noted that, while it is true that sex or gender violence is not among the causes of persecution under Article 1(2) of the [Refugee] Convention, it can however fit into persecution by the membership of a particular ‘social group’ as contemplated in that provision.⁹⁰ As is evident, the said court interpreted the Refugee Convention in such a way that led to the interpretative result that female genital mutilation falls under the causes of persecution that requires the granting of the status of refugee. The Spanish courts moved further on to note that, regardless of whether such practices are officially

Appeal No. 2039/93 Re M.N; Refugee Status Appeals Authority (New Zealand), 30 July 1996, Refugee Appeal No. 2223/94; High Court of Australia, *Applicant A and Another and Refugee Review Tribunal (joining) v Minister for Immigration and Ethnic Affairs*, Appeal decision, 24 February 1997; Court of Appeals (7th Circuit) (United States) *Grajo v. Immigration and Naturalization Service*, 4 August 1997, No. 124 F.3d 203; House of Lords (United Kingdom), *R v. Immigration Appeal Tribunal, ex parte Shah*, 25 March 1999, Nos. 2AC629, 2All ER545; Board of Immigration Appeals (United States), 11 June 1999, Interim Decision No. 3403; Refugee Status Appeals Authority (New Zealand), Refugee Appeal No. 71427/99; Asylum and Immigration Tribunal / Immigration Appellate Authority (United Kingdom), *Secretary of State for the Home Department v. Lyudmila Dzhygun*, 17 May 2000, Appeal No. CC-50627-99 (00TH00728); Board of Immigration Appeals (United States), 27 June 2000, Interim Decision No. 3433; Commission des Recours des Réfugiés (France), *Haj Ahmed*, 30 November 2000, No. T98-06186; *Mehmet Brahimi v. Immigration Appeal Tribunal and Secretary of State for the Home Department*, No. CO/2238/2001; Court of Appeals (9th Circuit) (United States), *Aguirre-Cervantes v. Immigration and Naturalization Service*, 21 March 2001, No. 242 F.3d 1169; Administrative Court Frankfurt am Main (Germany), 7 September 2001, No. 1 E 31666/97.A(1); Court of Appeals (9th Circuit) (United States), *Fuentes v. Immigration and Naturalization Service*, 7 September 2001, No. 127 F.3d 1105; Administrative Court (Verwaltungsgerichtshof, 3rd instance) (Austria), 31 January 2002, No. 99/20/0497-6; Court of Appeals (7th Circuit) (United States), *Nwaokolo v Immigration and Naturalization Service*, Appeal judgment, 314 F.3d 303, 27 December 2002; High Court of Justice (Queen’s Bench Division) (United Kingdom), Court of Appeals (9th Circuit) (United States), *Mohamed v Gonzales - Attorney General*, Appeal judgment, 400 F.3d 785, 10 March 2005; High Court of Australia, *Minister of Immigration and Multicultural Affairs v. Khawar*, 11 April 2002, No. HCA 14; Asylum Court (Austria), 29 January 2013, No. E1 432053-1/2013; 13th Asylum Committee of the Hellenic Ministry of Interior (*Greece*), 24 October 2016, No. 22371.

⁸⁹ Commission des Recours des Réfugiés (France), *Aminata Diop*, 164078, 18 September 1991; Commission des Recours des Réfugiés, *Mlle Kinda*, 366892, 19 March 2001; Immigration and Refugee Board of Canada, *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh v. Canada*, 10 May 1994; United States Board of Immigration Appeals, *In re Fauziya Kasinga*, Applicant File A73 476 695, 13 June 1996; Immigration and Appeals Tribunal (United Kingdom), Appeal Number 00TH00493, 19 January 2000; Austrian Federal Refugee Council, Independent Federal Asylum Senate, *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00, 21 March 2002; *Conseil du Contentieux des Etrangers* (Belgium), *Jurisprudence n° 979-1239*, 25 July 2007.

⁹⁰ Spanish National Court (Administrative Chamber), Judgment No. 540/2003, 12 January 2005.

prohibited by criminal laws of the countries of origin, an applicant should still be granted the refugee status, provided that circumstantial evidence of alleged persecution – but not complete or absolute evidence of the alleged facts – is brought, as female genital mutilation is eventually often carried out in private and the authorities of the country of origin are, in many cases, unable to provide effective protection against the abuse.⁹¹ Furthermore, even prior to these gender sensitive jurisprudential examples, the House of Lords had famously pronounced that female genital mutilation “constitutes treatment which would amount to persecution within the meaning of the [Refugee] Convention”⁹² and “will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment”⁹³. After all, the gender-sensitive attitude of States can be also traced within declarations of State representatives, who express their wishes and plans for the achievement of female refugees’ and asylum seekers’ protection – related goals.⁹⁴

In line with what has been already mentioned, such indications of state practice as the ones noted above, will be considered as means of interpretation in accordance with VCLT Article 31(3)(b) provided that they indicate at least an active practice of some (if not all) of the parties to the treaty to be interpreted, which is acquiesced by the other parties and against which other parties have not raised objections.⁹⁵ The practice indicated through national courts’ jurisprudence, national legislation or declarations of state representatives should therefore establish the agreement of the parties regarding the treaty’s interpretation.⁹⁶ Such an agreement deriving from subsequent practice under VCLT Article 31(3)(b) can result, in part, from silence or inaction by one or more

⁹¹ First instance Court of Spain, *Margarita v Spain*, Judgment no 2734, 21 June 2006, paras 3 – 4..

⁹² House of Lords, *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* 18 October 2006, para. 25.

⁹³ *Ibid.*, para. 94.

⁹⁴ See for example; Department for International Development of the UK, “UK steps up work to protect women and girls from trafficking and provide winter care for vulnerable refugees”, 3 February 2017, available at: <<https://www.gov.uk/government/news/uk-steps-up-work-to-protect-women-and-girls-from-trafficking-and-provide-winter-care-for-vulnerable-refugees>>; Media Center of the Irish Department of Justice and Equality, “Minister Stanton announces extended funding for female refugee employment projects”, 4 December 2018, available at: <<http://www.inis.gov.ie/en/INIS/Pages/press-release-041218-minister-stanton-announces-extended-funding-for-female-refugee-employment-projects>>; ALLWOOD and WADIA, *Refugee Women in Britain and France*, Manchester and New York, 2010, p. 5.

⁹⁵ See VILLIGER, cit. *supra* note 40, p. 431; See International Law Commission, cit. *supra* note 74, p. 59, para 18.

⁹⁶ See VILLIGER, cit. *supra* note 40, p. 431.

parties.⁹⁷ Lastly, for subsequent practice to be deemed as an interpretative means of VCLT Article 31(3)(b), it should be also of a certain frequency⁹⁸ and should intend, possibly among other aims,⁹⁹ to clarify the meaning of a treaty or how it is to be applied, whether a reference to this aim is explicit or implicit.¹⁰⁰

To the extent that these prerequisites are met, these indications of state practice that support a gender sensitive application of international refugee law will constitute interpretative means in accordance with VCLT Article 31(3)(b). The fulfilment of the aforementioned criteria will of course have to be examined on an *ad hoc* basis. However, even though the criterion of consistency and frequency will depend on the number of the States-parties of the treaty to be interpreted and their conduct, what should be underlined is that against the active gender sensitive application of provisions of international refugee law by many States, no State has raised objections. Indeed, even when Sweden did not accept that the claims of women or those based on sexual orientation fit within the ‘particular social group’ ground of the refugee definition, it did not do so in order to lessen a gender sensitive protection to asylum seekers, publicly noting its intentions to adopt legislative changes for the purpose of correcting this inconsistency.¹⁰¹ States’ silence is determining as to the fulfilment of the criterion of consistency, as a gender sensitive specification of States’ obligations stemming from international refugee law seems to have arisen. If States did not wish to actually carry this gender sensitive burden, they would have explicitly stated so, the circumstances formed having called for a reaction in case of disagreement. However, the States did not do so. Whether the latter was an outcome of their sensitivity on the matter of female refugee’s and asylum seekers’ protection, or of the consideration of their obligations arising from general rules of international law related to the said matter is irrelevant for the evaluation of the their subsequent practice as interpretative tools, indicating in fact a conduct that matches the one prescribed in VCLT Article 31(3)(b). At any rate, it should be underlined that even if the criterion of consistency is not met, the subsequent practice by one or more parties in the application of the treaty, after its conclusion, will at any rate serve as a supplementary means of interpretation under VCLT Article 32.¹⁰²

⁹⁷ See ILC, cit. *supra* note 58, p. 73, para. 13.

⁹⁸ See International Law Commission, cit. *supra* note 74, p. 59, para. 24.

⁹⁹ See International Law Commission, cit. *supra* note 58, pp. 30-31, para. 13.

¹⁰⁰ *Ibid.*, p. 31, para. 14.

¹⁰¹ See EDWARDS, cit. *supra* note 88, p. 55.

¹⁰² See International Law Commission, cit. *supra* note 58, Conclusion 4, para. 2, p. 27.

Lastly, as to the interpretative aim of the indications of State conduct noted above, the need of an *ad hoc* evaluation is also undeniable. However, it should be also presumed that States would not wish to act conversely to their international obligations. Thus, the presumption that the aim of the fulfilment of their obligations stemming from international refugee law provisions is the incentive leading to the adoption of the appropriate legal framework and the issuance of appropriate jurisprudence is at least probable.

Hence, in line with all the aforementioned, the holistic exercise¹⁰³ portrayed in VCLT Article 31 seems to determine a fate of gender sensitive interpretation and subsequently application of provisions of international refugee law, boosting the protection of female refugees and asylum seekers significantly.

3.2 – The Interpretative Rule of VCLT Article 32

Even though a gender-oriented view of international rules and standards incorporated in international conventions during the latter's interpretation according to VCLT Article 31 does not seem to leave the provisions' meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable,¹⁰⁴ recourse could be had to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, for the purpose of the confirmation of the meaning resulting from the application of VCLT Article 31. And so it will.

Initially, what should be pointed out is that treaties' *travaux préparatoires*, which indeed seem to indicate the "real" intentions of the drafters,¹⁰⁵ are on most occasions difficultly approachable. However, on occasions that these are indeed available, they seem to enhance gender perspectives in the application of the subsequently concluded convention. More precisely, even though the plight of women being persecuted for reasons related to their gender as victims of systematic rape, sexual abuse and discriminatory patterns of traditional customs or behaviour is a matter not addressed directly by the Refugee Convention,¹⁰⁶ a gender sensitive protection seems

¹⁰³ WTO Appellate Body, *United States v. China*, WT/DS363/AB/R, Report of 21 December 2009, para. 348.

¹⁰⁴ VCLT Art. 32 (a)-(b).

¹⁰⁵ See VILLIGER, cit. *supra* note 40, p.444.

¹⁰⁶ United Nations High Commissioner for Refugees, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, available at: <<https://www.unhcr.org/refugees/1951-convention>>

to be indicated by the said Convention's *travaux préparatoires*, as while drafting Articles 12 and 24, States seemed to bear in mind the rights and the needs of married women¹⁰⁷ and female workers.¹⁰⁸ Similarly, during the preparatory works of the *ad hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime, which eventually led to the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, particular consideration seems to have been placed on the need of protection of female refugees and asylum seekers.¹⁰⁹

Moving on to the political, social and cultural factors surrounding treaties' conclusion, which are also enumerated among the non-exhaustive list of supplementary interpretative tools noted in VCLT Article 32,¹¹⁰ it should be pointed out that *milieu* that seems to have had a decisive impact on the Contracting States' decisions as to the form and content of the treaties that fall within the ambit of international refugee law could be seen as leading to a gender sensitive interpretation and application of these treaties. Precisely, the years prior to the conclusion of the Refugee Convention seem to have had tremendous impacts on female refugees,¹¹¹ indicating the need for gender perspectives in the application of the provisions that were to be adopted. Accordingly, the historical background surrounding the drafting of CEDAW indicates that the Contracting States did have the female refugees' and asylum seekers' protection in mind as well.¹¹²

Furthermore, the rational techniques of interpretation, such as *per analogiam*, *a contrario*, *lex posterior derogat legi priori*, *lex specialis derogat legi speciali*, etc. are to be also deemed as supplementary interpretative means.¹¹³ That being said, it

hcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>, p. 9.

¹⁰⁷ *Ibid.*, pp. 64 - 66.

¹⁰⁸ *Ibid.*, pp. 115, 125 - 133.

¹⁰⁹ *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime, Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/AC.254/4/Add.3/Rev.7 (2000), pp. 2, 13.

¹¹⁰ *Ibid.*, p. 445.

¹¹¹ DAVIS, "Belonging and 'Unbelonging': Jewish refugee and survivor women in 1950s Britain", *Women's History Review*, 2017, p. 130 ff, p. 130-146; GATRELL, *The Making of the Modern Refugee*, Oxford, 2013, pp. 283-296.

¹¹² CAMPBELL, *Women, Poverty, Equality: The Role of CEDAW*, Oxford, 2018, p. 29-37.

¹¹³ *Ibid.*

should be noted that the application of the supplementary interpretative technique of *argumentum a contrario* seems to also support the gender sensitive application of rules and standards enshrined in international treaties. As such a gender sensitive interpretation and application is not prohibited by neither the wording nor the purposes of the treaties that constitute parts of the international refugee law regime, it is allowed. Lastly, what should be emphasised is that if the prerequisites for the classification of subsequent agreements, of subsequent state practice or of rules of international law as the means of interpretation provided for by the interpretative rules of VCLT 31(3)(a) – 31(3)(c) are not met, then the gender sensitive interpretative tools noted in Section 3,1 above will serve as supplementary means of interpretation, as the resilient wording of VCLT Article 32 allows for an extension of the indicative list of interpretative means it provides.¹¹⁴ Hence, the latter will also strengthen the gender perspectives in the interpretation of international refugee law provisions in this alternative way.

At any rate, the fact that the supplementary character of the interpretative tools included within VCLT Article 32 precludes a contrary to the purpose of the treaty interpretation based on them,¹¹⁵ is certain. That not being doubted, it should be underlined that this gender sensitive interpretation of refugee law provisions indicated by the aforementioned interpretative tools is far from being contrary to treaties' protective purposes, as they seem to rather enhance and complete them, no hesitation as to such a gender sensitive interpretation on such grounds is permitted. After all, given that the interpretative rule of VCLT Article 31 was proved to also lead to the said gender sensitive interpretative outcome, which was also verified by the interpretative rule of VCLT Article 32, this gender-coloured interpretation seems to be the only correct one.

4. – *International Jurisprudence and the Principle of Systemic Integration*

As indicated in 3.2, jurisprudence of international courts and tribunals plays a determining role within the construction of international law generally and interna-

¹¹⁴ BERNARDEZ, "Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties", in HAFNER et. al. (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday*, The Hague, 1998, p. 721 ff, p. 726.

¹¹⁵ See International Law Commission, cit. *supra* note 72, p. 223, para. 19.

tional refugee law specifically, serving as a valuable subsidiary means for the determination of rules of international law. What should be subsequently noted is the significant role it plays as to the principle of systemic integration. The latter is considered to be the main antidote to what has been called the phenomenon of fragmentation of international law.¹¹⁶ And despite the fact that within international refugee law contradictory provisions are rather rare, the significance of a homogenous application of these rules and standards, in line with the principle of systemic integration, is particularly essential, as conflicting interpretations of international law are also capable of leading to its fragmentation.¹¹⁷

Indeed, if the jurisprudence of international fora does not adopt a homogenous gender sensitive interpretative attitude, then a heterogeneous interpretation might result to the abnormal outcome of relevant treaties pointing to different directions in their application by a party.¹¹⁸ Indicatively, a non gender sensitive interpretation of the provisions of human rights conventions might lead to an excuse of the State's negligence to address the gender-based needs of female refugees and asylum seekers, but it will not alleviate the State from the violation of its obligations stemming from other treaties, such as CEDAW. Accordingly, if a homogenous interpretation is not adopted, systems of multiple levels of protection will arise.

This unwished outcome would be effectively avoided through the elimination of conflicting jurisprudence. Homogenous jurisprudence could result from the situating of the rules invoked within the context of other rules and principles that might have bearing upon a case, namely through the referral to the wider legal environment, the "system" of international law as a whole.¹¹⁹ Such a systemic integrating attitude has been already extensively adopted by regional and international fora¹²⁰ on various oc-

¹¹⁶ RACHOVITSA, "The Principle of Systemic Integration in Human Rights Law", *International and Comparative Law Quarterly*, 2017, p. 557 ff, p. 557.

¹¹⁷ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, (2006), p. 31, para. 49.

¹¹⁸ *Ibid.*, para. 23.

¹¹⁹ *Ibid.*, para 479.

¹²⁰ African Commission on Human and Peoples' Rights, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, Application No. 249/02, Judgment of 7 December 2004, para. 45; European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paras. 109-113, 123-125; European Court of Human Rights, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment of 29 January 2008, paras. 33-36; European Court of Human Rights, *Scoppola v Italy (No 2)*, Application No.

casions. To this general attitude, the proper addressing of gender-based needs of refugees and asylum seekers should not be an exception. It seems as if an alteration to the integrating attitude could not be excused when gender sensitive asylum seekers' and refugees' issues are at stake.

Furthermore, the integrating attitude is additionally boosted by the very fact that such a gender sensitive application of international rules and standards of refugee law has already taken place within international jurisprudence.¹²¹ Precisely, through the establishment of a constructive dialogue among international and regional fora,¹²² legal certainty and homogenous application of international law will be achieved, whereas conflicting obligations enshrined in fora's decisions will be diminished until deterioration.

If the aforementioned chances for the enhancement of the wishing systemic integration are not grasped, the phenomenon of multiple levels of female refugees' and asylum seekers' protection will be confronted. This way the whole system of international refugee law will be also safeguarded from the erosion capable of intruding with its orderly function through its fragmentation.

5. – Epilogue

The paper at hand noted the reasons why existing rules and standards of international refugee law, enshrined in international treaties, should be seen as granting gender sensitive protection, as well as why they should be applied in this way by the competent fora. Initially, it indicated that the establishment of an innovative jurisprudence does constitute the key to a gender sensitive application of existing international rules and standards of refugee law, after underlining the mere determinative

102493/03, Judgment of 17 September 2009, para. 96-110 and Partly Dissenting Opinion of Judge Nicolaou joined by Judges Bratza, Lorenzen, Jocićiené, Villiger and Sajó, paras. 44-47; European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, para. 286; European Court of Human Rights, *I.M. v. France*, Application No. 9152/09, Judgment of 2 February 2012, para. 127; Inter-American Court of Human Rights, *Artavia Murillo et al. v. Costa Rica*, Case No. 12,361, Judgment of 28 November 2012, paras. 224-244, 253; ALEBEEK, "The judicial dialogue between the ICJ and international criminal courts on the question of immunity", in VAN DEN HERIK and STAHN (eds.), *The diversification and fragmentation of international criminal law*, Leiden, 2012, p. 93 ff., pp. 93-116.

¹²¹ See *supra* notes 25, 27.

¹²² TREVES, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in WOLFRUM, RÖBEN (eds.), *Developments of International Law in Treaty-Making*, Berlin, 2005, p. 587 ff., pp. 614-615.

and not obligations-modifying importance of jurisprudence within the system of international law. Subsequently, an analysis of the rules of interpretation and of the elements that constitute interpretative tools according to these rules took place leading to the conclusion that the *lege artis* interpretation of refugee law provisions supports the ideal, gender sensitive interpretative outcome. Lastly, the significance of the said gender sensitive approach for the whole system of international refugee law was highlighted, as it seems to be guarding the latter from the adverse phenomenon of fragmentation.

As the analysis herein evinces, a gender sensitive interpretation – and subsequently application – of existing rules and standards of international refugee law, is not a *de lege ferenda* interpretation, but the only permissible one instead, as any divergence from it would very probably lead to a divergence from the interpretative outcome suggested by the customary rules of interpretation enshrined in VCLT. In other words the present paper demonstrated that gender sensitive interpretation of treaty rules on refugees' and asylum seekers' protection should be deemed as the only appropriate and compatible with the rules on treaty interpretation. It then moved on beyond this conclusion to highlight that this gender-based, needs-addressing interpretation of international refugee law provisions is significant to the contradiction of the worrying effects of the phenomenon of fragmentation, which is capable of rendering the framework of international refugee law that is called upon to address vulnerabilities, vulnerable. In this context, the analysis above indicated that gender perspectives cannot only contribute to the achievement of the desirable systemic integration within international (refugee) law, but they also gradually flourish the old-fashioned, slowly changing refugee law regime with a much-needed stable gender sensitive refreshment. And as the signs of the times note, such a refreshment remains essential.

11.

ESCAPING VIOLENCE: THE ISTANBUL CONVENTION AND VIOLENCE AGAINST WOMEN AS A FORM OF PERSECUTION

Sara De Vido

SUMMARY: 1. Introduction and Scope of the Analysis. – 2. The Silence of the UN Convention on Refugee Status on Gender-Based Violence as Ground to Recognise Refugee Status. - 3. Is Violence against Women a Form of Persecution? From the UN Guidelines to the Council of Europe Istanbul Convention. - 4. Violence *Because* They are Women or *As* They are Women. The Case of Female Genital Mutilation and Domestic Violence in the Jurisprudence of the European Court of Human Rights. - 5. How to Assess Violence against Women as a Form of Persecution? Issues of Credibility and the Situation in the Country of Origin. - 6. States' Due Diligence Obligations in Protecting Women from Violence: Setting a Higher Standard of Protection in Refugee Law in Light of the Istanbul Convention. - 7. Conclusions.

1. – Introduction and Scope of the Analysis

According to the data included in the 2018 report of the International Organization for Migration, women comprise marginally less than half of the global international migrant stock.¹ The share of female migrants has declined from 49.1 per cent in 2000 to 48.4 per cent (125 million) in 2017. The proportion of women migrating

¹ IOM GMDAC, *Global Migration Indicators 2018*, p. 43, available at: <https://publications.iom.int/system/files/pdf/global_migration_indicators_2018.pdf>.

varies considerably across regions and since 2000 the proportion of female migrants slightly increased in all regions except for Asia.²

Women have always migrated, and what has changed over the decades is not, or not significantly, the number of women leaving their country of origin, but rather the reasons for migration, the “causes and consequences of the migration gender balance, which [has shifted] over time and varies considerably across cultures and nations”.³ What has been called the “feminization of migration” does not consist in “an absolute increase in the proportion of women migrants”,⁴ but rather in a “feminization of international refugee law”, an increasing interest in female migrants’ rights, starting as late as the 1980s.⁵ The ‘absence’ of women from the narrative on migration mirrored the absence of women’s rights in the international arena and the late recognition of violence against women as a violation of human rights.⁶ And yet, even though the presence of women in international migration flows have been gradually recognised at the international level, women still face numerous obstacles to demonstrate that they have been victims of gender-based violence, and, because of that, they are entitled to international protection.

According to the definition that has consolidated at the international level, codified in the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence of 2011 (hereinafter the “Istanbul Convention”), gender-based violence against women consists in “violence that is directed against a woman because she is a woman or that affects women disproportionately”, a violation of human rights and a form of discrimination against women and shall mean “all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.⁷

² PAIEWONSKY, *The Feminization of International Labour Migration*, UN-INSTRAW, 2009, p. 4.

³ DONATO, GABACCIA, *The Global Feminization of Migration: Past, Present, and Future*, last update 2016, available at: <<https://www.migrationpolicy.org/article/global-feminization-migration-past-present-and-future>>.

⁴ *Ibid.*

⁵ SPIJKERBOER, *Gender and Refugee Status*, Farnham, 1999/2000, p. 1.

⁶ CHINKIN and CHARLESWORTH, *The Boundaries of International Law*, Manchester, 2000, p. 4. Violence against women was recognised at the international level as a violation of human rights in 1992 with the adoption of General Recommendation No. 19 of the CEDAW (A/47/38).

⁷ Istanbul Convention, Article 3, letters d) and a). In the General Recommendation No. 35, the CEDAW Committee stressed the importance of using the notion of “gender-based violence against women” to stress “gendered causes and impacts of the violence” (CEDAW/C/GC/35, 14 July 2017, para. 9).

The purpose of this chapter is to demonstrate that the Istanbul Convention can be used as means of interpretation of national refugee laws and of the provisions of the European Convention on Human Rights in assessing the situation of women who request refugee protection to escape from gender-based violence, in particular from two forms of inter-personal violence, on which this analysis is focused, namely female genital mutilation ('FGM') and domestic violence. The choice of these two cases is determined by their being forms of inter-personal violence, committed by non-State actors, and because they constitute illustrative examples of "cultural" violence, rooted in societies. Despite these similarities, as we will see, the approach of the European Court of Human Rights has not been thus straightforward and will be investigated in these pages from a feminist human rights law perspective. The chapter contends that judges should assess, in deciding the request for refugee status, or, in the case of the European Court of Human Rights, in determining whether violations of the woman's rights have occurred, whether the State of origin – where the migrant woman could be expelled failing her application – complies with its *due diligence* obligations in preventing and prosecuting gender-based violence. We will start our analyses from the silences of international refugee law with regard to women, then we will explain the reasons and the means – mainly soft law, with the relevant exceptions of the Istanbul Convention and the European Union "Qualification Directive"⁸ – through which gender-based persecution has been gradually recognised, we will then delve into issues of credibility of women asking for refugee status as a consequence of violence against women and we will assess how relevant the situation of the country where the woman can be expelled might be. We will then make some remarks on how the judges could use the Istanbul Convention as a means for interpretation of national and European law in the assessment of requests for refugee status coming from women who suffered forms of inter-personal violence because of their gender and/or as women. The chapter will limit the analysis to the jurisprudence of the European Court of Human Rights, being its focus on the Istanbul Convention adopted within the legal framework of the Council of Europe.

⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (*Qualification Directive*), *OJ L 337*, 20 December 2011, p. 9 ff.

2. – *The Silence of the UN Convention on Refugee Status on Gender-Based Violence as Ground to Recognise Refugee Status*

In immigration and nationality law, women have been treated differently from men.⁹ The 1951 Convention on the status of refugees (hereinafter the ‘Geneva Convention’) defines the refugee as an individual who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country”. From the text, it is clear that it was drafted “in the male form”.¹⁰ The use of language that is not gender-neutral in the definition of refugee does not come as a surprise, given the time in which the Convention was adopted, but it is clear that the provisions of the Convention were not conceived to deal with cases of gender-based violence against women.¹¹

Women’s rights started to emerge at the international level in the 1970s only, thanks to the adoption of the Convention on the elimination of all forms of discrimination against women (‘CEDAW’), and violence against women was brought within the terms of the Convention as late as 1992 with the adoption of the General Recommendation No. 19 on violence against women by the CEDAW Committee¹². Women were absent and invisible in the international arena, relegated to the “private” realm, where States could not interfere. Being in the “private” sphere, women’s activities were denied the quality of “political”, which has traditionally belonged to men’s experiences¹³. Even their rights as migrants were completely neglected, because women used to migrate with their family and, as part of the family and *not* as individuals entitled of rights, they were relevant for international refugee law¹⁴. One could contend that, in the definition of refugee provided by the 1951 Convention, there is the

⁹ See the evolution of the history of immigration and nationality law in BHABHA and SHUTTER, *Women’s Movement: Women Under Immigration, Nationality and Refugee Law*, Trentham Books, 1994.

¹⁰ SPIJKERBOER, *cit. supra* note 5, p. 1.

¹¹ According to Kelly, another element should be added to explain the absence of women in international refugee law: it is “a product of the general failure of refugee and asylum law to recognise social and economic rights and its emphasis on individual targeting and specific deprivation of civil and political rights”. KELLY, “Gender-Related Persecution: Assessing the Asylum Claims of Women”, *Cornell International Law Journal*, 1993/26, p. 625 ff., p. 627.

¹² CEDAW Recommendation No. 19, *cit. supra* note 6.

¹³ INDRA, “Gender: A Key Dimension of the Refugee Experience”, *Refuge*, 1987/7, p. 3 ff.

¹⁴ It refers to the fact that the application is generally filed by the husband and that the woman is heard

“catch-all category” of “membership of a particular social group”,¹⁵ in which women victims of violence might be always included. Nonetheless, asylum seekers must demonstrate that they have a “well-founded” fear of persecution *for reasons of* belonging to a particular social group. As Meyersfeld has pointed out, “this gives rise to a number of difficulties, not least whether ‘women’ can be said to comprise a particular social group.”¹⁶ Furthermore, “sex” was not a ground of discrimination explicitly mentioned in Article 3 of the Convention on the status of refugees. During the negotiations for the elaboration of the Convention, the Yugoslav representative proposed to add the words “or sex” after the words “country of origin” to the article on non-discrimination, but he was opposed by the representatives of Austria, Colombia, Italy, Switzerland, Turkey, the UK and the US.¹⁷

It can be argued that the ground for persecution “membership of a particular social group” alone cannot grasp the complexity of women’s experiences. As acknowledged by Firth and Mauthe, reporting the debate in international feminist legal scholarship, “framing all persecution of women as persecution because of gender has reinforced the image of men as the only ‘real’ refugees, and has also marginalised women by implying that only men have political or religious opinions, racial status, etc.”¹⁸

The absence of women from the Geneva Convention was confirmed in legal scholarship. As outlined by Spijkerboer, female migrants did not receive much attention until 1980s. In particular, he noted that in some classic works of international legal scholarship, women were mentioned “only in passing”, and that Goodwin-Will was the first to use “his or her” country of origin, although he had doubts on the

by the authorities in the same room as her husband.

¹⁵ MEYERSFELD, *Domestic Violence and International Law*, London, 2010, p. 280.

¹⁶ *Ibid.* National jurisprudence has not been clear in the definition of the “particular social group”. See, for example, the controversial US jurisprudence. In 2014 only the Board of Immigration Appeals recognised the particular social group of “married women in Guatemala who are unable to leave their relationship” whose members can qualify for asylum. *In Matter of A-R-C-G 26 I & N* Dec. 388 (see the comment in Harvard Law Review, available at: <<http://harvardlawreview.org/wp-content/uploads/2015/05/Matter-of-ARCG.pdf>>). See the position of the Board with regard to FGM as early as the 1990s in *In re Kasinga* of 1996 (21 I & N Dec. 357).

¹⁷ *The Refugee Convention 1951. The Travaux préparatoires analysed with a commentary by Dr. Paul Weis*, available at: <<https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>>, p. 36.

¹⁸ FIRTH and MAUTHE, “Refugee Law, Gender and the Concept of Personhood”, *International Journal of Refugee Law*, 2013, p. 470 ff., p. 482. See also MACKLIN, “Refugee Women and the Imperative of Categories”, *Human Rights Quarterly*, 1995, p. 213 ff.

possibility of recognising discrimination on the basis of sex, as such, “sufficient to justify the conclusion that [women], as a group, have a fear of persecution”.¹⁹ In 1991, Hathaway clearly argued that rape can be a form of persecution, and that the refusal to wear a chador had to be considered as expression of a political opinion.²⁰ In the 1990s, women’s rights received much more attention at the international level, a fact that had an impact on international legal scholarship on refugee rights as well. This does not mean to equate the experiences of women and men, without considering the specificity of women’s experiences in migration. Women can flee from their country of origin because of the forms of violence to which women are subjected *because they are* women or because they are disproportionately affected. Experiences of migration are not gender-neutral, they are determined by gender. The gendered experience of migration characterises all phases of displacement: it starts with the reasons underlying the decision of fleeing a country, it continues during the journey, it persists after the arrival in the country of destination.²¹

3. – Is Gender-Based Violence against Women a Form of Persecution? From the UN Guidelines to the Council of Europe Istanbul Convention

Why and how gender-based violence against women entered the language of international refugee law, to the point of being considered as a form of persecution which legitimises the recognition of refugee status to women that are subjected to violence?

As for the reasons, it is necessary to go back to the public/private dichotomy that, as highlighted by feminist scholarship, characterises international law.²² International

¹⁹ SPIJKERBOER, *cit. supra* note 5, p. 2, referring to the work by GOODWIN-GILL, *The Refugee in International Law*, Oxford, 1983. In the second edition of the book, of 1996, Goodwin-Gill dedicated to women two sections of the book.

²⁰ SPIJKERBOER, *cit. supra* note 5, p. 2, referring to the work by HATHAWAY, *The Law of Refugee Status*, Cambridge, 1991.

²¹ See also objective No. 7 of the Global Compact for Safe, Orderly and Regular Migration, adopted by the UN General Assembly on 19 December 2018 (A/RES/73/195): “(b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, [...] victims of violence, including sexual and gender-based violence”.

²² See, for example, SIFRIS, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*, Abingdon, 2014, p. 20.

law has traditionally regulated the public world, which is men's, completely neglecting the private world, characterised by issues that disproportionately affect women.²³ This perspective, simplistic that might be,²⁴ explains the reasons why women have not been considered by international law for years, including international human rights and refugee law. Talking about domestic violence as torture, Rhonda Copelon wrote in 1994 that this form of inter-personal violence is "rooted in and perpetuates the culture as well as the structure of the patriarchal State".²⁵ The right to privacy has been invoked to justify the State's refusal to interfere in matters of private violence against women.²⁶

International refugee law has ignored and marginalised the realities of migrant women subjected to violence for decades, even though, as we anticipated, women have always been present in migration flows. Violence occurring in interpersonal relations can be considered as a "threat of 'private' nature" and therefore not falling under the scope of the Geneva Convention.²⁷ Domestic violence and female genital mutilation, the two examples that we have chosen for this analysis, do not constitute State conduct and it seems difficult, at first sight, to identify women subjected to these practices as a particularly persecuted group.²⁸ Furthermore, it is challenging to assess whether there exists a minimum level of violence that justifies the use of the word "persecution". The drafters of the Geneva Convention conceived persecution as a "broadly inclusive concept, premised on the risk of serious harm but not necessarily of consequences of life and death proportion".²⁹ Even though it is not the pur-

²³ SIFRIS, *cit. supra* note 22, p. 21.

²⁴ What about the State interference in women's personal reproductive choice? See, in that respect, CHINKIN, CHARLESWORTH, WRIGHT, "Feminist Approaches to International Law", *American Journal of International Law*, 1991, p. 613 ff., p. 627, and the analysis of the two dimensions of violence against women's health in DE VIDO, *Violence against women's health in international law*, forthcoming for the Manchester University Press 2020.

²⁵ COPELON, "Recognizing the Egregious in Everyday: Domestic violence as Torture", *Columbia Human Rights Law Review*, 1994, p. 291 ff., p. 297.

²⁶ SIFRIS, *cit. supra* note 22, p. 118.

²⁷ FREEDMAN, *Gendering the International Asylum and Refugee Debate*, 2nd ed., Basingstoke, 2015, p. 77.

²⁸ FREEDMAN, *cit. supra* note 27, p. 45.

²⁹ HATHAWAY, "Reconceiving Refugee Law as Human Rights Protection", in MAHONEY and MAHONEY (eds), *Human Rights in the Twenty-First Century*, Dordrecht, 1993, p. 659 ff., p. 668. In 1989, an author argued for a human rights-based definition of persecution, without necessarily introducing a new

pose here to delve into the notion of persecution and how it has evolved in international and domestic jurisprudence, it is worth noting that the definition of refugee included in the 1951 Geneva Convention, broad it might be, seems however inadequate to grasp “pervasive, structural denial of rights”, such as pervasive and structural gender inequalities.³⁰ As pointed out by Freedman, “the consideration of gender-related claims is still a relatively arbitrary matter”, with the consequence that “women asylum seekers are still constructed in specific gendered ways which may mean that their claims will not be considered as ‘serious’”.³¹

The disruption of the public/private dichotomy started in the 1990s with the recognition of States’ obligations in the prevention and repression of violence against women also committed by private actors. In terms of international refugee law, it meant to acknowledge the experiences of women facing violence as critical cause of their decision to leave their own country, and as reason for fearing persecution which entitles them of the right to obtain international protection.

As to the second part of the question, how gender-based violence against women started to be considered as a form of persecution, the answer is that it mainly happened through acts of soft law, both at the international and national level, with the quite unique exception of the recent Istanbul Convention, which is binding for the ratifying States. It should be acknowledged that the issue of whether or not women victims of violence constitute a “particular social group” under the 1951 Convention has been tackled by national legislators and courts over time, without however developing a straightforward practice in that respect.³²

For the first time, in 1984, the European Parliament called upon States to recognise that women who “face harsh or inhumane treatment because they are considered to have transgressed the social mores of the country” constituted a particular social group.³³ The following year, the Executive Committee of the UN High Commission for refugee stated that States were “free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed

specific category of “gender”: GREATBATCH, “The Gender Difference: Feminist Critiques of Refugee Discourse”, *International Journal of Refugee Law*, 1989, p. 518 ff.

³⁰ CHINKIN, CHARLESWORTH, WRIGHT, *cit. supra* note 24, p. 632.

³¹ FREEDMAN, *cit. supra* note 27, p. 70.

³² FREEDMAN, *cit. supra* note 27, p. 76.

³³ European Parliament Resolution of 13 April 1984 on the application of the Geneva Convention relating to the status of refugees, OJ C 127, 14.5.1984, p. 137.

the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention”.³⁴ The document also stressed the “special needs and problems” of refugee women in the international protection.³⁵ Despite the positive step forward, both acts limited their scope to cases of women who did not respect the established rules in a given society (refusing to wear the veil, for example).

In 1991, the UNHCR adopted a set of guidelines to increase international protection for women, and asked States to improve their standards of asylum and refugee determination procedures.³⁶ These guidelines were followed by additional guidelines precisely dealing with the problem of sexual violence in 1995, and by the 2002 guidelines on international protection and gender-related persecution (‘Gender Guidelines’),³⁷ which complemented the interpretative guidance in the UNHCR Handbook.³⁸ In the “Gender Guidelines”, women are “a clear example of a social subset defined by innate and immutable characteristics [...] and who are frequently treated differently than men”.³⁹ However, as the UNHCR has repeatedly stressed, “mere membership in the group will not itself establish a valid claim to refugee status; the applicant must also demonstrate that she is specifically at risk because of such membership”.⁴⁰ Therefore, two cumulative requirements are needed: on one hand, the fact that the woman belongs to a particular group, for example women that are victims or risks to be victims of female genital mutilation, and, on the other hand, the fact that the applicant is “specifically” at risk.

³⁴ UNHRC, EXCOM, Conclusion No. 39, Refugees, Women and International Protection (1985), contained in United Nations General Assembly Document No. 12A, A/40/12/Add.1, letter k).

³⁵ *Ibid*, letter i).

³⁶ UNHCR, Guidelines on the Protection of Refugee Women (1991), available at: <<http://www.unhcr.org/3d4f915e4.html>>. FREEDMAN, *cit. supra* note 27, p. 91.

³⁷ UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002), HCR/GIP/02/01 (hereinafter ‘Gender Guidelines’). See also the most recent guidelines on persecution based on sexual orientation. Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23 October 2012.

³⁸ *Handbook and guidelines on procedures and criteria for determining refugee status*, reissued in 2011. Available at: <<https://www.unhcr.org/3d58e13b4.html>>.

³⁹ Gender Guidelines, *cit. supra* note 37, para. 30.

⁴⁰ UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, available at: <<https://www.unhcr.org/en-us/5822266c4.pdf>>, November 2016, p. 3.

The Gender Guidelines pointed out that a “well-founded fear of persecution” depends on the “particular circumstances of each individual case”, and listed some examples of violence that amounts to persecution: sexual violence, dowry-related violence, female genital mutilation, domestic violence, and trafficking, whether perpetrated by State or private parties, as acts which inflict “severe pain and suffering – both mental and physical”.⁴¹ In the Guidelines, no reference is made to the “seriousness” of domestic violence. A law can also be “persecutory in itself” when it emanates, according to the Guidelines, from “traditional or cultural norms and practices”.⁴² Other illustrative examples of persecution that legitimises the recognition of refugee status are the cases in which the State, though having prohibited the practice, condones it or is not able to stop it effectively; the cases of severe punishment for women who “by breaching law, transgress social mores in a society”; the implementation of laws or policies, such as those providing for forced abortions and forced sterilisations, which lead to “consequences of a substantially prejudicial nature for the person concerned”.⁴³ This approach is particularly interesting, because the UNHCR stresses the patterns of discrimination that emerge from State policies, and that materialise in specific cases of discrimination on which applicants can rely in presenting a request for refugee status. Discrimination on the basis of gender can amount to persecution “if the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity”.⁴⁴ Examples are domestic violence or abuse of one’s differing sexual orientation. Valerie Oosterveld observed that, even though gender can be “the true cause of the applicant’s predicament”, decision-makers “tend to adopt much narrower social groups”, such as “women belonging to a community where FGM are performed”.⁴⁵ Alice Edwards pointed out that “if one is able to establish that a woman has been persecuted because she is a woman, or for reasons of gender, then it seems less relevant whether she

⁴¹ Gender Guidelines, *cit. supra* note 37, para. 9.

⁴² Gender Guidelines, *cit. supra* note 37, para. 10.

⁴³ Gender Guidelines, *cit. supra* note 37, paras. 11, 12, 13.

⁴⁴ Gender Guidelines, *cit. supra* note 37, para. 15.

⁴⁵ OOSTERVELD, “Gender at the Intersection of International Refugee Law and International Criminal Law”, *Journal of International Criminal Justice*, 2014, p. 953 ff., p. 963.

belongs to a broad or narrow group of women”.⁴⁶ Why then creating “artificial” constructs?⁴⁷ The consideration of “women” as particular social group *in itself* hardly ever happens, though. It might be possible to argue that it cannot happen because women are discriminated in all societies on the basis of gender, and that the definition of persecution would remain excessively vague with the risk of potentially expanding the recognition of refugee status *ad infinitum*. One could counter-argue, however, that “decision-makers have accepted social groups consisting of, for example, ‘homosexuals’ or ‘homosexuals in a particular country’, in contrast to women’s claims on the basis of gender”,⁴⁸ with the consequence of perpetuating discrimination against women by virtue of patriarchal norms that do not recognise how women can be persecuted *because* of their gender.

At national level, guidelines have been adopted by national legislators, starting from Canada in 1993, and followed in 1996 by the United States.⁴⁹ The Canadian “model” proposed four gendered categories of persecution: gendered forms of harm, such as sexual violence, persecution on the basis of kinship, state collusion or negligence in protecting female citizens from severe discrimination or violence by private actors, and persecution for “transgressing certain gender-discriminating religious or customary laws and practices”.⁵⁰

General Recommendation No. 32, adopted by the CEDAW Committee in 2014, reinforced and complemented the UNHCR guidelines by noting that violence against women, as a form of discrimination against women,⁵¹ is “one of the major forms of persecution experienced by women in the context of refugee status and asylum”.⁵² Forms of violence recognised as legitimate grounds for international protection in law and in practice may include:

⁴⁶ Edwards, *Gender, Migration and Human Rights*, at the Conference of the European University Institute, Florence, Italy, 18-19 June 2012, available at: <<https://www.refworld.org/docid/4ffd430c2.html%20>>, pp. 10-11.

⁴⁷ *Ibid.*

⁴⁸ OOSTERVELD, *cit. supra* note 45, p. 964.

⁴⁹ Canadian Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution, March 1993, updated in November 1996. US Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender (May 26, 1996).

⁵⁰ Canadian Guideline, para. I. OOSTERVELD, “The Canadian Guidelines on Gender-Related Persecution: An Evaluation”, *International Journal of Refugee Law*, 1996, p. 569 ff.

⁵¹ As highlighted in General Recommendation No. 19, and now in General Recommendation No. 35 (CEDAW Committee).

⁵² CEDAW General Recommendation No. 32, CEDAW/C/GC/32 (2014), para. 15.

The threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called ‘honour crimes’, trafficking in women, acid attacks, rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, forced sterilization, political or religious persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores or for claiming their rights under the Convention.

The General Recommendation highlighted the “seriousness” of forms of domestic violence without however providing a “level” to distinguish which act can be considered as serious and which one cannot. Is it not psychological violence as serious as, though less easy to prove than, physical violence?⁵³ The General Recommendation also emphasised the existence of intersecting forms of discrimination, and the patriarchal attitude of many asylum systems, which “continue to treat the claims of women through the lens of male experiences”.⁵⁴ In its resolution of 2017, the European Parliament included gender-based violence among the “root causes of forced displacement and migration”, along with armed conflict, persecution on any ground, bad governance, poverty, lack of economic opportunities and climate change.⁵⁵ All the aforementioned instruments belong to the category of soft law, which surely has an impact in terms of State practice, but does not create legal obligations States must abide by.

Moving to the regional level – and limiting the scope to the European system for the purpose of our analysis – two different binding legal instruments must be mentioned: the so-called “Qualification Directive” within the EU legal system, and the Council of Europe Istanbul Convention. As for the former, which is binding for the EU member States, it includes among the acts of persecution the “acts of gender-specific nature”:⁵⁶ “Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”.⁵⁷ It is however very cautious when it comes to regulate the reasons for persecution. The preamble mentions some examples

⁵³ See, in that respect, the jurisprudence of the European Court of Human Rights, in particular *Valiulienė v. Lithuania*, Application No. 33234/07, judgment of 26 March 2013, which considered minor injuries as falling under Article 3 of the European Convention.

⁵⁴ CEDAW General Recommendation No. 32, *cit. supra* note 52, para. 16.

⁵⁵ European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), para. 5.

⁵⁶ Qualification Directive, *cit. supra* note 8, Article 9.

⁵⁷ Qualification Directive, *cit. supra* note 8, Article 10, letter d).

of acts that can amount to persecution: acts “related to certain legal traditions and customs”, resulting in genital mutilation, forced sterilisation or forced abortion, “in so far as they are related to the applicant’s well-founded fear of persecution”.⁵⁸ It is quite striking that domestic violence is not specifically mentioned; this form of violence, which is dramatically common in European countries, does not seem to be perceived as belonging to ‘other’ legal traditions, and, for this reason, it appears to lose the character of being ‘cultural’. We know, however, that all forms of violence against women are ‘cultural’ inasmuch as they are rooted in societies and ‘normalised’.

The most innovative binding legal instrument, adopted at regional level, on violence against women is the Council of Europe Istanbul Convention, which dedicates to migration issues an entire chapter (Chapter No. VII). The Convention, which defines violence against women and gender-based violence, is based on the four pillars prevention, protection, prosecution, and policies, which correspond to specific legal obligations for States parties (34 at the time of writing).⁵⁹ Despite its origin in a regional legal system, it has the potential to become universal, given the fact that States that are not parties to the Council of Europe can ratify the treaty.⁶⁰ Article 60 of the Convention provides that:

1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection. 2. Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments. 3. Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

As clarified in the explanatory report, the Convention codifies what has emerged in international refugee law over time. The report, which complements and interprets

⁵⁸ Qualification Directive, *cit. supra* note 8, preamble, recital No. 30.

⁵⁹ For a general analysis of the Convention, see DE VIDO, *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d’Europa del 2011*, Milano, 2016.

⁶⁰ Article 76(1) of the Convention.

the provisions of the treaty, acknowledges the “gender blindness” in the determination of refugee status, and the silence surrounding the requests of women fleeing from gender-based violence.⁶¹ Rape and other forms of gender-related violence, such as female genital violence, dowry-related violence, serious domestic violence, or trafficking, are “acts which have been used as forms of persecution, whether perpetrated by state or non-state actors”.⁶² The disruption of the public/private divide emerges when States are responsible for what occurs to women victims of violence perpetrated by non-State actors. The report also recognises that women can be persecuted *because* of their gender⁶³ and *as* women.⁶⁴ When gender-based violence constitutes a form of serious harm, Parties must ensure that women are entitled to complementary/subsidiary protection. It is worth pointing out that the report refers to *all* the grounds of persecution included in the Geneva Convention. If it is true that victims of gender-based violence have been considered as belonging to a “particular group”, a gender-sensitive interpretation of the Geneva Convention, which is encouraged by the Istanbul Convention, implies the understanding of how relevant the other grounds of persecution included in the definition of “refugee” are.⁶⁵ For example, persecution on the ground of race or on the ground of nationality, combines – *rectius*, intersects – gender with other forms of discrimination. As acknowledged by a scholar, “women who transgress social norms are not being persecuted solely because they are women but because ‘they are actively opposing a political/religious norm’”.⁶⁶ When they form a “particular group”, women must share a “common innate, unchangeable or otherwise fundamental characteristic other than the common experience of fleeing persecution”.⁶⁷ The use of the sole category of “particular social group” should not be encouraged, because it “fixes an opposition between ‘them’ and ‘us’, between ‘Western women’ and ‘other women’, which might obscure the real structures of gender inequalities in different societies”.⁶⁸

⁶¹ Explanatory report to the Convention, Details of Treaty No.210, para. 310.

⁶² *Ibid.*

⁶³ Explanatory report to the Convention, *cit. supra* note 61, para. 311.

⁶⁴ Explanatory report to the Convention, *cit. supra* note 61, para. 313.

⁶⁵ Explanatory report to the Convention, *cit. supra* note 61, para. 312.

⁶⁶ CRAWLEY, *Women as Asylum-Seekers: A Legal Handbook*, London, 1997, p. 144-145.

⁶⁷ *Ibid.*

⁶⁸ FREDMAN, *cit. supra* note 27, p. 85.

Article 61 of the Istanbul Convention then invokes the well-consolidated principle of *non-refoulement*,⁶⁹ which, when applied to the situation of migrant women victims/survivors of violence, means that States must ensure that women in need of protection “shall not be returned under any circumstances if there were a real risk, as a result, of arbitrary deprivation of life or torture or inhuman or degrading treatment or punishment”.⁷⁰

Learning the lessons from the precedent acts adopted at UN level, the Istanbul Convention clearly acknowledges how migration law cannot be gender-neutral, and how it is compelling to recognise the specific gendered experiences women face.

4. – Violence Because They are Women or As They are Women. The Case of Female Genital Mutilation and Domestic Violence in the Jurisprudence of the European Court of Human Rights

We have chosen as case studies for our analysis female genital mutilation and domestic violence. Both forms of violence are rooted in societies, they are forms of discrimination against women, which perpetuate the unequal power relations between women and men. They are both paradigmatic cases to discuss with regard to international refugee law. Domestic violence, as stressed by Mullally, challenges “not only the boundaries of refugee law’s categories, but also the continuing gap between ‘private harms’ and State accountability”.⁷¹ Furthermore, the ‘seriousness’ of domestic violence is often difficult to prove. In other words, is psychological violence as serious as bodily harms? Is a livid on the face a better evidence than psychological trauma? As posited by Freedman, “the normalisation of domestic violence is thus so pervasive that it is often not registered as being a proper ground for claiming asylum”.⁷² Psychological and economic acts of violence are difficult to detect, but they constitute violence against women according to the definition provided by the Istanbul Convention. FGM also challenges the boundaries of international refugee law with the addition of the fact that FGM, compared to domestic violence, is

⁶⁹ See, for example, ALLAIN, “The Jus Cogens of non-refoulement”, *International Journal of Refugee Law*, 2002, p. 533 ff.

⁷⁰ Explanatory report to the Convention, *cit. supra* note 61, para. 322.

⁷¹ MULLALLY, “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?”, *The International and Comparative Law Quarterly*, 2011, p. 459 ff., p. 461.

⁷² FREEDMAN, *cit. supra* note 27, p. 58.

often depicted as part of the culture of the “other”, from which women must be protected.⁷³ However, both forms of violence are cultural, because they are rooted in society, normalised and absorbed.

The difference between domestic violence and FGM can be seen in the fact that the former is a form of violence against a woman *because* she is a woman, whereas female genital mutilation is a form of violence against a woman both *because* she is a woman and *as* a woman. In the latter case, indeed, violence takes a particular form – the cutting of women’s genitalia – which is specific for women. “Because she is a woman” stresses the reasons underlying violence, whereas “as a woman” put emphasis on the specific forms of violence. Macklin explained that “the idea of women being persecuted *as* women is not the same as women being persecuted *because* they are women”.⁷⁴ In Crawley’s words, “when social mores and norms dictate that women must be circumcised in order to access their social, cultural and economic rights, this may lead to discrimination which is sufficiently severe to constitute serious harm within the meaning of the refugee Convention”.⁷⁵ Turning to domestic violence, we argue, borrowing Crawley’s thought, that when a woman is victim of psychological or physical abuse within the household, when she is prevented from having access to money or from working, this may lead to discrimination which is sufficiently severe to constitute serious harm within the meaning of the Geneva Convention.

In this chapter, we are not interested in a comparative analysis of national jurisprudence regarding requests for refugee status coming from women escaping from their country of origin,⁷⁶ but, rather, in the jurisprudence of the European Court of Human Rights, with the specific aim to argue that the application of the Istanbul Convention could make a significant change if used as means of interpretation of the European Convention on Human Rights. The same reasoning can be extended to the interpretation of national (countries which ratified the Istanbul Convention) refugee law.

Let us start from the case of female genital mutilation, on which the European

⁷³ Consider the use of the expression “brutal practice” in the European Parliament Resolution on the Commission communication entitled ‘Towards the elimination of female genital mutilation’ (2014/2511(RSP), 6 February 2014.

⁷⁴ MACKLIN, *cit. supra note 18*, p. 259.

⁷⁵ CRAWLEY, *Refugees and Gender: Law and Process*, Bristol, 2001, p. 189.

⁷⁶ The process was not straightforward, considering that there was not a legal obligation stemming from the Geneva Convention to recognise gender as a form of persecution. See *supra note 16*, *In Matter of A-R-C-G et al.*

Court of Human Rights has rendered the highest number of cases in relation to migration issues, even though none of the cases led to the recognition of the violation of the applicants' rights.

Female circumcision, female genital surgery, female genital mutilation and female genital cutting all describe procedures which affect female genital organs for non-medical reasons. Female circumcision seems the most misleading word, since the procedure does not resemble male circumcision.⁷⁷ Female genital mutilation is the expression used by several international organisations, including the WHO, and NGOs, to describe "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons", and is the expression that we are going to use in these pages.⁷⁸

In *Collins and Akaziebie v. Sweden*, Emily Collins and Ashley Akaziebie, mother and child, Nigerian nationals from Delta State, complained that, if expelled from Sweden (where they had sought asylum) to Nigeria, they would have faced a 'real risk' of being subjected to FGM.⁷⁹ The case was dismissed as inadmissible. It is worth noting that the government questioned the credibility of the applicant who did not mention during the first interview that she underwent FGM. The European Court of Human Rights first expressed the view that the applicants lived in a town situated in a province where the authorities passed laws prohibiting FGM; secondly, it endorsed the position of the government which doubted of the general credibility of the applicant;⁸⁰ thirdly, it questioned the fact that the applicant, instead of deciding to move to another part of Nigeria, put her life in the hands of a smuggler to reach Europe.⁸¹ The European Court of Human Rights decided similar cases on FGM in Nigeria in

⁷⁷ COOK, DICKSON, FATHALLA, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, Oxford, 2003, p. 265. *Contra*, according to some authors, the similarities of circumcision to FMG, as far as the permanent effects on a person and the absence of consent to the treatment are concerned, do not explain a legislation that admit the former, provided that it respects the right to health, but severely punish the latter (DENNISTON, HODGES, FAYRE MILOS (eds.), *Genital Cutting: Protecting Children from Medical, Cultural, and Religious Infringements*, Dordrecht-Heidelberg-New York-London, 2013, discussing the harm caused to boys by male circumcision).

⁷⁸ Available at: <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

⁷⁹ European Court of Human Rights, *Collins and Akaziebie v. Sweden*, Application No. 23994/05, Decision on admissibility of 8 March 2007.

⁸⁰ The Court acknowledged that, even though it is often necessary to give the applicants the benefit of the doubt in assessing the credibility of the applicant, information gathered by the authorities might give strong reasons to question the veracity of the asylum seeker's affirmation (p. 13 of the decision).

⁸¹ *Ibid.*

2011: *Enitan Pamela Izevbehai and others v. Ireland*, and *Mary Magdalene Omeredo v. Austria*.⁸² The complaints were considered inadmissible, as occurred in the *Collins and Akaziebie* case. With regard to two other applications, the Court found the case admissible, but did not conclude in the sense that there was a violation of the applicants' rights.⁸³ In *R.B.A.B. and others v. The Netherlands*, the applicants were members of a family who had asked for refugee status in the Netherlands, fearing that, once sent back to Sudan, their daughters X and Y would be subjected to female genital mutilation, whereas in *Sow v. Belgium*, a Guinean woman, aged 28, feared to be expelled back to her country of origin where she could be subjected to a mutilation of type I.⁸⁴ In *R.B.A.B. and others*, the European Court considered the complaint admissible, but rejected it in the merits arguing that some provinces of Sudan, including the applicants' one, passed laws prohibiting FGM as harmful practice affecting the health of the children, and that there was no real risk for a girl or a woman to be subjected to FGM at the instigation of persons who were not family members.⁸⁵ Since the girl would have been deported along with her family, who was contrary to the practice, there was no risk for her to undergo the practice. As for *Sow*, the Guinean woman asking for refugee status in Belgium, the Court decided that the applicant was "not particularly vulnerable", due to the fact that she received a progressive education and that her mother was herself contrary to the practice. The Court relied on the assessment conducted by national authorities, according to which the declaration of the applicant was not credible, and that she did not risk re-excision in

⁸² European Court of Human Rights, *Enitan Pamela Izevbehai and others v. Ireland*, Application No. 43408/08, Decision on admissibility of 17 May 2011; and *Id.*, *Mary Magdalene Omeredo v. Austria*, Application No. 8969/10, Decision on admissibility of 20 September 2011.

⁸³ The European Court of Justice has never directly dealt with cases of FGM. Nonetheless, in a case concerning the interpretation of Article 2(c) and Article 9(1)(a) of the Qualification Directive, Advocate General Yves Bot, in his opinion of 19 April 2012, argued that: "when [...] a man is at risk of being executed, tortured or imprisoned without any other form of trial, or a woman is at risk of being subjected to forced genital mutilation or reduced to the status of a slave, there is plainly and unanswerably an act of persecution" (Joined Cases C-71/11 and C-99/11, *Federal Republic of Germany v. Y and Z*, Opinion of Advocate General Bot, 19 April 2012).

⁸⁴ European Court of Human Rights, *R.B.A.B. and others v. The Netherlands*, Application No. 7211/06, Judgment of 7 June 2016; *Id.*, and *Sow v. Belgium*, Application No. 27081/13, judgment of 19 January 2016.

⁸⁵ *R.B.A.B.*, *cit. supra* note 84, paras. 54, 55, 57.

Guinea, not falling under the cases for which this practice was envisaged.⁸⁶ No violation of Articles 3 and 13 of the European Convention was found. The Court also used international reports on the situation of Guinea to conclude that, in the specific case of the applicant, despite the general situation of the country, the woman did not face a real risk of being forced to undertake the excision.⁸⁷

Turning to domestic violence as ground for persecution, the only case that can be found at the time of writing in the jurisprudence of the European Court of Human Rights is *N. v. Sweden*, decided in 2010.⁸⁸ The applicant, of Afghan nationality, asked for refugee status in Sweden where she arrived with her husband in 2004. Their request for asylum was rejected several times. The year after their arrival, she separated from her husband and asked for divorce in Sweden in 2008. Swedish courts refused the request because they had no authority to dissolve the marriage, given the absence of a legitimate reason for the applicant to stay in Sweden. Her husband opposed to the divorce. The woman asked the authorities to reassess her case and to stop deportation, claiming that she risked death penalty once back to Afghanistan due to her relationship with a Swedish man while in Sweden. Her family also refused to have her back. The Court acknowledged that “owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements”; nonetheless, the applicant had to adduce evidence capable of proving that “there [were] substantial grounds for believing that, if the measure complained of were to be imple-

⁸⁶ *Sow*, *cit. supra* note 84, para. 66.

⁸⁷ For the sake of completeness, it should be said that it was not only the European Court of Human Rights which was reluctant to recognise refugee status to women subjected to violence against women, but also the CEDAW Committee. In a case of FGM, *M.N.N. v. Denmark* (Communication No. 33/2011, views of 15 July 2013), the CEDAW Committee declared the complaint inadmissible, because the applicant failed to provide information on “the real, personal and foreseeable risk” of being exposed to FGM. Similarly, in another case, *N. v. the Netherlands* (Communication No. 39/2012, views of 17 February 2014), the CEDAW Committee argued that the applicant, who was victim of rape and psychological violence, failed to “sufficiently substantiate the claims under Articles 3 and 6 CEDAW”, in particular to show how the denial of her asylum application violated her human rights, that the man was still a threat to her, that Mongolian authorities had not previously protected her and that there was a real risk that they could not effectively protect her, and why she had not followed-up her complaints with the police or complained to the prosecuting authorities or courts.

⁸⁸ European Court of Human Rights, *N. v. Sweden*, Application No. 23505/09, Judgment of 20 July 2010.

mented”, she would be exposed to a real risk of being subjected to a treatment contrary to Article 3.⁸⁹ The Court noticed that women are at risk of ill-treatment in Afghanistan “if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system”.⁹⁰ The Court posited that, if deported to Afghanistan, according to the law in force, the man may decide to resume the married life together even against the applicant’s wish, and that, according to data and international reports, women who find themselves in this situation risk more often than others to be subjected to domestic violence.⁹¹ Even if there was no evidence substantiating this affirmation, the Court concluded that it could not ignore “the general risk indicated by statistic and international reports”.⁹² The applicant argued that, if back to Afghanistan, she would risk persecution and she would be possibly sentenced to death, owing to her extramarital relationship in Sweden. Despite the absence of any relevant information submitted by the applicant in that respect, the Court acknowledged that, had the applicant been successful in living separated from her husband, she could have faced the same limitations unaccompanied women or women lacking a male tutor usually encounter in her country of origin.⁹³ The European Court of Human Rights concluded that, given the “special circumstances of the case”, there were substantial grounds for believing that if deported to Afghanistan, the applicant would run “various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society”.⁹⁴

5. – How to Assess Violence against Women as a Form of Persecution? Issues of Credibility and the Situation in the Country of Origin

To assess when violence against women is a form of persecution, judges and authorities must consider both the personal situation of the applicant and the situation of the country to which the woman can be expelled absent the recognition of refugee status.

⁸⁹ *Ibid.*, para. 53.

⁹⁰ *Ibid.*, para. 55.

⁹¹ *Ibid.*, para. 57.

⁹² *Ibid.*, para. 58.

⁹³ *Ibid.*, para. 59.

⁹⁴ *Ibid.*, para. 62.

It is not easy for a woman to demonstrate, as required by the courts, that she runs the risk of being persecuted *because* she has been victim/survivor of violence, and that the harm is “serious”.⁹⁵ Credibility is highly problematic for claims where the experience of persecution is in some way related to a woman’s gender status.⁹⁶ Inconsistencies in the declarations to the authorities may undermine credibility, but might be dictated by the procedure, by the fact that, for example, a woman is heard along with her husband at the beginning of the procedure, and alone in second stance only.⁹⁷ Furthermore, medical evidence might not be available. In cases of rape and sexual violence that determined the escape from the country of origin, for example, physical evidence might be absent, unless the rape was particularly brutal or the woman was a virgin.⁹⁸ It must also be acknowledged that violence can take the form of psychological and economic violence, which might be very difficult to prove unless the woman has medical evidence supporting her psychological condition. The ‘likelihood’ of the risk of being subjected to violence should be determined by courts considering the ‘reasonable possibility’ of persecution. It seems obvious that the decision should be taken on a case-by-case basis. However, the processes followed in international refugee law have proved to be ‘insensitive to gender’: for example, as outlined by Valerie Oosterveld, some applicants might not be informed of the gender-related aspects of their experiences, interviews can be conducted without respecting the applicant’s privacy with the consequence of discouraging women from reporting episodes of rape or domestic violence or FGM, or interviews to women might be conducted by a male interviewer.⁹⁹ Advocates might not be sufficiently prepared to tackle cases of refugee women, with the consequence that “women’s cases are often formulated in ways which reflect the advocate’s understanding of the law rather than the reality of the applicant’s experiences”.¹⁰⁰ The effects of culture, trauma and post-traumatic stress disorder are rarely taken into consideration in the procedure for the recognition of refugee status. Furthermore, as highlighted in the judgments

⁹⁵ Victim/survivor is the language used by the General Recommendation No. 35 (CEDAW) of 2017.

⁹⁶ CRAWLEY, *cit. supra* note 75, p. 209. See also SINGER, “Falling at Each Hurdle: Assessing the Credibility of Women’s Asylum Claims in Europe”, in ARBEL, DAUVERGNE, MILLBANK (eds.), *Gender in Refugee Law. From the Margins to the Centre*, London, 2014, p. 98 ff.

⁹⁷ CRAWLEY, *cit. supra* note 75, pp. 209-210.

⁹⁸ CRAWLEY, *cit. supra* note 75, p. 218. See also UN Women report, *Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union*, p. 23, stressing how courts sometimes show reluctance to tie the reason for the rape to a Convention ground.

⁹⁹ OOSTERVELD, *cit. supra* note 45, p. 968.

¹⁰⁰ KELLY, *cit. supra* note 11, p. 629.

examined in the previous paragraph, there is another element taken into consideration by courts: whether or not a person can move to another region of her country to escape from violence. Is relocation enough to protect women from violence, or, better, to assess the capacity of a State to protect women from inter-personal violence?

Turning to the second element, the situation of the woman's country of origin, Crawley pointed out that "the State in the country of origin is frequently unwilling or unable to offer effective protection to women", because of the existence of a legislation that condones violence in the family, or because of the authorities' refusal to investigate the individual case, or because of the incapacity (or unwillingness) of the police to respond to the woman's plea for assistance.¹⁰¹ In the aforementioned *Collins and Akaziebie* case, the European Court of Human Rights considered both the situation in Nigeria and the personal situation of the applicant. With regard to the former aspect, however, the Court did not delve into the fact that, despite the adoption of laws by the country where the applicant was supposed to be expelled, a practice might be so well rooted in the society to be unavoidable, even if the family of the woman is against it. In the case regarding domestic violence decided in 2010, *N. v. Sweden*, the Court demonstrated a gender-sensitive approach, considering the capacity of the State – as we will argue further, its capacity of respecting due diligence obligations – in protecting women from violence, through a series of reports elaborated by international bodies and organs that showed the general situation for women in Afghanistan and how this could have affected the applicant. As Deborah Anker observed, "the most critical issue today in refugee determinations is the evidentiary burden faced by women claimants in establishing the lack of state protection".¹⁰² In that respect, the application of the Istanbul Convention, with the definition of due diligence obligations States must abide by, could be considered as a useful tool to interpret in a more gender-sensitive way the provisions of the European Convention on Human Rights.

¹⁰¹ CRAWLEY, *cit. supra* note 75, pp. 133-134.

¹⁰² ANKER, "Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States (Part 1)", *Benders Immigration*, 1997, p. 476 ff., p. 481.

6. – *States Due Diligence Obligations in Protecting Women from Violence: Setting a Higher Standard of Protection in Refugee Law in Light of the Istanbul Convention*

Under the Istanbul Convention, States have legal obligations to prevent and to repress violence against women and domestic violence, along with the obligation to protect the victims/survivors. According to Article 5 of the Istanbul Convention:

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation. 2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

As correctly pointed out in the explanatory report, due diligence obligations are obligations of means. It does not mean that *all* legal obligations included in the convention are of due diligence nature. Obligations under the Convention are obligations of result, of means and of progressive realisation.¹⁰³

In this paragraph, we will show how the Istanbul Convention can be useful in applying the due diligence standard in the assessment of the adequacy of the protection granted by the State of origin to the woman who is fleeing from gender-based violence. This would determine a paradigmatic shift from the need for the woman to prove that she has no alternative to escape violence to the assessment by the Court, with which the request for refugee status has been filed, of the situation of the country of origin in protecting women from gender-based violence. Mullally already pointed out, in her remarkable work, how due diligence is never applied in asylum cases,¹⁰⁴ and how, as we will show, it should (and *must* according to the legal obligations stemming from the Istanbul Convention). The paradigmatic shift concerns the passage from the centrality of women credibility – of the woman that must prove to concretely fear of being persecuted and subjected to serious violence once back to her country of origin – to the examination of the capacity of the State of origin to grant protection to women. Only when the State of origin is capable of complying with due diligence obligations, then the request for refugee status can be refused.

At first sight, this argument might seem an undue interference in the State of

¹⁰³ This is part of a broader research, *Violence against women's health*, *cit. supra* note 24.

¹⁰⁴ MULLALLY, *cit. supra* note 71.

origin's sovereignty. We argue that it is not. Through this paradigmatic shift, the protection of women would occur *par ricochet*, by assessing whether the State of origin from which the woman escapes is capable of protecting her, in her specific situation, from violence. To borrow the legal reasoning which is applied in relation to the prohibition of torture, inhuman or degrading treatment, the State that refuses expulsion to a country where there is a risk of torture or inhuman or degrading treatment decides thus on the basis of international reports, and reports of NGOs, which depict the situation of the country. That is not seen as an interference with the State's sovereignty. Why should it be in the case of examining the situation of a country from which a woman escapes fearing gender-based violence? In cases of FGM and domestic violence, the European Court of Human Right has applied Article 3 of the European Convention, namely the prohibition of torture, inhuman or degrading treatment,¹⁰⁵ without dwelling too much upon the "level of severity" of the harm suffered by the applicant. One could object that the standard of due diligence is applicable to those States of origin which ratified the Istanbul Convention only, but we can argue that, on the one hand, this standard is well established in international human rights law, and, on the other hand, that the protection of the woman's right only occurs *par ricochet*, because the persecution derives from an inaction of the State of origin. This hypothesis is not thus far-fetched. As early as 1992, the UNHCR wrote in its Handbook on Procedures and Criteria for Determining Refugee Status that:

Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.¹⁰⁶

It means, in other words, that the State is not responsible for a direct violation of rights, but for an omission in its compliance with its due diligence obligations.¹⁰⁷

¹⁰⁵ See, for example, *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009.

¹⁰⁶ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para. 65, available at: <<https://www.unhcr.org/4d93528a9.pdf>>. See also HAINES QC, "La persécution liée au genre", FELLER, TÜRK, NICHOLSON (eds), *Refugee Protection in International Law*, Cambridge, 2003, p. 319 ff., p. 375: "la persécution est composée de deux éléments séparés mais essentiels, à savoir le risque de préjudice grave et l'absence de protection de l'Etat. On peut l'exprimer avec la formule: la persécution = un préjudice grave + l'absence de protection de l'Etat".

¹⁰⁷ KORSAKOFF, "Femmes et droit international des réfugiés: la définition du réfugié renouvelée", in JÄNTERÄ-JAREBORG, TIGROUDJA (eds.), *Women's Human Rights and the Elimination of Discrimination*,

Hathaway interestingly contended in 1993 that a “conceptualization of persecution as the failure of basic State protection demonstrated through the denial of core, internationally recognised human rights is a helpful means of breathing new life into refugee law”.¹⁰⁸ He also added that, given the role of international human rights law in defining the basic duties of the States to their nationals, “individuals ought not to be required to endure life in societies which fail to meet its standards”.¹⁰⁹

Using this argument for our purposes, the question is the following: Has the State of origin put in place reasonable measures to protect women from violence?

In the *Collins and Akaziebie* case, and in the other cases on FGM that have been examined by the European Court of Human Rights, the assessment conducted by national authorities and by the Strasbourg judges concerned the situation in the applicant’s country of origin in terms of adoption of laws prohibiting FGM. This argument – based on the obligation of result to adopt laws criminalising FGM – does not seem enough to effectively protect women from violence. The legal argument proposed in *N. v. Sweden*, concerning domestic violence, was much more attentive in considering the situation of the State in which the woman could be forced to return whether expelled. The problem is that courts have hardly ever contextualised – which does not mean to adopt a relativistic approach to human rights law, but to consider the cultural and societal context in which the violation of women’s rights is perpetrated – the forms of violence that manifest in one country or the other. For example, the fact that a family is contrary to FGM in Sweden, or in another European country where the woman has escaped, does not automatically ensure that it will not be induced by the society of origin to change its mind.

As a consequence, relocation within the country, which is suggested in European Court of Human Rights decisions with regard to FGM, “puts the burden back on the [...] victim to escape the perpetrator(s) of abuse”.¹¹⁰ In domestic violence asylum cases, “the reasonableness of the relocation alternative [...] and the effectiveness of State protection [...] tend to be assessed from the perspective of the resources and opportunities available to the asylum applicant, rather than through scrutiny of the actions of the State, or of its due diligence obligations”.¹¹¹ The UNHCR Handbook

Leiden-Boston 2016, p. 218 ff., p. 260.

¹⁰⁸ HATHAWAY, *cit. supra* note 29, p. 669.

¹⁰⁹ *Ibid.*

¹¹⁰ MULLALLY, *cit. supra* note 71, p. 481.

¹¹¹ *Ibid.*

for the protection of women and girls illustrates the option of “voluntary relocation elsewhere in the country”,¹¹² which sounds interesting to support our argument. The possibility of relocation should be contemplated whether the woman wishes to do so, and after scrutiny of the capacity of the State to comply with its due diligence obligations. The obligation of the State to provide protection cannot be replaced by the work of NGOs or by the willingness of family members to protect the woman from violence. The European Court of Human Rights, except for the *N. v. Sweden* judgment, has not followed this line of reasoning yet, but it could do so in the application of the Istanbul Convention as a tool for the interpretation of the relevant provisions of the European Convention of Human Rights, in particular the prohibition of torture, inhuman or degrading treatment, and the right to privacy, which are applicable in cases of FGM and domestic violence. The standard of due diligence, in particular, would determine the paradigmatic change in perspective and would enhance the protection of women’s rights, with no need to scrutinise the “seriousness” of the harm suffered by the woman.

This approach is not new to domestic courts. In Italy, for example, the Italian Supreme Court, the *Cassazione*, decided on 5 December 2016 the appeal of a woman, of Moroccan nationality, whose request for international protection was denied by the competent authorities.¹¹³ Her request for reconsideration of the case was dismissed by the court of first instance and later by the court of appeal in Rome. The woman asked for international protection because she feared of being subjected to domestic violence perpetrated by her former husband once back home. The authorities rejected the application, arguing that she could receive protection in her country of origin. Not only she obtained divorce in Morocco, but also her former husband was criminally prosecuted and convicted for the perpetrated violence. The applicant complained that the protection offered by the Moroccan authorities was not enough, and that the Moroccan system did not grant forms of protection such as restraining or protection order. The Italian Court referred to Article 60 of the Istanbul Convention on gender-based asylum claims, pointing out that violence against women is a form of persecution under the 1951 Convention on refugee status, and that domestic violence suffered by the woman clearly fell under the notion of violence against

¹¹² UNHCR Handbook for the protection of women and girls, 2008, p. 88. <https://www.refworld.org/docid/47cfc2962.html>

¹¹³ Corte di Cassazione, sez. VI Civile - 1, ordinanza 5 dicembre 2016 – 17 maggio 2017, n. 12333.

women. The Court interpreted the notion of “inhuman and degrading treatment” under the Italian legislative Decree No. 251/2007,¹¹⁴ concerning international protection, as encompassing domestic violence. Such interpretation – the Court stressed – is not contrary to the text of the provision of domestic law, on the one hand, and is *compulsory* according to Article 60(1) of the Istanbul Convention, on the other hand. The *Cassazione* quashed the Court of Appeal’s judgment and referred the case back to the lower court to decide on the merits. The *Cassazione* did not focus on the existence of laws on domestic violence in Morocco, but rather considered whether Morocco “was able to offer her adequate protection”.¹¹⁵ The Italian Supreme Court stressed how the lower court “limited” its analysis “to circumstances which were not signal of adequate protection, such as, for example, the criminal conviction of the former husband [...] or completely unrelated to forms of national protection, such as the support of the applicant’s family”.¹¹⁶ There was no reference to the “seriousness” of domestic violence.

The standard of due diligence might reveal its usefulness also in the consideration of intersecting forms of discrimination against women,¹¹⁷ and to avoid the paternalistic position of judges that try to protect women from their culture of origin. When considering whether the State of origin has adequate measures to protect women from violence, judges should consider whether there are intersecting axes of persecution.¹¹⁸ In other words, a woman can be persecuted as victim of domestic violence because she is a woman, but also because she belongs to another “particular” group or because she adheres to a certain political opinion. Applying the standard of due diligence would allow a legal analysis of what is done by the State of origin to protect women, and more specifically women that face intersecting forms of discrimination,

¹¹⁴ Decreto legislativo 19 novembre 2007 No 251, Attuazione della direttiva 2004/83/CE recante norme minime sull’attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta.

¹¹⁵ Corte di Cassazione, n. 12333, para. 2.1.

¹¹⁶ *Ibid.*

¹¹⁷ On intersectionality, see, *inter alia*, CRESHAW, “Mapping the margins: intersectionality, identity politics, and violence against women of color”, *Stanford Law Review*, 1991, p. 1241 ff.; BOND, “International intersectionality: a theoretical and pragmatic exploration of women’s international human rights law”, *Emory Law Journal*, 2003, p. 71ff.; BRAH and PHOENIX, “Ain’t I a woman? Revisiting intersectionality”, *Journal of International Women’s Studies*, 2004, p. 75 ff.; SOSA, *Intersectionality in the Human Rights Legal Framework on Violence Against Women*, Cambridge, 2017.

¹¹⁸ MULLALLY, *cit. supra* note 71, p. 480.

from interpersonal violence.

The burden of proof should not be placed on the woman that must prove she can relocate. It would be up to courts to assess whether the State of origin has adequate measures to respect its due diligence obligations and whether relocation, when accepted by the woman, would be a feasible option. This can be done using the Istanbul Convention as a tool for interpretation of the provisions of the European Convention on Human Rights and of domestic refugee laws, as the Italian case clearly demonstrates.¹¹⁹

7. – *Conclusions*

The Istanbul Convention can be a powerful tool for national judges and the European Court of Human Rights alike when they interpret national law and the rights enshrined in the European Convention on Human Rights in cases of women requesting refugee status. Given the provisions on migration included in the Convention and its conceptualisation of due diligence obligations, the Istanbul Convention can be used to assess, in the analysis of a request for refugee status, whether the State of origin complies with its due diligence obligations in preventing and prosecuting violence against women, as well as in protecting victims/survivors. The paradigmatic change from the centrality of women's experience to the situation of the country of origin would be pivotal for the jurisprudence of the European Court of Human Rights, that only timidly approached the issue in the *N. v Sweden* case. As observed by Sjöholm, the Court has not adopted an overt gender-sensitive method in its case-law so far, although 'it has successfully integrated several forms of violence [of which women are victims], as human rights violations.'¹²⁰ A gender-sensitive approach means to consider the gendered causes and effects of violence and to recognise that harm exclusively or mainly affects women. It also implies the acknowledgement of the gendered effects of a violation, such as the social stigma that women might face as a consequence of violence. A gender-based approach, which is possible through the Istanbul Convention, will imply that Courts should not only assess whether in the country of origin there is a legislation concerning domestic violence or female genital mutilation – the adoption of a law corresponds to an obligation of

¹¹⁹ See, extensively, forthcoming, DE VIDO, "The Council of Europe Istanbul Convention as interpretative tool at European and national level", in NIEMI, PERONI, STOYANOVA (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention*, Abingdon, 2020.

¹²⁰ SJÖHOLM, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, Leiden/Boston, 2018, p. 116.

result – but also evaluate whether the State *complies with* its due diligence obligations to prevent, to protect and to prosecute. This approach extends to issues of relocation as well. The burden should not be on the woman that “might have escaped somewhere else”, but on courts that should assess whether in another area where the person could, and wishes, to relocate, the country of origin respects its obligations of prevention, protection and prosecution with regard to gender-based violence.

When tackling cases of refugee status, there are however some risks that must be avoided. First, if, on one hand, persecution can never be “normalised” by invoking culture,¹²¹ on the other hand, it is necessary not to commit the mistake of stereotyping other States as “others” with the risk of considering courts in the so-called “Western countries” as the ones that can “save women” from the brutality of other cultures. We are perfectly aware indeed of the stereotypes and the biases existing in European and national courts as well. The approach should be gender-sensitive in the sense that it should shift from focusing on the woman – the woman that should have relocated somewhere else, the woman who should have declared in the first interview to have been victim of violence, the woman who should demonstrate the “seriousness” of the harm suffered as a consequence of domestic violence – to focusing on the State of origin and its capacity of protecting women, and of preventing and prosecuting violence.

¹²¹ FREEDMAN, *cit. supra* note 27, p. 82.

FRAMING THE 'RISK ASSESSMENT' TEST IN WOMEN'S ASYLUM CLAIMS: A CRITICAL ANALYSIS OF DOMESTIC JURISPRUDENCE VS. THE EUROPEAN COURT OF HUMAN RIGHTS' APPROACHES

Maria Manuela Pappalardo

SUMMARY: 1. Introduction – 2. The 'Risk Assessment' Paradigm in International-Protection Claims: a Proposal – 3. Testing the Risk Paradigm: the Real Risk of Being Trafficked for Sexual Exploitation – 3.1. The Persecution – 3.2. The Present Threat and Risk Factors – 3.3. The State-Failure Protection – 3.4. The IPA Test – 4. Sketching the Risk Assessment in the Case-law of ECtHR – 5. Conclusions.

1. – Introduction

One of the major challenges in determining the status of 'refugee' is identifying – through a comprehensive and forward-looking assessment – the 'real risk' of being persecuted upon return.

As well known, the 1951 Refugee Convention provides no specific procedural tools to establish the status of refugee. Neither does the European Union Qualification Directive (henceforth 'Qualification Directive' or 'QD'),¹ which does not even

¹ Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards

clearly specify any adequate model for setting common standards and criteria of *risk assessment*. Indeed, testing the actual risk of being persecuted remains the core issue of the whole decision-making in international-protection claims.

Such test is generally carried out by anticipating what might happen were claimants returned to their country of origin, specifically considering applicants' personal circumstances and the country of origin's situation. In this regard, given women's special needs and vulnerability, ascertaining *risk* in asylum claims involving female-refugees becomes crucial: specific risk factors are indeed typically intertwined in the assessment of the 'real risk' of persecution.

This paper aims at sketching a 'risk paradigm' to be tested through in international-protection case-laws, focusing on selected case-studies about women's asylum seekers. The core elements of this paradigm are the following: persecution (or serious harm), present threat and failure of the state of origin to provide protection. The coexistence of all these components reveals the existence of a "real risk", which needs to ultimately pass the final test of the Internal Protection Alternative ('IPA'), taking into account all the factors useful to individualise the risk.

International legal scholars have extensively focused on all these elements,² without however scrutinizing the risk assessment question in international-protection

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. The Directive uses the exact same definition of 'refugee' given in the Geneva Convention (Art. 1 A 2, Geneva Convention or GC) and adds the subsidiary protection.

² See generally, GRAHL-MADSEN, *The Status of Refugees in International Law*, Leiden, 1966, Vol. I; CARLIER, "General Report," in CARLIER et al. (eds.), *Who is a Refugee? A Comparative Case Law Study*, Den Haag, 1997, p. 683 ff.; CARLIER, "The Geneva Refugee Definition and the 'Theory of the Three Scales'", in NICHOLSON and TWOMEY (eds.), *Refugee Rights and Realities. Evolving International Concepts and Regimes*, Cambridge, 1999, p. 37 ff.; CRAWLEY, *Refugees and Gender: Law and Process*, Bristol, 2001; CRAWLEY and LESTER, *Comparative Analysis of gender-related persecution in national asylum legislation and practice in Europe*, UNHCR EPAU, 2004, available at: <<https://www.unhcr.org/40c071354.pdf>>; GORLICK, *Improving decision-making in asylum determination*, UNHCR, Working Paper n. 119, 2005, available at: <<https://www.refworld.org/docid/4ff164622.html>>; NOLL, "Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear", in NOLL (ed.), *Proof, Evidentiary Assessment & Credibility in Asylum Procedures*, Leiden, 2005, p. 141 ff.; GOODWIN-GILL and MCADAM, *The Refugee in International Law*, 3rd ed., Oxford, 2007; WOUTER, *International Legal Standards for the Protection from refoulement: a legal Analysis on the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant Civil and Political Rights, and the Convention Against Torture*, Antwerp-Oxford-Portland, 2009; CHERUBINI, *L'asilo dalla Convenzione di Ginevra al Diritto dell'Unione Europea*, Bari, 2012; PEERS et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary)*, 2nd ed., Leiden, 2012;

claims, particularly when dealing with women’s asylum cases.

Moreover, the idea of risk has been mostly analysed by legal literature in relation to the principle of *non-refoulement*. The European Court of Human Rights (‘ECtHR’ or “the Court”), assessing applications for violations of Article 3 (Prohibition of torture) of the European Convention of Human Rights (‘ECHR’), has identified some principles embedded in the risk assessment that must necessarily be scrutinized when considering a possible return.

Further, although both ECtHR’s and domestic courts’ judgments may concern the same issues, actually their outcomes are different. The former – being limited to the prohibition of *refoulement* and State’s responsibility for violations of ECHR – cannot bring (unlike judgments of domestic courts) any direct benefits such as residence permits or specific rights for the applicant.

Thus, an empirical analysis on the rulings of domestic courts becomes crucial in order to duly investigate how the “risk paradigm” impacts international-protection claims.

This chapter presents a brief review of selected domestic case-laws (UK, France and Italy) in international-protection claims concerning women victims of persecution as members of a particular social group, drawing the risk paradigm in the context of the Common European Asylum System (‘CEAS’). It provides an analysis of asylum cases about trafficking for sexual exploitation, considering the ECtHR’s jurisprudence on procedural issues in international-protection claims. It aims at ascertaining how risk assessment generally works in the decision-making process about international protection (Section 1); it further outlines a tentative risk paradigm in women’s trafficking decisions, tested through a critical appraisal of both domestic courts and ECtHR approaches (Section 2), eventually exploring whether (and to what extent) the risk-assessment question matches the ECtHR’s evaluating criteria on the prohibition of *refoulement* (Section 3). The analysis reveals that in women’s asylum claims European domestic courts generally use specific socio-economic risk factors in determining the refugee status, even if these factors are not mentioned in the provisions of the QD. By

HATHAWAY and FOSTER, *The Law of Refugee Status*, 2nd ed., Cambridge, 2014; DRYWOOD, “Who’s in and who’s out? The Court’s emerging case law on the definition of a refugee”, *Common Market Law Review*, 2014, p. 1093 ff.; STOREY, “What Constitute Persecution? Towards a Working Definition”, *International Journal of Refugee Law*, 2014, p. 272 ff.; DEL GUERCIO, *La Protezione dei Richiedenti Asilo nel Diritto Internazionale ed Europeo*, Napoli, 2016; HAMDAN, *The Principle of Non-Refoulement Under the European Convention on Human Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Leiden, Boston, 2016.

examining the risk assessment carried out by the ECtHR in comparable cases, the chapter concludes that both jurisdictions (ECtHR and national asylum courts) adopt similar patterns of risk assessment in international protection cases.

2. – *The ‘Risk Assessment’ Paradigm in International-Protection Claims: a Proposal*

The 1951 Refugee Convention is the main international legal instrument framing the conditions for granting the refugee status. In the EU legal system, besides, a new form of protection (the subsidiary protection) was introduced by the Qualification Directive. According to the latter, both refugee status and subsidiary protection integrate the so-called “international protection”.³

Using the same definition provided by the Geneva Convention, the QD recognize the “refugee” as a third-country national (or a stateless person)

“who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]”.⁴

A “person eligible for subsidiary protection” is a third-country national (or a stateless person)

“who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.⁵

Thus, the qualification for international protection depends on the assessment of the risk of being persecuted (if present, the applicant is eligible for refugee status) and on the risk of facing a serious harm (to be eligible for subsidiary protection).

Accordingly, the investigation for granting the refugee status or subsidiary protection should include the following elements: firstly, the applicant has to be a third-country national or stateless person (personal scope) and he/she should be outside

³ QD, *cit. supra* note 1, Art. 2 (a).

⁴ *Ibid.*, (d).

⁵ QD, *cit. supra* note 1, Art. 2 (f).

the country of origin (territorial scope); secondly, the existence of well-founded of a persecution connected to the five *Geneva grounds* or to a real risk to suffer serious harm; thirdly, the availability and accessibility of protection in the State of origin against such persecution/serious harm.

In addition, the assessment includes: all relevant facts as they relate to the country of origin at the time of taking a decision on the application; the statements and documentations presented by the applicant including information (also taken *motu proprio* by decision-makers) on whether he/she has been or could be exposed to persecution or serious harm; the personal circumstances of the applicant, including factors such as background, gender, age and the situation in the country of origin.⁶

In accordance with the opinion of the Court of Justice of European Union (‘CJEU’), the decision-making in the context of international protection includes a two-step process. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application and involves gathering and evaluating information, the credibility assessment and the risk assessment. The second stage relates to the legal appraisal of that evidence, which entails deciding whether the substantive conditions for granting international protection are met (refugee status or subsidiary protection).⁷

Looking at the first step, it should be stressed that information gathering and credibility assessment are the most challenging actions of this phase. Indeed, due to several factors, including the consideration that a person fleeing from persecution commonly arrives without personal documents and it is not so practical to recover evidence after, the ECtHR holds that the requirement of proof should “*not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself*”.⁸ Still, if in doubt, the lack of evidence cannot be decisive *per se*. The special situation facing asylum seekers makes it necessary to grant them the benefit of the doubt when examining the credibility of their claims and of the documents produced to support them.⁹

⁶ *Ibid.*, Art. 4.

⁷ Case C-277/11, *M. M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, ECLI:EU:C:2012:744, para. 64.

⁸ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV.3 (2011), available at: <<https://www.refworld.org/docid/4f33c8d92.html>>, paras. 195-197.

⁹ European Court of Human Rights, *J.K. and Others v. Sweden*, Application no. 59166/12, Judgment of 23 August 2016, para. 95.

The Qualification Directive includes an *ad hoc* provision on the credibility test that describes some specific indicators of subjective authenticity to be applied when the applicant's statements appear unlikely and are not supported by documentary or other evidence. Indeed, truthfulness can be assumed if the following criteria are met, to be taken into account cumulatively:¹⁰

- (a) the applicant has made a genuine effort to substantiate his/her application;
- (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless he/she can demonstrate good reasons for not having done so; and
- (e) the general credibility of the applicant has been established.¹¹

Notwithstanding the positive adoption of these criteria to assess the credibility, there are still several obstacles that cannot be overcome through their implementation *sic et simpliciter*.

As noted by UN High Commissioner for Refugees ('UNHCR'), "*some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community*".¹² Moreover, it is even more difficult to find

¹⁰ C-148/13 to C-150/13, *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406, para. 58.

¹¹ QD, *cit. supra* note 1, Art. 4(5). See NOLL, "Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedure," in NOLL (ed.), *cit. supra* note 2, 2005, p. 197 ff.; KAGAN, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations", Georgetown Immigration Law Journal, 2003, p. 367 ff. See also MACKEY and BARNES, "Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive. Judicial Criteria and Standards", IARLJ, March 2013, p. 92, where other references on credibility assessment have also been developed; available at: <<https://www.refworld.org/docid/557028564.html>>.

¹² Guidelines on International Protection no.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 (2002), available at: <<http://www.refworld.org/docid/3d36f1c64.html>, para. 35>.

evidences to support the demand, especially in cases of situations that fall within the private sphere, as well as of signs of violence suffered that are not always physical and therefore of lacking visible damages. Undeniably, evidences of psychological harm are the greatest challenge in determining facts.¹³

On average, in cases involving women victims of violence, the credibility criteria suggested by QD cannot be applied automatically.

First, due to post-traumatic disorders, a woman victim of violence will not substantiate her claim because she is usually unable to remember events. Second, it is likely that a satisfactory explanation has not been given about the lack of other relevant elements (such as the proof of a forced marriage). Third, applicant’s statements will be contradictory when no information is detected by reports on the country of origin. Fourth, it is also possible that the application is not submitted in time because of the feeling of shame in telling traumatic experiences. Finally, due to the cultural background, the applicant will not generally be credible if she is not fully aware of the serious damage received.¹⁴

In the *Guidelines for Investigation and Evaluation of the Needs of Women for Protection* it is stated that “*there is often no reason to investigate painful abuse, such as sexual abuse in detail. The lack of detail in a woman’s story should therefore not be viewed as an indication that her information is not credible*”.¹⁵

In these particular circumstances, when the credibility test failed, the decision-making process should go on with the risk assessment, notwithstanding the lack of evidence to support the claim.

Therefore, the question arises whether it is possible to identify a different approach to consider just the risk assessment as determinative in establishing qualification for international protection.

Looking at the above definitions on “refugee status” and “subsidiary protection”, the evaluation for determining the “risk” as required by the international protection system could be summarized and exemplified by this formula, which supports the decision-making process:

¹³ CLAYTON et. al., BARNARD (ed.), *Through her Eyes: Enabling women’s best evidence in UK asylum appeals*, London, 2017, available at: <https://www.nuffieldfoundation.org/sites/default/files/files/Through-Her-Eyes_Full-Report_Nov17.pdf>, p. 41.

¹⁴ Note on Burden and Standard of Proof in Refugee Claims, UNHCR (1998), available at: <<http://www.refworld.org/docid/3ae6b3338.html>> para. 9.

¹⁵ Swedish Migration Agency, “Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection”, 28 March 2001, available at: <<http://www.refworld.org/docid/3f8c1a654.html>>, p. 15.

*persecution / serious harm + present threat + failure of state protection
= real risk*

This paradigm is finalized by the additional IPA test, i.e. the assessment of the possibility of being protected against the risks of persecution or serious harm outside the applicant's own area, but still within the same country of origin.

It is a prognostic decision-making method which alleviates the burden of proof and sets the judicial duty to cooperate in identifying elements corroborating the applications.

3. – Testing the Risk Paradigm: the Real Risk of Being Trafficked for Sexual Exploitation

This Section focuses on the functioning of the risk paradigm proposed, testing it on the real risk of persecution in cases of trafficking for sexual exploitation. By analyzing 40 selected cases from EU domestic courts (UK, France, and Italy) raised by female asylum-seekers victims of trafficking, the emerging trend shows that the refugee status is increasingly based on the membership of a particular social group (PSG). Most of the cases analysed apparently follow the paradigm's scheme and explain the prognostic factors typically recurring in trafficking jurisprudence and playing a crucial role in determining the level of risk to face persecution in case of return.

3.1. – The Persecution

One of the most controversial elements of the risk paradigm is the one of "persecution", specifically when it relates to features such as "womanhood", "sex", "gender" and "homosexuality" as well as when it needs to be linked to a Geneva Convention ('GC') grounds (Article 1, A2 GC) such as race, religion, nationality, political opinion or membership of a particular social group.

Moreover, the determination of persecution in women's asylum claims is generally connected with various treaties on the protection of women's human rights and has been progressively developed by scholarly interpretation as well as by courts' decisions on persecutions related to the PSG ground.¹⁶

¹⁶SPIJKERBOER, *Gender and Refugee Studies*, Aldershot, 2000, p. 177. See also HELTON, "Persecution

As clearly stated by the UNHCR, “*sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men. As such, they may constitute a particular social group*”.¹⁷

Also the 2011 Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence (henceforth, ‘Istanbul Convention’) acknowledges that gender-based violence is a form of persecution under Article 1 A(2) (GC). Such recognition implies “that a woman may be persecuted because of her gender, i.e. because of her identity and status as a woman” and that States Parties to the Convention are thus required “to recognize that *gender-specific violence may amount to persecution, and lead to the granting of refugee status*”.¹⁸

on Account of Membership in a Social Group As a Basis for Refugee Status”, *Columbia Human Rights Law Review*, 1983-1984, p. 39 ff.; ANKER, “Refugee Law, Gender, and the Human Rights Paradigm”, *Harvard Human Rights Journal*, 2002, p. 133 ff.; RANDALL, “Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution”, *Harvard Women’s Law Journal*, 2002, p. 281 ff.; HAINES, “Gender-related persecution”, in FELLER, TÜRK, NICHOLSON (eds.), *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection*, Cambridge, 2003, p. 319 ff.; HATHAWAY and FOSTER, “Membership of a Particular Social Group. Discussion Paper no. 4, Advanced Refugee Law Workshop International Association of Refugee Law Judges, Auckland, New Zealand, October 2002”, *International Journal of Refugee Law*, 2003, p. 477 ff.; MUSALO, “Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence”, *DePaul Law Review*, vol. 52, 2003, p. 777 ff.; FOSTER, “Why we are not there yet: the particular challenge of “particular social group”, in ARBEL, DAUVERGNE and MILLBANK (eds.), *Gender in Refugee Law. From the Margins to the Centre*, New York, 2014, p. 17 ff.; BEDNAR and PENLAND, “Asylum’s Interpretative Impasse: Interpreting Persecution and Particular Social Group Using International Human Rights Law”, *Minnesota Journal of International Law*, 2017, p. 145 ff. See also House of Lords (Judicial Committee) (United Kingdom), *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, Opinions of 18 October 2006, para. 86, available at: <http://www.refworld.org/cases,GBR_HL,4550a9502.html>. See SAPIENZA, “La Convenzione sui rifugiati nella recente giurisprudenza della Camera dei Lords”, *Diritti Umani e Diritto Internazionale*, 2007, p. 438 ff. This trend of evaluating the persecution of women on the grounds of PSG was expressly criticized for overlooking the other reasons (see the Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, para. 312, available at: <<https://rm.coe.int/16800d383a>>). This does not mean that other reasons should be disregarded, see Guidelines on International Protection no. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, HCR/GIP/06/07 (2006), available at: <<http://www.refworld.org/docid/443679fa4.html>>, paras. 33-36 and 40. See also Guidelines on International Protection no.1, *cit. supra* note 13, para. 18. See Art. 60 of Istanbul Convention, *cit. supra* note 3.

¹⁷ Guidelines on International Protection no.1, *cit. supra* note 13, para. 12.

¹⁸ Istanbul Convention, Arts. 60-61 (emphasis added). See Explanatory Report to the Convention, *cit.*

The CEDAW Committee in General Recommendation no. 32 recognizes gender-related forms of persecution, as “legitimate grounds for international protection”, including trafficking in women.¹⁹

Finally, the QD mentions certain acts qualified as persecution, such “acts of physical or mental violence, including acts of sexual violence” and “acts of a gender-specific or child-specific nature”.²⁰

In the judicial interpretation concerned with cases involving women’s gender-specific claims, the approach appears to be either to merely grant the refugee status to women due to their membership of the group of “women”.²¹ In *AZ (Trafficked women) Thailand* case, a British Court considered the “social group of women” victims of trafficking, making it clear that the relevant social group was “young female victims of trafficking for sexual exploitation”.²²

Similarly, in *SB Moldova* case, the Court stated that the social group relied upon was not the broad one of gender. The past experience of having been trafficked is the immutable characteristic which is capable of identifying the group, without showing

supra note 17, at para. 311. For an analysis of the Istanbul Convention, see DE VIDO, *Donne, Violenza e Diritto Internazionale. La Convenzione del Consiglio d’Europa del 2011*, Milano, 2016; DI STEFANO, “Violenza contro le donne e violenza domestica nella nuova Convenzione del Consiglio d’Europa”, *Diritti Umani e Diritto Internazionale*, 2012, p. 169 ff. See also DI STEFANO (ED.), *Gender Issues and International Legal Standards*, Catania, 2010.

¹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/90/PDF/N1462790.pdf?OpenElement>>, at para. 15. See also CHRISTENSEN, *Trafficking for sexual exploitation: victim protection in international and domestic asylum law*, New Issues In Refugee Research, Research Paper No. 206, 2011, available at: <https://www.refworld.org/docid/4dc253a22.html> DEMIR, “The Trafficking of Women for Sexual Exploitation: A Gender-Based and Well-Founded Fear of Persecution?”, Working Paper no. 80, UNHCR, EPAU, Geneva, March 2003, available at: <<https://www.unhcr.org/research/working/3e71f84c4/trafficking-women-sexual-exploitation-gender-based-well-founded-fear-persecution.html>>, p.1. FREEDMAN, “Female Asylum-seekers and refugees in France”, UNCHR Legal and Protection Policy Series, PPLAS/2009/01, June 2009, available at: <<https://www.refworld.org/docid/4a535e112.html>>.

²⁰ Art. 9 (2)(a)(f) QD.

²¹ Court of Appeal (England and Wales), *R v. Immigration Appeal Tribunal, Ex parte Shah*, 23 July 1997, available at: <https://www.refworld.org/cases,GBR_CA_CIV,3ae6b67f0.html>.

²² Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, 8 April 2010, paras. 139-140, available at: <http://www.refworld.org/cases,GBR_UTIAC,4bd58d912.html>.

that there is discrimination in the wider sense against the former victims of trafficking in the society in question.²³ The *Cour National de Droit d’Asile* (‘CNDA’), in the case *J.E.F.*, held that women victims of trafficking from Edo State were a PSG because they shared a common background and a distinct identity, being perceived as different by the surrounding community.²⁴

It is well accepted what constitutes a persecution and how to identify the nexus with the reasons of trafficking for sexual exploitation. Therefore, the first term of the paradigm is not so controversial and it requires an assessment on the presence of persecution. Yet the decision-making process must continue towards the assessment of the “risk” of suffering such persecution.

3.2. – The Present Threat and Risk Factors

Granting the refugee-status to trafficking victims is motivated and justified by their membership to a PSG. However, the recognition is not automatic since the prognostic judgement is characterised by several factors which, although not explicit in the relevant provisions, can be gathered from the courts’ decisions.

The second element of the suggested paradigm is the consideration of the “present threat” to be assessed at the time of judicial examination, not at the time when the application was lodged. It requires considering whether the troublesome circumstances of the individuals and the country of origin still exist at the time of the decision.

Article 4.3 of the QD requires EU Member States to carry out a case-by-case assessment of the following elements:

- (a) all relevant facts relating to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

²³ Asylum and Immigration Tribunal (Immigration Appellate Authority) (United Kingdom), *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, 26 November 2007, para. 54, available at: <https://www.refworld.org/cases,GBR_AIT,47837c902.html>.

²⁴ Cour Nationale du droit d’asile (France), *J.E.F.*, 24 March 2015, n. 10012810, available at: <<https://www.asylumlawdatabase.eu/en/case-law/france-national-asylum-court-24-march-2015-decision-no-10012810>>.

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country.²⁵

The analysis of the domestic case-law helps then in identifying specific prognostic factors in assessing those elements which are not limited to the "background, gender or age". Judges generally take into account the family status (e.g. single woman, single parent, orphan), the level of education, the socio-economic situation, the availability of supporting networks like family or other, the relatives' involvement in the trafficking as well as the power of the traffickers.²⁶

All these factors allow to measure the risk level from low to enhanced and to establish the consequences in case of return, hence the present threat.

In this sense, the Upper Tribunal (Immigration and Asylum Chamber) identified specific factors in *AM and BM Albania* cases.

This decision also clarifies that granting the refugee status based on membership of a particular social group (trafficked women from Albania) cannot exempt the judge (i.e., the only one able to ascertain the existence of the same risk of persecution) from investigating the risk. The Court listed the risk factors as the following:

- 1) social status and economic standing of trafficked women's family;
- 2) level of education of trafficked women or their family;
- 3) trafficked women's state of health, particularly mental health;
- 4) presence of illegitimate children;
- 5) area of origin of the trafficked women's family;
- 6) trafficked women's age.²⁷

²⁵ Art. 4.3, QD. See Döring, "Asylum Qualification Directive 2011/95/EU" (Articles 1-10), in HAILBRONNER and THYM (eds), *EU Immigration and Asylum Law. A Commentary*, 2nd ed., Munich, Oxford, Baden-Baden, 2016, p. 1108 ff.

²⁶ Guidelines on International Protection No. 7, *cit. supra* note, p.18.

²⁷ Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), *AM and BM (Trafficked women) Albania v. Secretary of State for the Home Department*, 18 March 2010, preamble, lett. f), available at: <http://www.refworld.org/cases,GBR_UTIAC,4ba796112.html>.

In this case, the decision identified, in addition to the socio-economic profiles, also the psychological aspect of the damage suffered²⁸ and it also considered the victim’s “risk of suicide”, together with ostracism and stigmatization due to the presence of illegitimate children.

The CNDA, assessing the risk, stated that the victims “*ne peuvent espérer y reprendre une vie normale et s’exposent à un risque sérieux de marginalisation, y compris vis-à-vis de leur propre famille, voire à une menace d’être renvoyées en Europe par le réseau*”.²⁹

Similarly, in *HD (Trafficked women) Nigeria*, the risk factors were based on severity, indicating an *enhanced risk* of being trafficked, like

- a. The absence of a supportive family willing to take her back into the family unit;
- b. Visible or discernible characteristics of vulnerability, such as having no social support network to assist her, no or little education or vocational skills, mental health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation such as to mean that she will be living in poverty or in conditions of destitution;
- c. The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked. On returning to Nigeria, it is probable that those characteristics of vulnerability will be enhanced further in the absence of factors that suggest otherwise.

Then, the Court, indicated as factors of a *lower risk* of being trafficked:

- a. The availability of a supportive family willing to take the woman back into the family unit;

²⁸ *Ibid.*, lett. b). Furthermore, “in making an assessment whether an individual is vulnerable to abuse a careful analysis of all her personal characteristics is required to assess whether the indicators of risk, including any mistreatment in her previous exploitative situation and the consequences of that for her personally”, see paras. 173-175. See also Asylum and Immigration Tribunal / Immigration Appellate Authority (United Kingdom), *HC & RC (Trafficked Women) China v. Secretary of State for the Home Department*, 18 July 2009, available at: <https://www.refworld.org/cases,GBR_AIT,4a6585cf2.html>. See also Cour Nationale du Droit d’Asile (France), 29 April 2011, no. 10012810, available at: <http://www.refworld.org/cases,FRA_CNDA,4fb173852.html>.

²⁹ Cour Nationale du Droit d’Asile (France), *Mme F. alias F.*, 30 March 2017, no. 16015058 R, in *Contentieux du Droit d’asile Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile (2017)* available at: <<http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Recueils-de-jurisprudence>>.

b. The fact that the woman has acquired skills and experiences since leaving Nigeria that better equip her to have access to a livelihood on return to Nigeria, thus enabling her to provide for herself³⁰.

Finally, in *AZ* case mentioned above, “[r]elevant factors will include the age, marital status, domestic background, educational level, qualifications and work experience of the appellant. The availability of employment and a familial or other support network will also be significant factors”.³¹ Therefore, the main risk of being re-trafficked lies in risk-enhancing socio-economic factors.

The current threat depends on all these elements to be assessed with the possible consequences in case of return, such as the discrimination and the stigmatization by the society, the rejection by family, the difficulties in reintegrating in socio-cultural life.

3.3. – The State-Failure Protection

Once established the presence of persecution and the current threat, the decision-maker must verify if State or non-state actors are unable to provide protection for such threat of persecution.

The QD acknowledges the “protection theory”, according to which international-protection applications must be accepted whenever: actions committed by *de jure* or *de facto* state agents result in persecution or serious harm; persecution or serious harm are attributed to non-state actors and the State is unable or unwilling to provide protection, and, finally, in cases of failed State.³²

According to article 7 of the QD, subjects who can provide protection against persecution or serious harm are the State and parties or organizations (including international organizations) controlling the State or a substantial part of it.³³ They must dispose of an “effective legal system” contrasting persecution. Hence, requiring not the mere existence, but rather the effective implementation of relevant legal provisions.

In this scenario, the *HD* case seen above is particularly interesting as it changes

³⁰ Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), *HD (Trafficked women) Nigeria*, 17 October 2016, para. 2, available at: <https://www.refworld.org/cases,GBR_UTIAC,580724ed4.html>.

³¹ *AZ* case, *cit. supra* note 23.

³² Art. 6 QD. See DEL GUERCIO, *cit. supra* note 2, p. 309.

³³ Several authors have criticized the decision to include non-state actors, which arguably do not have the power to enforce the rule of law, are not parties to human-right treaties and cannot be held liable in cases of serious violations. See DEL GUERCIO, *cit. supra* note 2, p. 312, at note 887.

the approach on the risk assessment, tracing different aspects: the distinction between persecution perpetrated by a single trafficker rather than by a structured criminal organization and the State of origin’s ability to offer effective protection.

Before this decision, the case-law confined the recognition of refugee status to the existence of a presumption of protection by the government (in this case the Nigerian government) for those victims recruited by traffickers *outside* the criminal organizations. An asylum seeker was therefore qualified as a ‘refugee’ only if recruited by a “gang” because in such case the State’s protection capacity was not considered sufficient: this constituted a decisive risk factor on the probability of being recruited again.³⁴

The *HD* case, however, exceeds this pattern. Indeed, judges believed that the lack of evidence of involvement in a criminal organization was not a determining factor in defining whether or not the woman could be reintegrated into the Nigerian territory, and therefore protected.

The fact that the government is able to offer protection only to victims of traffickers “outside” the criminal organization is not a sufficient evidence to eliminate the real risk of a new recruitment.³⁵

Moreover, this capacity cannot be demonstrated by the mere presence of internal legislation or international organizations in the territory to protect victims of trafficking. In *PO (Trafficked Women) Nigeria* case, the Court refused to accord the protection because in Nigeria was established an organization able to contrast trafficking – the National Agency for the Prohibition of Traffic in Persons and other

³⁴ Asylum and Immigration Tribunal / Immigration Appellate Authority (United Kingdom), *PO (Trafficked Women) Nigeria*, 23 November 2009, available at: https://www.refworld.org/cases,GBR_AIT,4b0ab38f2.html, paras. 191-192. See also Cour Nationale du Droit d’Asile, *Mme O.*, 13 March 2012, n. 11016563 C, in *Contentieux des Réfugiés*, *Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile* (2012), available at: <http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Recueils-de-jurisprudence>; see also *Cour Nationale du Droit d’Asile, Mlle O.*, 3 April 2012, n. 11020945 C. See also Tribunale di Milano, 29 April 2016, r.g. 71577/2015, which recognizes subsidiary protection by virtue of “a series of retaliations against the victim of trafficking if only to recover the money invested to expatriate the applicant” (author’s translation).

³⁵ See “Summary Conclusions: Gender-Related Persecution”, June 2003, adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, in the context of the Global Consultations on International Protection (San Remo, Italy, 6-8 September 2001), available at: <https://www.refworld.org/docid/470a33b60.html>, para. 6.

related matters ('NAPTIP')³⁶ – and also because there was an NGOs supporting victims – were circumstances implying with certainty the possibility to protect the victim from further persecution.³⁷

The *HD* case, however, goes beyond such assumption: “*merely because Nigeria is ‘doing its best’ to meet its international obligations to prevent trafficking does not necessarily result in a finding that there is sufficiency of protection for those identified as being at risk of being trafficked*”.³⁸

In other words, in considering the third element of the paradigm, the decision-maker must verify the effective protection provided to the asylum-seekers against the persecution.

3.4. – The IPA Test

The effectiveness of the proposed paradigm must pass the final test about the likelihood of an internal relocation in the country of origin, free from risk of persecution or serious harm. This element was defined as “an ‘antidote’ to the primary risk of persecution”.³⁹

Decision-makers must obtain accurate and up-to-date information from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.⁴⁰

³⁶ This is the main organisation set up by the Nigerian Government to combat the phenomenon of trafficking in human beings., see *PO* case, *cit. supra* note 35, para. 1.

³⁷ Cour Nationale du Droit d’Asile, 29 July 2011, 10020534, available at: <http://www.refworld.org/cases,FRA_CNDA,4fc8d40a2.html>.

³⁸ See *HD* case, *cit. supra* note 31, para. 172. For a contrasting view see Asylum and Immigration Tribunal / Immigration Appellate Authority (United Kingdom), *MP [Trafficking - Sufficiency of Protection] Romania v. Secretary of State for the Home Department*, 21 April 2005, available at: <http://www.refworld.org/cases,GBR_AIT,43fc2d731f.html>; Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) *TD and AD (Trafficked women)(CG) v. Secretary of State for the Home Department*, 23 February 2016, available at: <http://www.refworld.org/cases,GBR_UTIAC,56cc86804.html>. In *AZ* case, *cit. supra* note 23, the Court hold that “[a]lthough anti-trafficking legislation has been implemented, the involvement of corrupt officials with traffickers and/or criminals has weakened the steps taken by the government to combat trafficking” (see preamble, para. 3).

³⁹ HATHAWAY, “International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative”, *Michigan Journal of International Law*, 1999, p. 131 ff., paras. 12-13.

⁴⁰ Art. 8 QD “Internal Protection”, paras. 2-4. Not all EU Member States have implemented Art. 8 QD, such as Italy and Spain.

The international protection system lists three criteria for assessing *internal* protection: a part of the country of origin is *safe for the applicant* (“*safety*”); 2) the applicant has *access to that part of the country* (“*accessibility*”); and 3) the applicant can *reasonably be expected to settle there* (“*reasonableness*”).⁴¹

In this scenario, potential risk factors can be, *inter alia*, human-rights compliance, access to adequate education and health, and the economic survival, taking into account the applicant’s standard of living once established in the designated area.⁴²

In addition, the European Union Procedures Directive (2013/32/EU), in establishing criteria for assessing the safety of the destination country, requires that the destination State must provide a protection system complying with the Geneva Convention.⁴³

Applying the “reasonableness test” concerns the reasonable possibility that applicants may remain in those areas permanently rather than temporarily (e.g., while waiting for the situation to improve in their areas of origin). Yet, the IPA test is worthless when State or its agents are responsible for the persecution as the applicant could not benefit of any effective protection.⁴⁴

⁴¹ International Association for Refugee Law Judges European Chapter, “Qualification for international protection (Directive 2011/95/EU). A Judicial Analysis”, December 2016, p. 73, available at: <<https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf>>. See also Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04 (2003), para. 7, available at: <<http://www.refworld.org/docid/3f2791a44.html>>.

⁴² *Ibid.*, para. 29. See also UNHCR, Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called “Internal Flight Alternative” or “Relocation Principle”), 9 February 1999, available at: <<http://www.refworld.org/docid/3ae6b336c.html>>. Furthermore, see House of Lords (Judicial Committee) (United Kingdom), *Januzi (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*; *Hamid (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*; *Gaafar (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*; *Mohammed (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Consolidated Appeals)*, 15 February 2006, para. 19, available at: <https://www.refworld.org/cases,GBR_HL,43f5907a4.html>.

⁴³ Art. 38, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, (henceforth Procedure Directive or PD). See, HATHAWAY and FOSTER, *cit. supra* note 2, p. 357. See also European Council on Refugees and Exiles (ECRE), “Actors of Protection and the Application of the Internal Protection Alternative - European Comparative Report”, 2014, available at: <<http://www.refworld.org/docid/543bbb8f4.html>>, p. 61. Furthermore see *Januzi* case, *cit. supra* note 43, para. 59. See also House of Lords (Judicial Committee) (United Kingdom) *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and Others (FC) (Respondents)*, 14 November 2007, paras. 3-5, available at: <http://www.refworld.org/cases,GBR_HL,473ae09c2.html>.

⁴⁴ Recital 27, QD.

In case of relocation, the decision-makers must consider factors such as the individual's actual ability to move (as a durable solution). Hence, range of circumstances like transport, communication and information, cultural traditions, beliefs, customs, ethnic or linguistic differences, health care facilities, but also employment opportunities could be relevant. Furthermore, the presence of the family or of NGOs must be adequate to support the applicant, providing practical assistance.⁴⁵

As far for women, other significant peculiarities or situations should be considered, such as those of divorced or unmarried women, widows, single parents, especially in those countries where male protection is expected. Thus, for example, if women are unable to work in the relocation areas or to obtain assistance or subsidies from the authorities, the alternative transfer must be considered unreasonable. As explained in *HD* case, gender-specific risks also include an assessment of the likelihood of being subjected to sexual violence⁴⁶ «particularly where she is vulnerable to abuse because of lack of skills, mental and psychological problems and isolation».⁴⁷

Essentially, the IPA test, as implemented by domestic asylum courts, is based on the existence of adequate socio-economic conditions for victims of trafficking in the area of relocation.

4. – *Sketching the Risk Assessment in the Case-law of ECtHR*

The proposed risk paradigm stems from a review of rules which, together, show patterns of assessment of the existence of a “risk” in determining the international protection.

In order to establish the risk seriousness in relation to Article 3 of the ECHR, the European Court of Human Rights takes an approach coherent with the criteria established by international protection system and referred to in EU-law standards. In interpreting Article 3 ECHR through risk indicators and assessment principles, the Court has indeed produced a fundamental judgment-rule.⁴⁸

⁴⁵ See “Actors of Protection and the Application of the Internal Protection Alternative - European Comparative Report”, *cit. supra* note 44, p. 96.

⁴⁶ See *HD* case, *cit. supra* note 31, para. 186.

⁴⁷ *Ibid.* For a contrasting view see Asylum and Immigration Tribunal / Immigration Appellate Authority (United Kingdom) *JO (Internal Relocation - No Risk of Re-Trafficking) Nigeria v. Secretary of State for the Home Department*, 10 September 2004, available at: <http://www.refworld.org/cases,GBR_AIT,47a70794d.html>; see also *HC & RC* case, *cit. supra* note 29.

⁴⁸ BALDINGER, *Rigorous Scrutiny versus Marginal Review, Standard on Judicial Scrutiny and Evidence in International and European Asylum Law*, Oisterwijk, 2013.

Then, the challenge here is to consider the case-law of ECtHR in the context of decision-making process of international protection (as exemplified in the risk paradigm).

Starting with the credibility issue, it is noteworthy that in *Rustamov v. Russia* the Court stated that “requesting an applicant to produce ‘indisputable’ evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him”. The allocation of the burden of proof is the same prescribed in the QD and, in this regard, as noted in *H.L.R. v. France* in assessing the conditions in the receiving State, the Court takes also the material obtain *proprio motu*.

As in the international protection decision-making, the analysis is based on the “assessment of a real risk”. This latter, as stated in *Vilvarajah and Others v. the United Kingdom*, must focus on the foreseeable consequences of the applicant’s removal to the country of destination in the light of the general situation there and of his or her personal circumstances. In this connection, the assessment must also cover the general situation of violence existing in the country of destination.

The Court’s decision-making focuses on the assessment of substantial grounds for believing that the applicant, if removed, would face a real risk of ill-treatment in the receiving State. It is a ‘predictive’ decision-making on what might happen in case of return, hence very close to the kind of assessment in the ‘risk paradigm’.

The first element of the risk paradigm it is of course verifiable by the Court in light of article 3, outside of the meaning of the “international protection”. Yet, the Court takes into account the same aspects mentioned above. To establish the seriousness of the ill-treatment, the Court considers the overall human rights situation in the country of origin and, in case of removal of female applicants, the situation of women in such countries. In *Jabari v. Turkey*, the applicant had a well-founded fear of persecution as she belonged to a particular social group, namely “women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution”⁴⁹ and the Court held that in case of deport the applicant to Iran, there would be a violation of Article 3.

In this scenario, another principle laid down by the Court in *Saadi v. Italy* concerns the “membership of a target group” in which the evidence of individualized risk provides for certain exceptions, such as where the applicant is a member of a

⁴⁹ European Court of Human Rights, *Jabary v. Turkey*, Application no. 40035/98, Judgement of 11 July 2000, para. 34.

group systematically suffering maltreatment. Indeed, such situations do not require the establishment of an individualized risk, in the meaning that the applicant must be able to distinguish his own situation from that of the general dangers existing in the destination country.⁵⁰

In the Court's opinion, there is no doubt that trafficking constitutes inhuman and degrading treatment within the meaning of Article 3.⁵¹ However, the general risk-assessment principles must also be applied here, assessing whether can be verified substantial grounds that victims would face the same type of risk in the event of repatriation, according to their personal circumstances and those of their countries of origin.⁵²

Looking at the second element of the risk paradigm ("present threat"), in *F.G. v. Sweden* the Court sets out the principle of the *ex nunc* evaluation of the circumstances, assessing the risk at the time of the case's examination⁵³. Then the risk must be assessed first and foremost in light of the facts, which were known or ought to have been known to the authorities of the Contracting State at the time of expulsion. If, however, the claimant has not yet been expelled when the Court examines the case, the relevant time is the time of the proceedings.

Moreover, in *J.K. v. Sweden*, the Court outlines a mechanism of presumption of a future risk of violation of Article 3 using the "past ill-treatment as a risk indication", similar to that proscribed by Article 4(4) DQ, yet stating that presence of this element is not decisive for assessing the real risk's existence.⁵⁴

As for the "risk factors", in *N.A. v. The United Kingdom*, the Court specifically noted that

"the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation

⁵⁰ *Id.*, *Saadi v. Italy, Saadi v. Italy*, Application no. 37201/0628, Judgement of 28 February 2008, para. 132.

⁵¹ ANNONI, "La tratta di donne e bambine nella recente giurisprudenza della Corte europea dei diritti dell'uomo", DEP., *Deportate Esuli Profughe*, 2011, p. 87 ff.

⁵² European Court of Human Rights, *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Judgment of 11 January 2007, para. 2.

⁵³ *Id.*, *F.G. v. Sweden*, Application no. 43611/11, Judgment 23 March 2016, para. 115.

⁵⁴ *Ibid.*, paras. 99-101.

of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case”.⁵⁵

In addition, the victim should only prove one strong peculiar feature which makes her distinguishable, such as the fact that “*she has not earned the targeted amount of money and/or has not paid her debt as a result of which her trafficker might go to extreme lengths to find her; she has been trafficked by a trafficking organization/gang which makes it more likely that upon return she might meet some of them; the traffickers believe that she holds incriminating information and she might testify against them in the country of origin; the victim is from a particular background, from a particular age group, belongs to a certain ethnicity or minority, has no education and resides in certain areas of the country, which puts her at very high risk of re-trafficking*”.⁵⁶

Contrasting to the *HD* case (see above para. 3), the Court in *L.O. v. France* focuses on the assessment of elements which could eliminate the risk, such as the fact that the applicant was not recruited by a criminal organisation, but by a single person acting alone.⁵⁷

Other factors considered by the Court are very similar to those assessed by domestic courts like the chance for the applicant to be able to live a normal life in the country of origin, or the existence of a social network to protect and support her/him, further the likelihood she/he could seek protection from the authorities or NGOs working in that State.⁵⁸

Taking into account the considerations about the State-failure protection (third element of the paradigm) in *JK* case, the Court observes that, although the level of protection in Iraq appears to be sufficiently adequate for the generality of Iraqis, the same

⁵⁵ European Court of Human Rights, *NA. v. The United Kingdom*, Application no. 25904/07, Judgment of 17 July 2008, para. 130. See also *N.A. v. Finland*, Application no. 25244/18, Judgment of 14 November 2019, para. 77.

⁵⁶ See STOYANOVA, “Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights”, *Goettingen Journal of International Law*, 2011, p. 777 ff.

⁵⁷ European Court of Human Rights, *L.O. v. France*, Application no. 4455/14, Judgment of 26 May 2015, paras. 33-34.

⁵⁸ HAMDAN, *cit. supra* note 2, p. 240.

cannot be said for those who, like the applicants, are members of a group systematically suffering ill-treatment. Therefore, in view of the applicant's particular conditions, it is acknowledged that the destination State cannot offer effective protection against al-Qaeda's threats. In this regard, the Court mentioned the Article 7 QD.⁵⁹

In the *L.O. v. France* case, the Court, following the approach of the *P.O.* case (see above para. 3), based the decision on consideration that Nigerian authorities would protect the applicant from risks of inhuman and degrading treatment.⁶⁰

Eventually, in the decision-making process of the Court we find some indications about the final IPA test which must meet the threshold of Article 3 ECHR as noted in *RH v. Sweden*.⁶¹ As mentioned above, national courts assess the adequacy of socio-economic conditions for victims of trafficking in the area of relocation. In *Airey v. Ireland* the Court does not, however, seem to be opposed to extending the application of the Convention to the sphere of social and economic rights.⁶²

Therefore, the real risk may also depend on a lack of material and psychological support, both in the State and in the family itself, but it must reach the threshold of inhuman and degrading treatment. Yet, with regard to refugees, this threshold of Article 3 ECHR appears too restrictive if compared to the one used in the assessment of international-protection claims by domestic courts.

5. – Conclusions

Starting from the legal understanding of international protection and the definition of “refugee status” and of “person eligible for subsidiary protection”, we have sketched out a prognostic-test based on the finding of a “real risk”, for the recognition of the protection. This approach allows us to outline a paradigm of the risk of persecution (or serious harm). Functional to the analysis of necessary requirements and to exemplify the method used in the decision-making process in the international

⁵⁹ European Court of Human Rights, *J.K.* case, *cit. supra* note 10, para. 119.

⁶⁰ *Id.*, *L.O.* case, *cit. supra* note 61, paras. 35-37.

⁶¹ *Id.*, *RH v. Sweden*, Application no. 4601/14, Judgment of 10 September 2015, paras. 73-74. In *A.A.M. v. Sweden* the Court did not find an infringement of Art. 3 ECHR because the applicant would return to a part of the country where Al-Qaeda did not constitute a threat amounting to real risk, see *Id.*, *A.A.M. v. Sweden*, Application no. 68519/10, Judgment of 3 April 2014, para. 68. SCHULTZ, “The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?”, in GAUCI, GIUFFRÈ and TSOURDI (eds.), *Exploring the Boundaries of Refugee Law. Current Protection Challenges*, Leiden, 2015, pp. 31 ff.

⁶² European Court of Human Rights, *Airey v. Ireland*, Application. no. 6289/72, Judgment of 9 October 1979, para. 26.

protection claims.

The comprehensive focus on the elements of the “risk paradigm” makes it possible to ascertain the existence of a risk. In order to determine whether this risk is a “real risk”, it must be further tested with the reasonable possibility of transferring the applicant to another area of the country of origin, where he/she would be able to lead a “normal” lifestyle (the so-called IPA test).

The study of selected cases shows how decision makers take into account the socio-economic features of the destination area encompassing risk factors, such as those related to the possibility of economic survival, the ability to find employment, or the presence of an adequate health system.

The risk assessment provided by domestic courts includes the essence of the violence against women as gender-related persecution in its social perspective, considering the economic, social and cultural rights of women asylum seekers as fundamental requirements to recognize the international protection.

Some of the factors identified by the judicial rulings can also be distinguished as low and high risk of persecution. The identification of these elements can be useful in so far as they are taken as parameters to assess applications for international protection.

It is noteworthy that the factors listed above, closely related to the socio-economic conditions of the victims, are not included in the QD provisions.

Against this background, the analysis of the risk assessment implemented by the ECtHR shows a clear impact on the decision-making method implemented by domestic courts and then on the risk paradigm, although the protection of the ECtHR is complementary to the judgements on asylum seekers. The ECtHR has adopted a legal rationale comparable to those of national judges, invoking the provisions of the QD in cases of asylum-seekers *refoulement*. Yet, according to the “principle of subsidiarity”, the Court’s intervention does not concern the appellant’s claims rejected by the authorities of the State Party, nor does it verify the exact fulfilment of the obligations of QD. Eventually, the Court only ascertains the existence of arbitrary *refoulement* by the resistant government, even though it is undeniable an interrelation between the ECHR’s case-law and that of asylum courts in the performance of the decision-making process in international-protection claims.

13. A TALE OF TWO COURTS: THE EU-TURKEY STATEMENT BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS

Chiara Tea Antoniazzi

SUMMARY: 1. Introduction – 2. Prologue: Facts and Figures of the EU-Turkey Statement – 3. Act I: The Court of Justice of the European Union and the Legal Nature of the Statement – 4. Act II: The European Court of Human Rights and the Compliance of the Statement with Human Rights – 5. Is This the End of the Story? The Future of the EU-Turkey Statement before the Two Courts – 6. Beyond the EU-Turkey Statement: Other Arrangements in the Field of Migration.

1. – Introduction

During the spring and summer of 2016, the EU-Turkey Statement was all over the media and widely debated, especially in its political and moral repercussions.¹ As we have passed its third anniversary, the Statement is far less in the spotlight. The fact remains, however, that the Statement is being given effect on a daily basis and similar agreements in the field of migration are being pursued by the European Union ('EU') and its Member States.

¹ European Council, "EU-Turkey statement, 18 March 2016", 18 March 2016, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 355-380.

It thus appears appropriate to take stock of the rulings that have been delivered by the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR') concerning the Statement, either *per se* or as implemented; and to attempt a prognosis of these Courts' future approach in the face of further complaints regarding the Statement as well as other arrangements concluded by the EU and/or its Member States with countries of origin and transit.

Accordingly, this contribution first of all illustrates the essential elements of the EU-Turkey Statement and the context in which it came into being and has deployed its effects. The contribution subsequently analyses the rulings by the CJEU on the nature of the Statement and the first judgments by the ECtHR regarding the conditions of asylum seekers in Greece following the enactment of the Statement. On these bases, the prospects are outlined for cases currently pending before the two judicial systems and for new cases that can potentially be brought. Finally, the relevance of the approach by the CJEU and the ECtHR to the EU-Turkey Statement for the assessment of comparable arrangements is highlighted.

2. – *Prologue: Facts and Figures of the EU-Turkey Statement*

The EU-Turkey Statement was issued on 18 March 2016 as a response to the record number of migrants that had arrived in Greece from Turkey by sea in 2015 – i.e., 856,723, compared to 41,038 in 2014.² The Statement, which sets out “to end the irregular migration from Turkey to the EU”, entails the commitment by Turkey to take back “all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016”.³ It is notable that “irregular migrants” also include asylum seekers whose applications are found to be inadmissible on the ground that the applicants could receive protection in Turkey as a “first country of asylum” or a “safe third country”.⁴

Correspondingly, the EU has accepted to resettle as many Syrians as are returned to Turkey from Greece (the so-called “one-for-one” scheme), within a limit of 72,000

² UN Refugee Agency (UNHCR), “Operational Portal: Refugee Situations. Mediterranean Situation – Greece”, available at: <<https://data2.unhcr.org/en/situations/mediterranean/location/5179>>.

³ EU-Turkey Statement, *cit. supra* note 1, fourth preambular paragraph and point 1).

⁴ As made clear, *inter alia*, in European Commission, “EU-Turkey Statement: Questions and Answers”, 19 March 2016, available at: <http://europa.eu/rapid/press-release_MEMO-16-963_it.htm>. For details on the two concepts, see *infra* Section 5.

people; disburse up to 6 billion euros to improve the living conditions of beneficiaries of international protection in Turkey; and step up the liberalisation of visas for Turkish citizens and the EU accession process of Turkey.

The EU-Turkey Statement cannot be said to have been fully implemented to date – in particular, during more than three years, no progress has been made with regard to the Visa Liberalization Roadmap or the accession negotiations. On the other hand, the aspects of the Statement that are more closely related to the management of migration flows have been enacted more expeditiously: as of May 2018, all 3 billion earmarked for the “Facility for Refugees in Turkey” for the biennium 2016–2017 had been contracted and the new tranche of funds mobilised, while 13,313 Syrians had been resettled from Turkey to the EU.⁵

Even though the number of readmissions to Turkey during approximately the same period was significantly lower (1,630),⁶ so that the “one-for-one” scheme has not operated as originally conceived, the main goal pursued by the EU and its Member States seems to have been realised – i.e., the considerable decrease in the number of migrants reaching Europe through the Eastern Mediterranean route.⁷ The number of arrivals by sea dropped from 856,723 in 2015 to 173,450 in 2016 and further to 29,718 in 2017.⁸ While in 2018 arrivals bounced back to 32,497 and the number of land arrivals also started to increase considerably (18,014, compared to 4,907 in 2015),⁹ the flows are still significantly lower than during the period preceding the enactment of the EU-Turkey Statement.

Supporters of the Statement have also pointed to the apparent reduction of the number of people dead or gone missing in the crossings – from 799 in 2015 to 441 in 2016 and 59 in 2017, according to the data collected by the UN Refugee Agency (‘UNHCR’; but the death toll has started to rise again in 2018, with 174 fatalities).¹⁰

⁵ European Commission, “Communication from the Commission to the European Parliament, the European Council and the Council. Progress report on the Implementation of the European Agenda on Migration”, 16 May 2018, COM(2018)301 final, pp. 7 and 18.

⁶ UNHCR, “Returns from Greece to Turkey”, 31 May 2018, available at: <<https://data2.unhcr.org/en/documents/download/63916>>.

⁷ The existence of a causal relation between the EU-Turkey Statement and the decrease in the number of arrivals is challenged by SPIJKERBOER, “Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?”, *Border Criminologies*, 28 September 2016, available at: <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>>.

⁸ Operational Portal, *cit. supra* note 2.

⁹ *Ibid.*

¹⁰ *Ibid.*

On the other hand, detractors of the Statement have critically highlighted the externalisation of the management of migration flows onto a third country, the unusual procedure by which the Statement came into being, as well as the harsh conditions of Greek reception centres and the risks for the safety of those asylum seekers that are sent back to Turkey. The two latter aspects, which concern the legal nature of the Statement and the human rights obligations of the EU and its Member States, are – in whole or in part – legal aspects and have been dealt with by the CJEU and the ECtHR respectively.

3. – Act I: The Court of Justice of the European Union and the Legal Nature of the Statement

While the potential breach by the EU and its Member States of their human rights obligations featured prominently in the public debate, the uncertainties surrounding the drafting and entry into force of the Statement and the consequences for its validity and legal effects expectedly attracted much less attention beyond legal circles.

A first issue is whether the instrument, which is titled ‘statement’ and was published on the website of the European Council in the form of a press release, is to be considered binding. The Vienna Convention on the law of treaties and the well-established case-law of the International Court of Justice have made clear that substance prevails over form and that the “particular designation” of a text is not relevant for its identification as a binding instrument.¹¹ The CJEU itself upheld this general principle of international law in various instances.¹² It follows that a thorough examination is required of the intention of the parties to bind themselves, as can be derived from the text and context of the alleged treaty.

¹¹ See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 2 (and the almost identical Art. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986). In the case-law of the International Court of Justice, see *Aegean Sea Continental Shelf*, Judgment of 19 December 1978, para. 96; and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 1 July 1994, para. 23 in particular.

On these bases, the binding nature of the EU-Turkey Statement has been asserted, among others, by CANNIZZARO, “Disintegration Through Law?”, *European Papers*, 2016, p. 3 ff, pp. 3-4; and SPIJKERBOER, “Minimalist Reflections on Europe, Refugees and Law”, *European Papers*, 2016, p. 533 ff., pp. 551-555. For the contrary opinion, see PEERS, “The draft EU/Turkey deal on migration and refugees: is it legal?”, *EU Law Analysis*, 16 March 2016, available at: <<http://eulawanalysis.blogspot.se/2016/03/the-draft-euturkey-deal-on-migration.html>>.

¹² See Opinion 1/75, *Opinion given pursuant to Article 228(1) of the EEC Treaty*,

A second, related issue refers to the authors of the Statement – namely, to whether the Statement was agreed upon by Turkey on the one hand and the European Council on the other, or whether the EU Member States shall be considered parties instead. As both of these issues are relevant to establish the jurisdiction of the CJEU over the Statement, they were dealt with preliminarily by the General Court when ruling upon the request by three asylum seekers of Pakistani and Afghan origins to annul the Statement.¹³

In addition to raising issues of substance such as the infringement of a number of provisions of the EU Charter of Fundamental Rights¹⁴ and the disputable qualification of Turkey as a “safe third country” (a cornerstone of the Statement, as it allows for the return of the majority of asylum seekers from Greece to Turkey), the applicants before the General Court maintained that, for all purposes, the Statement ought to be considered an international agreement between the EU and Turkey, and that its adoption did not comply with the provisions in the EU treaties that regulate the conclusion of international agreements by the Union, which *inter alia* provide for the consent by the European Parliament in relation to treaties with certain characteristics.¹⁵

In its three identical orders of 28 February 2017, the General Court sought to retrace the tortuous path that led to the Statement and acknowledged that several ambiguities affect this act, starting with its authorship. Indeed, on the one hand, the Statement is defined as the outcome of a meeting between the “Members of the European Council” and their Turkish counterpart, and the “action points” that form the Statement are said to be agreed upon by “the EU and Turkey”.¹⁶ Moreover, the online version of the Statement is labelled “Foreign affairs and international relations”, which should refer to the activities by the European Council.

ECLI:EU:C:1975:145, Discussion, Section A; Case C-233/02, *French Republic v Commission*, 23 March 2004, ECLI:EU:C:2004:173, para. 42; and Joined Cases C-103/12 and C-165/12, *Parliament and Commission v Council*, 26 November 2014, para. 73.

¹³ Case T-192/16, *NF v European Council*; Case T-193/16, *NG v European Council*; and Case T-257/16, *NM v European Council*, Orders of 28 February 2017. Hereafter, the *NF* case will be referred to when examining the reasoning of the General Court.

¹⁴ Namely, Arts. 1 (“human dignity”), 18 (“right to asylum”), and 19 (“protection in the event of removal, expulsion or extradition”) of the Charter.

¹⁵ Art. 218(6) TFEU includes “agreements with important budgetary implications for the Union” and “agreements covering fields to which ... the ordinary legislative procedure applies” among those which require the consent by the European Parliament to be concluded. The EU-Turkey Statement, whose provisions largely relate to asylum policy and immigration, would appear to fall under both categories.

¹⁶ EU-Turkey Statement, *cit. supra* note 1.

On the other hand, the PDF version of the Statement bears the indication “International Summit”, which should instead refer to the activities by the Member States. Furthermore, according to the European Council, namely the defendant in the proceedings before the General Court, the above-mentioned references in the Statement to the “EU” and the “Members of the European Council” would be the result of a “simplification of the words used for the general public” in a “journalistic context”.¹⁷

Due to the “ambivalence” of these terms and categorisations, the Court ended up giving decisive importance to some organisational documents by the European Council and the Directorate for Protocol and Meetings of the Council setting out the details of the meeting which led to the adoption of the Statement in order to conclude that that meeting had taken place between the Head of Government of Turkey and the Heads of State or Government of the EU Member States.¹⁸ On that basis, the Court overcame any inconsistencies in the wording of the Statement, concluded that “the European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union”,¹⁹ and declared its lack of jurisdiction over the cases.

All in all, faced with contradictory elements, while reaffirming the principle by which the formal qualification of an act by the interested institution is not decisive for the purposes of the review by the CJEU,²⁰ the General Court appears to have attributed greater weight to the arguments put forward by the European Council and other intervening EU institutions.

Indeed, not only did the Court end up considering it irrelevant that the Statement refers to the “EU” and the “Members of the European Council”, but it also rather cursorily dismissed the observation that the President of the European Council was present at the meeting and had been highly involved in the negotiations leading to the meeting.²¹ The fact that the supposed meeting of the Heads of State or Government of the EU Member States took place in the building where the European Council holds its sessions, the day after a meeting of the European Council, was accepted as perfectly reasonable. In examining whether the European Council concluded the

¹⁷ *NF* case, *cit. supra* note 13, paras. 57-58. It should, however, be noted that there is no other official version of the Statement.

¹⁸ *Ibid.*, paras. 61-66.

¹⁹ *Ibid.*, para. 70.

²⁰ *Ibid.*, para. 45.

²¹ *Ibid.*, paras. 67-68.

Statement on behalf of the EU, no consideration was given to the fact that the European Commission was to play a crucial role in monitoring the implementation of the Statement²² and to this end appointed a “EU Coordinator for the implementation of the EU-Turkey Statement”,²³ that other EU agencies such as Frontex and the European Asylum Support Office were also to participate in the implementation of the measures,²⁴ that the actions laid down in the Statement have been partially financed through the EU budget, and that returns to Turkey are also based on a readmission agreement previously concluded between Turkey and the EU.

Even if the above elements were not considered sufficient to establish that the Statement constitutes an EU act, it has been noted how the Member States could not have concluded such an agreement, as the EU had already exercised its competence in various areas covered by the Statement and, according to the well-established *ERTA* doctrine and to current Article 3(2) of the Treaty on the Functioning of the European Union (‘TFEU’), “the Union shall ... have exclusive competence for the conclusion of an international agreement ... in so far as its conclusion may affect common rules or alter their scope”.²⁵

The General Court, however, having excluded that the EU-Turkey Statement can be considered an EU act, refused to examine the issue of the competence of Member States, and that of the binding nature of the Statement, as outside its jurisdiction under Article 263 TFEU.²⁶ Ultimately, matters falling within EU competence es-

²² European Council, European Council conclusions, 17-18 March 2016, 18 March 2016, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/european-council-conclusions/>>.

²³ European Commission, “President Juncker appoints EU Coordinator to organize operational implementation in Greece”, 18 March 2016, available at: <http://europa.eu/rapid/press-release_IP-16-942_it.htm>.

²⁴ See the reports issued by the Commission on the implementation of the Statement: e.g., European Commission, “Seventh Report on the Progress made in the implementation of the EU-Turkey Statement”, 6 September 2017, COM(2017)470 final, p. 4.

²⁵ See, on this point, CANNIZZARO, *cit. supra* note 11, pp. 4-5; and IDRIZ, “The EU-Turkey statement or the ‘refugee deal’: the extra-legal deal of extraordinary times?”, ASSER Research Paper, 2017, p.1 ff., pp. 8-9. The *ERTA* case is formally known as Case C-22/70, *Commission v. Council*, ECR, 1971, 00263.

²⁶ *NF* case, *cit. supra* note 13, para. 73. This line of reasoning appears to contrast with that followed by the Court of Justice in the *ERTA* case, *cit. supra* note 25, where the Court stated that, in order to establish whether the disputed act fell within those listed under Art. 173 of the EEC Treaty, “it is first necessary to determine which authority was, at the relevant date, empowered to negotiate and conclude” the international agreement at issue (Grounds of judgment, para. 3).

caped both the democratic control by the European Parliament and the judicial review by the CJEU.²⁷

In light of the importance of the Statement and of the contentious issues raised by the orders of the General Court, high expectations surrounded the appeals lodged with the Court of Justice against the first-instance rulings. By an order of 12 September 2018, however, the Court declared the appeals inadmissible as incoherent, unclear, and “simply mak[ing] general assertions that the General Court disregarded a certain number of principles of EU law”.²⁸

Without there being any intention to question the assessment carried out by the Court of Justice, it certainly is a missed opportunity that the supreme judicial organ of the EU did not exercise its scrutiny over an act which has been so central to the public debate and whose dubious nature has raised fundamental issues for the EU legal order and institutional balance.²⁹

4. – Act II: The European Court of Human Rights and the Compliance of the Statement with Human Rights

Meanwhile, various applications have been lodged with the ECtHR that deal with the consequences of the implementation of the EU-Turkey Statement for the fundamental rights of asylum seekers that have arrived in Greece from Turkey as from 20 March 2016. While the ECtHR would not be able to rule on the validity of the Statement, it is competent to rule on the alleged infringement by States Parties to the European Convention on Human Rights (‘ECHR’) of their obligations under the Convention while implementing the EU-Turkey Statement. What matters to the ECtHR is whether the States Parties (Greece in particular), in giving effect to the Statement, have violated any of the rights protected by the ECHR; whether the Statement

²⁷ CARRERA, DEN HERTOG and STEFAN, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, *CEPS Policy Insights*, 2017, p. 1 ff., pp. 7-10. See also, on the issue of judicial review, CANNIZZARO, “Denialism as the Supreme Expression of Realism: A Quick Comment on NF v. European Council”, *European Papers*, 2017, p. 251 ff., pp. 256-257; and, on the issue of democratic control, GATTI, “The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)”, *EJIL: Talk!*, 19 April 2016, available at: <<https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/>>.

²⁸ Joined Cases C-208/17 P to C-210/17 P, *NF, NG, NM v European Council*, 12 September 2018, ECLI:EU:C:2018:705, paras. 16 ff.

²⁹ See, on this point, CANNIZZARO, “Fundamental Values and Fundamental Disagreement in Europe”, *European Papers*, 2018, p. 469 ff., pp. 471-472.

is considered a binding instrument or otherwise, and whether it is authored by the European Council or the EU Member States is of little to no concern to the ECtHR.³⁰

On 25 January 2018, the ECtHR rendered its first judgment on the conditions of migrants on Greek islands following the publication of the EU-Turkey Statement, in the case of *J.R. and others v. Greece*.³¹ The applicants were three asylum seekers of Afghan origins who had arrived in Chios the day after the activation of the EU-Turkey Statement. They maintained that they had been arbitrarily detained in the VIAL reception centre (violation of Article 5(1) ECHR), that they had not been informed of the reasons for their detention (Article 5(2)), and that the living conditions in the centre amounted to inhuman or degrading treatment contrary to Article 3 ECHR.

As far as the detention of the applicants is concerned, the Court determined that since 21 April 2016 the hotspot³² at issue had ceased to be a detention centre, so that the complaints under Article 5 ECHR could be considered admissible up to that date only.³³ That conclusion had an impact on the examination on the merits of the alleged violation of Article 5(1), as the Court found that the Greek authorities acted in good faith, that the detention pursued the legitimate aim enshrined in Article 5(1)(f) ECHR (detention with a view to deportation or extradition) and had a basis in national law, and, finally, that the month-long deprivation of liberty ought not to be considered excessive.³⁴ On the other hand, the Court found a breach of Article 5(2) ECHR insofar as the leaflets distributed to migrants were not clear on the reasons for their detention and on available remedies against it, and the wording of the brochures was hardly accessible to the applicants.³⁵

Finally, as regards the alleged violation of Article 3 ECHR, the Court made reference to its precedent *Khlaifia and others v. Italy*, where it had taken into account

³⁰ Except for the application of the “equivalent protection test” in the event that the Statement is considered a binding EU act (see *infra* in this section).

³¹ European Court of Human Rights, *J.R. and others v. Greece*, Application no. 22696/16, Judgment of 25 January 2018.

³² Hotspots are first reception facilities that have been created in Italy and Greece with a view to identifying, registering, and fingerprinting asylum seekers arriving by sea; these procedures are managed by the competent national authorities in cooperation with EU agencies such as EASO and Frontex. The “hotspot approach” was first outlined by the European Commission in its “European Agenda on Migration” of May 2015.

³³ European Court of Human Rights, *J.R. and others case*, *cit. supra* note 31, paras. 83-87.

³⁴ *Ibid.*, paras. 108-116.

³⁵ *Ibid.*, paras. 119-124.

“the situation of extreme difficulty” faced by the Italian authorities;³⁶ it further maintained that the reports by international monitoring bodies and NGOs were either insufficiently detailed or not particularly critical of the conditions of the centre where the applicants lived;³⁷ and it again underlined the relatively short period during which the applicants had actually been detained in the centre.³⁸ On those grounds, the Court concluded that the threshold of severity required by Article 3 had not been reached.

The *O.S.A. and others* case,³⁹ whose circumstances were essentially analogous to those of *J.R. and others*, had a similar outcome. The complainants were a group of Afghan asylum seekers who had arrived in Chios on 20 March 2016 and had been detained in the VIAL reception centre. The Court confirmed its previous findings as to the (non-)arbitrariness of the applicants’ detention and the (non-)attainment of the threshold set out in Article 3.

The main difference between the two cases consists in the finding of a violation of Article 5(4) (which had not been raised in *J.R. and others*), as a “speedy” review of the lawfulness of the detention was unavailable. In this respect, the Court noted that the decisions ordering the applicants’ detention and expulsion and outlining the respective remedies were in Greek, a leaflet which they might have received was unclear, there was no court on the island of Chios, and the applicants had no access to legal assistance.⁴⁰ In the opinion of the Court, the finding of such a violation of Article 5(4) made it unnecessary to examine the alleged violation of Article 5(2), also put forward by the applicants in the case.

A violation of Article 5(4) was also found by the Court in the *Kaak and others* case, which concerned a group of asylum seekers residing either in the VIAL centre or in the SOUDA centre.⁴¹ On the other hand, the claims under Articles 3 and 5(1) were once again rejected, also in light of the fact that, the SOUDA centre being an open centre, the applicants’ stay there could not be considered detention and any overcrowding would have been alleviated. The alleged violation of Article 5(2) was not examined.

³⁶ *Ibid.*, para. 143; and *Id.*, *Khlaifia and others v. Italy*, Application no. 16483/12, Judgment (Grand Chamber) of 15 December 2016, paras. 178-185.

³⁷ European Court of Human Rights, *J.R. and others* case, *cit. supra* note 31, para. 144

³⁸ *Ibid.*, paras. 145-146.

³⁹ *Id.*, *O.S.A. and others v. Greece*, Application no. 39065/16, Judgment of 21 March 2019.

⁴⁰ *Ibid.*, paras. 53-58.

⁴¹ *Id.*, *Kaak and others v. Greece*, Application no. 34215/16, Judgment of 3 October 2019.

In all of these cases, predictably, the Court did not dwell much on the legal nature of the EU-Turkey Statement. In *J.R. and others*, the ECtHR indeed referred to it as an agreement between “the Member States of the European Union and Turkey”,⁴² thus apparently accepting the ruling in this respect by the General Court; however, the ECtHR would not be primarily concerned with the authors of the Statement as long as States Parties to the ECHR are acting to implement it.

At most, had Greece claimed that the Statement is a binding EU act, the ECtHR could have applied the “equivalent protection” test that it has developed exactly with respect to obligations flowing from membership in the EU.⁴³ According to this test, States Parties to the ECHR are presumed to act in accordance with the Convention when they implement EU obligations, as the rights enshrined in the ECHR receive “comparable” protection in the EU legal order. This presumption can nonetheless be rebutted “if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”.⁴⁴ Therefore, paradoxically, in the ECHR system, the fact that the EU-Turkey Statement has been disowned by the EU should render the scrutiny by the ECtHR more rigorous, as the presumption of “equivalent protection” does not hold.

In sum, the ECtHR, taking into account the particular circumstances of the cases submitted to it, including especially the relatively brief period of deprivation of liberty suffered by the applicants and the conditions of the reception centres in question (which were considered not to be too severe), established that Greece did not breach Articles 3 and 5(1) ECHR, while it did breach either Article 5(2) or Article 5(4), in giving effect to the EU-Turkey Statement vis-à-vis the applicants in the above-mentioned cases.⁴⁵

⁴² *Id.*, *J.R. and others* case, *cit. supra* note 31, para. 7.

⁴³ The test was fully developed in *Id.*, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment (Grand Chamber) of 30 June 2005, paras. 152-158. On this ruling and the concept of “equivalent protection”, see, among others, COSTELLO, “The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe”, *Human Rights Law Review*, 2006, p. 87 ff.; and RYNGAERT, “The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection with Acts of International Organizations”, *International & Comparative Law Quarterly*, 2011, p. 997 ff.

⁴⁴ European Court of Human Rights, *Bosphorus* case, *cit. supra* note 43, para. 156.

⁴⁵ See, on the consideration that the *J.R. and others* judgment was highly influenced by the particular circumstances of the case, PIJNENBURG, “JR and Others v Greece: what does the Court (not) say about the EU-Turkey Statement?”, *Strasbourg Observers Blog*, 21 February 2018, available at: <<https://stras->

Incidentally, it should be noted that the ECtHR also declared inadmissible, because of the non-exhaustion of the domestic remedies, a case submitted by a Syrian family complaining about the harsh conditions suffered on Greek mainland, where they were transferred from Lesbos following the implementation of the EU-Turkey Statement.⁴⁶ According to the ECtHR, the applicants, who lodged their case with the Court once they were not subjected anymore to the conditions that they complained about and thus sought an *ex-post* recognition of the violation suffered and compensation, should have filed an action for damages in accordance with Article 105 of the Introductory Law to the Greek Civil Code.⁴⁷

Another potentially relevant application submitted by an Afghan national has been struck out of the list of cases of the ECtHR, as the Court considered that “the applicant [did] not intend to pursue his application”.⁴⁸ Finally, in a case concerning the prolonged detention of a Syrian asylum seeker in a police station on the island of Lesbos, the parties reached a friendly settlement.⁴⁹ The applicant had lamented the violation of his rights under Articles 3, 3 in combination with Article 13, and 5(4) ECHR.

5. – Is This the End of the Story? The Future of the EU-Turkey Statement before the Two Courts

Do the rulings by the CJEU and the ECtHR examined above end the judicial review of the EU-Turkey Statement by international courts? As far as the annulment of the Statement is concerned, it would appear so. After the decision by the Court of Justice to declare the appeals inadmissible, the orders by the General Court have become final; and while a future overruling by the CJEU is theoretically possible, it is difficult to imagine that new proceedings for the annulment of the Statement could successfully be instituted, also in light of the time limit for bringing action.

bourgobscribers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>.

⁴⁶ European Court of Human Rights, *Abdulla and others v. Greece*, Application no. 62732/16, Decision of 19 June 2018.

⁴⁷ *Ibid.*, paras. 30-34.

⁴⁸ As he had not submitted observations upon request of the Court: *Id.*, *Abdullah Meelad Kaberi v. Greece*, Application no. 19557/17, Decision of 12 June 2018.

⁴⁹ *Id.*, *M.D. v. Greece*, Application no. 30275/17, Decision of 20 February 2018. For more details, see the case as communicated to the Government, from which it emerged *inter alia* that M.D. had also applied to the Greek Council of State (on whose decision see *infra* in the next section).

Nonetheless, the CJEU could be called upon to rule, especially by means of the preliminary ruling procedure, on EU provisions that are related to the implementation of the Statement.⁵⁰ The Court might, for instance, be requested to clarify the notions of “first country of asylum” and “safe third country”, which are enshrined in the so-called EU Asylum Procedures Directive⁵¹ and are crucial for the implementation of the Statement, which is premised on the qualification of Turkey under either category in order to return asylum seekers to that country from Greece.

Under Article 35 of the Directive, the concept of first country of asylum applies when the individual has already been recognised as a refugee in another country, or when he/she can otherwise receive “sufficient protection” in that country. This “sufficient protection” implies, at a minimum, that the applicant does not risk being returned to a country where he/she might be subjected to persecution. On the other hand, if a person has not already applied for international protection in a country with which he/she has a “reasonable connection”, and in that country the person could apply for refugee status and would not risk being persecuted or seriously harmed nor returned to another country where a risk of persecution or mistreatment exists, then that country would be considered a “safe third country” and the applicant could be returned there (Article 38 of the Directive).

In both instances, the assessment of the ‘safety’ of the country for an asylum seeker must be individualised, and the asylum seeker must be able to challenge the application of those concepts to his/her particular situation. Nonetheless, the European Commission readily expressed the position that the two concepts could apply to Turkey,⁵² and it openly stated that it “continued to support Greece by providing it with all the elements to conclude that Turkey is a safe third country and/or a country of first asylum ... for the purpose of returning to Turkey irregular migrants ... under the terms of the EU-Turkey Statement”.⁵³

⁵⁰ Under Art. 267 TFEU, the CJEU can “give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”, upon request from a national court.

⁵¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29 June 2013, pp. 60–95.

⁵² See *supra* note 4.

⁵³ Communication from the Commission to the European Parliament, the European Council and the Council. Second Report on the progress made in the implementation of the EU-Turkey Statement, 15 June 2016, COM(2016)349 final, p. 5. In light of the asylum system in Turkey (on which see *infra* in this section), the “first country of asylum” concept could apply to Syrian applicants, who are entitled to a generalised form

Notwithstanding the uncertainties surrounding the two concepts⁵⁴ and their importance for the implementation of the Statement, the Greek Council of State, which had been seized by two asylum seekers challenging, *inter alia*, the qualification of Turkey as a safe third country for them, by a small majority of thirteen to twelve judges decided not to submit the issue to the CJEU and held that Turkey can indeed be considered a safe third country.⁵⁵ Apart from the fact that the legal analysis carried out by the Council of State does not appear entirely convincing and dissenting opinions from judges of the panel were attached to the ruling, this is a missed opportunity to finally allow the CJEU to give its authoritative interpretation of Articles 35 and 38, the scope of which is debated and critical to the application of the Directive.

As the matter does not appear to be settled definitively and at least some Greek Appeal Committees, which review first-instance decisions on asylum requests, are reluctant to concur with the conclusions of the Council of State,⁵⁶ it cannot be excluded that the interpretive issue will be submitted to the CJEU by a Greek court in the future; alternatively, it could be that the courts of other Member States raise the issue in different contexts and that consequences could be derived for the implementation of the EU-Turkey Statement as well. Preliminary rulings on the interpretation

of “temporary protection”, while the “safe third country” concept could apply to all other nationals.

⁵⁴ See UNHCR, “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept”, 23 March 2016, available at: <<https://www.unhcr.org/56f3ec5a9.pdf>>.

⁵⁵ A summary of the ruling in English is provided by European Council on Refugees and Exiles, “Greece: The Ruling of the Council of State on the Asylum Procedure Post Eu-Turkey Deal”, 4 October 2017, available at: <<https://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal>>. On the difficulties of considering Turkey a “safe country” for asylum seekers, see LABAYLE and DE BRUYCKER, “The EU-Turkey Agreement on migration and asylum: False pretences or a fool’s bargain?”, *EU Immigration and Asylum Law and Policy*, 1st April 2016, available at: <<http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>>; and ROMAN, BAIRD, and RADCLIFFE, “Analysis: Why Turkey is Not a “Safe Country”, *Statewatch*, 2016, available at: <<http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>>. See also *infra* in this section.

⁵⁶ See “Committees at odds with Council of State over refugees’ safety in Turkey”, *Ekathimerini*, 26 October 2017, available at: <<http://www.ekathimerini.com/222741/article/ekathimerini/news/committees-at-odds-with-council-of-state-over-refugees-safety-in-turkey>>; see also, more recently, Administrative Court (First Instance) of Athens, “Decisions 20802/25.9.2018 and 20898/26.9.2018 of the 9th Independent Appeals Committee (administrative body, second instance)”, 25 September 2018, available at: <https://www.refworld.org/cases,GRC_ACA,5bc8c2a64.html>. On Greek Appeal Committees, see *infra* notes 80 and 81 and accompanying texts.

of the provisions of the EU Charter of Fundamental Rights that enshrine the right to asylum and protection in the event of removal could also have a bearing on the implementation of the Statement, but they are not in sight.

Applications before the ECtHR are likely to yield more prompt and concrete results for asylum seekers stranded on Greek islands, even though the first rulings of the kind by the Court were not particularly favourable to the applicants. Yet, the Court has repeatedly found violations of Articles 5(2) and 5(4) ECHR and, while it seems to have downplayed the reports by international organisations and NGOs on the conditions of the reception centres at issue, its findings would not automatically apply to other complaints, especially if these were to refer to other reception centres and longer periods of detention.

For instance, the applicant in the pending *Sedo* case⁵⁷ complains about the degrading conditions she endured in the hotspot of Samos, in a police station and in a detention centre for migrants due to be expelled; the success of her case will arguably depend on the reports available on the conditions of these facilities as well as on additional specific circumstances of her case (e.g., the applicant fled Samos at a certain point and was detained as a result).

Two other pending cases, *AL H. and others and F.J. and others*⁵⁸ and *Ansar*,⁵⁹ deal with the detention of asylum seekers in Moria, a centre on the island of Lesbos which has often made the headlines because of its poor conditions. These cases are also exemplary of another aspect which can affect the assessment by the Court – i.e., the personal circumstances of the applicants, and particularly their vulnerability. In this respect, the applicants in the first case are identified as “vulnerable people”, while the applicant in the second case is an unaccompanied minor.

Indeed, as regards alleged violations of Article 3, the level of severity required to attain inhuman or degrading treatment is not only determined by objective conditions such as the duration of the mistreatment, but also by personal circumstances such as “sex, age and state of health”.⁶⁰ Therefore, for instance, in the *Popov v. France* case,

⁵⁷ European Court of Human Rights, *Sedo v. Greece*, Application no. 2080/19, communicated on 20 October 2019.

⁵⁸ Id., *AL H. and others v. Greece and F.J. and others v. Greece*, Applications nos. 4892/18 and 4920/18, communicated on 26 February 2019.

⁵⁹ Id., *Ansar v. Greece*, Application no. 23413/16, communicated on 7 May 2019.

⁶⁰ See, among others, Id., *Price v. the United Kingdom*, Application no. 33394/96, Judgment of 10 July 2001, para. 24.

concerning the administrative detention of a family of asylum seekers with a view to removal, the Court considered that “the length of detention of the children, over a period of fifteen days, whilst not excessive *per se*, could be perceived by them as never-ending, bearing in mind that the facilities were ill-adapted to their accommodation and age” and found that France had violated Article 3 ECHR in respect of the children (only).⁶¹

While in the *Kaak and others* case the presence of vulnerable people was not decisive for the finding of a violation, the outcome might differ in the the *AL H. and others and F.J. and others* and *Ansar* cases, should the conditions of the Moira camp be found unbearable for vulnerable categories of asylum seekers such as pregnant women, families with minors, unaccompanied minors, LGBTI persons and persons with disabilities or illnesses. Additionally, both cases raise a further issue which has not been dealt with by the ECtHR to date in relation to the Statement, namely the obstacles faced by the complainants in applying for reunification with family members residing in other EU Member States, which could amount to a violation of Article 8 ECHR.

The personal circumstances of the applicants assume prominent importance also in the pending case of *Qaateh and others*,⁶² where two of the three Syrian applicants are gravely ill. Indeed, their conditions appeared so serious that they were transferred from Chios to a hospital in Athens. The applicants complain under Article 3 ECHR about the inadequacy of the medical care received, as well as under Article 8 about the lack of information, in a language that they could understand, on the medical procedures to which they were subjected, so that no free and informed consent could be given by them. A violation of Article 13 ECHR is also alleged by the applicants.

Similarly, in the case of *Al Yamani and others*,⁶³ some of the seventeen Syrian applicants complaining about the living conditions in various reception centres in Greece maintain that they have medical conditions and have not received adequate care. The application is not strictly related to the EU-Turkey Statement as the applicants would appear to have arrived by land and were hosted in reception centres on the mainland

⁶¹ Id., *Popov v. France*, Applications nos. 39472/07 and 39474/07, Judgment of 19 January 2012, paras. 100-103.

⁶² Id., *Qaateh and others v. Greece*, Application no. 59758/16, Case communicated on 20 January 2017.

⁶³ Id., *Al Yamani and others v. Greece*, Application no. 26657/16, Case communicated on 30 March 2017.

only. Nonetheless, the application was introduced after the activation of the Statement, in the context of a considerable increase in the migration flows from Turkey and of the proliferation of official and unofficial reception centres on both the islands and the mainland. The centres where the applicants in the case have lived include the camp of Idomeni, which has been repeatedly described as close to collapse.⁶⁴

Most of the applications currently pending before the ECtHR thus deal with the living conditions in Greek reception centres and the lawfulness of the detention of asylum seekers in these centres. The assessment by the Court of such complaints under Articles 3 and 5 ECHR is likely to depend on the duration of the detention, the availability and accessibility of remedies, the specific objective conditions of the centres, and the personal circumstances of the applicants.

Nonetheless, the standards usually applied by the Court, especially as far as the living conditions in camps are concerned, would probably be stretched in light of the “exceptionally difficult” situation likely faced by the Greek authorities in 2015 and 2016 with the surge in the number of arrivals, in application of the *ratio decidendi* expressed in *Khlaifia and others v. Italy*, which has been explicitly referred to by the ECtHR in *J.R. and others*. In *Khlaifia*, the Grand Chamber, to which the case was referred upon request of the Italian Government, confirmed that the Italian authorities had incurred in a violation of Articles 5(1), 5(2) and 5(4) ECHR, but it overruled the Chamber’s judgment as far as the infringement of Article 3 was concerned by holding that

“while the constraints inherent in such a [migration] crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind ... that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time”.⁶⁵

Even more controversially, the Grand Chamber reversed the Chamber’s ruling by finding no violation of Article 4 of Protocol no. 4, which prohibits the collective

⁶⁴ See, among many, SMITH, “Migration crisis: Idomeni, the train stop that became an ‘an insult to EU values’”, 17 March 2016, available at: <<https://www.theguardian.com/world/2016/mar/17/migration-crisis-idomeni-camp-greece-macedonia-is-an-insult-to-eu-values>>.

⁶⁵ European Court of Human Rights, *Khlaifia* case, *cit. supra* note 36, para. 185.

expulsion of aliens. The latter aspect is, however, of less relevance to the cases examined here as no application before the ECtHR concerning the EU-Turkey Statement has invoked a violation of this provision. Indeed, while the wording of the Statement had raised fears that asylum seekers arriving on Greek islands would be collectively expelled to Turkey without an assessment of their individual situations,⁶⁶ in practice this risk appears to not have materialised.⁶⁷

At any rate, there exists a further case pending before the ECtHR which is concerned with aspects other than the conditions in Greek reception centres and the lawfulness of the deprivation of liberty in those centres – namely, with the fairness and effectiveness of the asylum procedures in Greece, the qualification of Turkey as a safe third country, and the risk of *refoulement*.⁶⁸

J.B., a Syrian and Armenian Christian, arrived on the island of Lesbos on 6 May 2016 and was detained in the Moria camp and in the police station of Mytilene.⁶⁹ The application by J.B. describes how his asylum request, for the filing of which he had not received any legal assistance, was rejected as inadmissible on the ground that Turkey could be considered a safe third country for him. His appeal against this decision was rejected, as was his challenge against the decision to return him to Turkey. A further appeal is pending, while the applicant is currently wanted by the police.

The applicant raises various grievances under Article 3 ECHR, which do not only concern his detention conditions. He complains of several shortcomings in the asylum procedure as carried out by the Greek authorities in cooperation with the European Asylum Support Office, including the inadequate examination of his asylum application and of the conditions of returnees in Turkey, the insufficient statement of reasons for the decision of inadmissibility, the lack of a hearing, and the lack of legal and linguistic assistance. These pitfalls would amount to a violation of Articles 3 and 13 ECHR. Furthermore, the applicant complains under Article 3 ECHR that, if returned to Turkey, he would be subjected to inhuman and degrading treatment, especially as

⁶⁶ See PEERS, “The final EU/Turkey refugee deal: a legal assessment”, *EU Law Analysis*, 18 March 2016, available at: <<http://eulawanalysis.blogspot.se/2016/03/the-final-euturkey-refugee-deal-legal.html>>.

⁶⁷ As asylum seekers have mostly been given the opportunity to individually challenge their removal to Turkey; on the effectiveness of these proceedings, see *infra* in this section.

⁶⁸ European Court of Human Rights, *J.B. v. Greece*, Application no. 54796/16, communicated on 18 May 2017.

⁶⁹ On the situation in Lesbos, see OXFAM, “Vulnerable and Abandoned”, 9 January 2019, available at: <<https://www.oxfam.org/en/research/vulnerable-and-abandoned>>.

an Armenian Christian, and he would be at risk of *refoulement* to Syria.⁷⁰

Indeed, various reports have emerged on how asylum seekers have been detained in Turkey without an assessment of their individual circumstances, prevented from applying for asylum, forcibly returned to their countries of origins or precluded to enter Turkey (in particular from Syria and Iraq); some of these reports also refer to the period prior to the implementation of the EU-Turkey Statement.⁷¹ Additionally, the risk of *refoulement* has increased following the failed coup in July 2016, as the already precarious statuses of the beneficiaries of international protection in Turkey can now be more easily revoked (by administrative decision, *inter alia* if the individual is considered a “supporter of a terrorist organisation”) and appeals against deportation do not have suspensive effects anymore.⁷²

Besides, even before the attempted coup, it is doubtful whether the protection afforded by the Turkish legal order could be considered sufficient to qualify Turkey as a first country of asylum or safe third country. In Turkey, European nationals only can apply for full refugee status, while some forms of protection for non-Europeans have been afforded since 2014 by the Law on Foreigners and International Protection which, among others, introduced the “conditional refugee status”. As it is clear from its name, however, this kind of protection is more limited in scope than the full refugee status, excluding in particular long-term residence permits in Turkey and the right to family reunification.⁷³

As for Syrian nationals, they have been entitled to an *ad hoc* form of “temporary protection” which includes the right to stay in Turkey and the rights to free health

⁷⁰ These aspects have been contextualised in two third-party interventions by well-known NGOs, which also rely on the reports by other NGOs and international organisations: GISTI and FIDH, “Third-party intervention in case J.B. v. Greece, application n°54796/16”, 20 September 2017, available at: <https://www.gisti.org/IMG/pdf/tierce_interv_gisti-fidh.pdf>; and AIRE Centre et al., “Written Submissions on Behalf of the Interveners”, 4 October 2017, available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Greece-JB_v_Greece-ECtHR-amicus-ICJothers-final-eng-2017.pdf>.

⁷¹ See, among others, HUMAN RIGHTS WATCH, “Turkey: Syrians Pushed Back at the Border”, 23 November 2015, available at: <<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>>; and AMNESTY INTERNATIONAL, “Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal”, 1st April 2016, available at: <<https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>>

⁷² ALPES et al., “Post-deportation risks under the EU-Turkey Statement: What happens after readmission to Turkey?”, Robert Schuman Centre for Advanced Studies – Policy Brief, 2017, p. 1 ff., p. 3.

⁷³ European Council on Refugees and Exiles, “Country Report: Turkey”, 2017, pp. 97-106.

care and basic education, whereas the opportunity to work has been granted since January 2016.⁷⁴ Yet, this kind of protection cannot result in long-term integration in the country and, being based on an executive act, can be terminated by the Turkish Government at its will.⁷⁵

In addition to the legal framework outlined above, the situation on the ground must be considered, including the unrest in the predominantly Kurdish parts of Turkey, the concrete difficulties experienced by Syrians and other foreigners in having access to housing, health care, education, and jobs,⁷⁶ as well as acts of intolerance against Syrians in particular.⁷⁷

At any rate, according to the well-established case-law of the ECtHR, the examination of whether a country can be considered “safe” for the applicant needs to be based on reliable sources and to be individualised. In a recent case concerning the expulsion of two asylum seekers from Hungary to Serbia on the ground that the latter could be considered a safe third country for the applicants,⁷⁸ the Court noted how, until the issuance of a governmental decree in 2015, Serbia was not considered a safe third country by Hungarian authorities. In the opinion of the Court, the presumption of the safety of Serbia on the basis of the decree constituted an “abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings”,⁷⁹ which might not be reflected on the ground.

Indeed, the Hungarian authorities did not appear to have undertaken an appropriate examination of the widely available reports on the situation in Serbia (and in North Macedonia and Greece, where the applicants risked being subsequently returned) nor of the evidence submitted by the applicants; on the contrary, they appeared to have based their determinations solely on the inclusion of Serbia in the list of safe third

⁷⁴ *Ibid.*, pp. 110-116 and 122-150.

⁷⁵ *Ibid.*, pp. 110-111 and 123-125.

⁷⁶ *Ibid.*, 131-142; and KINGSLEY, “Fewer than 0.1% of Syrians in Turkey in line for work permits”, *The Guardian*, 11 April 2016, available at: <<https://www.theguardian.com/world/2016/apr/11/fewer-than-01-of-syrians-in-turkey-in-line-for-work-permits>>.

⁷⁷ See SHARMA, “Turks lash out in second summer of hate against Syrian refugees”, *Middle East Eye*, 6 July 2017, <<http://www.middleeasteye.net/news/syrians-face-second-summer-hate-turkey-turns-refugees-518017936>>. See also, on cross-party anti-Syrian sentiment in Turkey, ERDOĞAN and SEMERCI, “Attitudes towards Syrians in Turkey-2017”, *Istanbul Bilgi University-Center for Migration Research*, 2018, available at: <https://goc.bilgi.edu.tr/media/uploads/2018/03/15/turkish-perceptions-of-syrian-refugees-20180315_Y0gYZoI.pdf>.

⁷⁸ European Court of Human Rights, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, Judgment of 14 March 2017.

⁷⁹ *Ibid.*, para. 120.

countries as approved by the Hungarian Government. Also considering that the applicants were not given sufficient information on the asylum proceedings and were prevented from consulting with their lawyer in preparation to the court hearing, the Court held that “the applicants did not have the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment” and thus found a violation of Article 3 ECHR.

It remains to be seen whether the ECtHR would reach the same conclusion in respect of the Greek authorities and their qualification of Turkey as a safe country. While it appears that asylum seekers are entitled to submit their views on why Turkey would not constitute a safe country for them, the Court might want to more closely ascertain whether the evidence submitted by the applicants and the reports compiled by international organisations and respected NGOs have been carefully considered by the competent Greek authorities. In this respect, it is noteworthy that, right after the entry into force of the EU-Turkey Statement, the Greek Appeal Committees, which were called upon to review asylum applications that had been declared inadmissible at first instance, consistently maintained that Turkey could not be considered a safe third country, as no refugee status nor other kind of adequate protection was available and a concrete risk of *refoulement* existed.⁸⁰

Strikingly, after the composition of the Committees was amended, these started to consistently uphold first-instance inadmissibility decisions on the ground that Turkey could be considered a safe third country.⁸¹ This change of stance, which has subsequently been endorsed by the Greek Council of State,⁸² would seem at least as “abrupt” as that shown by the Hungarian authorities in respect of Serbia, and it appears

⁸⁰ AMNESTY INTERNATIONAL, “A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal”, 14 February 2017, available at: <<https://www.amnesty.org/en/documents/eur25/5664/2017/en/>>, p. 14. These committees, also known as Backlog Committees, consisted of three members appointed by the Interior or Justice Ministries, UNHCR, and the Greek National Commission for Human Rights respectively. For an analysis of the decisions delivered by these committees, see GKLIATI, “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committees”, *European Journal of Legal Studies*, 2017, p. 81 ff., pp. 93-115.

⁸¹ AMNESTY INTERNATIONAL, *cit. supra* note 80, pp. 14-15; and Greek Council for Refugees, “Safe Third Country – Greece”, 3 April 2018, available at: <http://www.asylumineurope.org/reports/country/greece/asylum-procedure/safe-country-concepts/safe-third-country#footnoteref11_py3x6su>. The new Appeal Committees are made up of two judges from the Greek Administrative Court and a third member put forward by UNHCR or the National Commission for Human Rights.

⁸² See *supra* note 55 and accompanying text.

strictly related to the implementation of the EU-Turkey Statement.⁸³ Since the conclusions as to the “safety” of Turkey appear to be mostly based on diplomatic assurances from the Turkish Government and on the assessment by the European Commission (which actively promoted the drafting of the Statement), a thorough and independent examination by the ECtHR would be appropriate.⁸⁴

In closing, it should be reminded that Turkey is also a party to the ECHR. However, limited access to lawyers, especially for those asylum seekers that are detained or have been returned to their countries of origin, arguably mostly explains why no case appears to have been communicated to date by the ECtHR to the Turkish Government in relation to the implementation of the Statement.

6. – Beyond the EU-Turkey Statement: Other Arrangements in the Field of Migration

On 2 February 2017, a Memorandum of Understanding was signed by the Italian Government and the Government of National Accord led by Al Sarraj in Libya.⁸⁵ Essentially, through the Memorandum, the Libyan Government undertakes to stem “illegal” migratory flows in exchange for technical support to the Libyan border and coast guard, funds for the reception centres for migrants, and development aid especially for those regions in Libya that are most affected by migration as well as for the countries of origin of migrants.

As can be seen, the content of the Memorandum does not differ substantially from that of the EU-Turkey Statement. Additionally and similarly, a clause has been inserted according to which “the Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties”.⁸⁶ However, any push back to Libya as well as, more generally, cooperation with the Libyan authorities in border management activities should be carefully examined by Italy in light of the situation of conflict that affects wide areas of Libya and the unbearable conditions of migrants and

⁸³ See *supra* note 53 and accompanying text.

⁸⁴ On the criteria used by the ECtHR to evaluate the quality and reliability of diplomatic assurances, see European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom*, Application no. 8139/09, Judgment of 17 January 2012, para. 189.

⁸⁵ An unofficial translation in English is available at: <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

⁸⁶ *Ibid.*, Art. 5.

asylum seekers specifically in the country.⁸⁷ Indeed, not only does Libya not recognise any form of protection for people fleeing persecutions or wars (not even with the restrictions applied in Turkey), but numerous reports by international bodies and NGOs have uncovered widespread patterns of prolonged deprivation of liberty, torture, ransom, and slavery to which migrants are subjected in the country.⁸⁸

While the EU is not a party to the Memorandum, Italy has sought to garner political support from the Union and its Member States and obtained it in the form of a “Declaration by the members of the European Council”,⁸⁹ through which the latter expressed their support for the Memorandum and undertook to “step up [their] work with Libya” with particular regard to the main points identified in the Memorandum itself – namely, the training of the Libyan border and coast guard, support for the development of local communities in Libya, resources for better conditions in reception centres, as well as the contribution to assisted voluntary return activities.⁹⁰ EU funds have been earmarked for the fulfilment of those objectives.⁹¹ Therefore, while in this case the EU is more clearly on the sidelines, at least formally, its role is still significant.

In parallel, the EU has sought to boost its involvement in the area of returns of people who are not eligible for international protection by promoting the conclusion of “joint ways forward”, “standard operating procedures”, and “good practices”.⁹²

⁸⁷ On the responsibilities of European States conducting border management operations in cooperation with third countries, see European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, Judgment of 23 February 2012; EU Agency for Fundamental Rights, “Scope of the principle of non-refoulement in contemporary border management: evolving areas of law”, 2016, available at: <<https://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-border-management-evolving-areas-law>>; and SKORDAS, “A ‘blind spot’ in the migration debate? International responsibility of the EU and its Member States for cooperating with the Libyan coastguard and militias”, *EU Immigration and Asylum Law and Policy*, 30 January 2018, available at: <<http://eumigrationlawblog.eu/a-blind-spot-in-the-migration-debate-international-responsibility-of-the-eu-and-its-member-states-for-cooperating-with-the-libyan-coastguard-and-militias/>>.

⁸⁸ See, among many, UN Support Mission in Libya and Office of the High Commissioner for Human Rights, “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, 20 December 2018.

⁸⁹ European Council, “Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route”, 3 February 2017, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>>. Note again the uncertain authorship of the Declaration.

⁹⁰ *Ibid.*, para. 6.

⁹¹ *Ibid.*, para. 7.

⁹² European Commission, “EU readmission developments – State of play October 2017”, 14 Novem-

Apart from the fact that these documents have been described as instrumental to the bilateral actions undertaken by Member States, with the result of a persistent blurring of the respective competences of the EU and its Member States in the area,⁹³ what is even more striking is the systematic recourse to non-binding instruments of cooperation in lieu of formal readmission agreements, whose conclusion would need the assent of the European Parliament.

The same applies to the means used by the Italian and Libyan Governments, namely a memorandum of understanding, which has been the subject of legal disputes in both countries as potentially trumping the domestic laws on the conclusion of treaties (which, in the case of Italy, would have required the approval of Parliament).⁹⁴ Admittedly, this trend of informalisation in the management of migration flows is not peculiar to the EU and its Member States and has recently been sanctioned at the world level by means of the Global Compacts on migrants and refugees negotiated in the UN context.⁹⁵

While the European Commission has justified this approach by pointing to alleged “internal political considerations” in third countries,⁹⁶ the fact that informal arrangements circumvent parliamentary approval and more easily escape judicial review (including by creating confusion over their authors and binding nature) has been clearly demonstrated with regard to the EU-Turkey Statement.

In addition to the issue of their uncertain legal nature, the content of these arrangements is also debated, particularly as far as the procedures for readmission are concerned. Indeed, the efforts by the EU to increase the rate of returns, both through the conclusion of new instruments and through amendments to the Return Directive with a view to “improving the effectiveness of returns”,⁹⁷ potentially create risks of

ber 2017, available at: <<http://www.statewatch.org/news/2017/nov/eu-com-letter-to-ep-readmissions.pdf>>; for an analysis of these instruments, see CASSARINO and GIUFFRÉ, “Finding Its Place in Africa: Why Has the EU Opted for Flexible Arrangements on Readmission?”, University of Nottingham – Forced Migration Unit Policy Brief Series, 2017, available at: <<https://www.nottingham.ac.uk/hrlc/documents/pb-1-finding-its-place-in-africa.pdf>>.

⁹³ See CASOLARI, “Il ricorso dell’Unione europea a strumenti informali per il contrasto all’immigrazione irregolare”, *Rivista trimestrale di diritto pubblico*, 2019, p. 539 ff.

⁹⁴ See *infra* notes 98 and 99.

⁹⁵ See CATALDI and DEL GUERCIO, “I *Global Compact* su migranti e rifugiati. Il *soft law* delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi”, *Diritto, Immigrazione e Cittadinanza*, 2019, p. 189 ff.

⁹⁶ European Commission, *cit. supra* note 92, p. 1.

⁹⁷ European Commission, “State of the Union 2018: Stronger EU rules on return – Questions and Answers”, 12 September 2018, available at: <http://europa.eu/rapid/press-release_MEMO-18-

collective expulsions and violations of the principle of *non-refoulement*.

The increase in the number of these arrangements and of returns is likely to give rise to multiple applications before national and international courts, regarding both the form and the substance of the arrangements. The conclusion of the Memorandum between Italy and Libya has already led to the submission of a constitutional appeal in Italy alleging the infringement of parliamentary prerogatives,⁹⁸ whereas court proceedings brought in Libya to challenge the legality of the Memorandum ultimately failed.⁹⁹

Additionally, the implementation of the Memorandum has prompted the lodging with the ECtHR of an application against Italy by a group of seventeen migrants who survived a shipwreck in the Central Mediterranean; some of them were taken to Italy, while others were returned to Libya. Complaints have been raised among others under Article 4 of Protocol no. 4 to the ECHR as well as under Article 3 ECHR, on the grounds that the lives of the applicants were allegedly put at risk when the rescue operations by the NGO Sea Watch were obstructed by the Libyan coast guard and that migrants returned to Libya were subjected to inhuman and degrading treatment in reception centres in the country.¹⁰⁰

The ECtHR might indeed be preferred by individuals because of its accessibility and broader jurisdiction, as well as for its focus on the protection of human rights. On the other hand, the particular circumstances of each case play a significant role in the rulings by the ECtHR, so that while the decisions that the Court adopted and will adopt on the applications regarding the EU-Turkey Statement might be indicative of its approach towards this kind of arrangements, they will hardly be conclusive.

Conversely, interventions by the CJEU through annulment proceedings or preliminary rulings would have broader consequences and more effectively prevent future violations, yet the “passivism”¹⁰¹ of the CJEU with respect to the EU-Turkey

5713_en.htm>.

⁹⁸ The appeal was declared inadmissible by the Constitutional Court because of the lack of legal standing of the group of parliamentarians that initiated the proceedings: *Corte costituzionale*, Order no. 163, 19 July 2018.

⁹⁹ The suspension of the effects of the Memorandum ordered by Tripoli Appeals Court was revoked by the Libyan Supreme Court in August 2017: ASSAD, “Supreme Court annuls verdict that suspended implementation of Italy-Libya MoU”, 26 August 2017, available at: <<https://www.libyaobserver.ly/news/supreme-court-annuls-verdict-suspended-implementation-italy-libya-mou>>.

¹⁰⁰ European Court of Human Rights, *S.S. and others v. Italy*, Application no. 21660/18, communicated on 26 June 2019.

¹⁰¹ See GOLDNER LANG, “Towards ‘Judicial Passivism’ in EU Migration and Asylum Law? Prelimi-

Statement does not appear promising. Nonetheless, the Court might be called upon to take a firmer stance against the trend, described above, of ‘informalisation’ and ‘nationalisation’ of agreements with third countries, which appear to violate those provisions of the EU treaties that, after Lisbon, have brought additional matters under the competence of the EU and reinforced the democratic principle in the Union. The fact remains that the CJEU avenue is more likely to succeed if it is activated by the European Parliament complaining about the infringement of its prerogatives rather than by individuals, whose standing before this Court is, moreover, restrictive.

While the matter of arrangements between the EU/its Member States and third countries in the field of migration (and of returns specifically) would appear to provide particularly fertile ground for a ‘dialogue’ between the ECtHR and the CJEU, similarly to that which took place with regard to the implementation of the Dublin system, the formalistic approach adopted by the CJEU so far has to date prevented such an interaction. Should this approach change and the CJEU examine the instruments at issue on their merits and as they are applied in practice, the protection of the rights of migrants and asylum seekers in Europe would arguably be strengthened – as would legal certainty and the rule of law.

14. THE DUBLIN SYSTEM VIS-À-VIS EU SOLIDARITY BEFORE THE EUROPEAN COURT OF JUSTICE: THE LAW, THE WHOLE LAW, AND NOTHING BUT THE LAW!

Giuseppe Morgese

SUMMARY: 1. 1. Introduction – 2. The Legal Framework: The Dublin System and EU Solidarity Provisions in Asylum Matters – 3. A Pragmatic-But-Not-Bold Approach by the ECJ – 3.1. The Limited Role of Article 80 in Itself in Disputes before the ECJ Involving the EU Institutions... – 3.2. ... and the Member States – 3.3. The Full Effectiveness of Solidarity-Based Measures Provided for in the EU Secondary Law – 4. Concluding Remarks.

1. – Introduction

The currently pending reform of the Common European Asylum System ('CEAS') in the European Union ('EU') – whose future is still unknown in the 2019-2024 European Parliamentary term – is largely affected by sharp contrasts between the Member States on the reform of the allocation criteria of the so-called 'Dublin

* The research has been carried out within the Italian PRIN 2017 "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues". Principal Investigator: Prof. Angela Di Stasi (prot. 20174EH2MR).

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 381-407.

system',¹ due to the difficulty of finding a mutually acceptable solution to the responsibility-sharing dilemma. The Dublin III Regulation,² as its predecessors,³ set out a strict hierarchy of criteria⁴ aimed at figuring out which State is responsible for applications lodged by asylum seekers arrived in the territory of those Member States. Despite some family and sovereignty clauses, the main criterion is indeed the 'State of the first entry' one, either legal or illegal. Due to the actual migration flows in Europe, the problem lies in the fact that the Member States of the first entry are usually those located at the southern external borders (i.e. Greece, Italy, Spain,

¹ See CAGGIANO, "Ascesa e caduta della rotta balcanica. Esternalizzazione contro solidarietà per i richiedenti asilo", *Studi sull'integrazione europea*, 2016, p. 221 ff., p. 235 ff.; DI FILIPPO, "The Reform of the Dublin System and the First (Half) Move of the Commission", SIDIBlog, 12 May 2016, available at: <<http://www.sidiblog.org/2016/05/12/the-reform-of-the-dublin-system-and-the-first-half-move-of-the-commission>>; MORI, "La proposta di riforma del sistema europeo comune d'asilo: verso Dublino IV?", *Eurojus*, 7 September 2016, available at: <<http://rivista.eurojus.it/la-proposta-di-riforma-del-sistema-europeo-comune-d-asilo-verso-dublino-iv>>; VITIELLO, "Du vin vieux dans de nouvelles outres? Réflexions sur la proposition de règlement 'Dublin IV'", *European Papers - European Forum*, 27 December 2016, available at: <<http://www.europeanpapers.eu/en/europeanforum/du-vin-vieux-dans-de-nouvelles-outres-reflexion-sur-la-proposition-de-reglement-dublin-iv>>; FAVILLI, "La crisi del sistema Dublino: quali prospettive?", in SAVINO (ed.), *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, Napoli, 2017, p. 279 ff., p. 293 ff.; MAIANI, "The reform of the Dublin system and the dystopia of 'sharing people'", *Maastricht Journal of European and Comparative Law*, 2017, p. 622 ff.; MORGESE, "Principio di solidarietà e proposta di rifusione del regolamento Dublino", in TRIGGIANI et al., (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, p. 471 ff.; DE PASQUALE, "Verso la refusione del regolamento 'Dublino III'", *Studi sull'integrazione europea*, 2018, p. 267 ff.; MOSCHETTA, "I criteri di attribuzione delle competenze a esaminare le domande d'asilo nei recenti sviluppi dell'iter di riforma del regime di Dublino", *Federalismi.it*, 2018, No. 5; RIZZA, "La riforma del sistema di Dublino: laboratorio per esperimenti di solidarietà", *Diritto, immigrazione e cittadinanza*, 2018, No. 1; VITIELLO, "The Dublin System and Beyond: Which Way Out of the Stalemate?", *Diritti umani e diritto internazionale*, 2018, p. 463, p. 473 ff.; MORGESE, "Dublin System, 'Scrooge-Like' Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?", *Diritto, Immigrazione e Cittadinanza*, 2019, No. 3; NICOLOSI, "La riforma del sistema europeo comune di asilo tra impasse negoziale e miopia normativa", *Rivista trimestrale di diritto pubblico*, 2019, No. 2, p. 521 ff.; POLLET, "All in vain? The faith of EP positions on asylum reform after the European elections", *EU Immigration and Asylum Law and Policy*, 23 May 2019, available at: <<http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections>>.

² Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013, OJ L 180, 29 June 2013, p. 31 ff.

³ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990, OJ C 254, 19 August 1997, p. 1, and Council Regulation (EC) No 343/2003 of 18 February 2003, OJ L 50, 25 February 2003, p. 1.

⁴ *Infra*, Section 2.

Malta, Cyprus). As a consequence, the ‘First Entry Rule’ has put a considerable burden on the latter States over the years.

In this chapter, starting from a legal analysis of both the Dublin III Regulation and solidarity provisions set out in the TFEU (Section 2), attention will be paid to the applicable European Court of Justice (‘ECJ’ or ‘the Court’) case-law regarding the possibility to ease the Dublin system’s strict allocation criteria in a fairer responsibility-sharing way (Section 3). Attention will be paid to the ECJ pragmatic approach aimed at preserving the overall Dublin system, where on the contrary a sharper approach has been put in place in case of those mandatory solidarity-based provisions adopted in 2015 by the EU Council as a temporary derogation to the Dublin III Regulation itself.

2. – The Legal Framework: The Dublin System and EU Solidarity Provisions in Asylum Matters

The Dublin III Regulation is considered a cornerstone of the CEAS, insofar as its hierarchy of criteria “clearly allocates responsibility for the examination of asylum application”.⁵ Based on the principles of mutual trust between the Member States and (albeit in principle) equal treatment of asylum seekers in every Member State, the Regulation aims at ensuring that at least one, and only one, Member State shall examine an asylum application,⁶ thus removing the possibility of multiple examinations and the risk of positive/negative conflicting decisions.⁷ In so doing, Chapter III of the Regulation set out the above mentioned hierarchy of criteria. First of all, where an applicant is an unaccompanied minor, responsibility for examining its application lies with the Member State where a family member, a sibling or a relative is legally present, provided that it is in the best interests of the minor⁸ (Article 8). Secondly, responsibility lies with the Member State where the applicant has a family member who is beneficiary of (Article 9) or applicant for (Article 10) international protection.

⁵ See European Council, The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, p. 1 ff., para. 6.2.1.

⁶ Article 3(1).

⁷ See also GARLICK, “The Dublin System, Solidarity and Individual Rights”, in CHETAIL, DE BRUYCKER and MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden-Boston, 2016, p. 159 ff., p. 161.

⁸ In the absence of such family members, siblings or relatives, the Member State responsible is the one where the unaccompanied minor has lodged his or her application.

In the absence, the First Entry Rule does apply insofar as the Member State responsible is the one (a) that issued to an applicant a visa or residence document (Article 12), (b) that waived a visa for such applicant (Article 14), (c) whose external borders the applicant has irregularly crossed (Article 13), or (d) in whose international transit area of an airport the application has been lodged (Article 15). Where no Member State can be designated as responsible, the first Member State “in which the application for international protection was lodged shall be responsible for examining it” (Article 3(2), first subparagraph).

It is important to take into account that – except subsequent transfers of competence due to the expiry of specific time limits related to taking charge and tacking back procedures⁹ – the hierarchy of criteria set out above may be derogated only in three cases: where a non-responsible Member State independently decide to examine an asylum application (“sovereignty clause”: Article 17(1)); where the responsible Member State requests a non-responsible one to take responsibility of an applicant “in order to bring together any family relations, on humanitarian grounds” (“humanitarian clause”: Article 17(2)); and where the transfer of an applicant to the responsible Member State proves to be impossible “because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment” (Article 3(2), second subparagraph).¹⁰

The strict criteria foreseen in the Dublin III Regulation and the lack of a mechanism aimed at redistributing asylum responsibilities between the Member States in a fairer way, especially in cases of massive influx of asylum seekers, have become important shortcomings over time. Leaving aside the question of whether or not each Member State is always able to comply with its fundamental rights obligations even in the case of massive inflow of asylum seekers and, consequently, to what extent the principle of mutual trust enshrined in the Dublin system is suitable of working properly without an intra-EU fair sharing of burdens,¹¹ we should face with the question whether other EU legal provisions are capable of counterbalancing the negative

⁹ Chapter IV, Articles 20-33.

¹⁰ In such case, the non-responsible Member State must continue to examine the criteria in order to find another Member State that can be designated as responsible; in the absence, the former State shall take responsibility. This provision takes into account the Court’s decision in the Joined Cases C-411/10 and C-493/10, *N. S. and others*, 21 December 2011, ECLI:EU:C:2011:865 (hereinafter, the “*N.S.* case”).

¹¹ On the topic, see the ECJ decision in the *N.S.* case (cit. *supra*, note 10) further explained *infra*, note 40 and accompanying text.

redistributive impact of the Dublin system criteria.

At first glance, the First Entry Rule seems to be in contrast with the wording of at least two provisions, namely Articles 67(2) and 80 TFEU. Following the former, “[the EU] shall frame a common policy on asylum [...] based on solidarity between Member States [...]”. Such a Treaty provision seems to be *programmatically in nature* insofar as, on the one hand, it stresses the fundamental character of intra-EU solidarity in the common policy on asylum, immigration and external border control but, on the other hand, it says nothing about the resulting obligations on Member States themselves.¹²

In turn, Article 80 TFEU states that “[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.

It must be pointed out that such a provision – unlike Article 78 – does not contain a stand-alone legal basis for the adoption of EU asylum acts promoting solidarity among the Member States. Indeed, nothing in Article 80 indicates a legislative procedure to be followed¹³ or at least the EU Institution(s) competent to adopt non-leg-

¹² See MORGESE, *La solidarietà tra Stati membri dell’Unione europea in materia di immigrazione e asilo*, Bari, 2018, p. 59.

¹³ Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017, ECLI:EU:C:2017:631 (hereinafter, the “relocation case”), para. 62. See LABAYLE, “Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice”, *EU Immigration and Asylum Law and Policy*, 11 September 2017, available at: <<http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council>>; MESSINA, “La Corte di giustizia afferma la validità giuridica del meccanismo provvisorio di ricollocazione obbligatoria dei richiedenti protezione internazionale. A quando la volontà politica di alcuni Stati membri UE di ottemperarvi?”, *Ordine internazionale e diritti umani*, 2017, available at: <http://www.rivistaoidu.net/sites/default/files/1_paragrafo_1_CGUE_4_2017.pdf>, p. 603 ff.; OBRADOVIC, “Cases C-643 and 647/15: Enforcing solidarity in EU migration policy”, *European Law Blog*, 2 October 2017, available at: <<https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy>>; PEERS, “A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers”, *EU Law Analysis*, 8 September 2017, available at: <<http://eulawanalysis.blogspot.com/2017/09/a-pyrrhic-victory-ecj-upholds-eu-law-on.html>>; PENASA, “La relocation delle persone richiedenti asilo: un sistema legittimo, giustificato e ... inattuato? Brevi riflessioni sulla sentenza Slovacchia e Ungheria c. Consiglio”, *DPCE on line*, 2017/3, available at: <<http://www.dpceonline.it/index.php/dpceonline/article/view/451>>, p. 735 ff.; RIZZO, “Ricollocazione *infracomunitaria* e principio di solidarietà: un nuovo paradigma per le

islative acts. Given that EU asylum policy and its implementation shall be “governed” by the solidarity principle “whenever necessary” and with “appropriate measures”, the material scope of Article 80 seems rather to be supplementary to EU asylum acts adopted pursuant to Article 78. In other words, Article 80 should be understood as an *enabling rule* giving EU Institutions, whenever necessary, the power to supplement asylum acts adopted (or to be simultaneously adopted) following Article 78 TFEU with appropriate solidarity and responsibility-sharing measures.¹⁴ Furthermore, it is not even strictly required to indicate Article 80 TFEU as a joint legal base together with Article 78 TFEU (as the European Parliament suggests),¹⁵ having EU Institutions not made use of such an opportunity so far.¹⁶

Even though we are dealing with a single principle of solidarity and fair sharing of responsibility, where the latter is a specification of the wider concept of the former,¹⁷

politiche d’asilo dell’Unione”, *La Comunità Internazionale*, 2017, p. 397 ss.; DE WITTE and TSOURDI, “Confrontation on relocation - The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak Republic and Hungary v. Council*”, *Common Market Law Review*, 2018, p. 1457 ss.

¹⁴ See MCDONNELL, “Solidarity, Flexibility, and the Euro-Crisis: Where Do Principles Fit In?”, in ROSSI and CASOLARI (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Cham-Heidelberg-New York-Dordrecht-London, 2014, p. 57 ff., p. 66; PEERS et al. (eds.), *EU Immigration and Asylum Law. Volume 3: EU Asylum Law*, Leiden, 2015, p. 14; HAILBRONNER and THYM, “Legal Framework for EU Asylum Policy”, in HAILBRONNER and THYM (eds.), *EU Immigration and Asylum Law. A Commentary*, München-Oxford-Baden-Baden, 2016, p. 1023 ff., p. 1044; ROSENFELDT, “The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU”, 31 March 2017, available at: <<https://ssrn.com/abstract=2944116>>, p. 10. *Contra* GARLICK, *Solidarity under Strain*, Doctoral Thesis, Radboud University, 19 September 2016, p. 230.

¹⁵ Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 1.

¹⁶ For instance, the so-called “relocation decisions”, while indicating Article 80 TFEU in their premises, were only based on Article 78(3) TFEU: see Council Decision (EU) 2015/1523, of 14 September 2015, OJ L 239, 15 September 2015, p. 146 ff.; and Council Decision (EU) 2015/1601, of 22 September 2015, OJ L 248, 24 September 2015, p. 80 ff.

¹⁷ See MORGESE, “Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione europea”, in CAGGIANO (ed.), *I percorsi giuridici per l’integrazione. Migranti e titolari di protezione internazionale tra diritto dell’Unione e ordinamento italiano*, Torino, 2014, p. 365 ff., p. 373; DE BRUYCKER and TSOURDI, “The Bratislava Declaration on migration: European irresponsibility instead of solidarity”, *EU Immigration and Asylum Law and Policy*, 27 September 2016, available at: <<http://eumigrationlawblog.eu/the-bratislava-declaration-on-migration>>; PAPA, “Crisi dei rifugiati e principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell’Unione europea”, *Costituzionalismo.it*, 2016, No. 3, p. 287 ff., p. 290; MORANO-FOADI, “Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures”, *European Journal of Migration and Law*, 2017, p. 223 ff., pp. 230-231; MORENO-LAX, “Solidarity’s reach: Meaning, dimensions and implications for EU (external) asylum policy”, *Maastricht*

it is crucial to stress out that that principle is not further defined in Article 80 or elsewhere in the EU law. What should be meant by ‘solidarity’? When can we assume that a responsibility sharing is ‘fair’? The lack of definition is actually a major obstacle in finding a proper balance between responsibilities of the Member States under the Dublin system and solidarity among themselves, insofar as the vagueness of the first sentence of Article 80 leaves room for different possible interpretation of the principle. It is no secret that, on the one hand, frontlines Member States ask for more solidarity calling upon, above all, a reform of the Dublin system allocation criteria in a more redistributive way, either by reforming the hierarchy of criteria in order to set aside such a rule or introducing a corrective mechanism capable of mitigating their burdens¹⁸. On the other hand, the ‘Visegrad Group’ of Member States (Czech Republic, Hungary, Poland and Slovakia) persistently advocates more responsibility to frontlines Member States and a “voluntary” or “flexible” approach to solidarity,¹⁹ thus refusing to take into account any amendments of those criteria. In general, those Member States less affected by migration flows from third countries are not just enthusiastic to put in place such amendments²⁰. In the absence of a clear interpretation of what the principle

Journal of European and Comparative Law, 2017, p. 740 ff., p. 751. *Contra* GRAY, “Surveying the Foundations: Article 80 TFEU and the Common European Asylum System”, *Liverpool Law Review*, 2013, p. 175 ff., p. 180.

¹⁸ *Supra* note 1.

¹⁹ Joint Statement of the Heads of Governments of the V4 Countries, Bratislava, 16 September 2016, available at: <<https://www.vlada.cz/assets/media-centrum/aktualne/Bratislava-V4-Joint-Statement-final-15h30.pdf>>. See also the Slovak Presidency Non-Paper on “Effective Solidarity: a way forward on Dublin revision”, November 2016, available at: <<http://www.statewatch.org/news/2016/nov/eu-council-slovak-pres-non-paper-dublin-effective-solidarity-11-16.pdf>>. See GRAY, *cit. supra* note 17, pp. 182-185; VÉGH, “‘Flexible solidarity’. Intergovernmentalism or differentiated integration: the way out of the current impasse”, *Visegrad Insight*, 19 December 2016, available at: <<https://visegradinsight.eu/flexible-solidarity>>; DEN HEIJER, “Corrective allocation or effective solidarity? The Slovak Presidency non-paper on the revision of the Dublin system”, *EU Immigration and Asylum Law and Policy*, 10 March 2017, available at: <<http://eumigrationlawblog.eu/corrective-allocation-or-effective-solidarity-the-slovak-presidency-non-paper-on-the-revision-of-the-dublin-system>>; MORANO-FOADI, *cit. supra* note 17, pp. 240-241. Sometimes, the voluntary approach to solidarity has been stressed also by EU Institutions: see JUNCKER, “State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends”, 14 September 2016, available at: <http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm>.

²⁰ See for instance KÜÇÜK, “The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?”, *European Law Journal*, 2016, p. 448 ff., p. 453, with respect to the fact that the United Kingdom, Ireland and Denmark decided not to participate in the 2015 relocation agreement (*supra*, note 16).

of solidarity and fair sharing of responsibility means (or should mean), each interpretation can be considered as legitimate in principle.

In my opinion,²¹ taking into account the overall solidarity provisions laid down in the EU Treaties together with both the aims of the EU asylum policy and the legitimate expectations of beneficiaries of Article 80 (i.e. the Member States), the term “solidarity” should be understood as a non-selfish way of carrying out that policy. In turn, it means that Member States and EU Institutions should have responsibility both (i) to avoid in advance that other Member States find themselves in trouble and (ii) to give assistance to those Member States facing difficulties or an emergency situation, due to unbalances stemming from the implementation of the CEAS. As part of such a broad notion of solidarity in asylum matters, the concept of ‘fair sharing of responsibility’ should be intended as the mutual support between the Member States aimed at helping those States most affected by the management of migration flows. If this is true, the single principle referred to in Article 80 TFEU should play a threefold role: (i) a *preventive* one, consisting in prior mutual assistance between the Member States especially in modifying existing EU asylum legislation if necessary, before problems arise; (ii) a *rebalancing* role, consisting in mutual assistance between the Member States in order to counterbalance the existing responsibility-sharing proved to be unfair in difficult cases; and (iii) an *emergency* role, consisting in mutual assistance between the Member States with the aim of providing practical assistance to those Member States facing genuine emergency situations, especially in the case of massive inflows of asylum seekers.

However, even if we agree to the above, the inherent vagueness of the solidarity principle is further accentuated by the fact that, following the second sentence of Article 80, EU asylum law shall contain “appropriate” solidarity measures “whenever necessary”. As a result of the wording, the EU Institutions enjoy a wide margin of discretion in deciding whether and to what extent such measures are required. In the absence at least of an objective system of assessment of the Member States’ reception capacities, suitable to point out with a certain degree of predictability the fair or unfair nature of the EU asylum law and its implementation (including responsibility allocation provided for in the Dublin system), it must be concluded that Article 80 – read together with the EU (shared) competence under Article 78 – essentially gives the Institutions a huge discretionary power to decide (i) whether or not an EU action in asylum matters is needed due to the inadequacy of corresponding Member

²¹ Further explained in MORGESSE, *cit. supra* note 12, p. 74 ff.

States' actions, (ii) whether or not such action is likely to affect the Member States in case of difficulties or emergency, and (iii) whether or not one or more preventive, rebalancing or emergency EU solidarity measures are likely to lessen or remove the adverse effect on the Member States. After all, it is not a case that the Institutions have so far decided in a wide discretionary manner whether or not one or more Member States were in a difficult or emergency situation and which kind of solidarity measures (financial, technical or physical) to adopt.

Therefore, it can be stated that Article 80 in itself, insofar as it requires to take appropriate solidarity measures only if necessary, *imposes no positive obligations on the Institutions*: the latter are only allowed but not required to put in place appropriate solidarity measures. Even more, Article 80 in itself *cannot impose positive obligations on the Member States*: firstly, due to the fact that a fairer responsibility-sharing scheme does unavoidably require the adoption of collective measures, one or more Member States acting alone in a spirit of solidarity would bring some relief but not a sustainable solution in the event of inaction at the EU level;²² secondly, on the contrary, some national unfair measures are currently permitted in accordance with the EU law.²³

Rather, the principle of *effet utile* lets us to stem from the general aim of Article 80 in itself – i.e. preventing the EU asylum policy and its implementation to be detrimental to the Member States – a (*quite narrow*) *negative obligation on both the EU Institutions and the Member States*. Indeed, the Institutions should avoid, as far as possible, to take measures that are clearly and entirely in conflict with the core of the solidarity principle as defined above:²⁴ such a negative obligation would be a sort of 'shield' for the Member States aimed at preventing the adoption of clearly unfair EU asylum acts.²⁵ Likewise, the Member States should refrain from national conducts

²² See, for instance, some recent events concerning migrants arrived by sea in Italy and the subsequent relocation agreements between some Member States. See PASTAVRIDIS, "Recent 'Non-Entrée' Policies in the Central Mediterranean and Their Legality: A New Form of "Refoulement"?", *Diritti umani e diritto internazionale*, 2018, p. 493 ff.; CARRERA and CORTINOVIS, "Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?", CEPS Paper in Liberty and Security in Europe, No. 2019-10, available at: <www.ceps.eu>.

²³ See, for instance, those national measures concerning temporary reintroduction of internal border controls, in line with the Schengen Borders Code and aimed at preventing movements of third-country nationals in the Schengen area.

²⁴ It would be quite a *stand-still obligation* similar to that imposed to the Member States in case of directives that have not yet been implemented: see Case C-129/96, *Inter-Environnement Wallonie*, 18 December 1997, ECLI:EU:C:1997:628, para 45.

²⁵ See also KÜÇÜK, *cit. supra* note 20, p. 458.

leading to the violation of the negative obligation stemming from Article 80 in itself, provided however that unfair national measures in accordance with the EU law could never be regarded as a violation of such negative duty.²⁶

3. – *A Pragmatic-But-Not-Bold Approach by the ECJ*

So far, the ECJ case-law related to Article 80 TFEU is very limited in number. This is the reason why it is important to review the Court's overall approach to solidarity-related asylum matters. Bringing forward the end of the story, such approach could be seen as pragmatic but certainly not bold,²⁷ insofar as the Court seems quite determined to keep the EU Institutions' room for manoeuvre safe, and not to impose obligations on the Member States other than those deriving from secondary binding acts adopted by the Institutions themselves.

3.1. – The Limited Role of Article 80 in Itself in Disputes before the ECJ Involving the EU Institutions...

First of all, as regards the possibility for a Member State to bring an action against the Institutions *for failure to act consistently with the principle of solidarity* referred to in Article 80, it should be recalled the Court's case-law on the Institutions' margin of appreciation whenever an open-ended legal provision – and even more a principle as manifold and contested as the solidarity one – involves complex evaluations of a political, economic or social nature, which in turn requires a judicial review limited to the existence of manifest errors of assessment.

For instance, in *Racke* the ECJ stated that “because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily [...] be limited to the question whether [...] the Council made manifest errors of assessment concerning the conditions for applying those rules”.²⁸ Likewise, in *Vodafone* it has been argued that “in the exercise of the powers conferred on it the [EU] legislature must be allowed a broad discretion in areas in

²⁶ On the contrary, as discussed below, solidarity-based measures provided for in EU mandatory acts (as the second relocation decisions: *supra*, note 16) are binding for the Member States.

²⁷ Here I refer to and rephrase the title of a paper of MAIANI and HRUSCHKA, “The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic?”, *EU Immigration and Asylum Law and Policy*, 20 December 2017, available at: <<http://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic>>.

²⁸ Case C-162/96, *Racke*, 16 June 1998, ECLI:EU:C:1998:293, para. 52.

which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations”.²⁹ Furthermore, in *Star Fruit* the ECJ recalled that, on procedural ground, whenever an Institution “is not bound to [act] but in this regard has a discretion[, it] excludes the right for [the applicant] to require that institution to adopt a specific position” pursuant to Article 265 TFEU.³⁰

Due to the fact that the necessity and appropriateness of solidarity measures are left entirely to the discretion of the Institutions in accordance with Article 80, second sentence, then it would be very difficult – if not impossible at all – for a Member State to find out a positive obligation on those Institutions and, as a result, to bring an action for failure not only to adopt a specific solidarity-based measure but also to modify the Dublin III Regulation in a manner consistent with Article 80. Such a conclusion does not seem to be at odds with two Court’s statements in the *relocation* case.³¹ In para. 252, the ECJ stressed that

“the Council, when adopting the [EU Council Decision 2015/1601], was in fact required, as is stated in recital 2 of the decision, to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented”.

Furthermore, in para. 291, the Court stated that

“[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy”.

While the Court apparently claimed the existence of a solidarity obligation on the EU Institutions, the afore-mentioned statements should however be framed in the light

²⁹ Case C-58/08, *Vodafone and Others*, 8 June 2010, ECLI:EU:C:2010:321 para. 52.

³⁰ Case 247/87, *Star Fruit v. Commission*, 14 February 1989, ECLI:EU:C:1989:58 para. 11.

³¹ *Cit. supra* note 13.

of the overall *relocation* case, dealing with an action for annulment of a binding Council decision establishing a relocation scheme (in temporary derogation to the Dublin III Regulation) on, *inter alia*, the substantive ground of the breach of the principle of proportionality, and where the reference to the solidarity principle was quite secondary.³² Here, the Court was only asked to state whether or not there had been a manifest error of assessment by the Council in its decision to adopt such a temporary relocation measure, considered as disproportionate by Slovakia and Hungary. In doing so, the ECJ recognised that, before the adoption of the contested decision,

“the Council found that many actions had already been taken to support the Hellenic Republic and the Italian Republic in the framework of the migration and asylum policy and [...] that, since it was likely that significant and growing pressure would continue to be put on the Greek and Italian asylum systems, the Council considered it vital to show solidarity towards those two Member States and *to complement the actions already taken with the provisional measures provided for in the contested decision*” (para. 251).³³

As a consequence,

“there [was] no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take – on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein – provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision” (para 253).

In my opinion, it clearly shows that the assumed Council obligation to act consistently with Article 80 (para. 252) has been linked by the ECJ both to the *previous verification of the need to show solidarity* towards those Member States in difficulty (para. 251) and the *assessment of the appropriateness* of the temporary relocation scheme among other possible solidarity measures. In other words, saying that Article 80 TFEU is mandatory only whenever appropriate solidarity measures are necessary is another way to state that the Institutions have a wide margin of appreciation in deciding if and to what extent a solidarity action has to be taken. So, it can be concluded that the Institutions themselves are not bound to act consistently with Article 80, at least as long as such a need has not been previously acknowledged.

³² See PENASA, *cit. supra* note 13, p. 740.

³³ Emphasis added.

The same ample room for manoeuvre that the Institutions enjoys in deciding when and to what extent to take a solidarity action would prevent one or more Member States to successfully bring an action before the ECJ *for annulment of an act considered to be inconsistent with the principle of solidarity in itself*.

It is true that there is no ruling on the issue yet,³⁴ but the Court would hardly deviate from its previous case-law in similar cases. For instance, in the *relocation* case, concerning an action for annulment of a solidarity-related measure albeit not based on the breach of Article 80, the Court stressed that “the EU institutions must be allowed broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, on their part and complex assessments”.³⁵ Bearing in mind the above-mentioned negative obligation lying on the Institution to avoid, as possible, measures that would be clearly and entirely in conflict with the core of Article 80,³⁶ one can assume that *only an act in a very manifest breach of the principle of solidarity might be annulled according to Article 263 TFEU*: i.e., due to its inherent anti-solidarity balance, the lack of any other measures intended to lessen its adverse effect, the non-temporary nature of the contested act or the seriousness of the injury suffered by the applicant State(s), and so on.

The main point at stake is, therefore, whether the Dublin III Regulation could be deemed in a manifest breach of the principle provided for in the Article 80. Despite the fact that the Dublin system constitutes, to a certain degree, the antithesis of solidarity and the result of an unfair responsibility-sharing,³⁷ it seems nonetheless not so easy to declare its manifestly anti-solidarity nature. On the one hand, the First Entry Rule is not the only criterion for the allocation of Member States’ responsibility; on the other hand, the Regulation itself lays down some subsequent responsibility-shifting clauses that allow other Member States to bear responsibility instead of the States of the first entry: one may refer to Article 16 of the Dublin Regulation, according to which the Member States have the obligation to keep together or reunify “dependent”

³⁴ This is because the *relocation* case was dealing, on the contrary, with an action for annulment of an act assumed to be, in short, too solidarity-based.

³⁵ *Cit. supra* note 13, para. 124. See also Case C-358/14, *Poland v. Parliament and Council*, 4 May 2016, ECLI:EU:C:2016:323, para. 79.

³⁶ *Supra*, Section 2.

³⁷ See MORGESE, *cit. supra* note 17. See also BAST, “Deepening Supranational Integration: Interstate Solidarity in EU Migration Law”, *European Public Law*, 2016, p. 289 ff., p. 296, and GARLICK, *cit. supra* note 14, p. 29 ff..

applicants among themselves; or the above-mentioned “sovereignty clause” and “humanitarian clause”.³⁸

Pending further clarification from the ECJ, the question is therefore whether the latter provisions are enough to counterbalance – or at least to mitigate – those inequalities stemming from the application of the First Entry Rule. If this is the case, one may conclude that the Dublin III Regulation remains fully valid; otherwise, the latter should be deemed as invalid in its entirety. What it seems inadmissible, however, is a declaration of invalidity of the First Entry Rule as such: in that case, there would be a legal void that would not be possible to overcome in an interpretative way; moreover, strictly speaking, it would not result in a fairer responsibility-sharing due to the fact that, in the absence of the First Entry Rule, an increased and unfair responsibility would fall in the end on “the first Member State in which the application for international protection [has been] lodged”³⁹.

In my opinion, the rationale according to which judicial introduction of a fairer responsibility-sharing system for some Member States would likely result in an unfair one for other States is behind the pragmatic-but-not-bold ECJ case-law aimed at preserving the overall balance of rights and duties laid down in the Dublin III Regulation and, in the end, leaving the EU Institutions a wide political margin for further amendments. Even though such a jurisprudence has been developed following some references for interpretative preliminary ruling according to Article 267 TFEU, its conclusions are relevant also for future direct proceedings.

In *N.S.* – a case concerning the return of an Afghan national from the U.K. to Greece under the Dublin Regulation – the Court stated that the presumption that every Member State as such is safe for asylum seekers cannot be conclusive⁴⁰ and

³⁸ *Supra*, Section 2.

³⁹ Article 3(2) of the Dublin Regulation.

⁴⁰ *N.S.* case, *cit. supra* note 10, para. 103. See MORGESE, “Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso *N.S. e altri*”, *Studi sull’integrazione europea*, 2012, p. 147 ff.; MORGADES-GIL, “The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?”, *International Journal of Refugee Law*, 2015, p. 433 ff., p. 441 ff. In *N.S.*, the ECJ had partly complied with the European Court of Human Rights’ case-law referred to in *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011: see ITALIANO, “La protezione dei diritti dei richiedenti asilo nella CEDU e nell’Unione europea non è necessariamente equivalente?”, *Gli Stranieri*, 2011, p. 117 ff.; LABAYLE, “Le droit européen de l’asile devant ses juges: précision ou remise en question?”, *Revue fran-*

that, as a consequence, a Member State should not transfer asylum seekers to the responsible Member State where there are substantial grounds for believing that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State.⁴¹ *Inter alia*, the Court stressed that such a rule could be derived from the fact that “Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”.⁴²

That very short reference to Article 80 in *N.S.* has been welcomed as an (albeit indirect) example of a solidarity-based interpretation of the Dublin Regulation⁴³. However, from the purely incidental reference to Article 80, one can conclude that in the *N.S.* case the Court has only limited the automatic adverse effects of the Dublin system on the protection of asylum seekers’ human rights, where a fairer responsibility-sharing among the Member States were just an indirect, quite accidental secondary effect:⁴⁴ in fact, should the Member State concerned by the *N.S.* rule be not a frontline one (unlike Greece in the *N.S.* case), such a case-law would have, on the contrary, anti-solidarity effects also for overloaded frontline States, insofar as they would be forced to “continue to examine the criteria set out in [the Dublin Regulation] in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application”⁴⁵ and, where necessary, to “examine the application in accordance with the procedure laid down in Article 3(2)” of that Regulation.

In *Cimade and GISTI*,⁴⁶ also the financial burden-sharing resulting from asylum-seekers’ minimum reception obligations held by the Member States following the

çaise de droit administratif, 2011, p. 273 ff., p. 287 ff.; MARCHEGANI, “Regolamento ‘Dublino II’ e Convenzione europea dei diritti umani: il caso *M.S.S. c. Belgio e Grecia*”, *Studi sull’integrazione europea*, 2011, p. 357 ff.

⁴¹ *N.S.* case, *cit. supra* note 10, para. 106.

⁴² *Ibid.*, para. 93.

⁴³ See GRAY, *cit. supra* note 17, p. 179; CASOLARI, “EU Loyalty After Lisbon: An Expectation Gap to Be Filled?”, in ROSSI and CASOLARI (eds.), *cit. supra* note 14, p. 93 ff., p. 126; MITSILEGAS, “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, 2014, No. 2, p. 181 ff., p. 190.

⁴⁴ See also ROSENFELDT, *cit. supra* note 14, p. 5.

⁴⁵ *N.S.* case, *cit. supra* note 10, para. 107.

⁴⁶ Case C-179/11, *Cimade and GISTI*, 27 September 2012, ECLI:EU:C:2012:594.

Dublin system has been left untouched by the ECJ. The reference for a preliminary ruling concerned the interpretation of the so-called Reception Directive⁴⁷ on the issue whether or not the obligation, incumbent on the Member State of the first reception, to guarantee the minimum reception conditions ceased at the moment of the acceptance decision by the Member State to which the applicants were to be transferred under the Dublin system and, in particular, which Member State should assume the financial burden of providing the minimum reception conditions during the period between the decision of a Member State to call upon another Member State considered responsible (or the latter's acceptance decision) and the effective transfer. The Court, recalling that a Member State of the first reception has to grant the minimum reception conditions until applicants have actually been transferred to another Member State,⁴⁸ stated that the related financial burden "is usually assumed by the Member State which is subject to the obligation to satisfy those requirements [...] unless European Union legislation provides otherwise",⁴⁹ irrespective of other solidarity-based burden-sharing than those possible financial assistance instruments provided for in the EU law itself.⁵⁰

The Court's pragmatic approach is also present in *Halaf*,⁵¹ a case concerning a reference for preliminary ruling on the interpretation, *inter alia*, of the "sovereignty clause".⁵² Called upon to rule on whether such a clause could be interpreted to be in line with Article 80 TFEU in the absence of any other solidarity provisions, the ECJ has merely stressed that "the exercise of that option is not subject to any particular

⁴⁷ Council Directive 2003/9/EC of 27 January 2003, OJ L 31, 6 February 2003, p. 18, now replaced by Directive 2013/33/EU of the European Parliament and of the Council, of 26 June 2013, OJ L 180, 29 June 2013, p. 96.

⁴⁸ *Cimade and GISTI*, *cit. supra* note 46, para. 58.

⁴⁹ *Ibid.*, para. 59.

⁵⁰ *Ibid.*, para. 60, according to which "[i]t should furthermore be added that, with a view to responding to the need to share responsibilities fairly between Member States as concerns the financial burden arising from the implementation of common policies on asylum and immigration – a need which can in particular manifest itself in the case of major migration flows – the European Refugee Fund [...] provides for the possibility of financial assistance being offered to the Member States with regard, *inter alia*, to reception conditions and asylum procedures".

⁵¹ Case C-528/11, *Halaf*, 30 May 2013, ECLI:EU:C:2013:342.

⁵² *Supra*, Section 2.

condition”,⁵³ thus simply avoiding to provide a response on the submitted question from the referral court.⁵⁴

The ECJ’s will to preserve the overall balance of the Dublin system is even more clear in those decisions issued after the 2015 refugee crisis. In *X. and X.*,⁵⁵ a case concerning some Syrian nationals that had submitted applications for visas with limited territorial validity on humanitarian grounds (“humanitarian visas”) at the Belgian Embassy in Beirut on the basis of Article 25(1)(a) of the Visa Code,⁵⁶ with a view to applying for asylum immediately upon their arrival in Belgium, the Court highlighted that the Member States are not obliged to issue such visas. Due to the fact that “no measure has been adopted, to date, by the EU legislature [...] with regard to the conditions governing the issue by Member States of long-term visas [...] on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law”.⁵⁷ It is of paramount importance to note that, in the ECJ’s view, a different conclusion would allow “third-country nationals to lodge applications for [humanitarian visas] in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by [the Dublin Regulation]”.⁵⁸

An even more unequivocal reasoning – maybe a closing one – can be found in the *A.S.* and *Jafari* cases,⁵⁹ where the Court stated that the Dublin system cannot be

⁵³ *Halaf*, *cit. supra* note 51, para. 36.

⁵⁴ KÜÇÜK, *cit. supra* note 20, p. 464.

⁵⁵ Case C-638/16 PPU, *X and X*, 7 March 2017, ECLI:EU:C:2017:173. See CAGGIANO, “Are You Syrious? Il diritto europeo delle migrazioni dopo la fine dell’emergenza alla frontiera orientale dell’Unione”, *Freedom, Security & Justice: European Legal Studies*, 2017, No. 2, p. 7 ff., pp. 14-16; CELLAMARE, “Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie”, *Studi sull’integrazione europea*, 2017, p. 527 ff.; DEL GUERCIO, “La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un’occasione persa”, *European Papers - European Forum*, 12 maggio 2017, available at: <<http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-justizia-sul-rilascio-del-visto-umanitario>>; FAVILLI, “Visti umanitari e protezione internazionale: così vicini così lontani”, *Diritti umani e diritto internazionale*, 2017, p. 553 ff.

⁵⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council, of 13 July 2009, OJ L 182, 29 June 2013, p. 1.

⁵⁷ *X. and X.*, *cit. supra* note 55, para. 44.

⁵⁸ *Ibid.*, para. 48 (emphasis added). Therefore, no relevance has been given to the opposite Opinion of the Advocate General: see Case C-638/16 PPU, *X and X* (Opinion), 7 February 2017, ECLI:EU:C:2017:93, para. 174.

⁵⁹ Case C-490/16, *A.S.*, 26 July 2017, ECLI:EU:C:2017:585, and case C-646/16, *Jafari*, 26 July 2017, ECLI:EU:C:2017:586. See DI STASIO, “Il ‘sistema Dublino’ non è derogabile: note a margine della sentenza della Corte di giustizia del 26 luglio 2017, causa C-646/2016, *Jafari*”, *Dirittifondamentali.it*, 2017,

derogated even in the event of a massive refugee crisis. The issues at stake concerned some Syrian and Afghanistan nationals that, after having entered Europe from Turkey during the refugee crisis of the summer of 2015, taken the so-called “Western Balkan route”, crossed some other Member States’ borders and here lodged their asylum applications. National asylum authorities refused to examine (in the *A.S.* case) or rejected (in the *Jafari* case) those applications on the ground that the State of the first entry was Croatia: such a Member State, indeed, faced with the arrival of an unusually large number of third-country nationals seeking transit through its territory in order to lodge an application for international protection in other Member States, had simply tolerated the entry of such nationals who do not fulfilled the entry conditions. Moving away from the Advocate General’s Opinion,⁶⁰ in the Court’s reasoning even a refugee crisis must be seen as an ‘ordinary’ irregular crossing situation under the Dublin III Regulation, “irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals”.⁶¹ Unambiguously, the ECJ concluded that “[t]he fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of [...] the Dublin III Regulation”.⁶²

As to the main question of whether or not the Dublin system is enough solidarity-based, the Court in *Jafari* also recalled that, on the one hand, there is a “direct link between the responsibility criteria established in a spirit of solidarity and common efforts towards the management of external borders, which are undertaken [...] in the interest not only of the Member State at whose external borders the border control is carried out but also of all Member States which have abolished internal border

No. 2, 4 September 2017, available at: <<http://www.dirittifondamentali.it/fascicoli/anno-2017/numero-22017/c-di-stasio-il-sistema-dublino-non-è-derogabile-note-a-margin>>; FERRI, “Il regolamento ‘Dublino III’ tra crisi migratoria e deficit di solidarietà: note (dolenti) sulle sentenze *Jafari* e *A.S.*”, *Studi sull’integrazione europea*, 2018, p. 519 ff.; THYM, “Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*”, *Common Market Law Review*, 2018, p. 549 ff.

⁶⁰ Cases C-490/16, *A.S.*, and C-646/16, *Jafari* (Opinion), 8 June 2017, ECLI:EU:C:2017:443, para. 262: see CAGGIANO, *cit. supra* note 55, p. 16 ff.

⁶¹ *Jafari*, *cit. supra* note 59, para. 92.

⁶² *Ibid.*, para. 93 (emphasis added).

control”;⁶³ and that, on the other hand, in the event of massive influx of asylum seekers, *the demand of solidarity under the Article 80 could be met by other means than interpretative derogations of the Dublin III Regulation*, such as the enactment of the sovereignty clause,⁶⁴ the mechanism for early warning, preparedness and crisis management,⁶⁵ the mechanism provided for in the Temporary Protection Directive⁶⁶ and those provisional measures that could be adopted under Article 78(3) TFEU.⁶⁷

It is apparent that the Court does not seem willing to change its mind, as recently stated in *X.*: indeed, while the Advocate General recalled that “the automatic nature of the transfer of responsibility is difficult to reconcile with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System and the Dublin III Regulation”,⁶⁸ the Court concluded in brief that “this is a result of the choices made by the EU legislature”.⁶⁹

In view of the above, even the option for the Member States not to comply with the Dublin Regulation – like any other EU asylum binding provision – as a reaction to the lack of solidarity by the Institutions does not seem a feasible one.

Indeed, the fact that the Member States cannot act upon the *inadimpleti non est adimplendum* rule as a reaction against unfair EU asylum provisions stems from the mere conclusion that such conduct would constitute a breach of the principle of loyalty according to Article 4(3) TEU. Following the latter, the Member States are bound to take all the appropriate measures to implement EU obligations and facilitate the fulfilment of Institutions’ tasks, in addition to avoiding undermining the implementation of the EU common objectives. So, it is not a case that in *Commission v. Italy*⁷⁰ the ECJ had linked the breach of the solidarity between the Member States to

⁶³ *Ibid.*, para. 85.

⁶⁴ *Ibid.*, para. 100, according to which “the taking charge in a Member State of an unusually large number of third-country nationals seeking international protection may also be facilitated by the exercise by other Member States – unilaterally or bilaterally with the Member State concerned in a spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation – of the [sovereignty clause], to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation”.

⁶⁵ *Ibid.* para. 95. Such a mechanism is laid down in Article 33 of the Dublin Regulation.

⁶⁶ *Jafari cit. supra* note 59, para. 97. See Council Directive 2001/55/EC of 20 July 2001, OJ L 212, 7 August 2001, p. 12.

⁶⁷ *Jafari, cit. supra* note 59, paras. 98-99.

⁶⁸ Case C-213/17, *X* (Opinion), 13 June 2018, ECLI:EU:C:2018:434, para. 99.

⁶⁹ Case C-213/17, *X*, 5 July 2018, ECLI:EU:C:2018:538, para. 39.

⁷⁰ Case 39/72, *Commission v. Italy*, 7 February 1973, ECLI:EU:C:1973:13.

a violation of the duty of loyal co-operation, stating that “for a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations”,⁷¹ and that, as a consequence, “[t]his failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order”.⁷² Moreover, the *inadimpleti non est adimplendum* rule does usually work in bilateral contracts as a response to the lack of the owed consideration by the counterpart: in the case of Article 80 TFEU, the lack of positive obligations on the Institutions does remove *ex ante* any owed consideration by the latter (that therefore are, technically speaking, not counterparts of the Member States), so making such a rule simply not applicable.

Accordingly, a Member State not complying with EU asylum provisions – even if deemed as unfair – would be exposed to an infringement procedure according to Article 258 TFEU and following, facing a quite likely declaration of failure to fulfil its obligations under EU law. This could be, for instance, the case of the infringement procedures brought by the Commission against Italy, Greece and Croatia in December 2015 for their failure to correctly implement the Eurodac Regulation.⁷³ Such non-compliance has been somewhat a reaction by those three Member States for the non-response of the Institutions to their reiterated requests for a fairer and solidarity-based responsibility-sharing of asylum seekers. But it remains the case that the Commission has decided to send three letters of formal notice⁷⁴ and, after the closure of the procedures against Italy and Greece for the latter’s subsequent almost fully compliance,⁷⁵ to continue the procedure against Croatia sending to the latter a reasoned opinion.⁷⁶

3.2. – ... and the Member States

It is also highly questionable whether the Commission or a Member State could bring an action against other Member States for their assumed lack of solidarity.

⁷¹ *Ibid.*, para. 24.

⁷² *Ibid.*, para. 25.

⁷³ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013, OJ L 180, 29 June 2013, p. 1.

⁷⁴ IP/15/6276, 10 December 2015.

⁷⁵ IP/16/4281, 8 December 2016.

⁷⁶ MEMO/17/1577, 14 June 2017.

Actually, it would be impossible for the Commission under Article 258 TFEU (or a Member State after it has brought the matter before the Commission, following Article 259 TFEU) to bring an infringement procedure against other Member States for their failure to adopt *positive solidarity measures* based on Article 80 in itself. Indeed, where the Institutions have not (yet) decided to adopt such measures, it is a matter of fact that there would be no unfulfilled obligations on the Member States to bring before the ECJ. It seems equally difficult to bring an infringement procedure against those Member States that failed to fulfil the above-mentioned *negative obligation* aimed at refraining from the adoption of national measures that are manifestly contrary to the spirit of Article 80. In such a case, the Commission and the Court should consider not only specific national acts or omissions but rather the overall national legislation and practice: to this effect, therefore, only national legal systems acknowledged as fully and manifestly against the solidarity principle in itself could – maybe – lead to an infringement decision by the ECJ. Obviously, the option for a Member State not to comply with EU law as a reaction to the lack of solidarity by other Member States seems as unfeasible as in the case concerning EU Institutions, already discussed above.

This is why one can also conclude that Article 80 in itself is not directly applicable in the Member States. Indeed, if according to the *Van Gend en Loos* case-law⁷⁷ only those Treaties provisions that are clear and unconditional should be considered as having direct effect, Article 80 cannot be deemed as such due to its lack of clarity and the need for implementing measures by the Institutions.⁷⁸ As a consequence, while no obligation can be imposed by national courts on the Member States as well as natural and legal persons, it would be difficult to find even those rights of individuals that the direct application of Article 80 should protect.⁷⁹ Moreover, it is not even entirely clear whether or not EU solidarity-based acts – as the relocation decisions – would be deemed by national courts as having direct application against the Member States concerned: according to some Dutch courts, such decisions have no direct

⁷⁷ Case 26/62, *van Gend en Loos*, 5 February 1963, ECLI:EU:C:1963:1.

⁷⁸ See DE BRUYCKER and TSOURDI, “Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension”, in CHETAIL, DE BRUYCKER and MAIANI (eds.), *cit. supra* note 7, p. 473 ff., pp. 499-500.

⁷⁹ See MORGESE, *cit. supra* note 12, pp. 110-112.

effect;⁸⁰ on the contrary, the *Tribunal Supremo* has recently sentenced the Spanish government for its failure to completely relocate its quota of asylum seekers.⁸¹

3.3. – The Full Effectiveness of Solidarity-Based Measures Provided for in the EU Secondary Law

In contrast, what seems unquestionable is the acknowledgement of *the fullest possible effect to those solidarity-based provisions laid down in EU mandatory acts of the Institutions*. Indeed, in the case of the adoption of solidarity-based emergency asylum measures according to Article 78 TFEU – irrespective of whether or not those measures are jointly based on Article 80 or make a mere reference to it – the Member States are therefore bound to give them full effect⁸² and, in the case of a non-completely or incorrect implementation, it could be brought actions pursuant to Articles 258 and following.

This could be, for instance, the case concerning the alleged incorrect implementation of Council Decisions 2015/1523 and 2015/1601.⁸³ With those Decision the EU Council had put in place – on the emergency legal basis of Article 78(3) TFEU –⁸⁴ a temporary derogation to the Dublin III Regulation through an emergency relocation of 40.000 and 120.000 asylum seekers, respectively, from Italy and Greece to other States, due to the massive migratory inflows occurring in the 2015 summer. It must

⁸⁰ See OOMEN and RODRIGUES DE OLIVEIRA, “Relocation and its Numbers - Which Role for the Courts?”, *EU Immigration and Asylum Law and Policy*, 31 May 2017, available at: <<http://eumigrationlawblog.eu/relocation-and-its-numbers-which-role-for-the-courts>>.

⁸¹ See MOYA, “Are National Governments Liable if They Miss Their Relocation Quota of Refugees?”, *Verfassungsblog*, 20 July 2018, available at: <<https://verfassungsblog.de/are-national-governments-liable-if-they-miss-their-relocation-quota-of-refugees>>; PELACANI, “Il Tribunal Supremo condanna il Governo spagnolo per l’inadempimento dei suoi obblighi di ricollocazione, ma è bene non farsi illusioni”, *SIDIBlog*, 9 October 2018, available at: <<http://www.sidiblog.org/2018/10/09/il-tribunal-supremo-condanna-il-governo-spagnolo-per-linadempimento-dei-suoi-obblighi-di-ricollocazione-ma-e-bene-non-farsi-illusioni>>; ROSANO, “La sentenza del Tribunal Supremo di Spagna del 9 luglio 2018 sui meccanismi di ricollocazione di migranti del 2015: note a prima lettura”, *Eurojus*, 31 July 2018, available at: <<http://rivista.eurojus.it/la-sentenza-del-tribunal-supremo-di-spagna-del-9-luglio-2018-sui-meccanismi-di-ricollocazione-di-migranti-del-2015-note-a-prima-lettura>>.

⁸² *Relocation case*, *cit. supra* note 13, para. 291, according to which “the burdens entailed by the provisional measures adopted under [Article 78(3) TFEU] for the benefit of that or those Member States must, as a rule, be divided between all the other Member States”.

⁸³ *Cit. supra*, note 16.

⁸⁴ According to which “[i]n the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned”.

be stressed that Decision 2015/1601 – unlike Decision 2015/1523 – set out a national binding quota of asylum applications to be examined by the Member States (and some EEA States) other than Italy and Greece. While Decision 2015/1523 had been unanimously adopted insofar as the distribution would have been made “reflecting the specific situations of Member States”,⁸⁵ the mandatory relocation scheme provided for in the Decision 2015/1601 was adopted by only a majority of the Member States (with Czech Republic, Romania, Slovakia and Hungary voting against). The subsequent implementation of such measures has been strongly opposed by the Visegrad Group of Member States, that have substantially failed to fulfil their obligations. Moreover, Slovakia and Hungary has brought actions before ECJ for annulment of the Decision 2015/1601. Having the ECJ dismissed in their entirety those actions in September 2017,⁸⁶ the Commission in the following December has decided to refer the Czech Republic, Hungary and Poland to the ECJ for a declaration of failure to fulfil their obligations on relocation.⁸⁷

In October 2019, Advocate General Sharpston has provided her Opinion on the matter, suggesting to the ECJ to declare the infringement proceedings brought by the Commission admissible and, as a consequence, that Poland, Hungary and the Czech Republic have failed to fulfil their obligations under EU law.⁸⁸ In short, Advocate

⁸⁵ European Council Conclusions of 25-26 June 2015, EUCO 22/15, para. 4(b).

⁸⁶ *Relocation case*, *cit. supra* in note 13.

⁸⁷ Cases C-715/17, *Commission v. Poland*; C-718/17, *Commission v. Hungary*; and C-719/17, *Commission v. Czech Republic*. See FULLERTON, “Borders, Bans, and Courts in the European Union”, *Roger Williams University Law Review*, 2018, p. 393 ff., p. 414 ff.

⁸⁸ Cases C-715/17, *European Commission v. Republic of Poland*, C-718/17, *European Commission v. Republic of Hungary*, C-719/17, *European Commission v. Czech Republic* (Opinion), 31 October 2019, ECLI:EU:C:2019:917 (hereinafter: *relocation infringement case*). See COLOMBO, “Le conclusioni dell’Avvocato Generale Sharpston sulle Relocation Decisions: la condanna dei Paesi convenuti per preservare lo Stato di diritto e il principio di solidarietà”, *Eurojus*, 25 November 2019, available at: < <http://rivista.eurojus.it/le-conclusioni-dellavvocato-generale-sharpston-sulle-relocation-decisions-la-condanna-dei-paesi-convenuti-per-preservare-lo-stato-di-diritto-e-il-principio-di-solidarieta>>; FERRI, “L’assassino è il maggiordomo? Primi rilievi sulle conclusioni dell’Avvocato generale nel giudizio di infrazione contro Polonia, Ungheria e Repubblica ceca in materia di ricollocazioni”, *SIDIBlog*, 20 November 2019, available at: < <http://www.sidiblog.org/2019/11/20/lassassino-e-il-maggiordomo-primi-rilievi-sulle-conclusioni-dellavvocato-generale-nel-giudizio-di-infrazione-contro-polonia-ungheria-e-repubblica-ceca-in-materia-di-ricollocazioni>>; KIRST, “The Three Villains and the Lifeblood of the European Union Project – Advocate General Sharpston’s Opinion in C-715/17 (the asylum relocation mechanism)”, *EU Law Analysis*, 27 November 2019, available at: < <http://eulawanalysis.blogspot.com/2019/11/the-three-villains-and-lifeblood-of.html>>; PENASA, “La relocation come ‘minaccia’ alla sicurezza nazionale? Prerogative statali, obblighi di solidarietà e spinte sovraniste nelle Conclusioni dell’Avv. Gen. Sharpston (casi C-715/18, C-718/18 e C-719/18, 31 ottobre 2019)”, *ADiM Blog*, November 2019, available at: < http://www.adimblog.com/wp-content/uploads/2019/11/ADiM-Blog-Novembre-2019-Analisi-Opinioni-Penasa_DEF.pdf>.

General stressed, on the one hand, that any consideration related to the maintenance of law and order and the safeguarding of internal security should have been resolved, by the three States, in a spirit of cooperation and mutual trust between all the other Member States involved, rather than peremptorily disregard their obligations under those Decisions; and, on the other hand, that any practical risk inherent in processing large numbers of applicants should have been addressed by applying for and obtaining temporary suspensions of relocation obligations under those decisions, and certainly not by deciding unilaterally that compliance with the Relocation Decisions was not necessary.

While the matter is still under consideration, it would be very hard for the Court not to come to a solution other than the one discussed here. Indeed, one must consider that the issue at stake in the relocation infringement procedures is not so much a breach of Article 80 in itself but the breach of the general duty of a proper implementation of EU law by the Member States. In other words, the violation of the principle of solidarity here is only one part of a much wider violation of the principle of loyalty provided for in Article 4(3) TEU. This conclusion is in line with the Advocate General's Opinion in the *relocation* case, according to which

“the non-application of the [Decision 2015/1601] also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. To my mind there is no doubt that, in an action for failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations, and to do so in no uncertain terms, as it has done in the past”.⁸⁹

and with the Advocate General's Opinion in the *relocation infringement* case, by which

“under the principle of sincere cooperation, each Member State is entitled to expect other Member States to comply with their obligations with due diligence. That is, however, manifestly not what has happened [in the case of the implementation of the relocation decisions]”.⁹⁰

It should also be recalled that it would be very difficult for the Czech Republic,

⁸⁹ Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union* (Opinion), 26 July 2017, ECLI:EU:C:2017:618, para. 242.

⁹⁰ *Relocation infringement* case (Opinion), para. 245.

Hungary and Poland to justify their non-implementing conduct on the ground of the previous non-completely implementation of other EU asylum provisions by those Member States that were beneficiaries of the relocation measures:⁹¹ actually, it would constitute an unlawful application of the *inadimpleti non est adimplendum* rule that, in a reverse order, has been discussed and rejected above.

In the end, it can be observed that *only the non-appropriate nature of solidarity-based measures* for attaining the objective which they pursue could be a strong argument for a Member State not to fulfil its obligations. This argument would involve the scope of application of the proportionality principle and, in turn, a review of the wide margin of manoeuvre of the Institutions “in areas which entail choices on their part, including of a political nature, and in which they are called upon to undertake complex assessments”.⁹² While the topic has been yet discussed above,⁹³ it can be useful to remind in short that, in the ECJ’s view, only a manifestly inappropriate measure could be deemed as unlawful,⁹⁴ in particular where “another measure that was less restrictive, but equally effective, could [be] adopted within the same period”.⁹⁵

It is important, therefore, to bear in mind that, where not manifestly inappropriate, such a choice by the Institutions “is an essentially political choice, the appropriateness of which cannot be examined by the Court”.⁹⁶ The latter would be the case, for instance, where solidarity-based measures (like the relocation decisions) have an adverse impact on some Member States as a consequence of a re-balance between the different interests involved: indeed, such a re-balance “tak[es] into account not the particular situation of a single Member State, but that of all Member States”,⁹⁷ which is in accordance to the very nature of Article 80.⁹⁸ After all, following the

⁹¹ *Relocation* case, para. 210: indeed, one of the arguments of the Slovakia for the annulment of Decision 2015/1601 was its inappropriateness “for attaining that objective because the relocation mechanism for which it provides is not capable of redressing the structural defects in the Greek and Italian asylum systems. Those shortcomings, which relate to lack of reception capacity and of capacity to process applications for international protection, need to be remedied before the relocation can actually be implemented”.

⁹² *Relocation* case, *cit. supra* note 13, para. 207.

⁹³ *Supra*, subsection 3.1.

⁹⁴ *Relocation* case, *cit. supra* note 13, para. 207.

⁹⁵ *Ibid.*, para. 236.

⁹⁶ *Ibid.*, para 257.

⁹⁷ *Ibid.*, para. 290.

⁹⁸ *Ibid.*, para. 291.

Advocate General in the *relocation infringement* case, on the one hand,

“[i]n what was clearly an emergency situation, it was the responsibility of both the front-line Member States and the potential Member States of relocation to make that mechanism work adequately, so that relocation could take place in sufficient numbers to relieve the intolerable pressure on the frontline Member States. *That is what solidarity is about*”;⁹⁹

and, on the other hand,

“[s]olidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, *Member States and their nationals have obligations as well as benefits, duties as well as rights*. Sharing in the European ‘demos’ is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also *requires one to shoulder collective responsibilities and (yes) burdens to further the common good*”.¹⁰⁰

4. – *Concluding Remarks*

It can be concluded that, at the present time, there is very little room for a judicial solidarity-based interpretation or amendment of the allocation criteria of the Dublin III Regulation. Indeed, as explained above, the Court does seem very unwilling to undertake a breakthrough review of what is still considered “a cornerstone in building the CEAS”,¹⁰¹ limiting itself to – we might say – apply the law, the whole law, and nothing but the law.

Such an approach depends in part from quite an ‘original sin’, i.e. the wording of Article 80 TFEU: linking the legal force of the principle of solidarity and fair sharing of responsibility to the necessity and appropriateness of its implementation by the Institutions resulted in depriving the ECJ of the possibility of giving such a Treaty provision in itself full binding effects and, as a consequence, implementing it

⁹⁹ *Relocation infringement* case (Opinion), para. 234 (emphasis added).

¹⁰⁰ *Ibid.*, para. 253 (emphasis added). It is noteworthy that Advocate General Sharpston has further stressed that “[r]especting the ‘rules of the club’ and playing one’s proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of ‘what precisely does the EU cost me per week and what exactly do I personally get out of it?’ Such self-centredness is a betrayal of the founding fathers’ vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that” (para. 254).

¹⁰¹ The Stockholm Programme, *cit. supra* note 5, para. 6.2.1.

‘against’ the unfair responsibility-sharing system resulting from the strict application of the Dublin system. But such a conclusion also depends in part from the ‘political’ will of the Court not to substitute its own solidarity-based vision of the CEAS, if any, to the one of the Institutions and the Member States. To this effect, refusing to acknowledge that “the Dublin III Regulation was not conceived as an instrument to deal with determining the Member State responsible for international protection in the event of a massive inflow of people”¹⁰² and therefore maintaining the First Entry Rule ‘alive and kicking’ even in times of refugee crisis,¹⁰³ the ECJ has opted for a somewhat purely technical and formalistic approach to the Dublin system that has been suggestively defined as ‘judicial passivism’.¹⁰⁴

How the contrast between the high symbolic value of the solidarity principle and its judicial implementation – as well as the tension between the need to preserve the administrative integrity of the Dublin system and the potentially broad constitutional function of Article 80 – should be resolved, is still an open and debatable question.¹⁰⁵ What does seem unquestionable is that, on the one hand, where solidarity-based measures are enacted by the EU Institutions, they should have to be fully respected even by those Member States unwilling to act in a spirit of solidarity; and, on the other hand, that the very problem lies in the persistent political unwillingness of the Member States to resolve in a mutually acceptable manner the ‘solidarity conundrum’, on which the Court is showing to be reluctant to intervene.

¹⁰² As the Advocate General stated in *A.S. and Jafari*, *cit. supra* note 60, para. 171.

¹⁰³ See POULARAKIS, “Responsibility drifting in the sea – Search and rescue operations and the Dublin Regulation”, *European Database of Asylum Law*, 25 June 2018, available at: <<http://www.asylumlawdatabase.eu/en/journal/responsibility-drifting-sea---search-and-rescue-operations-and-dublin-regulation>>.

¹⁰⁴ See GOLDNER LANG, “Towards ‘Judicial Passivism’ in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference”, *EU Immigration and Asylum Law and Policy*, 24 January 2018, available at: <<http://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference>>.

¹⁰⁵ See also THYM, *cit. supra* note 59, p. 561 ff.

15. THE 'SOVEREIGNTY CLAUSE' OF THE DUBLIN REGULATIONS IN THE CASE-LAW OF THE ECtHR AND THE CJEU: THE MIRAGE OF A JURISPRUDENTIAL CONVERGENCE?

Vassilis Pergantis

SUMMARY: 1. Introduction – 2. The Scope of the ECtHR's Powers of Review Regarding the Dublin System – 3. Setting the Stage for the Dialogue between the ECtHR and the CJEU on the 'Sovereignty Clause': the *M.S.S.* Case – 4. The CJEU's Response and the Ensuing Dialogue: The *N.S./M.E.* Case and Beyond – 4.1. The Dublin System under the Influence of the Systemic Deficiencies Saga: The Factual Contours of the Sovereignty Clause – 4.1.1. The Conundrum between Systemic Deficiencies and Individualized Risk – 4.1.2. Can the Presumption of Safety Be Rebutted in Situations not Involving a Risk of Inhuman or Degrading Treatment? – 4.2. From Discretion to Obligation and Back: The Legal Contours of the 'Sovereignty Clause' – 4.2.1. The Scope of the Obligation to Assess the Risk – 4.2.2. Between the Obligation to Prevent the Return of the Asylum Seeker and the Discretion to Examine His/Her Application: The Ambiguities of the Dublin Regime – 5. Conclusion.

1. – Introduction

The project of a single European market, and that of European integration more generally, have been crucially advanced by the use of the mechanism of mutual recognition.¹ The logic of the mechanism is that products and services should circulate freely within the internal market, since the national regulatory frameworks on which they are

¹ Case C-120/78, *Rewe-Zentral*, Judgment of 20 February 1979, ECLI:EU:C:1979:42.

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 409-433.

based serve a common objective and thus, while different in each Member State, should be mutually recognized by them as equivalent.² Such mutual recognition is inextricably linked to mutual trust, in the sense that the former presupposes but also generates trust among Member States ('MS') that all of them apply correctly within their autonomous national regulatory orders the requisite safeguards and thus, offer a similar level of protection.³ In other words, MS of the European Union ('EU') are required to treat products, services etc. of another Member State as if they were their own because they trust the guarantees and controls of the country of origin.⁴

It is in the Area of Freedom Security and Justice ('AFSJ') that the principle of mutual recognition found its full effectiveness. From early on,⁵ the free circulation of judicial and administrative decisions, as well as of people, was deemed necessary for the embedment of cooperation on civil and criminal matters and was achieved partly due to the principles of mutual recognition and mutual trust,⁶ and partly due to the various legislative initiatives at the EU level aiming at the harmonization of national regulatory standards and procedures in this area.⁷ The Treaty on the Functioning of the European Union ('TFEU') makes multiple references to the principle of mutual recognition,⁸ though provisions on mutual trust are conspicuously absent from the constitutive treaties and have been only inserted in the relevant secondary legislation.⁹

² Commission White Paper, 'Completing the Internal Market' COM(85) 310 final, 14 June 1985, para. 58.

³ LABAYLE, "La confiance mutuelle dans l'Espace de liberté, sécurité et justice", in JOCHUM, FRITZMEYER and KAU (eds.), *Grenzüberschreitendes Recht – Crossing Frontiers. Festschrift für Kay Hailbronner*, Heidelberg, 2013, p. 153 ff., p. 160.

⁴ KORNEZOV, "The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?", *Cambridge Yearbook of European Legal Studies*, 2013, p. 227 ff., p. 230.

⁵ EU Council, 1-16 October 1999, Conclusions of the Presidency (SN 200/1/99 REV 1).

⁶ See the analysis in BLANCHET, "Aie confiance! – La confiance mutuelle peut-elle se décréter?", in CZUCZAI and NAERT (eds.), *The EU as a Global Actor – Bridging Legal Theory and Practice. Liber Amicorum in Honour of Ricardo Gosalbo Bono*, Leiden, 2017, p. 174 ff.

⁷ From that perspective, the application of the principle of mutual recognition in the AFSJ differs from its application in the framework of the single European market.

⁸ See, indicatively, Arts. 67(4), 81(1) and 82(1) TFEU.

⁹ For instance, see Recitals 16 and 17 of Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

The same logic underpins the Common European Asylum Policy ('CEAS'), even if references to mutual recognition and mutual trust are scarce.¹⁰ The Dublin system, CEAS' main pillar, is founded on a list of responsibility allocation criteria, which, when applicable, impose a duty upon the designated Member State to take up the asylum seeker and review his/her application, recognizing that other MS are not responsible thereof.¹¹ Hence, the system has been described as one of negative mutual recognition.¹² The automatic effects of the allocation criteria are justified by reference on the one hand, to the trust placed by other EU MS that asylum procedures in the designated State provide the requisite protection of the asylum seekers' human rights and on the other hand, to asylum standards harmonization processes undertaken during the last two decades on the basis of a series of relevant EU regulations.¹³

The automaticity of the asylum allocation criteria means that national authorities of the sending Member State are not normally supposed to review the impact a Dublin transfer might have on the fundamental rights of an asylum seeker.¹⁴ In other words, other MS are presumed to be safe countries with respect to fundamental rights protection allowing the *refoulement* of the asylum seekers.¹⁵ Nevertheless, an automatic transfer to the responsible Member State without review of the circumstances there, could entail a serious risk for the asylum seeker's fundamental rights in case asylum conditions in that State were generally deficient.

The ensuing tension between automaticity based on mutual trust and a presumed

¹⁰ Mutual trust is only mentioned in Recital 22 of the Dublin III Regulation 604/2013 of the Council of 26 June 2013. Nevertheless, its logic permeates the whole system. For instance, Protocol no. 24 annexed to the TFEU establishes a presumption that EU Member States constitute safe countries of origin for all the purposes of the CEAS. See also LEBOEUF, *Le droit européen de l'asile au défi de la confiance mutuelle*, Bruxelles, 2016.

¹¹ MITSILEGAS, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law*, 2012, p. 319 ff., p. 334.

¹² GUILD, "Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures", *European Law Review*, 2004, p. 198 ff., p. 206.

¹³ DE SCHUTTER and TULKENS, "Confiance mutuelle et droits de l'homme. La Convention européenne des droits de l'homme et la transformation de l'intégration européenne", in *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber Amicorum Michel Melchior*, Bruxelles, 2010, p. 947 ff., pp. 958-959.

¹⁴ MITSILEGAS, "Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition", *Maastricht Journal of European and Comparative Law*, 2017, p. 721 ff., p. 729.

¹⁵ COSTELLO, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, 2012, p. 287 ff., pp. 313-316.

harmonization of asylum standards on the one side, and fundamental rights protection on the other, has been at the center of a testy jurisprudential exchange between the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('CJEU') that influenced heavily the function of the Dublin system. We will attempt to highlight the evolution of the two Courts' case-law and the dialogue developed between them while focusing on some unresolved issues.

2. – *The Scope of the ECtHR's Powers of Review Regarding the Dublin System*

As the Dublin system forms part of the EU integration project, the ECtHR had to initially establish whether the doctrine of equivalent protection enunciated in the *Bosphorus* case was applicable or not. According to this doctrine, State action implementing strict obligations undertaken in the framework of an international organization would be justified as long as the relevant organization offers equivalent – that is, comparable but not identical – substantive and procedural guarantees for the protection of human rights.¹⁶ Thus, in the case of the Dublin system, the Strasbourg Court had to determine whether states implementing the Dublin allocation criteria and returning asylum seekers to the responsible State were constrained to do so because of the Dublin rules – and thus the *Bosphorus* doctrine was applicable – or enjoyed a margin of discretion thereof.

The Dublin system itself, while relying on a *rationale* of automatic returns on the basis of a presumption – stemming from the principle of mutual trust – that all MS constitute safe countries, includes a proviso that allows a Member State other than the one responsible *per* the Dublin allocation criteria to proceed itself to the examination of an asylum claim.¹⁷ This so-called 'sovereignty clause' or 'discretionary clause' is phrased in a permissive rather than an obligatory way.¹⁸ Consequently, one

¹⁶ European Court of Human Rights, *Bosphorus v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, para. 155.

¹⁷ See Art. 3(4) of the Dublin Convention, 15 June 1990, OJ (1997) C254/1, replaced by Art. 3(2) of the Dublin II Regulation (EC) No 343/2003 of the Council of 18 February 2003 (Dublin II Regulation). This proviso survives in the recast Regulation under the name 'discretionary clause'; see Art. 17(1) Dublin III Regulation: "By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation".

¹⁸ STUBBERFIELD, "Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights", *Australian International Law Journal*,

would have expected the ECtHR to dismiss any argument concerning the application of the *Bosphorus* doctrine of equivalent protection, since any return effectuated under the Dublin system was not an implementation of a strict obligation stemming from EU law as a Member State could invoke the "sovereignty clause" in order to prevent a return that would violate the State's obligations under the European Convention of Human Rights ('ECHR').¹⁹

Still, at first, the ECtHR oscillated between finding that on the basis of the 'sovereignty clause' MS enjoyed a wide margin of discretion in implementing the Dublin criteria and, in contrast, assuming that the automaticity of the returns under the Dublin system stemmed from a strict obligation of MS to act in conformity with the responsibility allocation criteria. More specifically, in the *T.I.* case,²⁰ the ECtHR was confronted with the UK's refusal to examine both an asylum claim and the claimant's allegations that a return to Germany would constitute an indirect *refoulement* in violation of the ECHR, as the latter did not adhere to the ECtHR's case-law on indirect *refoulement* when the risk of torture originated from non-State actors.²¹ The UK was arguing that any review of the ECHR's implementation by Germany would run counter to the effectiveness of the Dublin system founded on the presumption of automaticity.²² The ECtHR dismissed these arguments noting that the United Kingdom could not "rely automatically...on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims"²³ but it had to ensure that the asylum procedure in the receiving State afforded sufficient guarantees with regard to the safeguards under Article 3 ECHR.²⁴ Thus, the presumption of compliance was not absolute and irrebuttable and there was no obligation whatsoever upon the UK stemming from the Dublin Convention to proceed to the *refoulement*.

2012, p. 117 ff., p. 120.

¹⁹ MORENO-LAX, "Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*", *European Journal of Migration and Law*, 2012, p. 1 ff., p. 14.

²⁰ European Court of Human Rights, *T.I. v. United Kingdom*, Application No. 43844/98, Decision of 7 March 2000.

²¹ NOLL, "Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law", *Nordic Journal of International Law*, 2001, p. 161 ff., pp. 176-180.

²² See European Court of Human Rights, *T.I.* case, *cit. supra* note 20, p. 12.

²³ *Ibid.*, p. 15.

²⁴ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, para. 342.

In the *K.R.S.* case, however, the Court curiously insinuated that the *Bosphorus* ruling was applicable with regard to the Dublin II Regulation as the return of an asylum seeker to another EU Member State on the basis of the Dublin criteria was, according to the Court, “the implementation of a legal obligation on the State in question which flows from its participation in the asylum regime created by that Regulation”.²⁵ Yet, at the same time, the Court confusingly stated that “the Dublin Regulation itself would allow the UK Government, if they considered it appropriate, to exercise their right to examine asylum applications under Article 3.2 of the Regulation”.²⁶

The Court’s ambivalence *vis-à-vis* Article 3(2) of the Dublin II Regulation reflected the contemporaneous practice of some EU MS, which statutorily or jurisprudentially provided for an irrebuttable presumption of safety regarding several countries, thus depriving the asylum seekers of a remedy for the review of the transfer decision in the sending State.²⁷ The idea of implementing a ‘strict obligation’ was also supported by the CJEU’s finding that the principle of mutual trust, which underpinned the CEAS, imposed on States an obligation to recognize and enforce quasi-automatically the judgments and extrajudicial decisions of other EU MS in their respective legal orders and therefore, required national courts to abstain from reviewing the observance of human rights by the other MS and to apply a presumption that the latter respect Union law and fundamental rights, unless such a ground for refusal was provided for in the relevant document or exceptional circumstances warranted so.²⁸

Nevertheless, none of these developments fully endorsed the ECtHR’s view that the Dublin II Regulation mandated MS to automatically return an asylum seeker at all circumstances. State practice concerned a *State-enacted*, absolute presumption of safety that went beyond the Dublin system and, in any case, did not eliminate MS’ margin of discretion, if they deemed it opportune, to refuse the return and examine

²⁵ European Court of Human Rights, *K.R.S. v. United Kingdom*, Application No. 32733/08, Decision of 2 December 2008, p. 16.

²⁶ *Ibid.*, p. 17. For a sympathetic to the Court’s approach analysis, see GRAGL, “The Shortcomings of Dublin II: Strasbourg’s *M.S.S.* Judgment and its Implications for the European Union’s Legal Order”, *European Yearbook on Human Rights*, 2012, p. 123 ff., pp. 127-128.

²⁷ See DE BRUYCKER et al., *Setting up a Common European Asylum System*, Study for the LIBE Committee PE425.62, 2010, available at: <<http://www.europarl.europa.eu>>, pp. 129-130.

²⁸ Opinion 2/13, *Accession of the European Union to the European Convention of Human Rights*, Opinion of 18 December 2014, paras. 191-194.

the asylum request themselves.²⁹ Moreover, the CJEU's Opinion No. 2/13 included an important caveat allowing States to overrule the precepts of mutual trust on the basis of a relevant provision or in exceptional circumstances, exceptions respectively reflected in the sovereignty and humanitarian clauses of the Dublin Regulations.

As a result, it comes as no surprise that the Strasbourg Court ultimately found in the *M.S.S.* case that the presumption of equivalent protection is inapplicable with respect to Dublin transfers as such transfers "did not strictly fall within Belgium's international legal obligations" due to the Member State's possibility to invoke the 'sovereignty clause' in order to avoid them.³⁰ Consequently, the Court proceeded to a full review of the Belgian acts and concluded that Belgium, in returning the asylum seeker back to Greece despite numerous reports and evidence suggesting that the Greek asylum system faced systemic deficiencies, had violated the obligation of *non-refoulement* stemming from Article 3 ECHR.³¹ The Court reached this conclusion after determining that under the aforementioned circumstances the presumption of safety that Greece enjoyed on the basis of the Dublin system was rebutted³² and Belgian authorities could have frozen the removal of the asylum seeker, since they knew or ought to have known that, because of the situation in Greece, there were substantial grounds "for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country".³³

3. – *Setting the Stage for the Dialogue between the ECtHR and the CJEU on the 'Sovereignty Clause': the M.S.S. Case*

The Court further offered in its seminal judgment on the *M.S.S.* case some clues on how the Dublin system must work when a return to another Member State might entail a risk of a serious violation of fundamental rights of the asylum seeker. First of all, the ECtHR elucidated the issue of the remedies that should be provided by the

²⁹ See MAIANI and NÉRAUDAU, "L'arrêt M.S.S./Grèce et Belgique de la Cour EDH du 21 janvier 2011. De la détermination de l'Etat responsable selon Dublin à la responsabilité des Etats membres en matière de protection des droits fondamentaux", *Revue du droit des étrangers*, 2011, p. 3 ff., p. 8.

³⁰ European Court of Human Rights, *M.S.S.* case, *cit. supra* note 24, paras. 338-340. See also VICINI, "The Dublin Regulation between Strasbourg and Luxembourg: Reshaping *Non-Refoulement* in the Name of Mutual Trust?", *European Journal of Legal Studies*, 2015, p. 50 ff., p. 59.

³¹ *M.S.S.* case, *cit. supra* note 24, paras. 367-368.

³² *Ibid.*, para. 353.

³³ *Ibid.*, para. 365.

sending State against Dublin transfers. In the *K.R.S.* case, the Strasbourg Court had initially summarized its relevant case-law, according to which the applicant should have effective access to a remedy, endowed with automatic suspensive effect, enabling him/her to challenge its transfer and resulting to a meaningful and rigorous assessment of the applicant's claim,³⁴ only to then declare that because of Greece's presumption of compliance with international refugee law and the Dublin standards, the applicant's fundamental rights could be effectively protected after his/her return by the available legal remedies in Greece and the ECtHR.³⁵ The Court's insistence on the availability and effectiveness of legal remedies in the receiving State highlighted its deferential stance towards the principle of mutual trust, as exemplified also in other similar cases.³⁶ The ensuing logic is that fundamental rights can be sufficiently protected through the use of legal remedies in the Member State that is presumed to be compliant with human rights precepts; use of legal remedies in the other MS would presumably undermine the automaticity of mutual recognition and ultimately, the AFSJ cooperation regime, which is premised on mutual trust.³⁷

This approach has been squarely set aside, however, in the *M.S.S.* case, where the Strasbourg Court summarily dismissed the Belgian allegations that the asylum seeker had failed to voice his fears about the return to Greece. The Court acerbically described the procedure before the Belgian Alien Office as virtually preventing the applicant from raising his concerns about his transfer and criticized the Alien Office's form to be filled in, because it did not contain a section for such comments.³⁸ Consequently, the Court imposed an obligation on MS to provide for a relevant remedy, thus granting an opportunity to the asylum seeker to raise his/her claim.³⁹

³⁴ European Court of Human Rights, *T.I.* case, *cit. supra* note 20, p. 15.

³⁵ *Ibid.*, p. 17. See also CLAYTON, "Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*", *Human Rights Law Review*, 2011, p. 758 ff., p. 761.

³⁶ See, European Court of Human Rights, *Stapleton v. Ireland*, Application No. 56588/07, Decision of 4 May 2010, para. 29, concerning a challenge to the execution by Ireland of a EAW issued by the United Kingdom. In this case, the ECtHR determined that it would be more appropriate for the courts of the State of origin to review the applicant's claims. In the same vein, see European Court of Human Rights, *Avotiņš v. Latvia*, Application No. 17502/07, Judgment of 23 May 2016, para. 121. See also CORTÉS-MARTÍN, "The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust", *Review of European Administrative Law*, 2018, p. 5 ff., pp. 20-21 and 23-24.

³⁷ LABAYLE, "Droit d'asile et confiance mutuelle: regard critique sur la jurisprudence européenne", *Cahiers de droit européen*, 2014, p. 501 ff., p. 509.

³⁸ European Court of Human Rights, *M.S.S.* case, *cit. supra* note 24, para. 351.

³⁹ BROUWER, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU

Secondly, and more crucially, the Court determined that the asylum seeker, when objecting to his/her refoulement on grounds of risk of torture, should not bear exclusively the burden of proof concerning the establishment of the requisite threshold for the prevention of the return. For the ECtHR, the public knowledge of the specific circumstances of systemic deficiencies in the Greek asylum system meant that the Belgian authorities had “to first verify how the Greek authorities applied their legislation on asylum in practice”, even if the asylum seeker had failed to sufficiently establish an individualized risk.⁴⁰ In this way, the Court laid down the principle that when general deficiencies are confirmed, a presumption of individualized risk is established, thus shifting the burden of proof to the national authorities of the sending State.⁴¹

These crucial clarifications notwithstanding, the ECtHR's judgment left many issues unresolved. For instance, it is not altogether clear from the Court's reasoning whether systemic deficiencies create for the authorities of the sending State an obligation to verify *ex officio* the conditions for determining the existence of a risk that would prevent the refoulement or whether there must be a certain objection raised by the asylum seeker before proceeding to the verification. Moreover, the Court has not sufficiently explained the repercussions of a finding that the presumption of safety was rebutted: is the obligation to withhold the return of the asylum seeker supplemented by a faculty of the sending State to examine itself the asylum request, as Article 3(2) of the Dublin II Regulation stipulated, or is such a faculty transformed into an obligation? And where do these obligations (of non-return and of own assessment) stem from? More importantly, one may wonder what is the requisite threshold for imposing a duty of non-return upon the sending State: individualized risk, systemic deficiencies, or maybe both? And finally, is the above construction only relevant for Article 3 ECHR violations? The CJEU was confronted with these and other questions immediately after the *M.S.S.* case and its answers set the stage for a testy dialogue between the Strasbourg and Luxembourg courts.

and the Burden of Proof”, *Utrecht Law Review*, 2013, p. 135 ff., p. 142.

⁴⁰ European Court of Human Rights, *M.S.S.* case, *cit. supra* note 24, paras. 352 and 358-359.

⁴¹ IPPOLITO and VELLUTI, “The Relationship between the CJEU and the ECtHR: The Case of Asylum”, in DZEHTSIAROU et al. (eds.), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR*, London, 2014, p. 156 ff., p. 171.

4. – *The CJEU’s Response and the Ensuing Dialogue: The N.S./M.E. Case and Beyond*

4.1. – The Dublin System under the Influence of the Systemic Deficiencies Saga: The Factual Contours of the Sovereignty Clause

4.1.1. *The Conundrum between Systemic Deficiencies and Individualized Risk*

The CJEU reacted to the *M.S.S.* judgment when it gave a preliminary ruling on the *N.S./M.E.* case. In that case the Luxemburg Court was asked by British and Irish courts to clarify whether EU fundamental rights precluded the operation of an irrebuttable presumption of compliance of the responsible State with Union law, and if that was answered in the affirmative, whether the sending States were obliged to assess the compliance of the receiving Member State with Union law *and* to examine the asylum request themselves in case of violations in the responsible State.⁴² In its reply, the Court confirmed the ECtHR’s finding that MS are obliged to respect fundamental rights when proceeding to Dublin transfers and thus, no irrebuttable presumption of safety could be recognized. It then declared that MS may not transfer an asylum seeker to the responsible Member State when they “cannot be unaware that systemic deficiencies...[in the responsible State] amount to substantial grounds for believing that the asylum seeker would face risk of being subjected to inhuman or degrading treatment” *per* Article 4 of the Charter of Fundamental Rights (‘CFR’).

Yet, the CJEU’s formulation raised the question whether the presumption of safety could only be rebutted in case of systemic deficiencies and thus, whether only in such cases a Member State was obliged to assess the situation in the responsible State and/or refrain from returning the asylum seeker. Some authors suggested so⁴³ relying on the CJEU’s insistence that not any, minor, or the slightest infringement of Union law by the responsible State could impede the transfer of the asylum seeker to it, as such a construction would undermine the Dublin system and empty the principle of mutual trust, upon which the system is founded, of its substance⁴⁴; according

⁴² C-411/10 and C-493/10, *N.S./M.E. and others*, ECLI:EU:C:2011:865, paras. 50 and 53.

⁴³ See, indicatively, LABAYLE, *cit. supra* note 37, pp. 517 and 519; MORGADES-GIL, “The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses after the Interpretations of the ECtHR and the CJEU?”, *International Journal of Refugee Law*, 2015, p. 433 ff., p. 442.

⁴⁴ *N.S./M.E.* cases, *cit. supra* note 42, paras. 82-85.

to the Court, only systemic deficiencies resulting to torture, inhuman or degrading treatment would rebut the absolute presumption of safety and thus, render such a transfer incompatible with Article 4 CFR.⁴⁵

This idea of the CJEU choosing the criterion of systemic deficiencies as the threshold for rebuttal of the safety presumption was further corroborated by the subsequent preliminary ruling on the *Abdullahi* case, where the Luxembourg Court argued that the only way for an asylum applicant to challenge the applicability of the Dublin criteria is by pleading the existence of “systemic deficiencies in the asylum procedure *and* in the conditions for the reception of applicants for asylum” in the designated State.⁴⁶ Consequently, the Court indirectly recognized that in case of individual risk, the State can remove the asylum seeker since the latter could not plead systemic deficiencies.⁴⁷ According to the Court, this restrictive approach was justified in view of the *rationale* of the Dublin II Regulation, which aimed at organizing relations between the MS through the allocation of mutual duties rather than vesting individuals with procedural rights.⁴⁸ Moreover, the Court argued that this approach was in harmony with the principle of mutual trust.⁴⁹

At the same period, the ECtHR in section formation, had also repeatedly suggested that only evidence of systemic failure could rebut the safety presumption, thus giving rise to a transfer that would violate Article 3 ECHR.⁵⁰ This concordant jurisprudence led various authors to argue that within the Dublin system the “substantial grounds for assuming individualized risk” test for the activation of the obligation of non-refoulement under Article 3 ECHR was replaced by the much stricter “systemic flaws/deficiencies” test.⁵¹

⁴⁵ *Ibid.*, paras. 86, 94 and 106.

⁴⁶ C-394/12, *Abdullahi*, Judgment of 10 December 2013, ECLI:EU:C:2013:813, paras. 60-62 (emphasis added). See also C-4/11, *Puid*, Judgment of 14 November 2013, ECLI:EU:C:2013:740, para. 30.

⁴⁷ BANK, “The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law”, *International Journal of Refugee Law*, 2015, p. 213 ff., p. 234.

⁴⁸ See C-620/10, *Kastrati*, Judgment of 3 May 2012, Opinion of Advocate General Trstenjak, para. 29; *Puid* case, *cit. supra* note 46, Opinion of Advocate General Jääskinen, para. 58.

⁴⁹ *Abdullahi* case, *cit. supra* note 46, paras. 52-53; *Puid* case, *ibid.*, para. 62.

⁵⁰ See, indicatively, European Court of Human Rights, *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, Application No. 27725/10, Decision of 2 April 2013, para. 78; *Id.*, *Mohammadi v. Austria*, Application No. 71932/12, Decision of 3 July 2014, para. 74. See also COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2016, pp. 271-272.

⁵¹ See TINIERE, “Confiance mutuelle et droits fondamentaux dans l’Union européenne”, in *Mélanges en l’honneur du Professeur Henri Oberdorff*, Paris, 2015, p. 71 ff., p. 78; BRIBOSIA and WEYEMBERGH,

This restrictive approach was justifiably criticized, since it was considered that it was leading to a *de facto* irrebuttable presumption, where a transfer would be incompatible with the ECHR only in extreme circumstances.⁵² For that reason, various authors offered other interpretations on the “systemic deficiencies” criterion in an effort to harmonize its application with the case-law of the ECtHR from the *Soering* case onwards, which insisted on “individual” risk as the relevant criterion for non-refoulement.⁵³ On the one hand, some authors tried to allay any fears of collision between the ECtHR and the CJEU, noting that the divergence between the two Courts was more apparent than real, in that it could be explained by the specificities of each case.⁵⁴ Ultimately, so the argument goes, the two criteria of “systemic deficiencies” and “individualized risk” refer to different facets of the same idea each being sufficient on its own in order to stop a transfer.⁵⁵ This line of reasoning seems, however, unpersuasive, all the more that the CJEU did not recognize a right to a remedy for pleading “individual risk” under Article 19 Dublin II Regulation, as we saw above.

In contrast to this approach, some other authors tried to empty the “systemic deficiencies” criterion of much of its substance arguing that it should simply be treated as one of the elements – alongside individualized risk – taken into account for risk assessment.⁵⁶ Others took a step further by claiming that when systemic deficiencies are substantiated, there is no need for the applicant to also prove the existence of individualized risk, thus significantly lowering the threshold of proof.⁵⁷ In other words, the systemic deficiencies criterion was treated either as shifting the burden of

“Confiance mutuelle et droits fondamentaux: ‘back to the future’”, *Cahiers de droit européen*, 2016, p. 469 ff., p. 487.

⁵² VEDSTED-HANSEN, “Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?”, in CHETAIL, DE BROUYCKER and MAIANI (eds.), *Reforming the Common European Asylum System*, Leiden, 2016, p. 317 ff., pp. 334 and 346. This was the CJEU’s logic in *Opinion 2/13*, *cit. supra* note 28, para. 191.

⁵³ European Court of Human Rights, *Soering v. United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, para. 88.

⁵⁴ LENAERTS, “La vie après l’avis: Exploring the Principle of Mutual (Yet not Blind) Trust”, *Common Market Law Review*, 2017, p. 805 ff., p. 832; CORTÉS-MARTÍN, *cit. supra* note 36, p. 16.

⁵⁵ LÜBBE, “‘Systemic Flaws’ and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR”, *IJRL*, 2015, p. 135 ff., p. 137; DÜSTERHAUS, “In the Court(s) We Trust – A Procedural Solution to the Mutual Trust Dilemma”, *Freedom, Security & Justice: European Legal Studies*, 2017, p. 26 ff., p. 40.

⁵⁶ VEDSTED-HANSEN, *cit. supra* note 52, p. 344.

⁵⁷ COSTELLO, “Dublin-case NS/ME: Finally, an End to Blind Trust across the EU?”, *Asiel en Migrantenrecht*, 2012, p. 83 ff., p. 89; BATTJES and BROUWER, “The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?”, *Review of European Administrative Law*, 2015, p. 183 ff., p. 214.

proof to the sending State, which had then to prove that despite systemic flaws there was no individualized risk and thus a transfer could proceed, or, even more radically, as creating an irrebutable presumption that any transfer to that State would automatically violate the fundamental rights of the asylum seeker.⁵⁸

The conflict between the ECtHR and the CJEU, however, took a new turn when the former explicitly confirmed in the *Tarakhel* case its *Soering* jurisprudence declaring that “[t]he source of the risk... does not exempt the State ordering the person’s removal... from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established”.⁵⁹ Thus, the State was always obliged to conduct an individualized assessment and refuse the re-foulement if the *Soering* threshold was attained, even in cases where no systemic flaws could be substantiated.⁶⁰ This criterion seems to be both more generous and stricter for the asylum seeker than that of systemic deficiencies. It is more generous in the sense that it requires neither the existence of systemic deficiencies *and* individualized risk, as some have suggested,⁶¹ nor the presentation by the asylum seeker of a fully proven claim of systemic deficiencies for the sending State to be obliged to withhold the removal, as was argued in *Abdullahi*. Instead, what needs to be shown is the existence of substantial grounds for believing that the person might face a real risk of torture, inhumane or degrading treatment.⁶² Nevertheless, it is *arguendo* stricter than the systemic deficiencies in the *M.S.S.* judgment, where general information about such deficiencies was deemed enough for the sending State to be

⁵⁸ COSTELLO and MOUZOURAKIS, “Reflections on Reading *Tarakhel*: Is ‘How Bad Is Bad Enough’ Good Enough?”, *Asiel en Migrantenrecht*, 2014, p. 404 ff., p. 404.

⁵⁹ European Court of Human Rights, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment of 4 November 2014, para. 104.

⁶⁰ *Ibid.*, para. 115; MONTALDO, “On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice”, *European Papers*, 2016, p. 965 ff., p. 986.

⁶¹ PRECHAL, «Mutual Trust before the Court of Justice of the European Union», *European Papers*, 2017, p. 1 ff., p. 15.

⁶² European Court of Human Rights, *Tarakhel* case, *cit. supra* note 59, para. 93. See the observations of COSTELLO and MOUZOURAKIS, *cit. supra* note 58, p. 410; LAGEOT, “Les enseignements de l’affaire *Tarakhel*: le raisonnement enrichi des juges à la source d’une protection renforcée des migrants en Europe”, *Revue trimestrielle des droits de l’homme*, 2016, p. 245 ff., p. 250. *Contra* seems to be THYM, “Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: *Jafari, A.S., Mengsteab and Shiri*”, *Common Market Law Review*, 2018, p. 549 ff., p. 564.

obliged to review the return and probably even refrain from removing the asylum applicant.⁶³

At the same period, however, the EU legislator, following the *N.S./M.E.* case, consecrated the “systemic deficiencies” criterion, as the only one explicitly activating the State’s duty to prevent the return of the asylum seeker.⁶⁴ Thus, the question was raised whether other categories of risk (i.e. individualized) could act as a bar on removals.⁶⁵ In other words, was the ECtHR’s *Tarakhel* judgment an exception justified by the vulnerability of the applicants or could it be generalized, thus rendering Article 3(2) Dublin III Regulation an unnecessarily restrictive codification of the non-refoulement rule?⁶⁶ Consequently, in spite of the EU’s willingness to incorporate in the Dublin Regulation the *N.S./M.E.* pronouncement that supposedly reflected the *M.S.S.* judgment of the ECtHR, the tension between the two Courts appeared intact.

Ultimately, it was the CJEU that “blinked” first, confirming, albeit not wholeheartedly, the *Tarakhel* test of individualized risk in the *C.K.* case.⁶⁷ The case concerned the transfer from Slovenia to Croatia of a family of asylum seekers, who argued that the transfer itself could constitute inhuman and degrading treatment as it could contribute to a significant and permanent deterioration in the wife’s already impaired mental health. Since there were no systemic deficiencies in Croatian asylum procedures and reception conditions – all the more that the applicants would have been relocated to a center intended for vulnerable groups – the Advocate General (AG) Tanchev argued that the removal could not be prevented.⁶⁸ The CJEU, on its part, diverged from the AG’s opinion and ruled that the transfer should be suspended irrespective of systemic flaws in case of individual risk within the meaning of Article 4 CFR.⁶⁹ The Luxembourg Court reached this decision despite the clear language of Article 3(2) Dublin III Regulation and the Court’s previous pronounce-

⁶³ MARIN, ““Only You”: The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and its Underpinning in the European Composite Constitutional Order”, *European Papers*, 2017, p. 141 ff., p. 145.

⁶⁴ Art. 3(2) Dublin III Regulation.

⁶⁵ HRUSCHKA and MAIANI, “Dublin III Regulation”, in HAILBRONNER and THYM (eds.), *EU Immigration and Asylum Law: A Commentary*, 2nd ed., München, 2016, p. 1478 ff., p. 1499.

⁶⁶ COSTELLO and MOUZOURAKIS, *cit. supra* note 58, p. 411.

⁶⁷ C-578/16 PPU, *C.K. et al.*, Judgment of 16 February 2017.

⁶⁸ *Ibid.*, para. 52.

⁶⁹ *Ibid.*, paras. 71 and 90-91.

ments in the *Abdullahi* case. In a balancing act, the CJEU observed that such a conclusion was admissible, on the one hand, because of the absolute character of Article 4 CFR and the clear precedent thereon, and on the other hand, because this case dealt with a claim under the Dublin III Regulation that the transfer itself entailed a risk of inhuman and degrading treatment.⁷⁰

The Court's line of argumentation warrants a series of observations. *Primo*, it is not altogether obvious what is the impact of the fact that in the *C.K.* case the risk of inhuman and degrading treatment concerned the transfer itself. Does this mean, for instance, that in case of non-systemic flaws in the reception conditions or the asylum procedures where, however, an individualized risk within Article 4 CFR can be substantiated, the sending State is not obliged to suspend the transfer?⁷¹ This can be plausibly sustained, as the CJEU declared that the exceptional circumstances of the case at hand were crucial for enlarging the scope of the non-*refoulement* obligation under the Dublin system.⁷²

The recent CJEU judgment in the *Jawo* case remains ambivalent. On the one hand, the Luxemburg Court expanded the assessment obligation incumbent upon the courts of the sending State beyond the asylum procedures and the reception conditions in the responsible State so as to also include the expected living standards of the applicant in the latter State after being granted individual protection. Thus, it considered that a situation of extreme material poverty leading to absolute destitution could amount to inhuman or degrading treatment.⁷³ On the other hand, the Court stressed that such a situation could be produced only when there were "deficiencies, which may be systemic or generalized, or which may affect certain groups of people" attaining "a particularly high level of severity".⁷⁴ Consequently, the obligation of non-*refoulement* could be triggered only in exceptional circumstances pertaining to systemic flaws or to the unique vulnerability of that particular applicant.

⁷⁰ *Ibid.*, para. 94.

⁷¹ See IMAMOVIĆ and MUIR, "The Dublin III System: More Derogation to the Duty to Transfer Individual Asylum Seekers?", *European Papers*, 2017, p. 719 ff., pp. 726-727; BRIBOSIA and RIZCALLAH, "Arrêt 'C.K.': transfert 'Dublin' interdit en cas de risque de traitements inhumains et dégradants tenant à la situation particulière d'un demandeur", *Journal de droit européen*, 2017, p. 181 ff., p. 183.

⁷² *C.K.* case, *cit. supra* note 67, para. 92.

⁷³ C-163/17, *Jawo*, Judgment of 19 March 2019, paras. 91-93, citing the *M.S.S.* judgment, *cit. supra* note 24, para. 254.

⁷⁴ *Ibid.*, paras. 91-92, citing C-404/15 and 659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016, para. 89.

Secundo, the Court's observation that its change of heart with regard to Dublin transfers is partly due to the more explicit and expanded fundamental rights safeguards included in the Dublin III Regulation⁷⁵, raised an important issue. More specifically, some authors wondered whether the Court's aforementioned admission signified that if MS decide to backtrack from this pro-human rights choice in the next amendment to the Dublin system, the CJEU could again limit the obligation of non-refoulement only to "systemic flaws", a choice widely perceived to be at variance with the ECtHR's case-law.⁷⁶ Such a scenario seems nowadays increasingly doubtful taking into account the subsequent case-law of the CJEU. More particularly, while the Court initially paid particular attention to the drafting differences between Dublin II and Dublin III regarding fundamental rights protection,⁷⁷ such references are absent in later cases. In the *Jafari* case, for example, the Court applied Article 3(2) Dublin III Regulation without explicitly referring to the systemic flaws criterion or to the differences with the Dublin II Regulation.⁷⁸ Further clarifications were adduced by the CJEU in the recent *M.A.* case, where it was explicitly mentioned that fundamental rights in the framework of Dublin transfers are protected not only by Article 3(2) concerning systemic flaws, but also by the MS' obligations under Article 4 CFR and the case-law of the ECtHR on Article 3 ECHR.⁷⁹

Consequently, the obligation to not proceed with a Dublin transfer under circumstances entailing a risk of inhuman and degrading treatment beyond the "systemic flaws" criterion cannot stem solely from the human rights-friendly language of the Dublin III Regulation; it is firmly grounded on the MS' international human rights obligations, which cannot be derogated *via* secondary Union law.

⁷⁵ *C.K.* case, *cit. supra* note 67, paras. 62 and 94.

⁷⁶ See IMAMOVIC and MUIR, *cit. supra* note 71, p. 725; THYM, *cit. supra* note 62, p. 565. This scenario of backtracking from the advanced human rights protection offered in the Dublin III Regulation is envisaged in Art. 28(4) of the Dublin IV Regulation proposal by the European Commission; COM(2016)270 final.

⁷⁷ C-63/15, *Ghezelbash*, Judgment of 7 June 2016, para. 34.

⁷⁸ C-646/16, *Jafari*, Judgment of 26 July 2017, para. 101.

⁷⁹ C-661/17, *M.A. et al.*, Judgment of 23 January 2019, para. 84; *Jawo* case, *cit. supra* note 73, paras. 87-89. See also the reference to Recitals 32 and 39 of the Dublin III Regulation, as highlighted in *C.K.* case, *cit. supra* note 67, para. 63

4.1.2. *Can the Presumption of Safety Be Rebutted in Situations not Involving a Risk of Inhuman or Degrading Treatment?*

A further issue concerns the possibility of activating the obligation of non-refoulement for other human rights violations beyond those related to Article 3 ECHR/4 CFR.⁸⁰ The ECtHR offers a series of such examples⁸¹ – though none of them has been expounded by the Court in the framework of Dublin transfers. For instance, the Strasbourg Court has found that flagrant breaches of human rights under, among other, Articles 4,⁸² 5,⁸³ 6,⁸⁴ 8⁸⁵ and 9⁸⁶ ECHR might potential give rise to an obligation of non-refoulement. In the *Othman* case, while examining an allegation of a flagrant denial of justice under Article 6 ECHR, the Court explained that to be flagrant a breach should be “so fundamental as to amount to a nullification, or destruction of the very essence, of the rights guaranteed”.⁸⁷ This legal construction illustrated a distinction between violations of absolute and non-derogable rights, which require substantial grounds for believing that there will be a real risk of violation, and other human rights, where the threshold is “flagrant breach”.⁸⁸

In contrast, and despite the reference to a right to asylum in Article 18 CFR and the AG’s opinion in the *N.S./M.E.* case that any serious risk of violation of a fundamental right could give rise to an obligation of non-refoulement⁸⁹, the CJEU rejected in that case the view that minor or the slightest infringements of other human rights

⁸⁰ HAILBRONNER and THYM, “Legal Framework of EU Asylum Policy”, in HAILBRONNER and THYM (eds.), *cit. supra* note 65, p. 1023 ff., pp. 1051-1052; PEERS et al. (eds.), *EU Immigration and Asylum Law*, Vol. 3: EU Asylum Law, 2nd ed., Leiden, 2015, pp. 105-106.

⁸¹ See COSTELLO, “The Search for the Outer Edges of *Non-refoulement* in Europe: Exceptionality and Flagrant Breaches”, in BURSON and CANTOR (eds.), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory*, Leiden, 2016, p. 180 ff., pp. 197-203; KTISTAKIS, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter*, 2nd ed., Strasbourg, 2016, pp. 100-105.

⁸² European Court of Human Rights, *Ould Barar v. Sweden*, Application No. 42367/98, Decision of 19 January 1999.

⁸³ *Id.*, *Tomic v. UK*, Application No. 17387/03, Decision of 14 October 2003, p. 12.

⁸⁴ See, indicatively, European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, paras. 88 and 91.

⁸⁵ *Id.*, *F v. United Kingdom*, Application No. 17341/03, Decision of 22 June 2004, p. 12.

⁸⁶ *Id.*, *Z and T v. United Kingdom*, Application No. 27034/05, Decision of 28 February 2006, p. 8.

⁸⁷ *Id.*, *Othman v. United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, para. 260.

⁸⁸ *Id.*, *Soering* case, *cit. supra* note 53, para. 88.

⁸⁹ *N.S./M.E.* case, *cit. supra* note 42, Opinion of the Advocate General Trstenjak, para. 127; C-245/11, *K*, Judgment of 6 November 2012, Opinion of the Advocate General Trstenjak, para. 65.

or of the secondary legislation on the CEAS could give rise to such an obligation⁹⁰, while remaining non-committal about cases of more serious human rights violations going beyond Article 4 CFR.⁹¹ The CJEU's evading strategy, validated in the *Ibrahim* case, where despite the invocation of Article 18 CFR, the Court considered that systematic violations of the Qualifications Directive by the responsible State did not give rise to an obligation of the returning State to non-*refoulement*,⁹² and the ECtHR's vague, and admittedly unduly stringent,⁹³ threshold led various authors to suggest their own criteria for the freezing of Dublin transfers, such as 'serious risk of violation'⁹⁴ of absolute fundamental rights',⁹⁵ 'manifest and disproportionate breaches'⁹⁶ or 'systematic violations of core fundamental rights'.⁹⁷

This cacophony and the lack of consistent judicial practice might be changing lately on the basis of a string of judgments by the CJEU, which recognize a right to challenge a Dublin transfer decision on various procedural reasons, such as the non-respect of time limits or the incorrect application of the Dublin criteria. While the CJEU has not explicitly declared that such claims might activate the obligation of non-*refoulement*, the outcome of this jurisprudential development might be the blocking of Dublin transfers because of procedural defaults.⁹⁸

4.2. – From Discretion to Obligation and Back: The Legal Contours of the 'Sovereignty Clause'

Dublin transfers are further complicated by the existence of procedural layers, where each one of them gives rise to a discussion whether the sending State is bound to perform a specific duty or, instead, enjoys a margin of discretion thereto. More

⁹⁰ *N.S./M.E.* case, *ibid.*, paras. 81-84.

⁹¹ See the observations by COSTELLO, *cit. supra* note 57, p. 87; LABAYLE, *cit. supra* note 37, p. 515.

⁹² C-297, 318, 319 and 438/17, *Ibrahim*, Judgment of 19 March 2019, paras. 99-100. See also *Jawo* case, *cit. supra* note 73, para. 80, where the CJEU highlights the equivalent protection offered by MS' national legal systems concerning "particularly Articles 1 and 4 [CFR]" (emphasis added).

⁹³ C-396/11, *Radu*, Judgment of 29 January 2013, Opinion of the AG Sharpston, paras. 82-83.

⁹⁴ MORGADES-GIL, *cit. supra* note 43, p. 442.

⁹⁵ CORTÉS-MARTÍN, *cit. supra* note 36, p. 17.

⁹⁶ MONTALDO, *cit. supra* note 60, p. 990, citing C-619/10, *Trade Agency*, Judgment of 6 September 2012, para. 51.

⁹⁷ CANOR, "My Brother's Keeper? Horizontal *Solange*: "An ever Closer Distrust Among the Peoples of Europe"", *Common Market Law Review*, 2013, p. 383 ff., p. 386. See also *mutatis mutandis* LENAERTS, *cit. supra* note 54, p. 835, who speaks about "manifest and *prima facie* unjustified limitations on the exercise of other fundamental rights".

⁹⁸ See the critique by THYM, *cit. supra* note 62, pp. 564-566.

specifically, controversies over the extent of State obligations under Dublin transfers touch upon three different aspects of the procedure: firstly, whether the sending State's national authorities are obliged to examine the relevant circumstances in order to assess the extent of risk of inhuman and degrading treatment (*obligation to assess*) and correlatively, whether these authorities should proceed to the assessment *ex officio*; secondly, whether a sending State is obliged to not return an asylum seeker to the responsible Member State and under what circumstances (*obligation of non-refoulement*); and thirdly, when is a Member State other than the responsible State obliged to examine itself an asylum application and when is it simply free to do so (*obligation to examine the application*).

4.2.1. *The Scope of the Obligation to Assess the Risk*

In asylum cases, as in any other case, it is in principle “for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he/she would be exposed to a real risk of being subjected to treatment contrary to Article 3” on the basis of the transfer.⁹⁹ Only afterwards a duty arises for the competent national authorities to review any evidence and challenge this belief in order to be able to proceed to the removal.¹⁰⁰ For that precept to be fully realized, the applicant must be firstly given the opportunity to present such evidence before the Member State reaches or executes the transfer decision, that is, he/she must be granted a remedy that will allow for the presentation of his/her views and the contestation of a removal decision.¹⁰¹

Two developments in the case-law of both the ECtHR and the CJEU have challenged this perception. On the one hand, there has been a tendency to circumscribe the asylum seeker's right to a remedy in the framework of the Dublin system. Such a strategy was feasible under the Dublin II Regulation, which in its Article 19(2)

⁹⁹ See European Court of Human Rights, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 129.

¹⁰⁰ DEN HEIJER, “Joined Cases C-411 & 493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011, nyr”, *Common Market Law Review*, 2012, p. 1735 ff., p. 1747.

¹⁰¹ BILLING, “The Parallel between Non-removal of Asylum Seeker and Non-execution of a European Arrest Warrant on Human Rights Grounds: The CJEU Case of *N.S. v. Secretary of State for the Home Department*”, *European Criminal Law Review*, 2012, p. 77 ff., p. 90.

provided that the decision not to examine the application and the obligation to transfer the applicant “*may* be subject to an appeal or a review”, giving the impression that States had a discretion on whether to grant a remedy or not to the asylum applicant.¹⁰² This restrictive approach reflected the principle of mutual trust, as already explained: any challenge to the presumption of compliance of MS with human rights was treated as undermining and disrupting the Dublin system.¹⁰³ That logic, which permeated the *K.R.S.* case,¹⁰⁴ also inspired the CJEU in the *Abdullahi* case, as we highlighted, where the Luxemburg court considered that only a remedy against a transfer pleading systemic deficiencies was admissible; any other challenge to the application of the Dublin criteria or allegations on violations of his/her fundamental rights could not be raised with the transferring authorities.¹⁰⁵

On the other hand, and in stark contrast to the above approach that placed a heavy burden of proof on the applicant, the *M.S.S.* and the *N.S./M.E.* cases recognized a different, more constructive, role for the criterion of “systemic deficiencies”. In the *M.S.S.* case, as we have argued, the attainment of the “systemic deficiencies” threshold allowed to shift the burden of proof to the national authorities of the sending State.¹⁰⁶ Some even suggested, on the basis of the *N.S./M.E.* judgment, that publicly known “systemic deficiencies” obliged the sending State to assess the possible risk resulting from the transfer *proprio motu*, that is, even when the asylum seeker had not raised a specific objection to that effect.¹⁰⁷ Such a solution of relieving the applicant of any burden of proof seems fair taking into account the inherent vulnerability

¹⁰² Emphasis added. See also DEN HEIJER, “Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*”, *Common Market Law Review*, 2017, p. 859 ff., p. 860.

¹⁰³ MORGADES-GIL, *cit. supra* note 43, p. 444.

¹⁰⁴ *K.R.S.* case, *cit. supra* note 25, pp. 16-18.

¹⁰⁵ *Abdullahi* case, *cit. supra* note 46, paras. 52-53, 60 and 62; *Puid* case, *cit. supra* note 46, Opinion of the AG Jääskinen, para. 62, who advocated against systematic examination. See also IPPOLITO, “Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?”, *European Journal of Migration and Law*, 2015, p. 1 ff., p. 26.

¹⁰⁶ European Court of Human Rights, *M.S.S.* case, *cit. supra* note 24, paras. 352 and 358-9; *N.S./M.E.* cases, *cit. supra* note 42, para. 91. For the use of the ‘systemic deficiencies’ criterion for determining the burden of proof, see MORGADES-GIL, *cit. supra* note 43, p. 446; IPPOLITO and VELLUTI, *cit. supra* note 41, p. 171.

¹⁰⁷ *N.S./M.E.* cases, *cit. supra* note 42, paras. 94 and 106. See BROUWER, “Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts”, *European Papers*, 2016, p. 893 ff., p. 908; BILLING, *cit. supra* note 101, p. 90.

of the asylum seeker and the complete control of MS over a Dublin transfer procedure.¹⁰⁸ Thus, there is no doubt that under both prongs of this second approach when there are systemic deficiencies the national authorities are obliged to assess the risk before proceeding to a transfer.¹⁰⁹

It is still, however, disputed whether the asylum seeker is enabled to also challenge his/her transfer for other reasons, namely whether national authorities are obliged to assess the risk from a Dublin transfer in cases beyond the ones encompassing 'systemic deficiencies'. This more egalitarian iteration of the Dublin system became increasingly plausible recently in view of the more prominent role recognized to asylum applicants under the Dublin III Regulation, where the right to a remedy and legal safeguards are guaranteed "in fact and in law [and in accordance with Article 47 CFR] against a transfer decision" covering "both the examination of the application of [the] Regulation and of the legal and factual situation in the Member State to which the applicant is transferred".¹¹⁰ This broader consecration of a right to an effective remedy has been confirmed by the case-law of both the ECtHR¹¹¹ and the CJEU.¹¹² The latter Court has stressed, however, that the asylum seeker must raise a relevant claim for the Dublin transfer to be challenged, thus rejecting the idea of an *ex officio* assessment¹¹³, and it additionally determined recently in a preliminary ruling concerning the effects of *Brexit* that the remedy of Article 27 Dublin III Regulation does not cover a refusal of a Member State to examine an asylum application under the discretionary clause of Article 17(1) Dublin III Regulation.¹¹⁴

¹⁰⁸ BROUWER, *cit. supra* note 39, p. 144.

¹⁰⁹ NEVEU, "Reconnaissance mutuelle et droits fondamentaux: quelles limites à la coopération judiciaire pénale?", *Revue trimestrielle des droits de l'homme*, 2016, p. 119 ff., p. 129; VEDSTED-HANSEN, *cit. supra* note 52, pp. 342-343.

¹¹⁰ Art. 27(1) and Recital 19, respectively, of the Dublin III Regulation; *Ghezelbash* case, *cit. supra* note 77, paras. 34-44. See also the observations in DEN HEIJER, *cit. supra* note 102, pp. 859-861.

¹¹¹ European Court of Human Rights, *Tarakhel* case, *cit. supra* note 59, paras. 103-104, and the comments by MITSILEGAS, "Mutual Recognition, Mutual Trust and Fundamental Rights after Lisbon", in MITSILEGAS, BERGSTRÖM and KONSTANTINIDES (eds.), *Research Handbook on EU Criminal Law*, Cheltenham, 2016, p. 148 ff., p. 161.

¹¹² *C.K.* case, *cit. supra* note 67, paras. 75-77; *Ghezelbash* case, *cit. supra* note 77, para. 37; C-670/16, *Mengesteab*, Judgment of 16 July 2017, para. 62.

¹¹³ *C.K.* case, *cit. supra* para. 94; *Jawo* case, *cit. supra* note 73, para. 90; C-582/17 and 583/17, *H. and R.*, Judgment of 2 April 2019, para. 84. See also THYM, *cit. supra* note 62, p. 564; BRIBOSIA and RIZCALLAH, *cit. supra* note 71, p. 183.

¹¹⁴ *M.A.* case, *cit. supra* note 79, paras. 75 and 78-79, adding, however that such a refusal could be indirectly challenged through the use of the above remedy against the transfer decision. More recently, the

Consequently, it is by now widely accepted that the asylum seeker must have the possibility to raise a claim against a transfer decision. Such a claim might concern the circumstances in the responsible State pertaining to the reception or living conditions before or after the granting of international protection respectively, and/or other defects in the transfer procedure, such as the violation of time limits or the incorrect application of the Dublin criteria by the sending State. In all those circumstances, it is indirectly established that the national authorities of the sending State are obliged to assess the claim and the risk entailed from the transfer.

4.2.2. Between the Obligation to Prevent the Return of the Asylum Seeker and the Discretion to Examine His/Her Application: The Ambiguities of the Dublin Regime

The interrelation between the obligation of non-return and the examination of an asylum application is another area where the case-law of the two supranational courts is not strictly aligned. For a start, it must be borne in mind that while an obligation of a third Member State to examine an asylum application inescapably means also an obligation not to return the asylum seeker to the responsible – *per* the Dublin criteria – State, the opposite is not always true, as we will see, meaning that a State could be obliged to withhold the transfer while remaining free to search for another responsible Member State that could take up the asylum request.

The successive Dublin Regulations have shaped the legal contours of the sovereignty clause in varied ways. The Dublin II Regulation's only relevant proviso was Article 3(2) establishing a State's faculty to examine an application it was not responsible for *per* the Dublin criteria. There was instead no reference to an obligation to not return asylum seekers, as the safety presumption underpinning the Dublin system meant that returns between EU MS could be automatic. This was challenged by the ECtHR's judgment in the *M.S.S.* case, which declared that if substantial grounds existed for believing that an asylum seeker would be exposed through a Dublin transfer to a real risk of inhuman or degrading treatment, the national authorities of the sending State could – and actually should – refuse the transfer on the basis of the sovereignty clause.¹¹⁵

CJEU has also determined that while the remedy under Article 27 Dublin III Regulation covers 'take charge' or 'take back' procedures, it cannot be used in this procedural framework to challenge the criteria for determining the responsible State; *H. and R.* case, *cit. supra* note 113, para. 85.

¹¹⁵ European Court of Human Rights, *M.S.S.* case, *cit. supra* note 24, paras. 358-360.

Yet, the ECtHR did not clarify the legal basis upon which the non-refoulement obligation was grounded leading to multiple legal constructions thereon. For some authors, the fleeting reference to Article 3(2) Dublin II Regulation in the *M.S.S.* judgment meant that the duty to refuse transfer could be based on that provision.¹¹⁶ But since this clause did not mention anything about non-refoulement, it was countered that in the above circumstances the discretionary clause of Article 3(2) turned mandatory solely regarding the examination of the asylum request and only reflectively, that obligation also meant an obligation to not return the asylum seeker.¹¹⁷ However, the Court had not explicitly said that any obligation whatsoever stemmed from Article 3(2). Consequently, it is more accurate to say that in the ECtHR's judgment the duty of non-refoulement stemmed from the MS' obligations under the ECHR, while that State remained free to examine or not the asylum application under the sovereignty clause.¹¹⁸ In other words, when the *M.S.S.* circumstances were at play, nothing prevented the said Member State, after implementing its non-refoulement obligation, from transferring the asylum seeker to the next in line responsible, *per* the Dublin criteria, State.

The CJEU further clarified this point in the *N.S./M.E.* and *Puid* cases. Firstly, it confirmed that in case of systemic deficiencies in the responsible State, any other Member State should not return an asylum seeker there.¹¹⁹ The absence of any reference to Article 3(2) Dublin II Regulation at that point validates the view that the obligation of non-refoulement cannot stem from or be materialized through the sovereignty clause. Secondly, the CJEU held that the sending State was only obliged to continue searching for the next in line responsible State and that under Article 3(2) it still enjoyed discretion on whether to treat itself the asylum application, unless the above search took an unreasonable length of time leading to a deterioration of the human rights situation of the asylum applicant.¹²⁰

¹¹⁶ MORENO-LAX, *cit. supra* note 19, p. 6.

¹¹⁷ MORGADES-GIL, *cit. supra* note 43, p. 439.

¹¹⁸ BOSSUYT, "Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law: *M.S.S. v Belgium and Greece*, Grand Chamber, European Court of Human Rights, January 21, 2011", *European Human Rights Law Review*, 2011, p. 581 ff., p. 584.

¹¹⁹ *N.S./M.E.* case, *cit. supra* note 42, para. 94.

¹²⁰ *Ibid.*, paras. 107-108. The Court upheld the finding that a MS is not obliged to take up the asylum application itself under Article 3(2) in the *Puid* case, *cit. supra* note 46, para. 37. For a correct reading of the case, see LABAYLE, *cit. supra* note 37, p. 521; BANK, *cit. supra* note 47, p. 232. *Contra* GRAGL, *cit. supra* note 26, pp. 133-134; BROUWER, *cit. supra* note 39, p. 143, speaking about an obligation to examine.

Eventually, the EU legislator amended the Dublin Regulation and incorporated these findings in the recast Regulation. More specifically, Article 3(2) Dublin III Regulation prohibits any transfer in case of systemic flaws in the responsible Member State and further provides that in such a case, the “sending” State “shall continue to examine the criteria...in order to establish whether another Member State can be designated as responsible” and only if no other such State can be found or if the search takes an unreasonable length of time,¹²¹ it becomes the one responsible for the asylum application.¹²² Consequently, under Article 3(2) the obligation of non-refoulement does not give rise to an immediate obligation of the Member State to examine itself the asylum request. Moreover, the Regulation retains the sovereignty clause in Article 17(1), according to which a State, which is not responsible under the Dublin criteria, can under this clause take up the asylum application itself.¹²³ In this framework, a Member State enjoys a wide margin of discretion on whether to take up the asylum request and thus, to not return the asylum seeker to the responsible State.

Apart from the case of systemic flaws regulated in Article 3(2), however, it has already been shown that a duty of non-refoulement might equally exist under different circumstances.¹²⁴ This was confirmed in the *Tarakhel* and the *C.K.* cases, while there is also a developing jurisprudence on an obligation of non-refoulement in the context of flagrant violations of other human rights, as we illustrated.¹²⁵ The additional to Article 3(2) obligation of non-refoulement is usually justified by reference to the discretionary clause of Article 17(1) Dublin III Regulation, which under the aforementioned circumstances is allegedly transformed into a mandatory clause that imposes on the sending State an obligation to examine the asylum request and, comparatively, an obligation to not return the asylum seeker to the responsible State.¹²⁶

This legal construction cannot, however, explain why the consequences of the activation of non-refoulement are different, and actually more severe for the sending

¹²¹ For the view that we should read into Art. 3(2) Dublin III Regulation this condition enunciated in the *N.S.* case, see HRUSCHKA and MAIANI, *cit. supra* note 65, pp. 1500-1501.

¹²² See VICINI, *cit. supra* note 30, p. 68. The imposition of the responsibility has been described as constituting a transformation of the sovereignty clause of Art. 17(1) into a mandatory one; see HRUSCHKA and MAIANI, *ibid.* Nevertheless, the Regulation itself makes in Art. 3(2) no reference to Art. 17(1).

¹²³ See BRIBOSIA and WEYEMBERGH, *cit. supra* note 51, p. 488.

¹²⁴ See *supra*, p. 422 f.

¹²⁵ See *supra*, p. 425 f.

¹²⁶ This approach underpins the analysis in HRUSCHKA and MAIANI, *cit. supra* note 65, pp. 1499-1500 and 1535; VEDSTED-HANSEN, *cit. supra* note 52, p. 347. *Contra* MORENO-LAX, *cit. supra* note 19, p. 30.

State, in the case of individualized risks compared to systemic flaws. More particularly, in the former case the application of Article 17(1) signifies that the sending State must examine the application itself, while in the latter case Article 3(2) only forces the sending State to continue searching for the next in line responsible State.¹²⁷ Additionally, the above construction is confronted with the CJEU's persistent finding that the discretionary clause of Article 17(1) remains optional notwithstanding the existence of an obligation of non-refoulement.¹²⁸ As the CJEU has recently held, Article 17(1) consecrates an unconditional and absolute right of the State to take up the asylum application, reflecting its sovereign prerogative to grant international protection.¹²⁹ Such wide margin of discretion is not overturned, according to the Court, by any fundamental rights considerations.¹³⁰

Accordingly, as in the case of Article 3(2), the obligation of non-refoulement for situations beyond systemic flaws, which itself stems from outside the Dublin III Regulation as we have explained¹³¹, cannot be linked to an obligation to examine the asylum request. Nevertheless, such an obligation can arise if the search for the next in line responsible State takes an unreasonable amount of time threatening the human rights of the asylum seeker¹³² or if, as in the *C.K.* case, the refugee's state of health continues to prevent the transfer for more than six months.¹³³

5. – Conclusion

The ECtHR and the CJEU have lately engaged in a jurisprudential dialogue on the Dublin Regulations that has been both testy and fertile for the CEAS. Despite the convergence in their case-law, there remain some gray areas that warrant a more systematic treatment. This will contribute to a more effective implementation of the Dublin Regulation and the better protection of the asylum seeker. New challenges, such as the *Brexit* or the mass refugee flows, pose an extraordinary challenge for the smooth implementation of the Dublin stipulations but they also offer an opportunity to fine-tune the CJEU's case-law and re-align it even closer to the ECtHR's jurisprudence.

¹²⁷ HRUSCHKA and MAIANI, *ibid.*, p. 1500.

¹²⁸ See, indicatively, *Puid* case, *cit. supra* note 46, para. 29; *C.K.* case, *cit. supra* note 67, para. 88.

¹²⁹ *M.A.* case, *cit. supra* note 79, paras. 58-60.

¹³⁰ *Ibid.*, para. 72.

¹³¹ See *supra*, p. 424 f.

¹³² See *supra*, p. 431 f.

¹³³ Art. 29(2) Dublin III Regulation, cited by BRIBOSIA and RICZALLAH, *cit. supra* note 71, p. 182.

16. THE CASE-LAW OF THE EU COURT OF JUSTICE ON THE RETURN DIRECTIVE AND THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW: 'WITH OR WITHOUT YOU'?

*Tamás Molnár**

SUMMARY: 1. Introduction and Scope of Scrutiny – 2. The *Völkerrechtsfreundlichkeit* of the Return Directive – 3. The CJEU Jurisprudence on the Return Directive and International Human Rights Law – 4. Reasons behind the CJEU's Distancing from International Human Rights Law – 5. Concluding Remarks.

1. – Introduction and Scope of Scrutiny

The *Return Directive*¹ of the European Union ('EU') was adopted in December 2008 to provide common standards and procedures to be applied by EU Member States to third-country nationals (non-EU nationals) who do not fulfil the conditions for entry, stay or residence in a Member State, with a view to promoting an effective

* The views expressed in this chapter are solely those of the author and its content does not necessarily represent the views or the position of the European Union Agency for Fundamental Rights.

¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 12.24.2008, pp. 98-107) (hereinafter: 'Return Directive').

BRUNO, PALOMBINO, DI STEFANO (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 435-460.

return policy. The directive lays down common, harmonised rules related to the issuing of ‘return decisions’² and the enforcement of removals (forced returns),³ the use of pre-removal detention as well as procedural safeguards, including due process guarantees and access to effective remedies. This *keystone legal instrument* of the Union’s return acquis integrates into the EU return policy a set of principles stemming from international law (including the 1950 European Convention on Human Rights⁴ – ‘ECHR’) and EU law (including the EU Charter of Fundamental Rights⁵ – hereinafter, the ‘Charter’).

The Return Directive *entered into force* on 13 January 2009 (pursuant to Article 22 of the directive). EU Member States bound by it,⁶ as well as the four Schengen Associated Countries,⁷ had to transpose its provisions into their domestic legislation until 24 December 2010 (with the exception of the free legal assistance and/or representation for which the transposition deadline expired one year later – see Article 20(1) of the directive).

Since its entry into force more than ten years ago (and even before, during the negotiations phase), the Return Directive has been subject to heated policy debates;⁸

² According to the definition in Art. 3(4) of the Return Directive, a ‘*return decision*’ “means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.” ‘*Return*’ is defined in paragraph (3) of the same article as follows: “the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to: [...] his or her country of origin, or [...] a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or [...] another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.”

³ Art. 3(5) of the Return Directive defines ‘*removal*’ as “the enforcement of the obligation to return, namely the physical transportation of [the person] out of the Member State.”

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS No. 005.

⁵ See OJ C 202, 7.06.2016, p. 389 ff.

⁶ The Return Directive is not applicable to Ireland and the United Kingdom pursuant to Protocol (No. 21) on their respective positions in the area of freedom, security and justice, annexed to the founding Treaties; and these EU Member States did not subsequently opted-in either.

⁷ Iceland, Liechtenstein, Norway and Switzerland (see also recitals (27)-(30) in the preamble of the directive).

⁸ See e.g. PHILLIPS, “Global Outcry against EU Immigration Directive”, *EU Observer*, 19 June 2008, available at: <<https://euobserver.com/justice/26354>> (quoting the then UN High Commissioner for Human Rights, Louise Arbour); United Nations, “Report Submitted by the Special Rapporteur on the Human Rights of Migrants, Jorge G. Bustamante: Addendum: Communications Sent to Governments and Replies Received”, UN Doc. A/HRC/11/7/Add.1, 20 May 2009, paras. 81-103 (ten UN independent experts sent a joint communication to France, which held the rotating Presidency of the EU Council during the second

harsh criticism by multiple civil society organisations;⁹ and a number of academic commentaries.¹⁰ One of the recurring aspects of the discussions and controversies over the directive's contents and standards relates to its (non-)compliance with *human rights* stemming from either universal (United Nations – 'UN') or regional (primarily Council of Europe – 'CoE') instruments. The scholarly writings on the directive, however, have not yet really engaged with the role of international human rights law in the ever-growing case-law of the Court of Justice of the European Union ('CJEU') unfolding and clarifying various provisions of the Return Directive.

half of 2008 when the directive was adopted); United Nations High Commissioner for Refugees, "UNHCR Observations on the European Commission's Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals COM(2005)391 final", Geneva, December 2005; Id., "UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals", Geneva, 16 June 2008.

⁹ See, *inter alia*, SAVE THE CHILDREN, "Comments on 'Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals'", September 2005; AMNESTY INTERNATIONAL EU OFFICE, "Returning 'irregular' migrants: The Human Rights Perspective: Amnesty International's Comments on the Draft Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals COM (2005) 391 Final", May 2006; EUROPEAN COUNCIL ON REFUGEES AND EXILES, "Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005)391 Final)", CO2/5/2006/ExtPC, May 2006; RED CROSS EU OFFICE, "Position Paper: European Commission Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals", July 2006.

¹⁰ For leading in-depth academic commentaries on the directive, see e.g. LUTZ and MANANASHVILI, "Return Directive 2008/115/EC" in HAILBRONNER and THYM (eds.), *EU Immigration and Asylum Law. A Commentary*, Munich/Oxford/Baden-Baden, 2016, 2nd edition, p. 658 ff.; PEERS, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law*, Oxford, 2016, 4th edition, sub-section 7.7, p. 501 ff.; ACOSTA ARCARAZO and GUILD, "The Returns Directive", in PEERS, GUILD, ACOSTA ARCARAZO, GROENENDIJK and MORENO-LAX (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Leiden, 2012, p. 483 ff.; ACOSTA ARCARAZO, "The Returns Directive: Possible Limits and Interpretation" in ZWAAN (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen, 2011, p. 7 ff.; BALDACCINI, "The EU Directive on Return: Principles and Protests", *Refugee Survey Quarterly*, 2009, p. 114 ff.; BALDACCINI, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive", *European Journal of Migration and Law*, 2009, p. 1 ff.; BOELES, DEN HEIJER, LODDER and WOUTERS, *European Migration Law*, Antwerp/Oxford/Portland, 2009, p. 411 ff.; MARTUCCI, "La directive 'retour': la politique européenne d'immigration face à ses paradoxes", *Revue trimestrielle de droit européen*, 2009, p. 47 ff.; CARLIER, "La directive retour' et le respect des droits fondamentaux", *L'Europe des Libertés – Revue d'actualité juridique*, 2008, p. 13 ff.

Against this backdrop, this contribution aims at mapping and analysing the approach of the CJEU, which is the guardian that “the law is observed” in the interpretation and application of the EU Treaties,¹¹ towards *international human rights law* in the context of EU return law and policy. While doing so, the piece focuses on the Return Directive as the central element of the EU return acquis, and it seeks to explore and understand the place and role of international human rights law (including the ECHR and the case-law of the European Court of Human Rights (‘ECtHR’),¹² seated in Strasbourg) in the CJEU’s return-related jurisprudence based on the directive.

2. – *The Völkerrechtsfreundlichkeit of the Return Directive*

‘Expulsion of aliens’ (in the UN language)¹³, or ‘returning illegally staying third-country nationals’ (expression used in the EU legal parlance)¹⁴ does not take place in a legal vacuum.¹⁵ Rather, it is subject to a *comprehensive set of human rights*¹⁶ protecting returnees’ rights, given that such coercive measures performed by the immigration law enforcement authorities of the host country may easily result in drastic changes involving serious consequences on the life and future of the persons concerned.¹⁷

¹¹ Art. 19(1), Treaty on European Union (see OJ C 202, 7.06.2016, p. 1 ff).

¹² For a well-structured and recent overview of the ECtHR jurisprudence relating to the expulsion of aliens, see SCUTO, “‘Aliens’ protection against expulsion and prohibition of collective expulsion by the jurisprudence of the European Court of Human Rights”, *Federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato*, 2018, p. 1 ff. On the changing dynamics in the expulsion related adjudication of the Strasbourg Court, consider FARAHAT, “Enhancing Constitutional Justice by Using External References: The European Court of Human Rights’ Reasoning on the Protection against Expulsion”, *Leiden Journal of International Law*, 2015, p. 303 ff.

¹³ International Law Commission, *Report on the Work of Its Sixty-Sixth Session, Draft Articles on the Expulsion of Aliens*, GAOR, 69th session, Supplement No. 10 (A/69/10) (2014).

¹⁴ See the title of the Return Directive as well as its Art. 3 on the definitions.

¹⁵ For a scholarly account of legal boundaries when expelling aliens (non-nationals) under international law, see e.g. WOJNOWSKA-RADZIŃSKA, *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law*, Leiden, 2015.

¹⁶ MAJCHER, *The European Union Returns Directive and its Compatibility with International Human Rights Law*, Thesis submitted at the Graduate Institute of International and Development Studies in fulfilment of the requirements of the PhD degree in International Law, Thesis No. 1214, Geneva, 2017, p. 46 [manuscript is with the author].

¹⁷ MOLNÁR, “Limitations on the Expulsion of Aliens Imposed by the International Covenant on Civil and Political Rights. A Retrospect of 50 Years”, in SZABÓ, LÁNCOS and VARGA (eds.), *Hungarian Yearbook of International Law and European Law 2017*, The Hague, 2018, pp. 84-104.

The Return Directive *refers* quite a few times to *international human rights law* in general and as embodied in specific treaties. The Return Directive attributes different roles to internationally protected human rights in its scope of application, which can be summarised as follows:

- conceiving international human rights law as *standards of conformity for EU law* (see recitals (17), (22)-(24) and Articles 1 and 5);
- providing such norms of international origin *priority vis-à-vis EU law* (Articles 5 and 9); and
- applying ‘*without prejudice*’ or ‘*non-affectation*’ clauses, which make the application of international human rights treaties and standards possible where these rules lay down more favourable conditions for the irregular migrant subject to a return procedure (recital (23) and Article 4(1)).

The international human rights conventions which serve as yardsticks to assess the legality of the application of the Return Directive – and also as interpretative tools for the EU Court and national courts – comprise the ECHR, the 1951 Geneva Convention relating to the Status of Refugees¹⁸ and its 1967 New York Protocol,¹⁹ the 1989 Convention on the Rights of the Child (‘CRC’),²⁰ coupled with all *other relevant treaties* concluded by the Member States, the European Union or both, which contain more favourable provisions for the migrants subject to expulsion (e.g. CoE Istanbul Convention on combatting violence against women and domestic violence;²¹ or the CoE Warsaw Convention against Trafficking in Human Beings²²).

¹⁸ Convention relating to the Status of Refugees, Geneva, 28 July 1951, UNTS No. 2545, Vol. 189, p. 137.

¹⁹ Protocol relating to the Status of Refugees, New York, 31 January 1967, UNTS No. 8791, Vol. 606, p. 267.

²⁰ United Nations Convention on the Rights of the Child, New York, 20 November 1989, UNTS No. 27531, Vol. 1577, p. 3.

²¹ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011 (CETS No. 210), Arts. 59 (residence status) and 61 (*non-refoulement*). The EU signed this convention in June 2017 – see the Council Decisions on the signing of the Istanbul Convention on behalf of the EU with regard to judicial cooperation in criminal matters (Decision (EU) 2017/865) and asylum and non-refoulement (Decision (EU) 2017/866). Ratification by the EU is expected to follow soon. Nonetheless, on the occasion of a plenary debate held by the European Parliament on 13 May 2018 on the state of play, i.e. one year on from the signature of the Convention by the EU, the European Commission’s First Vice President noted that there was strong opposition to the Convention in some Member States (see the proceedings available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20180613+ITEM-004+DOC+XML+V0//EN&language=EN>>).

²² Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005 (CETS No. 197), Art. 13 – No expulsion is allowed during the recovery and reflection period of at

Content-wise, besides general references to ‘*international law*’, ‘*refugee protection*’ and ‘*fundamental rights/human rights obligations*’, the operative provisions of the Return Directive name a few *concrete international human rights* norms and principles. These include the principle of the best interests of the child, the right to family life, the principle of *non-refoulement*, the principle to provide humane and dignified detention conditions as well as the principle to respect dignity and psychical integrity of irregular migrants subject to return procedures.

Some other provisions have been clearly inspired by *Council of Europe human rights standards* and mirror their language. For instance, Articles 16-17 of the Return Directive on detention conditions are a good illustration for that, which have been largely based on the CoE Twenty Guidelines on Forced Return.²³ The revised EU Return Handbook, which is a set of non-binding recommendations providing guidance to national authorities competent for carrying out return related tasks on the application of the directive, expressly mentions this connection.²⁴ Similarly, Article 13(1) of the Return Directive on the right to an effective remedy against return related decisions is closely modelled after the same CoE guidelines on forced returns (see Guideline No. 5.1) and it should be interpreted in accordance with relevant case-law of the European Court of Human Rights as stipulated in the EU Return Handbook.²⁵

What is more, the *EU Return Handbook* contains *further references* to international human rights law relevant for migrants. This European Commission recommendation, which is addressed to the Member States and Schengen Associated Countries bound by the directive, essentially deals with the correct implementation of common standards and procedures in Member States for returning irregular migrants. This soft law instrument is based on secondary EU legislation regulating this issue (essentially the Return Directive) and related CJEU case-law. The Return Handbook seeks to ensure an effective and uniform application of the Return Directive across the Union. It specifies, for instance, that in relation to the detention of

least 30 days. All EU Member States have ratified it, but the EU is not party to this convention, although this CoE treaty allows the EU to accede to it (see Art. 42(1)).

²³ Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted at the 925th Meeting of the Ministers’ Deputies, Strasbourg, 4 May 2005.

²⁴ Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks, OJ L 339/83, 19.12.2017, Annex.

²⁵ *Ibid.*, sub-section 12.4 (p. 70).

children and families, standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT')²⁶ must be applied beyond the text of the directive. Likewise, in the case of non-removable irregular migrants, be it due to legal or humanitarian impediments, practical obstacles or policy choices, access to education for such children as laid down in the Return Directive (Article 14(1)(c)) should be provided in accordance with the CRC and General Comment No. 6 (2005) of the Committee on the Rights of the Child relating to the treatment of unaccompanied and separated children in the context of migration,²⁷ as required by the revised EU Return Handbook.

Summing it up, the above-presented provisions as well as the *travaux préparatoires* of the Return Directive²⁸ showcase that the EU co-legislators (the Council and the Parliament), but also the European Commission (see the Return Handbook) have had a vision of a fairly *international law friendly approach* when codifying the common EU standards and procedures for returning irregularly staying third-country nationals. *Compliance with fundamental rights*, which comprise norms laid down in international human rights instruments, is originally meant to be a *cardinal principle of interpretation* of the Return Directive. The following section examines to what extent the EU Court of Justice developed its case-law on returns in line with the legislature's openness to international human rights law.

²⁶ This anti-torture monitoring body, belonging to the Council of Europe structures, was established under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), as amended by Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) which entered into force on 1 March 2002. For compilations of its key standards pertaining to immigration detention, see CPT, "Safeguards for irregular migrants deprived of their liberty", Extract from the 19th General Report of the CPT CPT/Inf(2009)27-part; CPT, "Factsheet on Immigration detention", CPT/Inf(2017)3, March 2017.

²⁷ UN Committee on the Rights of the Child, "General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin", CRC/GC/2005/6, 1 September 2005.

²⁸ See LUTZ, *The Negotiations on the Return Directive. Comments and Materials*, Nijmegen, 2010, pp. 73-80.

3. – *The CJEU Jurisprudence on the Return Directive and International Human Rights Law*

As a preliminary remark, jurisprudence of international, EU and national courts illustrates well the complexity of legal issues involved in the return procedures, in particular how returns may affect the human rights of the persons concerned.

The CJEU has been playing an ever-important role in the development of European return law since its initial ruling on this matter in the *Kadzoev* case delivered in November 2009,²⁹ which interpreted for the first time the provisions of the Return Directive. Since the entry into force of the Return Directive (13 January 2009), the EU Court of Justice has delivered 27 rulings interpreting the directive (as at September 2019).³⁰ Remarkably enough, there was practically no case-law relating to the interpretation of other legal instruments of the EU return acquis, predating the Return Directive. The lone preliminary reference asking for the interpretation of Directive 2001/40/EC on the mutual recognition of expulsion decisions³¹ was not considered in the merits due to the EU Court's manifest lack of jurisdiction.³² Two other infringement procedures were initiated against Portugal and Spain for purely formal reasons,³³ i.e. not transposing into their national law, within the prescribed period, Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air.³⁴

The CJEU's jurisdiction to rule in *preliminary references* as well as in *other actions* (e.g. in infringement procedures other than the failure of transposition within

²⁹ Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, ECLI:EU:C:2009:741.

³⁰ For a very good overview of the CJEU return-related case-law, consider the Quarterly Overviews of CJEU judgments and pending cases published by the Centre for Migration Law at the Radboud University of Nijmegen, available at: <<https://www.ru.nl/law/cmr/documentation/cmr-newsletters/cjeu-overview/>>.

³¹ Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2.6.2001, pp. 34-36.

³² Case C-456/14, *Manuel Orrego Arias v. Subdelegación del Gobierno en Ciudad Real*, 3 September 2015, ECLI:EU:C:2015:550.

³³ See, Case C-4/07, *Commission of the European Communities v. Portuguese Republic*, 27 September 2007, ECLI:EU:C:2007:558; and Case C-58/07, *Commission of the European Communities v. Kingdom of Spain*, 14 February 2008, ECLI:EU:C:2008:93.

³⁴ Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 12.6.2003, pp. 26-31.

the set deadline³⁵) has a substantial impact on the definitional and interpretative guidance of EU legislation on returning irregular migrants.³⁶ It does not come by surprise, given that the CJEU has the monopoly to authentically interpret the whole body of EU law,³⁷ including the return acquis. Judgments of the EU Court are all the more instrumental given that as described above in Section 2, black letter EU law on returns makes explicit reference to international treaties and human rights law. Putting the evolution within the EU law and international law duality under scrutiny in light of this case-law in order to see where it is developing in times of large scale migratory movements is particularly worthy of academic attention.

Looking carefully at this fairly abundant CJEU's case-law unfolding various stipulations of the directive, one can notice a *rather EU-law centred* argumentative strategy, without genuinely engaging with applicable international human rights law standards, including the ECHR and relevant ECtHR judgments. More generally, taking the CJEU jurisprudence as a whole, as opposed to regularly highlighting the "*special significance*" of the *ECHR*,³⁸ the EU Court has only *occasionally* referred to the ICCPR,³⁹ the CRC,⁴⁰ the 1966 International Covenant on Economic, Social and Cultural Rights,⁴¹ and the 1961 European Social Charter (adopted under the CoE

³⁵ See, for instance, the ongoing infringement procedure against Hungary before the CJEU concerning domestic incompatibles with the Return Directive. According to the European Commission, Hungary failed to ensure that return decisions are issued individually and include information on legal remedies. As a result, apprehended migrants in an irregular situation risk being returned without the appropriate safeguards and in breach of the principle of *non-refoulement*. (European Commission, Press Release – IP/18/4522, Brussels, 19 July 2018, available at: <http://europa.eu/rapid/press-release_IP-18-4522_en.htm>).

³⁶ TAYLOR, "The CJEU and its interaction with international law in the Qualification Directive: a calculated selectivity?", *EDAL Journal*, 12 February 2015, available at: <<http://www.asylumlawdatabase.eu/en/journal/cjeu-and-its-interaction-international-law-qualification-directive-calculated-selectivity>>.

³⁷ See Art. 19(1) and (3) TEU and Arts. 263, 267 and 344 TFEU.

³⁸ Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991, ECLI:EU:C:1991:254, para. 41; Case C-299/95, *Friedrich Kremzow v. Republik Österreich*, 29 May 1997, ECLI:EU:C:1997:254, para. 14.

³⁹ See e.g., Case C-249/96, *Grant v. South West Trains Ltd*, 17 February 1998, ECLI:EU:C:1998:63, para. 44; Case C-540/03, *European Parliament v. Council*, 27 June 2006, ECLI:EU:C:2006:429, para. 37.

⁴⁰ See e.g., Case C-540/03, *European Parliament v. Council*, 27 June 2006, ECLI:EU:C:2006:429, paras. 37, 50 and 57; Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 14 February 2008, ECLI:EU:C:2008:85, paras. 39-40.

⁴¹ See e.g., Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française*, 13 April 2010, ECLI:EU:C:2010:181, paras. 3-4, 83-88.

aegis)⁴² as sources of fundamental rights being general principles of EU law. Such references are *sporadic* and often *not elaborated*.⁴³ Some scholars noted that the CJEU failed “to appreciate the nature and status of the ICCPR as well as the role of the HRC”,⁴⁴ when, for example, it considered that the UN Human Rights Committee “is not a judicial institution”,⁴⁵ contrary to a generally accepted (quasi-)judicial function of the latter. This exclusionary approach towards international human rights instruments other than the ECHR appears thus to be a general pattern across all EU policy fields. The Advocate Generals (‘AG’), in their submissions, were more willing to refer to the ECHR and some relevant ECtHR case-law, but not beyond this regional human rights protection regime. Other pertinent and applicable international law instruments have not been thus used in the argumentative toolkit of the Advocate Generals, who have otherwise been fairly open to holistic approaches as well as multi-layered legal reasoning, including the international legal order, and a ‘joined-up approach to fundamental rights’⁴⁶ (see some examples below in *Table 1*).

Table 1 gives an *overview* of the various references to international law in general, and to international human rights law instruments and case-law in particular (essentially but not exclusively ECtHR jurisprudence) which have been so far referred to either by the Advocate Generals or the EU Court in cases pertaining to the interpretation and application of the Return Directive.

⁴² See e.g., Case 149/77, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 15 June 1978, ECLI:EU:C:1978:130, para. 28.

⁴³ PEERS, “International law, human rights law, and EU asylum and migration policy”, in MAES, FOLETS, DE BRUYCKER, VANHEULE and WOUTERS (eds.), *External Dimensions of EU Migration and Asylum Law and Policy/Dimensions Externes du Droit et de la Politique d’Immigration et d’Asile de l’UE*, Bruxelles, 2011, p. 82; ZIEGLER, *Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law*, University of Leicester School of Law Research Paper No. 15-25 (2015), p. 20, available at: <http://ssrn.com/abstract=2665725>.

⁴⁴ DE JESÚS BUTLER and DE SCHUTTER, “Binding the EU to International Human Rights Law”, *Yearbook of European Law*, 2008, p. 285, cited by ZIEGLER, *cit. supra* note 43, p. 21.

⁴⁵ Case C-249/96, *Grant v. South West Trains Ltd*, 17 February 1998, ECLI:EU:C:1998:63, para. 46.

⁴⁶ For this term, see the EU Fundamental Rights Agency’s toolkit entitled ‘Joining up fundamental rights’, available at: <https://fra.europa.eu/en/joinedup/home>.

Table 1: Return-related CJEU cases referring to international human rights law

Case	Subject-matter	IHL in AG opinion/view (Y/N)	IHL references and instruments mentioned		ECtHR case-law/other international jurisprudence	
			in AG opinion/views	in CJEU ruling	in AG opinion/views	in CJEU ruling
C-357/09, <i>Kadzoev</i> , Judgment of 30 November 2009 (ECLI:EU:C:2009:741)	Detention – reasons for prolongation; link to asylum related detention	Y	<ul style="list-style-type: none"> - ECHR (Art.5) - 1951 Geneva Convention relating to the Status of Refugees - CoE Twenty Guidelines on forced return (Guideline No. 7), with Commentaries - 'international law' - 'law of human rights and fundamental freedoms' 	--	<ul style="list-style-type: none"> - ECtHR, <i>Amuur v. France</i>, 25 June 1996 - ECtHR, <i>Chahal v. United Kingdom</i>, 15 November 1996 - ECtHR, <i>Mohd v. Greece</i>, 27 April 2006 - ECtHR, <i>Riad and Idiab v. Belgium</i>, 24 January 2008 - ECtHR, <i>Saadi v. United Kingdom</i> [GC], 29 January 2008 - ECtHR, <i>Mikolenko v. Estonia</i>, 8 October 2009 - Human Rights Committee, Communication No. 560/1993: Australia, 30/04/97, CCPR/C/59/D/560/1993 	--
C-61/11 <i>PPU, El Dridi</i> , Judgment of 28 April 2011 (ECLI:EU:C:2011:268)	Criminalisation of irregular migration – penalisation of illegal stay by imprisonment	Y	--	<ul style="list-style-type: none"> - CoE Twenty Guidelines on forced return (Guideline No. 8) 	<ul style="list-style-type: none"> - ECtHR, <i>Moustaquim v. Belgium</i>, 18 February 1991 - ECtHR, <i>Riad and Idiab v. Belgium</i>, 24 January 2008 	<ul style="list-style-type: none"> - ECHR, <i>Saadi v. United Kingdom</i> [GC], 29 January 2008

Case	Subject-matter	IHL in AG opinion/view (Y/N)	IHL references and instruments mentioned		ECtHR case-law/other international jurisprudence	
			in AG opinion/views	in CJEU ruling	in AG opinion/views	in CJEU ruling
<i>C-146/14 PPU, Mahdi, Judgment of 5 June 2014 (ECLI:EU:C:2014:1320)</i>	Detention – reasons for prolongation and judicial supervision	Y	<ul style="list-style-type: none"> - ECHR (as a whole and Art.5) - CoE Twenty Guidelines on forced return - CoE PACE, Report of the Committee on Migration, Refugees and Displaced Persons, 'The detention of asylum seekers and irregular migrants in Europe', 11 January 2010 	--	<ul style="list-style-type: none"> - 'case-law of the [ECtHR] relating to the right to liberty' - ECtHR, <i>Abdulaziz, Cabales and Balkandali v. United Kingdom</i>, 28 May 1985 - ECtHR, <i>Moustaquim v. Belgium</i>, 18 February 1991 - ECtHR, <i>Quinn v. France</i>, 22 March 1995 - ECtHR, <i>Chahal v. United Kingdom</i>, 15 November 1996 - ECtHR, <i>Kaya v. Romania</i>, 12 October 2006 - ECtHR, <i>Riad and Idiab v. Belgium</i>, 24 January 2008 - ECtHR, <i>Herman and Seradzishvili v. Greece</i>, 24 April 2014 	--
<i>C-473/13 and C-514/13, Bero and Bouzalmate, Judgment of 17 July 2014 (EU:C:2014:295)</i>	Detention conditions – obligation to provide for specialised facilities	Y	<ul style="list-style-type: none"> - 'international commitments' - ECHR (Arts. 3, 5 and 8) - CoE Twenty Guidelines on forced return (Guidelines No. 10 and 11) 	--	<ul style="list-style-type: none"> - ECtHR, <i>Chahal v. United Kingdom</i>, 15 November 1996 - ECtHR, <i>S.D. v. Greece</i>, 11 June 2009 - ECtHR, <i>Popov v. France</i>, 19 January 2012 - ECtHR, <i>Aden Ahmed v.</i> 	--

Case	Subject-matter	IHL in AG opinion/view (Y/N)	IHL references and instruments mentioned		ECtHR case-law/other international jurisprudence	
			in AG opinion/views	in CJEU ruling	in AG opinion/views	in CJEU ruling
C-562/13, <i>Abdida</i> , Judgment of 18 December 2014 (ECLI:EU:C:2014:2453)	Rights of the returnees pending postponed return	Y	<ul style="list-style-type: none"> - CPT report on Germany (2012) - CoE PACE, 'The Human Rights of Irregular Migrants in Europe' [CommDH/Issue Paper(2007)1] 	- ECHR (Arts. 3 and 13)	Malta, 23 July 2013	<ul style="list-style-type: none"> - 'case-law of the [ECtHR]' - ECtHR, <i>Gebramedhin [Gaberamadhien] v. France</i>, 26 April 2007 - ECtHR, <i>N. v. United Kingdom</i>, 27 May 2008 - ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> [GC], 23 February 2012
			<ul style="list-style-type: none"> - ECHR (generally; and Arts. 2, 3 and 13) 	- ECHR (Arts. 3 and 13)	<ul style="list-style-type: none"> - ECtHR, <i>D. v. United Kingdom</i>, 2 May 1997 - ECtHR, <i>Larioshina v. Russia</i>, 23 April 2002 - ECtHR, <i>Kutevov and Anikayenko v. Russia</i>, 25 October 2005 - ECtHR, <i>Budina v. Russia</i>, 18 June 2009 - ECtHR, <i>Huc v. Romania and Germany</i>, 1 December 2009 - ECtHR, <i>M.S.S. v. Belgium and Greece</i> [GC], 21 January 2011 - ECtHR, <i>I.M. v. France</i>, 2 February 2012 - ECtHR, <i>De Souza Ribeiro v. France</i> [GC], 13 December 2012 	

Case	Subject-matter	IHL in AG opinion/view (Y/N)	IHL references and instruments mentioned		ECtHR case-law/other international jurisprudence	
			in AG opinion/views	in CJEU ruling	in AG opinion/views	in CJEU ruling
<i>C-82/16, K.A. and Others, Judgment of 8 May 2018 (ECLI:EU:C:2018:308)</i>	Suspension of entry ban and family life	Y	- ECHR (generally; and Art. 8)	--	- ECtHR, <i>Arvelo Aponte v. the Netherlands</i> , 3 November 2011 - ECtHR, <i>Jeunesse v. the Netherlands</i> [GC], 3 October 2014	--
<i>C-181/16, Ghandi, Judgment of 19 June 2018 (ECLI:EU:C:2018:465)</i>	Suspensive effect of an appeal against a return decision and effective remedy	Y	- 1951 Geneva Convention relating to the Status of Refugees - ECHR (Art. 3 and 13)	--	- 'case-law of the [ECtHR]' - ECtHR, <i>Saadi v. United Kingdom</i> , 29 January 2008 - ECtHR, <i>V.M. and Others v. Belgium</i> , 7 July 2015 - ECtHR, <i>Allanazarova v. Russia</i> , 14 February 2017	- 1951 Geneva Convention relating to the Status of Refugees
<i>C-175/17, X v. Belastingdienst/Toeslagen, Judgment of 26 September 2018 (ECLI:EU:C:2018:776)</i>	Suspensive effect of appeal against a return decision (risk of <i>refoulement</i>)	Y	- ECHR (Arts. 3, 13 and 35(1)) - 1951 Geneva Convention relating to the Status of Refugees	- ECHR (as a whole and Arts. 3 and 13) - 1951 Geneva Convention relating to the Status of Refugees (Art. 33)	- ECtHR, <i>Čonka v. Belgium</i> , 5 February 2002 - ECtHR, <i>Gebremedhin [Gebremadhi] v. France</i> , 26 April 2007 - ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> , 23 February 2012 - ECtHR, <i>A.M. v. The Netherlands</i> , 5 July 2016 - ECtHR, <i>Allanazarova v. Russia</i> , 14 February 2017	- 'case law of the [ECtHR]' - ECtHR, <i>A.M. v. The Netherlands</i> , 5 July 2016

Case	Subject-matter	IHL in AG opinion/view (Y/N)	IHL references and instruments mentioned		ECtHR case-law/other international jurisprudence	
			in AG opinion/views	in CJEU ruling	in AG opinion/views	in CJEU ruling
C-180/17, <i>X and Y v. Staatssecretaris van Veiligheid en Justitie</i> , Judgment of 26 September 2018 (ECLI:EU:C:2018:775)	Suspensive effect of appeal (risk of <i>refoulement</i>)	Y	- ECHR (Arts. 3, 13 and 35(1)) - 1951 Geneva Convention relating to the Status of Refugees	- ECHR (as a whole and Arts. 3 and 13) - 1951 Geneva Convention relating to the Status of Refugee (Art. 33)	- ECtHR, <i>Čonka v. Belgium</i> , 5 February 2002 - ECtHR, <i>Gebremedhin [Gebremadhiem] v. France</i> , 26 April 2007 - ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> , 23 February 2012 - ECtHR, <i>A.M. v. The Netherlands</i> , 5 July 2016 - ECtHR, <i>Allanazarova v. Russia</i> , 14 February 2017	- 'case law of the [ECtHR]' - ECtHR, <i>A.M. v. The Netherlands</i> , 5 July 2016

Notes:

AG = Advocate General

IHL = International human rights law

CoE PACE = Parliamentary Assembly of the Council of Europe

Y/N = Yes/No

As shown in *Table 1*, the CJEU has only sporadically referred to *international human rights law*, including the 1951 Refugee Convention, when interpreting different provisions of the Return Directive. First and foremost, such a source of international origin relied on by the EU Court is the ECHR as interpreted by the ECtHR. True, this is a clearly set duty of the CJEU under the Charter to duly take into account the ECtHR case-law when interpreting Charter rights corresponding to those laid down in the ECHR (see Article 52(3) of the Charter). For instance, as far as Article 7 of the Charter and Article 8(1) of the ECHR are concerned (right to respect for private and family life), the CJEU has explicitly confirmed that “Article 7 of the Charter must [...] be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights”.⁴⁷ Furthermore, in the context of human rights applicable in the return procedure, it has been rightly observed that

“[t]he obligation of the Court and the Advocate General to consult the relevant Strasbourg case law derives in first place from Article 1 of the [Return Directive], which lays down that the Directive must be applied ‘in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations.’⁴⁸

References to the ECHR and the ECtHR case-law vary. It ranges from acknowledging States’ sovereign powers to decide on admitting and expelling non-nationals (see the Advocate Generals’ View in the *Kadzoev*,⁴⁹ *El Dridi*⁵⁰ and *Mahdi*⁵¹ rulings), through applying the ECtHR’s proportionality test in the context of the length of immigration detention (see the *El Dridi* judgment⁵²) and the grounds of pre-removal detention as well as the judicial review of the detention order in light of the ECtHR case-

⁴⁷ Case C-400/10 PPU, *J. McB. v. L. E.*, 5 October 2010, ECLI:EU:C:2010:582, para. 53.

⁴⁸ DE BRUYCKER and MANANASHVILI, “*Audi alteram partem* in immigration detention procedures, between the ECJ, the ECtHR and Member States: *G & R*”, *Common Market Law Review*, 2015, p. 569 ff.

⁴⁹ Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, View of Advocate General Mazák, 10 November 2009, ECLI:EU:C:2009:691, para. 5.

⁵⁰ Case 61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, View of Advocate General Mazák, 1 April 2011, ECLI:EU:C:2011:205, para. 29.

⁵¹ Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, View of Advocate General Szpunar, 14 May 2014, ECLI:EU:C:2014:1936, para. 45 and footnote 9.

⁵² Case 61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, ECLI:EU:C:2011:268, paras. 43-44.

law (see the Advocate General's View in *Mahdi*⁵³), to interpreting the principle of *non-refoulement* as set out in Article 19(2) of the Charter in respect of serious health issues in accordance with the Strasbourg jurisprudence (see the *Abdida* ruling⁵⁴). Summary references to ECtHR jurisprudence have also occurred, used by some Advocate Generals to confirm the outcome of the textual interpretation of certain provisions of the Return Directive.⁵⁵ In some other cases, the CJEU has only briefly mentioned a given right protected by the ECHR or a concept of international law, but did not draw any significant conclusions from its wording for the Return Directive.

In addition, the *Council of Europe Twenty Guidelines on Forced Return* have been mentioned and used on one occasion by the EU Court as a general standard of conformity for national law to comply with EU law (see the *El Dridi* judgment⁵⁶). In other words, CoE Guideline No. 8 ('Length of detention') has been considered in this case as an interpretative tool, which fills in with normative content certain terms of the Return Directive on the length of pre-removal detention and also to define their concrete meaning with which Member States' legislation must conform. Furthermore, the Council of Europe Twenty Guidelines of Forced Return in general and CoE Guideline No. 9 ('Judicial remedy against detention') specifically were subsequently invoked by Advocate General Szpunar in his View in *Mahdi* as sources of inspiration and interpretive contexts for certain provisions of the Return Directive.⁵⁷ Similarly, Advocate General Mazák used CoE Guideline No. 7 ('Obligation to release where the removal arrangements are halted') as a benchmark to assess the legality of Member State authorities' actions depriving someone's liberty in *Kadzoev*.⁵⁸

As *Table 1* showcases, *Advocate Generals were more keen* on referring to international human rights law than the judges of the EU Court, and not only to the ECHR and the related Strasbourg jurisprudence (although their dominance is clear), but also

⁵³ Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, View of Advocate General Szpunar, *cit. supra* note 51, para. 2 and footnotes 14, 17-18, 20 and 33.

⁵⁴ Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, 18 December 2014, ECLI:EU:C:2014:2453, paras. 47, 51-52.

⁵⁵ See Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, View of Advocate General Szpunar, *cit. supra* note 51, paras. 2 and 90.

⁵⁶ Case 61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, ECLI:EU:C:2011:268, paras. 43-44.

⁵⁷ Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, View of Advocate General Szpunar, *cit. supra* note 51, paras. 45 and 51.

⁵⁸ Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, View of Advocate General Mazák, 10 November 2009, ECLI:EU:C:2009:691, footnotes 17 and 35.

to the 1951 Refugee Convention, a number of (soft law) instruments elaborated within the CoE and – once – the quasi case-law of the UN Human Rights Committee, too.

When widening the channels through which international human rights law, including those of procedural nature, can flow into the EU Court's jurisprudence on the Return Directive, the category of '*general principles of EU law*' need to be mentioned as well. It is a well-established judge-made doctrine that fundamental rights form an integral part of the general principles of Union law.⁵⁹ Regarding the identification of possible sources of fundamental rights protected by and within the EU legal order, the EU Court stipulated long ago:

“international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines [in identifying fundamental rights as general principles of EU law] which should be followed within the framework of Community law.”⁶⁰

This has been subsequently confirmed in primary EU law, ever since the Treaty of Maastricht, in respect of the ECHR (and its Protocols ratified by all EU Member States, I would add), qualifying fundamental rights guaranteed by the ECHR as 'general principles of EU law' (Article 6(3) of the Treaty on European Union (TEU)). Some general principles of EU law have a particular relevance to coercive measures regulated under the Return Directive, such as the *principle of proportionality* which entails that a measure should be proportionate to the legitimate goal pursued.⁶¹ As Majcher rightly observed, the CJEU relied on the principle of proportionality in a few cases relating to

⁵⁹ The leading cases in this respect are Case, 29-69, *Erich Stauder v. City of Ulm – Sozialamt*, 12 November 1969, ECLI:EU:C:1969:57, para. 7; Case 11-70, *International Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide*, 17 December 1970, ECLI:EU:C:1970:114; and Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974, ECLI:EU:C:1974:51, para. 13.

⁶⁰ First pronounced in Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974, ECLI:EU:C:1974:51. In subsequent jurisprudence, see e.g., Case 44/79, *Hauer v. Land Rheinland Pfalz*, 13 December 1979, ECLI:EU:C:1979:290; or Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004, ECLI:EU:C:2004:614, para. 35.

⁶¹ See e.g., Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, 11 July 2002, ECLI:EU:C:2002:434, paras. 42-45; Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002, ECLI:EU:C:2002:493, paras. 90-94; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004, ECLI:EU:C:2004:639, para. 32; and C-343/09, *Afton Chemical Limited v. Secretary of State for Transport*, 8 July 2010, ECLI:EU:C:2010:419, para. 45. For more on the principle of proportionality as a general

the Return Directive.⁶² In the *Z.Zh. and I.O.* ruling, the EU Court held that the principle of proportionality applies to all decisions taken under the directive and this key principle requires an individualized assessment of the adequacy of a return measure.⁶³ Hence, in accordance with the general principles of EU law, including the principle of proportionality, decisions taken under the directive need to be adopted on a case-by-case basis and properly take into account the fundamental rights of the person concerned.⁶⁴ Later on, the CJEU added in the *Mukarubega* judgment that prior to the adoption of a return decision, the person concerned has the *right to be heard* which stems from the right of the defence as a general principle of EU law.⁶⁵

Summing up the preceding analysis, in contrast to the *Völkerrechtsfreundlichkeit* advanced by the EU legislator, as depicted in the forgoing Section, the Court of Justice of the EU has been rather *reluctant* so far to refer to international human rights law when interpreting the Return Directive. Despite the CJEU's expanding case-law relating to the Directive (beyond the 27 rulings delivered since the first one in *Kadzoev* in November 2009, two further cases were pending at the time of submitting the manuscript⁶⁶), the EU judiciary seemed, up to now, to be unwilling to step out of the EU law framework when shaping its case-law on returns. This in spite of some suggestions from the Advocate Generals and their more inclusive, 'joined-up' approach towards external sources of human rights applicable in the return context.

Certainly, not each and every case offers a stepping stone for the EU Court to engage more with international human rights law. It depends on the subject-matter of the individual case, the type of the procedure/legal action, and is limited by the (narrow) questions the referring national court may ask. Nevertheless, cases seeking the interpretation of *procedural safeguards* such as the right to be heard and the right

principle of EU law, consider e.g. HOFMANN, "General Principles of EU law and EU Administrative Law" in BARNARD and PEERS (eds.), *European Union Law*, Oxford, 2014.

⁶² MAJCHER, *cit. supra* note 16, p. 43.

⁶³ Case C-554/13, *Z. Zh. v. Staatssecretaris Voor Veiligheid En Justitie and I. O. v. Staatssecretaris Voor Veiligheid En Justitie*, 11 June 2015, ECLI:EU:C:2015:377, paras. 49 and 69.

⁶⁴ *Ibid.*, para. 69.

⁶⁵ Case C-166/13, *Sophie Mukarubega v. Préfet de Police and Préfet de La Seine-Saint-Denis*, Judgment of the Court of 5 November 2014, ECLI:EU:C:2014:2336, paras. 44-45.

⁶⁶ These were the following as at 1 September 2019: 1) Case C-526/18, *AA v. Migrationsverket*, which concerns issues of identifying third-country national children under the Return Directive (no further developments after the request for a preliminary ruling by the *Förvaltningsrätten i Göteborg* (Sweden) lodged on 13 August 2018, OJ C 381, 22.10.2018, pp. 16-17); and 2) Case C-806/18, *JZ*, which concerns entry bans under Art. 11(2) of the Return Directive (reference by the Dutch Supreme Court lodged on 27 November 2018, OJ C 122, 1.4.2019, p. 8).

to an effective judicial review of the return decision and the detention order (also set out under the ECHR protection regime); or those relating to the *grounds of detention* and *detention conditions* (massively developed by the CPT standards) could have provided more room for using international human rights norms at least as interpretative tools. The *pending cases* may provide the CJEU with further occasions to strengthen its engagement with relevant elements of international human rights law, especially as protected and developed in the ECtHR case-law.

One of the pending cases concerns issues of identifying third-country national children under the Return Directive (*AA v. Migrationsverket*), whereas another case touches upon the issue of the length of the entry bans if the third-country national represents a serious threat to public policy, public security or national security (*JZ* – preliminary reference by the Dutch Supreme Court).

4. – *Reasons behind the CJEU's Distancing from International Human Rights Law*

Mapping and analysing the CJEU's above judicial practice allowed to explore the possible reasons and motivations behind the CJEU's more guarded approach towards international human rights law in EU return law and policy. The conceivable *explanations* are manifold. In scholarly works, these range from the desire to *preserve the autonomy of EU law* to the more extensive, if not exclusive reliance on the *EU Charter* instead of international human rights law instruments, in particular the ECHR.⁶⁷

With regard to the former consideration, the EU Court's position in the *J.N.* ruling (case C-601/15 PPU) is fairly illustrative, when the Explanations to the EU Charter have been used to confine the boundaries of ensuring necessary consistency between the meaning and scope of Charter rights and the ECtHR jurisprudence (which obligation stems from Article 52(3) of the Charter⁶⁸). According to the judges in Luxembourg, the need for such a consistency must be “without [...] adversely affecting the

⁶⁷ See PEERS, *cit. supra* note 43, pp. 83-84; ZIEGLER, *cit. supra* note 43, pp. 20-29, 54; KROMMENDIJK, “The Use of the ECtHR Case Law by the Court of Justice after Lisbon. The View of Luxembourg Insiders”, *Maastricht Journal of European and Comparative Law*, 2015, pp. 831-832; and TOMUSCHAT, “The Relationship between EU Law and International Law in the Field of Human Rights”, *Yearbook of European Law*, 2016, pp. 609, 619.

⁶⁸ Art. 52(3) of the Charter: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning

autonomy of Union law and [...] that of the Court of Justice of the European Union”.⁶⁹ The same dictum has been later reiterated in the *J.Z.* judgment (case C-294/16),⁷⁰ and subsequently highlighted specifically in the return context.⁷¹ This jurisprudence shows that the EU Court has tried to minimalise the effects of Article 52(3) of the Charter,⁷² which requires consistency in the interpretation of Charter rights with ECtHR case-law in relation to corresponding rights enshrined in the ECHR.

As far as the gradual downplaying of the ECHR and the ECtHR case-law is concerned, empirical research demonstrates that after the entry into force of the Treaty of Lisbon in December 2009, the CJEU has examined and cited the Strasbourg case-law less frequently and extensively.⁷³ Commentators have noted that after the Treaty of Lisbon vested the Charter with the legal value of primary EU law, the CJEU started using the Charter as the “EU’s own bill of rights” at the expense of references to the ECHR and the ECtHR case-law. Glas and Krommendijk coined this phenomenon as an “increasing Charter centrism of the CJEU”.⁷⁴ Several reasons have been put forward explaining this, primarily on the basis of the observations of interviewed CJEU judges, former judges and *référéndaires* as to the EU Court’s readiness to cite the Strasbourg case-law. These include a growing awareness that both European apex courts are different as well as strategic reasons related to the wish to develop an autonomous interpretation of the Charter.⁷⁵ A few years ago, the then president of the CJEU, Vassolios Skouris held that “the Court of Justice is not a human rights court: it is the Supreme Court of the European Union”.⁷⁶ As a result of this approach,

and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

⁶⁹ Case C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, ECLI:EU:C:2016:84, para. 47.

⁷⁰ C-294/16, *J.Z. v. Prokuratura Rejonowa Łódź — Śródmieście*, 28 July 2016, ECLI:EU:C:2016:610, para. 50.

⁷¹ C-175/17, *X v. Belastingdienst/Toeslagen*, 26 September 2018, ECLI:EU:C:2018:776, para. 35.

⁷² See similarly, ISPOLINOV, “Consequences of the delay: the perspective of a non-EU member state”, *Kazan University Law Review*, 2018, p. 8.

⁷³ KROMMENDIJK, *cit. supra* note 67, pp. 812-835; LEHTINEN, *The European Court of Justice and European Court of Human Rights: A Complex Interaction and Coexistence between the Two Courts*, Workshop in the ECHR – Tampere 2015, available at: <<https://blog.uta.fi/ECHRworkshop/2016/03/07/lehtinen>>.

⁷⁴ GLAS and KROMMENDIJK, “From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts”, *Human Rights Law Review*, 2017, p. 573.

⁷⁵ KROMMENDIJK, *cit. supra* note 67, pp. 830-833.

⁷⁶ BESSELINK, “The CJEU as the European ‘Supreme Court’: Setting Aside Citizens’ Rights for EU

cases are often solved on the basis of the primarily applicable secondary EU law (here: the Return Directive) and the CJEU's own pre-existing case-law, without relying on otherwise relevant standards of international human rights law and international (primarily ECtHR) case-law. It is especially the case when the given piece of EU *acquis* stroke a certain balance between clashing fundamental rights claims, or fundamental rights and State interests, which essentially holds true for the Return Directive as well. Furthermore, the CJEU's distancing from human rights treaties other than the ECHR in developing the 'general principles of EU law' can also be seen in its dismissal of the validity of UN monitoring treaty bodies' interpretations of human rights provisions in one case.⁷⁷ In *Grant*, the EU Court rejected the weight of UN Human Rights Committee findings, stating that it "is not a judicial institution" and that its findings "have no binding force in law".⁷⁸

A further development needs to be considered, too. As the Luxembourg case-law on the Return Directive has been building up over the years, the CJEU rather referred to *its already delivered rulings on the directive* in new cases, instead of quoting international human rights law, especially the ECHR and the ECtHR pertinent jurisprudence. It might be a technique to find a clever way around, allowing the EU Court to remain self-referential and to avoid direct engaging with Strasbourg case-law.

However, one might also argue that the CJEU *introduced the substance* of international human rights law into its return related case-law via the EU Charter or by packaging certain human rights norms as 'general principles of EU law' (e.g. the principle of proportionality; the right to be heard), without labelling them expressly as flowing from international human rights law. In other words: the EU Court was cognizant of the substance of various international human rights standards and engaged with the relevant human rights norms – but when doing so, it labelled them as EU law and not as international human rights law or ECtHR jurisprudence. The reason for this 'labelling' may be institutional or internal as well as a self-restraint not to be seen as interpreting international law norms for which other international courts

Law Supremacy", *Verfassungsblog*, 18 August 2014, available at: <<http://www.verfassungsblog.de/CJEU-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/>>.

⁷⁷ REGIONAL OFFICE FOR EUROPE OF THE UNITED NATIONS HIGH COMMISSIONER OF HUMAN RIGHTS, *The EU and International Human Rights Law*, Brussels, 2011, p. 11, available at: <https://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf>.

⁷⁸ Case C-249/96, *Grant v. South West Trains Ltd*, Judgment of the Court of 17 February 1998, ECLI:EU:C:1998:63, para. 46.

or treaty bodies are competent. All this is paired with the EU Court's desire, following the French and continental tradition of constructing judgments, to keep the rulings as concise and minimalistic as possible,⁷⁹ without any dissenting or concurring opinions as other international/regional courts do (e.g. the International Court of Justice, the Inter-American Court of Human Rights, or the ECtHR).

5. – *Concluding Remarks*

This contribution attempted to understand the quite controversial perception of the role and place of international human rights law in the CJEU case-law interpreting the Return Directive. The main question was – and to some extent, still remains to be – why different EU institutions (legislature versus judiciary) follow remarkably diverging treatment of international human rights law when shaping and developing the EU return acquis.

Given that the Return Directive has been repeatedly and harshly criticised in academia and civil society for falling short of certain international human rights standards (called as ‘the Directive of Shame’ by many),⁸⁰ the CJEU, using such hooks in the directive, could have been in a position to address these alleged shortcomings. In particular, the EU Court could have developed an interpretation of the Return Directive which fully takes into account and builds upon the at times higher standards and more developed safeguards offered by international human rights law, especially the ECtHR jurisprudence. This silent ignorance of external norms is even more striking if compared to the CJEU case-law on asylum matters, which is much more open to international (refugee) law (see e.g. the rulings in *Bolbol*,⁸¹ *El Kott*,⁸² *Bundesrepublik Deutschland v. Y and Z*,⁸³ and *Minister voor Immigratie en Asiel v. X, Y and*

⁷⁹ KROMMENDIJK, *cit. supra* note 67, pp. 827-829.

⁸⁰ On the very harsh critiques of the Return Directive from Latin American countries, see e.g. ACOSTA ARCARAZO, “Latin American Reactions to the Adoption of the Returns Directive”, *CEPS Liberty and Security in Europe Publication Series*, November 2009, available at: <<https://www.ceps.eu/system/files/book/2009/11/latin-american-reactions-adoption-returns-directive.pdf>>. Consider also LUTZ, *cit. supra* note 28, pp. 73-80.

⁸¹ Case C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 17 June 2010, ECLI:EU:C:2010:351.

⁸² Case C-364/11, *Abed el Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, 19 December 2012, ECLI:EU:C:2012:826.

⁸³ Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, 5 September 2012, ECLI:EU:C:2012:518.

Z⁸⁴). In a similar vein, the CJEU's omission to adequately integrate the ECtHR case-law in its reasoning in return-related cases is also surprising in mirrors of the EU Family Reunification Directive (Directive 2003/86/EC),⁸⁵ which also includes references to the ECHR (in recital (2)) as the Return Directive does. The EU Court clearly stated in the *Chakroun* ruling that relevant provisions of the Family Reunification Directive "must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in [...] the ECHR."⁸⁶

This distancing from the Strasbourg Court-developed human rights standards is despite the fact that Article 52(3) of the Charter provides that the rights contained in the Charter that correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR and interpreted by the Strasbourg Court. Nonetheless, while acknowledging that fundamental rights recognised by the ECHR constitute 'general principles of EU law' (Article 6(3) TEU) and the cardinal role of the ECHR and the ECtHR case-law as interpretive tools when adjudicating Charter rights, the CJEU has constantly underlined that the ECHR does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law. Therefore, as such the European Convention is not legally binding on the European Union as a distinct legal entity.⁸⁷ The recent autonomy-centred pronouncements in the aforementioned *J.N.*, *J.Z.* and *X* cases seem to make this reliance on the ECHR and its case-law in the context of interpreting the Charter even more conditional – despite the clear primary EU law instructions in Article 52(3) of the Charter.

Here, at the intersectionality of laws (EU and international law) in a specific domain called 'expulsion of aliens' (in the language of the UN International Law Com-

⁸⁴ Joined Cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v. X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.

⁸⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, pp. 12-18).

⁸⁶ Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, EU:C:2010:117, para. 44. In the legal literature, see also DE BRUYCKER and MANANASHVILI (2015), *cit. supra* note 48, p. 578.

⁸⁷ Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others*, 24 April 2012, ECLI:EU:C:2012:233, para. 62; Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, EU:C:2013:105, para. 44; Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v. Commission*, 3 September 2015, EU:C:2015:535, para. 45.

mission) or ‘return of illegally staying third-country nationals’ (in the EU vocabulary), one can clearly witness the CJEU’s firm preference to one of the competing legal orders. As shown in the forgoing, the EU Court has generally *squeezed out other human rights norms of international origin* when interpreting and further developing the edifice of EU return law. Nonetheless, one might still claim that although this practice is contrary to the intention of the co-legislators (i.e. the text of the directive) from a purely formalistic perspective, substance-wise quite a number of internationally protected human rights and principles have been packaged in the CJEU rulings as EU law standards. Hence, it is also arguable that international human rights law do play a role, behind the scenes when the bench in Luxembourg deliberates, but do not surface in the judgments themselves. The ever-evolving jurisprudence of the EU Court will provide further responses and clarifications to the main question, whereas further empirical and legal sociological research still needs to be done to nuance our understanding of the apparently “exclusionary” approach of the EU judiciary towards international human rights law in return law and policy. Presently, it is beyond doubt that the EU Court expressed a *strong autonomy-driven position* in this specific field of EU migration law and policy.

Looking at the *future*, once and if the proposed (currently negotiated), fairly restrictive changes to the Return Directive⁸⁸ will be adopted, the CJEU might need to look for legal yardsticks other than those found in the EU toolkit to uphold with authority certain standards and safeguards protecting returnees’ rights. In this eventual quest for additional, *external legal benchmarks* that can trump secondary EU law, with the aim not to allow the directive to go below a *fil rouge*, the ECHR and ECtHR case

⁸⁸ European Commission, “Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals”, COM(2018)634 final, 2018/0329(COD); Brussels, 12 September 2018. The June 2019 Justice and Home Affairs Council reached a partial general approach on the proposal (except for the border procedure) – see <<https://www.consilium.europa.eu/en/press/press-releases/2019/06/07/migration-policy-council-agrees-partial-negotiating-position-on-return-directive/>>.

For thorough and detailed, fundamental-rights centred analyses of the proposal, see EU Agency for Fundamental Rights, *The recast Return Directive and its fundamental rights implications – Opinion of the European Union Agency for Fundamental Rights*, FRA Opinion – 1/2019 [Return], Vienna, 10 January 2019, available at: <<https://fra.europa.eu/en/opinion/2019/returns-recast>>; European Parliament, *The proposed Return Directive (recast) – Substitute Impact Assessment*, Brussels, European Parliamentary Research Service, February 2019, available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU\(2019\)631727_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf)>. For a more succinct presentation of the main issues of concern, see MAJCHER, “The Recast of the EU Returns Directive: Human Rights Lost Again?”, *RLI Blog on Refugee Law and Forced Migration*, 29 May 2019, available at: <<https://rli.blogs.sas.ac.uk/2019/05/29/the-recast-of-the-eu-returns-directive-human-rights-lost-again/>>.

law on the expulsion of aliens, alongside other international instruments and jurisprudence upholding returnees' rights can finally become the EU Court's natural allies to stop the watering down of existing return-related protection regimes. Such a scenario will definitely present a good opportunity to put the CJEU return-related jurisprudence under a similar scrutiny anew. The intellectual adventure has hereby begun.

1. Judicial Responses to the Migration Crisis: The Role of Courts in the Creation of a European Identity (Carola Lingaas)

This chapter analyses the connection between the judicial creation of an ostensible European identity, domestic policy, and public opinion. It provides insight into the role of the European regional courts for the construction of a (perceived) European identity, contrasted to the identity of the ‘others’ from beyond Europe. The jurisprudence of the European courts is an effective tool to influence popular and political views on migration. Current developments suggest that the courts constrain the attribution of rights and adjust to expectations and perceptions of their constituency.

The EU Global Strategy (2016) explicitly emphasises that “remaining true to our values is a matter of law as much as of ethics and identity”. It treats migration as a challenge. Such value narratives are indicators of the community’s understanding of social relations and can influence the European judiciary. If the Courts underpin their legal analysis with references to policy documents, then the narratives of migration contained therein are likely to be reflected in their judgments.

2. Questions of Jurisdiction and Attribution in the Context of Multi-Actor Operations in the Mediterranean (Fulvia Staiano)

On 8 May 2018, an application was filed before the European Court of Human Rights concerning the Sea Watch-3 incident of 6 November 2017. The application

hinges on Italy's responsibility for violations of several provisions of the European Convention on Human Rights. This chapter stems from the consideration that the application at issue offers the occasion to reflect on key questions of international law that are being raised with increasing frequency and urgency in the context of multi-actor operations at sea. First, this chapter reflects on the possibility to establish extraterritorial jurisdiction on the grounds of the criterion of effective control over events occurring on the high seas. Second, this chapter enquires on matters of attribution of conduct and of allocation of responsibility between different state and non-state actors involved in multi-actor operations at sea when international law violations are committed in such contexts.

3. Allocating Responsibility for Refugee Protection to States: Actual and Potential Criteria in International (Case) Law (Ruben Wissing)

This chapter analyses legal criteria adopted by international law and jurisprudence for allocating and attributing responsibility to States, and evaluates which are or have the potential to be applicable in international refugee law.

Global numbers of persons fleeing violence and persecution are high, but refugees unequally distributed among States. Some countries are overburdened. This is due to natural factors and migrant aspirations, but also deliberate migration policies. Quality of and access to protection are under pressure, fundamental refugee and human rights increasingly threatened.

International refugee law does not provide for a specific distribution mechanism or criteria to allocate responsibility for refugee protection to States. The traditional attribution of legal responsibility in international law on the basis of jurisdiction does not suffice to distribute those burdens equitably. This article looks at relevant case-law to identify alternative criteria that have the potential of allocating responsibility for refugee protection to States beyond their borders.

Besides assessing the potential of extraterritorial jurisdiction, the article explores two interesting responsibility allocating candidates: the principles of international cooperation and solidarity, and the Responsibility to Protect-doctrine.

4. Les réfugiés en mer devant les juridictions internationales : vers la protection d'un droit international de l'hospitalité ? (Edoardo Stoppioni)

La réflexion sur les réfugiés en philosophie politique oscille entre deux pôles discursifs opposés, l'approche individualiste et l'approche communautariste de la migration. Cette enquête sur le discours juridictionnel sur les réfugiés en mer montre que le droit international contemporain fonctionne à partir d'une dialectique argumentative qui rappelle ce même mouvement de balancier.

Dans une optique davantage individualiste, les juridictions internationales employé le droit international des droits de l'homme pour façonner des garanties procédurales permettant une prise en compte réelle du statut de réfugié. Selon une tendance plutôt communautariste, les juridictions internationales continuent à refuser de lire le droit international du droit de la mer comme une branche irriguée par des droits individuels. La fragmentation du droit international constitue encore une limite à ce que l'on pourrait appeler une sanction juridictionnelle du droit international de l'hospitalité, telle que postulée par Étienne Balibar.

5. The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights (Francesco Luigi Gatta)

This chapter argues that the process of 'securitization' and restrictive border management put in place by European frontline States in reaction to the so-called "refugee crisis" has produced a direct impact on migrants' human rights. This is demonstrated by looking at the case law of the European Court of Human Rights concerning the prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4 to the European Convention on Human Rights). It is indeed possible to identify a parallelism and a direct interrelation between the growing engagement of the Court with such violation of the Convention and the border practices recently adopted by European States in response to the increasing migratory pressure.

6. The Russian Law on Refugees through the Lens of the European Court of Human Rights (Maria Sole Continiello Neri)

Migration is a pivotal issue for Russia. Migrants came to almost 8% of the overall Russian population. According to the UNHCR in 2016, 322,856 people have sought international or temporary protection in the Russian Federation. The migration emergency in Russia is not only tied to the massive arrival of Ukrainians but also stems from refugee and asylum seekers from other theatres of war – like Syria and Afghanistan – or authoritarian regimes such as Uzbekistan and Tajikistan. The latter face several difficulties with asylum procedures and the recognition of their status. The European Court of Human Rights has repeatedly highlighted the shortcomings of the Russian Refugee Law. Moreover, since 2010, the Court condemned the Russian Federation for the extraditions and 'undercover' transfers of Uzbek and Tajik asylum seekers in violation of the Court interim measures. During the past years, the decisions of the Court have stimulated a jurisprudential openness, however, a few legislative steps have been done.

7. *Refoulement* at the Border Undermines the Best Interest of the Child: Preliminary Remarks (Patrizia Rinaldi)

The main purpose of this chapter is to analyse the decisions of the European Court of Human Rights concerning both *refoulement* at the border and indiscriminate expulsions. They are examined in contrast with the paramount principle of the best interests of the child as sanctioned by article 3 of the UNCRC and article 24 (2) of the EU Charter of Fundamental Rights.

The migration phenomenon is a complex problem in which several actors intervene and which is composed of various phases. The first outpost is a physical and legal frontier for those who become migrants. The lack of legal pathways and the outsourcing of border controls are responsible for most human rights violations. At the border, and without any age assessment, minors can also be rejected, with the motivation of family reunification in their country of origin, or they can be considered irregular migrants, without any discrimination based on age.

8. The Protection of the Migrant Parent-Child Relationship in Spanish and Supranational Jurisprudence: a Sensitive or a Sensible Approach? (Encarnación La Spina)

The case law of the European Court of Human Rights and the Court of Justice of the European Union concerning the right to family unity has had an unequal impact on the jurisprudence of Spanish Courts. This has been particularly so when cases concerned the protection of the migrant parent-child relationship involving migrant parents with an irregular migrant status or criminal records and their Spanish children. This chapter is focused on the “sensible and sensitive approach” identified in the interpretive guidelines at both national and supranational levels in the light of two cases in Spain: Decision No. 186/2013 of the *Tribunal Constitucional* and Decision No. 15/2017 of the *Tribunal Supremo* in the application of C-165/14, *Rendón Martín v Spain* case.

9. Migration Issues in the Inter-American System of Human Rights: the Development of an increasingly Humane *Jus Migrandi* (Luca Paladini, Nicolás Carrillo Santarelli)

The chapter explores Inter-American standards on the protection of migrants, as developed and identified mostly by the Inter-American Court of Human Rights. Some salient thematic issues that have been paid special attention are identified, namely the rights of workers with an irregular status, rights of migrant children, nationality, non-devolution, rights of refugees and asylum-seekers, prohibitions of mass expulsions, obligations to protect migrants from non-state abuses, and tensions between sovereignty and duties towards migrants. Concerning these issues, the Court has recalled that deporting individuals without carrying out an individualized analysis of their situation is unlawful; that workers must have their labour rights respected and protected regardless of status; that non-devolution is not only applicable to refugees; that due process guarantees must be respected in regard to all individuals, whatever their origin; that children are entitled to special protection; and that States must protect from xenophobia, intolerance, and abuses of private parties.

10. Gender Perspectives in the Application of Existing International Rules and Standards of Refugee Law (Spyridoula Katsoni)

The chapter explains the reasons why existing rules and standards of international refugee law, enshrined in international treaties, should be seen as granting gender sensitive protection. Initially, it indicates that an innovative jurisprudence constitutes the key to the establishment of the said gender sensitive application, after underlining the mere determinative and not obligations-modifying importance of jurisprudence in international law. Subsequently, an analysis of the rules on treaty interpretation takes place to be followed by a thorough presentation of elements that constitute interpretative tools according to the said rules and lead to the conclusion that the *lege artis* interpretation of refugee law provisions supports the gender sensitive interpretative outcome. Lastly, the significance of the said interpretative approach for the whole system of international refugee law is highlighted, as it seems to be capable of guarding the latter from the adverse phenomenon of fragmentation.

11. Escaping Violence: the Istanbul Convention and Violence against Women as a Form of Persecution (Sara De Vido)

The purpose of this chapter is to demonstrate that the Council of Europe Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence can be used as means of interpretation of national refugee laws and of the provisions of the European Convention on Human Rights in assessing the situation of women who request refugee protection to escape from gender-based violence, in particular from two forms of inter-personal violence, on which this analysis is focused, namely female genital mutilation and domestic violence. The chapter contends that judges should assess, in deciding the request for refugee status, or, in the case of the European Court of Human Rights, in determining whether violations of the woman's rights have occurred, whether the State of origin – where the migrant woman could be expelled failing her application – complies with its due diligence obligations in preventing and prosecuting gender-based violence.

12. Framing the ‘Risk Assessment’ Test in Women’s Asylum Claims: A Critical Analysis of Domestic Jurisprudence vs. the European Court of Human Rights’ Approaches (Maria Manuela Pappalardo)

This chapter provides a review of the decision-making process in international-protection claims, based on the “risk assessment” of being persecuted. Lacking specific procedural tools to predict what might happen were claimants returned to their countries of origin, this contribution aims at sketching a “risk paradigm” tested in international-protection cases (UK, France and Italy). Focusing on selected case-studies about female asylum seekers as members of a particular social group, the chapter shows that domestic courts use specific socio-economic risk factors in determining refugee status, even if these factors are not mentioned by the relevant rules. Taking into account the risk analysis carried out by the ECtHR in comparable cases, a comprehensive method of risk assessment can be drawn through the similar patterns followed by domestic and international jurisdictions (ECtHR and national asylum courts) in international-protection case-laws. These shared approaches eventually frame the forward-looking assessment used in determining the real risk of persecution (or serious harm).

13. A Tale Of Two Courts: The Eu-Turkey Statement Before The Court Of Justice Of The European Union And The European Court Of Human Rights (Chiara Tea Antoniazzi)

From a legal perspective, the controversy surrounding the EU-Turkey Statement, which provides for the return of “irregular migrants” from the Greek islands to Turkey, would appear to be settled after both the CJEU and the ECtHR dealt with it. While the former unexpectedly held that the Statement is not an EU act, and thus refused to examine the merits of the complaints, the latter only found relatively minor violations of the rights of migrants held in Greek reception centres following the enactment of the Statement.

Are these decisions the final words of the two Courts as regards the validity and human rights-compliance of the Statement? This contribution argues that it is premature to say so. The rulings of the ECtHR appear inextricably linked to the specific

circumstances of the cases lodged with it, while the CJEU has, *inter alia*, yet to clarify the notion of “safe third country” and whether Turkey can qualify as such. The Tale of Two Courts might not have come to an end yet.

14. The Dublin System vis-à-vis EU Solidarity before the European Court of Justice: The Law, The Whole Law, and Nothing But The Law! (Giuseppe Morgese)

The chapter aims at exploring the European Court of Justice (ECJ) case-law concerning the relationship between the Dublin system and the solidarity principle enshrined in Article 80 of the TFEU. Starting from a legal analysis of Article 80, attention is paid to some decisions (e.g. *N.S., X. and X., A.S. and Jafari*, the “*relocation*” case), in which the ECJ has followed a cautious approach. Notably, it held, on the one hand, that responsibility criteria of the Dublin system cannot be derogated for solidarity reasons (even by way of interpretation or in the case of massive inflows of asylum seekers); on the other hand, that solidarity has to be implemented in legislative acts in order to fully reach its goals, being understood that a breach of such acts by some “reluctant” Member States is, first of all, a violation of the principle of loyalty provided for in Article 4(3) TEU.

15. The ‘Sovereignty Clause’ of the Dublin Regulations in the case-law of the ECtHR and the CJEU: The Mirage of a jurisprudential convergence? (Vassilis Pergantis)

The chapter offers an updated analysis of the dialogue between Strasbourg and Luxembourg on the sovereignty clause included in succeeding Dublin Regulations. It presents the initial tension in the jurisprudence between the two Courts and the gradual convergence of their case-law and indicates those issues that remain unresolved, such as the saga between systemic deficiencies and individualized risk, whether non-refoulement can be activated in cases not involving a risk of Art. 3 ECHR/4 CFR violations, and the scope of the obligations involved in Dublin transfers. It highlights the ambiguities in recent case-law (*M.A., Jawo, Ibrahim, H and R.*) concerning the obligation to assess the risk, and the interplay between the obligation

to prevent the return of the asylum seeker in cases involving non-refoulement and the discretion to examine the asylum application. Finally, it briefly tackles the question of the burden and threshold of proof in relevant cases.

16. The Case-Law of the EU Court of Justice on the Return Directive and the Role of International Human Rights Law: ‘With or Without You’? (Tamás Molnár)

The CJEU plays an ever-important role in the development of EU return *acquis* when interpreting the Return Directive (Directive 2008/115/EC). The Return Directive refers quite a few times to international human rights law. The Directive conceives this body of law as standards of conformity for EU law; and applies “without prejudice” clauses, which make the application of international human rights law possible where these rules formulate more favourable provisions. In contrast, when looking at the CJEU’s case-law in this domain, one can notice a rather EU-law centred argumentative strategy, without genuinely engaging with international human rights standards, including the ECHR and ECtHR judgments. This contribution aims at mapping and analysing the approach of the CJEU towards international human rights law in EU return policy. The chapter explores the possible reasons and motivations behind the CJEU’s more guarded approach towards international human rights law in this field. The main question remains: Why different EU institutions (legislature versus judiciary) follow remarkably diverging treatment of international human rights law when shaping and developing the EU return *acquis*.

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BRUNO, PALOMBINO, DI STEFANO (eds.), Migration Issues before International Courts and Tribunals, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 471-473.

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P.le Aldo Moro 7
00185 Roma

Graphic project : Angela Petrillo

ISBN 978 88 8080 367 6